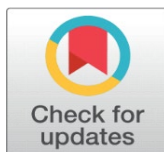


A LEGAL PERSPECTIVE ON COMBATING CUSTODIAL RAPE AND ENSURING JUSTICE IN INDIA

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DOI

10.29121/shodhkosh.v5.i6.2024.4450

Funding: This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

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ABSTRACT

The bureau of police plays a very significant role in the criminal justice system. In India the performance of police agency has been very dynamic, not only their duty is to collect evidence but also to facilitate protection to the victims as well as the society as a whole. However there are several occurrences in the past decade where instead of providing protection to the society, some of the officers of the police fraternity had committed some heinous crime with the people under their custody. The offence of rape is one of such crimes in that category. There are several precedents wherein the Honorable Supreme Court of India as well as the Honorable High Courts of India has pronounced some stringent punishments in such cases of custodial rape. Several pronouncements have led to amendments in the core legislations of India. From time to time the law commission of India has put forward certain recommendations to the legislature of India. Accordingly the legislature of India has enacted Criminal Law Amendment Act in the year 2013 and 2018. It has made certain amendments in the Indian Penal Code 1860, Criminal Procedure Code 1973, and Evidence Act 1872 and in the Protection of Children from Sexual Offences Act 2012. The new amendments have incorporated changes in the earlier laws as well as have inserted new provisions in the earlier legislations. Now the law has become more particular and deterrent in context of custodial rape. The punishments have been increased including imprisonment for the remainder of life and fine. The new provisions also provide compensations to the victims of rape. This research paper focuses on the legal developments made in the legislations of India curbing and preventing the custodial rape practice in India.

Keywords: Police Bureau, Custodial Rape, Stringent Punishments, Criminal Law Amendment Act, Custodial Protection

1. INTRODUCTION

Custody in simple terms means keeping. Whenever an authority or a person keeps anything or any person or thing within its protection and supervision is known as keeping in custody. In India the Criminal Procedural laws provides power to certain departments and authorities to keep another person's within its custody. The police department is one of such agency which authorizes its officials to keep another person in its custody for the purpose of investigation. The investigating department is the first agency that is to provide help and assistance to the victims of offence. It should be the duty of the police to guide and aid the victim in order to get justice. However there are several occurrences in the past decade where instead of providing protection to the society, some of the officers of the police fraternity had misused their power and have committed some heinous crime with the people under their custody. The offence of rape is one of such crimes in that category.

The offence of rape itself is regarded as one of the most sensitive topic in every society. On top of that there are certain hooligans in the investigating department itself who in order to satisfy their desire destroys the modesty of woman under their custody. The offence of custodial rape has been a major problem in the entire world and India is also not an exception. In India too women have to face the havoc of these heinous offence. Section 375¹ of the Indian Penal Code (I.P.C) defines the offence of rape and Section 376² prescribes its punishment. However with the emerging number of rape cases in India these sections have been amended a couple of times but still the offence is prevalent in our society.

According to National Crime Records Bureau (NCRB) data, between 2001 and 2018, only 26 policemen were convicted of custodial violence despite 1,727 numbers of such deaths were being recorded in India. Between the years 2015-2019, 36% of deaths by suicide in police custody have been reported from 2014 onwards, physical assault by police has been recorded in only 6% of the cases. In the last 10 years, 403 of 1,004 deaths (40%) in police custody are listed as due to "Hospitalisation/ Illness/ Natural deaths".³

The ambit of custodial rape includes police officer, management or on the staff of a jail, remand home or other place of custody established by or under any law, hospital and any public servant holding a women within his custody. However in this paper the researcher has focused on the rapes committed by the police officers in the police custody. Thus the objective of this research paper is to focus on the legal developments made in the legislations of India curbing and preventing the custodial rape practice in police custody in India.

2. METHODOLOGY

The researcher has carried out the research using doctrinal approach. The data has been collected by both primary sources and secondary sources of law. It has included Content analysis, Document Analysis, Case Laws/ Judgments, library and internet resources, and statistical reports. The researcher has reviewed government documents both in print and digital medium. The researcher has gone through a wide range of bibliographical sources from different scholarly articles, academic journals, newspapers, conference papers and publications.

3. DEFINITION

The word 'rape', is derived from the Latin term '*rapio*', which means 'to seize'. Thus, rape literally means a forcible seizure. It signifies in common terminology, "as the ravishment of a woman without her consent and against her will, by force, fear, or fraud" or "the carnal knowledge of a woman by force against her will". In other words, rape is violation with violence of the private person of a woman, an outrage by all means.⁴ Thus custodial rape is the rape where the custodian rapes the person under his custody. Therefore custodial rape is much more heinous as the man who has the control over the women who is in his custody and to whom he should have provided safety and custody, rapes that very woman in his custody.

