

REVISITING RAPE LAWS - NEED OF THE HOUR

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Rape is a sordid reality in India; in all its gruesome manifestation, it reflects society's attitude to treat women as subservient. The distress and the psychological damage that is caused to a victim of rape destroys her aspirations in life, is unendurable and deplorable. The mindset of the society adds fuel to her intolerance. The Delhi incident awakened the conscience of the citizens and their solidarity compels the law makers to think about a change of law. In India we have no dearth of laws. However, drastic changes are required in the system of investigation, prosecution and trial process. Death penalty or castration of the accused is not a solution to minimise rapes. Speedy and effective justice delivery and the prevention of crime is the only deterrence. A mere amendment in the penal law will not serve the purpose. There is a need of classification of rape according to gravity within the section. Like incest, a more horrific crime committed by a protector is not addressed specifically in the section. Aggravated penetrative sexual assault should be defined and incorporated in the IPC. Revisiting the Substantive and Procedure laws is the need of the hour.

This paper discusses the amendments required in the substantive and procedural laws, with specific reference to the Criminal Law (Amendment) Bill, 2012.

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I. INTRODUCTION

Rape is a sordid reality in India; in all its gruesome manifestation, reflects society's attitude to treat women as subservient. The distress and the psychological damage caused to a victim of rape destroys her aspirations in life, is unendurable and deplorable. The mindset of the society adds fuel to her intolerance. The Delhi incident awakened the conscience of the citizens and their solidarity compels the law makers to think about a change of law.

"Law should not sit limply; while those who defy it go free and those who seek its protection lose hope".¹ The criminal justice system in India is under serious strain. It is not because of dearth of effective laws. The two major problems that have besieged the criminal justice system are the huge pendency of criminal cases and the inordinate delay in disposal of criminal cases on the one hand and the very low rate of conviction in cases relating to serious crimes.² Low conviction rate leads to loss of faith in the criminal justice system. The real reason for the huge pendency and delay is not addressed by many committees constituted for this purpose. In many cases, the institutional prejudices make the system ineffective and its impact is much on the vulnerable sections of the community. Certain judgements of the Superior Court reflects the mythology that prior experience on the part of the victim of rape is a reasonable provocation to the perpetrators to commit this heinous crime and absence of medical evidence to prove resistance has often been interpreted as consent.³ However, there is a change in the approach of the judiciary in last decade.

¹ Jennison v. Baker, (1972) 1 All E.R. 997 as cited in *Committee on Reforms of Criminal Justice System*, Ministry of Home Affairs, Vol. I, 2003.

² Government of India, *Committee on Reforms of Criminal Justice System*, Ministry of Home Affairs, Vol. I, 2003.

³ Prem Chand v. State of Haryana, A.I.R. 1989 SC 937, the Supreme Court held that the mandatory minimum sentence of 10 years awarded to two police officers for raping a woman was reduced to 5 years only because the woman was of easy virtue and there was no proof of physical resistance. In *Tukaram v. State of Maharashtra*, A.I.R. 1979 SC 185 (Mathura case), the Supreme Court overruled the judgement of the Bombay High Court's conviction of two police officers by saying that though there was sexual intercourse there was no rape because there was no mark of physical injury and hence no proof of physical resistance. Moreover, Mathura had not "raised any alarm for help" and the "absence of any injuries or signs of struggle" on her body. It is harsh to observe that a tribal illiterate girl did not resist the barbaric act of the police officers inside the police station. The Criminal Law Amendment Act, 1983, made custodial rape

Rape is viewed as an aggressive act against women, which symbolises social and cultural attitudes. As the incidence of rape increases, the attention should focus not mainly on increasing the punishment but to understand the offender and the social patterns that perpetuate the crime and social background of the offender. The basic experience of the rape victim is isolation and rape destroys simultaneously the sense of community and the sense of person.⁴ A murderer kills the body but a rapist kills the soul.⁵ Although the social community is the appropriate centre for the restoration of the spirit lost by the rape victim, but in reality the same community makes her future miserable. The element of chance in most rapes reinforces the nonperson status of the rape victim. Trauma of the rape victim continues till the time the literary, mythic, and historic attitudes toward rape changes.