4. THE SCENARIO IN INDIA

The history of custodial rape moves back to the year 1978 soon after the first emergence. After the year 1977 a series of such cases took place in India shaking the whole nation. Some of those cases are discussed as follows-

4.1. MAYA TYAGI CASE⁵

Maya Tyagi's case is one such case in which case the legal reforms were set off making a difference between custodial rape and rape. In this case, Maya Tyagi who was six months pregnant was dragged out of the car, beaten and stripped. When she did not move despite the cruelty, the cops shoved a 'lathi' into her vagina. She was paraded naked to the

¹ Indian Penal Code, 1860, Section 375, No. 45, Act of Parliament, 1860 (India) reads as 'Rape'.

² Indian Penal Code, 1860, Section 376, No. 45, Act of Parliament, 1860 (India) reads as 'Punishment for rape'.

³ *Custodial Rape in India*, FREE LAW BY DE JURE (Dec. 08, 2022, 9.12

PM), [https://www.freelaw.in/legalarticles/Custodial-Rape-in-](https://www.freelaw.in/legalarticles/Custodial-Rape-in-India#:~:text=Through%20the%20Criminal%20Law%20Amendment,to%2010%20years%20with%20fine.)

[India#:~:text=Through%20the%20Criminal%20Law%20Amendment,to%2010%20years%20with%20fine.](https://www.freelaw.in/legalarticles/Custodial-Rape-in-India#:~:text=Through%20the%20Criminal%20Law%20Amendment,to%2010%20years%20with%20fine.)

⁴ K.D GAUR, CRIMINAL LAW: CASES AND MATERIALS 505 (Lexis Nexis, Haryana, Seventh Edition 2013, Reprint 2014).

⁵ Sheo Kumar Gupta and Others vs. State of U.P., AIR 1978 All 386, 1978(37) FLR 118

police station where she was raped. Her spouse was shot dead by the cops. This case led to the widespread protests from several women's organizations as well as political parties across the country.

4.2. RAMEEZA BEE'S CASE ⁶

The case of Rameeza Bee occurred in Hyderabad in the year 1978. In this case, a woman named Rameeza Bee was raped by several policemen. When her husband, a rickshaw puller tried to protest against the heinous crime, he was murdered. As a protest, many people including the activists came up. The unrest was finally suppressed after the declaration of the President's Rule and a commission was appointed to enquire the rape and murder.

4.3. MATHURA RAPE CASE ⁷

In the year 1972, Mathura, an Adivasi girl, who was of an age between 14-16 years was sexually assaulted, raped by Constable Ganpat and Head Constable Tukaram also assaulted her by fondling her private parts. An FIR was lodged against the two police constables. However, the Hon'ble Supreme Court of India held that the nature of consent of the victim had to be understood from the circumstances and the circumstances showed that the consent was not "passive". There was no injury she had suffered, therefore it could not be concluded that the girl had been subject to any fear or was constraint such as it would justify an inference of "passive submission". As for the allegations which were made against Tukaram, the first information report that was made by Mathura against Tukaram had serious allegations on which during the trial, she had gone back at the trial and the acts covered by which she assigned in her deposition to Ganpat instead of Tukaram. The court explained that if a girl could alter her words concerning such serious allegations, how could it be guaranteed that her words are truthful in association to what she now says about Tukaram? Thus the charge remained unproved against the head constable Tukaram. In conclusion, the appeal succeeded and was accepted. The verdict of the Supreme Court reversed from the verdict of the High Court and the conviction which were recorded against including the sentences which were imposed upon the appellants were set aside. Thus, the appellants were acquitted.

Thus these three landmarked cases shackled the whole nation and led to major protests. Finally, results were seen where the government introduced amendments in the law under rape and on the definition of rape. This amendment introduced the category of *custodial rape*. The punishment for custodial rape was set to rigorous imprisonment of not less than ten years and may also extend to imprisonment for life and shall also be liable to fine.

5. THE REFORMATION OF THE LAWS

With the need of the hour the Government of India has enacted implemented and interpreted such laws from time to time in order to prevent and protect women from the sordid offence of rape.

5.1. THE CRIMINAL LAW AMENDMENT ACT, 1983⁸

The Criminal Law Amendment Act, 1983 had introduced certain important changes in the Law relating to Rape. The Act of 43, 1983 the part including Section 375 and Sec 376 Indian Penal Code was known as of '*offences of rape*'. However the Act 43 of 1983 had amended the word '*of rape*' to '*sexual offences*' the Act also inserted Section 375 B-D including rape committed by public servants on the women under their custody. A new Section 114-A⁹ was inserted in the Indian Evidence Act, 1872 regarding the presumption as to absence of consent in certain prosecutions for rape. It had brought to the fore, key issues around press censorship, age of consent, appropriate punishment, burden of proof, custodial rape and the past sexual history of the victim. To that extent it had helped in controlling violence against women.¹⁰

⁶ Sreyasi Bhattacharya, *Custodial Rape in India*, LAWCIAN, (Dec. 09, 2022, 9.00 PM), <https://www.lawcian.com/post/custodial-rape-in-india>

⁷ Tukaram and others vs. State of Maharashtra, AIR 1979 SC 185

⁸ No.43, Act of Parliament, 1983 (India).

⁹ Indian Evidence Act, 1872, Sec. 114 A reads as :Presumption as to absence of consent in certain prosecution for rape.

¹⁰ S.114A reads as- Presumption as to absence of consent in certain prosecution for rape

5.2. CODE OF CRIMINAL PROCEDURE AMENDMENT ACT 2005¹¹

This Act brought a number of amendments in the existing laws relating to arrest of persons. This Act also inserted certain new sections viz.- Section 41A-41D in Chapter V of the Code of Criminal Procedure. Moreover sub section 4 was inserted to Section 46 of Cr.P.C which enumerates that no women shall be arrested after sunset and before sunrise except in certain circumstances. Whenever such exceptional circumstance exists then the woman police officer shall make a written report and obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made. This provision was including keeping in view the safety and protection of women.

5.3. THE CRIMINAL AMENDMENT ACT 2013¹²

After the unfortunate Nirbhaya gang rape case¹³ that occurred on 16th December, 2012, the whole nation had undergone a revolt for the punishments of the culprits as well as against the age old law, existing for the offence of rape in the Indian Penal Code. As a result of the protests, a judicial committee headed by J. Verma was set up to study and take public suggestions for the best ways to amend laws to provide quicker investigation and prosecution of sex offenders. After considering the public demands as well as required and necessary suggestions the committee submitted its report. Thereafter, the Criminal Law (Amendment) Act, 2013¹⁴ was passed by the parliament which received assent of the President of India on April 2, 2013, which also had retrospective effect, from the date, when the ordinance was promulgated i.e., from February 3 2013. The new Act widened the definition of rape, broadened the ambit of aggravated rape and enhanced punishment thereof. Accordingly in the year 2013 the definition of the term rape was revised under the Criminal Law (Amendment) Act 2013.

Finally the laws on the offence of rape were again amended and the Criminal Law (Amendment) Act, 2018¹⁵ was enacted by the Parliament in the 69th year of the Republic of India. This Act came into force on the 21st day of April, 2018. This Act further inserted some new sections and subsections, omitted certain sections and enhance the punishment of certain offences under the Indian Penal Code, 1860, Indian Evidence Act, 1872, the Code of Criminal Procedure, 1973, (Cr.P.C) and the Protection of Children from Sexual Offences Act, 2012, (POCSO) thus reforming the law on the offence of rape further.

After the enactment of the Criminal Law Amendment Act 2013 and 2018, significant changes have been made in the investigation procedure. The Act has amended certain sections of The Code of Criminal Procedure introducing the role of woman police officers in the investigating system. Section 154, Section 156, Section 157, Section 161, Section 164A, Section 173 Cr.P.C provisions have made it mandatory as far as possible for the officer in charge to appoint a woman police constable or any woman officer to assist and carry out the investigation in cases of rape. Because of these new amendments the victim as well as her family members and the society as a whole have become more open-minded and welcoming to the woman officers resulting in a smooth and efficient investigation in the cases involving the offence of rape.

In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

Explanation.-- In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375 of the Indian Penal Code (45 of 1860).

¹¹ No.25, Act of Parliament, 2005 (India).

¹² No.13, Act of Parliament, 2013 (India).

¹³ Yamini, *Criminal Law (Amendment) Act, 2013: Sexual Offences*, ACADEMIKE, (Oct. 08, 2022, 9.12 PM), <https://www.lawctopus.com/academike/criminal-law-amendment/>.

¹⁴ No.13, Act of Parliament, 2013 (India).

¹⁵ No.22, Act of Parliament, 2018 (India).

5.4. SUBSECTION (2) OF SECTION 376 OF THE INDIAN PENAL CODE PROVIDES PUNISHMENT FOR RAPE COMMITTED BY PERSONNELS WITH WOMEN UNDER THEIR CUSTODY. ACCORDING TO THIS PROVISION WHOEVER,--

1) being a police officer commits rape-

- within the limits of the police station to which he is appointed; or
- in the premises of any station house whether or not situated in the police station to which he is appointed; or
- on a woman in his custody or in the custody of a police officer subordinate to him; or

2) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

3) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

4) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine. The court may, for adequate and special reasons mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

5.5. SECTION 376 C OF THE INDIAN PENAL CODE DEFINES SEXUAL INTERCOURSE BY A PERSON IN AUTHORITY. ACCORDING TO THIS SECTION WHOEVER IS -

1) in a position of authority or in a fiduciary relationship; or

2) a public servant; or

3) superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or

4) on the management of a hospital or being on the staff of a hospital,

abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.

Explanation 3 of the section also includes any other person other than the superintendent, in relation to a jail, remand home or other place of custody or a women's or children's institution, holding any other office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.

Thus both the amendments have enhanced the punishment for such kind of aggravated forms of rape in order to inflict stringent punishments on the offender.

5.6. SECTION 197 OF CODE OF CRIMINAL PROCEDURE, 1973 INCORPORATES THE PROCEDURES IN CASES INVOLVING PROSECUTION OF JUDGES AND PUBLIC SERVANTS.

This section specifies that no Court can take cognizance of an offence allegedly committed by a judge or magistrate or a public servant, who is not removable from his office without the previous sanction of the Government, during the discharge of his official duty without the prior sanction of the Government. However there are certain exceptions to this provision. The explanation provided in this section states that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 166A, section 166B, section 354, section 354A, section 354B, section 354C, section 354D, section 370, section 375, section 376, section 376A, section 376AB, section

376C, section 376D, section 376DA, section 376DB or section 509 of the Indian Penal Code, 1860. Thus the public servants are excluded from taking any protection under this section if they are found committing such kind of offence.

Therefore the above are some of the provisions enacted by the legislatures from time to time in order to fight back the heinous offence of custodial rape.

6. CONCLUSION AND SUGGESTIONS.

From the fore going discussion we can derive to the conclusion that sexual offences are prevalent in our society in different forms and nature as such crimes are the product of the pervasive nature of the human kind. The new Criminal Law Amendment Act 2013 and 2018 has brought a number of positive changes in the criminal justice system. The inclusion of some of the new offences in the I.P.C and amending the laws on rape has widened the scope and ambit of the offence. Despite such repressive socio-legal measures to control sex crime, these crimes are still prevalent in the Indian society. These offences therefore, have thrown a great challenge before the criminal justice administration. Although the Criminal Law Amendment Act 2013 as well as the Criminal Law Amendment Act 2018 has brought some stringent laws in order to fight violent crimes against women like rape and other sexual offences. However we still have a long way to leap in order to curve out this menace from the society. In order to implement those laws we need to move forward hand in hand.

Moreover custodial rape can be regarded as an aggravated form of rape as it vanish the only hope that innocent people have from the enforcement agency. It is a known fact that people approaches the investigating department with a trust and expectations to be protected. Thus breaking such trust amounts to gross violence of human rights. Moreover the institution of police department is provided with immense power which they are expected not to misuse. The police department and specially the investigating officer are bestowed with huge responsibilities to abide by while the accused is in their custody. Thus the Hon'ble Supreme Court has prescribed certain guidelines in the case of *D.K Basu v. State of West Bengal*¹⁶ to be followed by the investigating officer while remanding the accused person.

In a recent landmark case titled *Paramvir Singh Saini vs Baljit Singh* 2020, the Hon'ble Supreme Court of India ordered that CCTV cameras should be installed in all police stations across the country, including interrogation rooms. Installation of CCTV cameras in police stations and jails across the country, constitution of human rights commissions and surprise visits of jails and lock-ups by the civil society would considerably reduce the cases of custodial rapes and torture. Installation of cameras inside the custodial homes will definitely create fear in the potential offenders to commit the heinous crime on the women under their custody. Even if the culprits do not care about the cameras atleast the video footage captured in the camera will help in instituting a strong prosecution case leading to conviction of the culprits.

It is obvious that not only the three wings of the government i.e the legislature, the judiciary and the executive is responsible for enforcement of such laws in the society but also the media, the non-governmental organizations and the civil societies plays a very significant role in preventing such heinous offences as well as in the proper enforcement of such laws. Finally the researcher would like to suggest that sensitization is one of the most effective solutions in combating this offence. Therefore legal aid camps must be organized by the governmental and non-governmental organization circulating and explaining the laws and regulations among the lay men so that they can understand the grievousness and consequences of the offences. Until and unless the mentalities of the sexual offenders are detoxified, the offence of rape will continue despite of any efforts by the government or the civil society. Sensitization programmes are a must to prevent such offence. The enactment and interpretation of such laws are to no avail if we handover all the responsibilities of its implementation to the government alone. It is high time that we take a step forward by playing our part by being more vigilant, sensitized and steadfast to those laws.

CONFLICT OF INTERESTS

None .

¹⁶ (1997) 1 SCC 416.

ACKNOWLEDGMENTS

None.

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