II. ROLE OF LAW COMMISSION OF INDIA

The existing literature on rape is concentrated more on the change of definition of rape. The Law Commission of India, the only duly constituted law reform agency in India, is a toothless tiger. Its suggestions are recommendatory in nature and the unenforceability of its recommendations cannot be questioned unlike other statutory bodies created by the Government of India during the same period of 1955.⁶ Due to the inaction of

punishable as a consequence of this judgment. In *Mohd. Habib v. State*, 1989 Cr.L.J. 137 Del., the Delhi High Court acquitted an accused who raped a seven year old child merely on the ground that there were no marks of injury on his penis by ignoring the fact that the victim suffered a ruptured hymen and the bite marks on her body and there were eye witnesses also. The court is under the impression that injury on the penis is a mark of resistance. But later on in some cases the Supreme Court disagreed with the earlier views. In *State of Maharashtra v. Madhukar N. Gardikar* (1991) 1 S.C.C. 57 the Supreme Court held that "the unchastity of a woman does not make her open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate her person against her wish. She is equally entitled to the protection of law. Therefore merely because she is of easy virtue, her evidence cannot be thrown overboard." Likewise in *State of Punjab v. Gurmit Singh* (1996) 2 S.C.C. 384, the Supreme Court has advised the lower judiciary, that even if the victim girl is shown to be habituated to sex, the Court should not describe her to be of loose character.

⁴ Metzger, *It is Always the Women Who is Raped* <https://www.ncjrs.gov/App/publications/Abstract.aspx?id=44701> NCJ 044701. (last visited on January 11, 2013)

⁵ *Rafiq v. State* 1980 Cr.L.J. 1344 SC.

⁶ Like, the University Grant Commission which was given statutory recognition and autonomy by an Act of the Parliament.

law makers many of the far reaching suggestions made by various commissions and Supreme Court guidelines are not incorporated in the statutes. From 1860 to 2012, the Law Commission has submitted four Reports relating to rape laws.⁷

The 42nd Law Commission Report was the first step towards the reforms in rape laws. It suggested change in the definition of rape and punishment for custodial rape, which was not severe. It discussed consent in view of section 90 Indian Penal Code (IPC). It suggested insertion of the words 'either to herself or anyone else' in section 375. The Commission was against criminalization of marital rape. The Commission recommended enhanced punishment of rigorous imprisonment up to 14 years for rape. The law remained unamended due to the dissolution of the Lok Sabha in 1979.

The *Mathura* case,⁸ an unfortunate decision of the Supreme Court, sacrificing the dignity and human rights of women, led to public outcry, coupled with the intensification of pressure by the legal fraternity and social organizations paved the way to the 84th Report.⁹ The role played by the legal fraternity by strongly responding against the judgment of the Supreme Court was extraordinary.¹⁰ The response against the judgment in *Mathura* case was an eye opener to the policy makers to make proper law to tackle with the indignity suffered by women. In the 84th report, the Law Commission pointed out that the victim needs empathy and safety and a sense of reassurance. In the absence of public sensitivity in these needs the experience of figuring of the offence is an injury than an assault.¹¹ The report considered the 42nd Law Commission recommendations, for example, changing the definition of rape, incorporating custodial rape as a specific offence, etc. The major concern of the Report is defining the term 'consent', since the nuances of consent is

⁷ See, the 42nd Report, 84th report, 156th report and 172nd report of the Law Commission of India.

⁸ *Tukaram v. State of Maharashtra*, A.I.R 1979 SC 185.

⁹ *Rape law in India - The Need for an Overhaul*, <http://legalservices.co.in/blogs> (last visited on January 12, 2013).

¹⁰ Upendra Baxi *et al.*, *An Open Letter to the Chief Justice of India*, (1979) 4 S.C.C. 17 (J). The letter highlighted Indian judiciary's approach towards the downtrodden and the affluent. If the relief is sought by affluent people like Nandini Satpathy and Maneka Gandhi, the judiciary is much concerned about the violation of fundamental right.

¹¹ Government of India, *Law Commission of India 84th Report on Rape and Allied Offences-Some Questions of Substantive Law, Procedure and Evidence*, 1980, p.1.

important in deciding rape cases. Consent is a concept which is capable of rendering the immoral moral, the painful pleasurable, and the reprehensible commendable. It plays an invaluable role in transforming the illegal into the legal.¹² The difference between consent and submission is misunderstood in many cases. All consents are submission but all submissions are not consent. Submission may be by fear, coercion, and threat or like factors. Inability of the victim to get out of the act of the perpetrators is given paramount importance while considering the concept of consent in sexual offences. In order to get over this situation the 84th Law Commission had suggested adding an explanation to section 375, i.e., “A mere act of helpless resignation in the face of inevitable compulsion, acquiescence, non resistance and passive giving in when volitional faculty is either clouded by fear or vitiated by duress cannot be deemed to be consent.”¹³ However, this was not materialised. Hence, the Commission suggested to add “free and voluntary consent”. When the Criminal Law Amendment Bill 1980 was placed in the Parliament, the same was referred to the joint committee of the Parliament; the committee did not accept the expanded concept of consent. But in the Act the punishment for rape was increased to a term of ten years to life with a mandatory minimum requirement of 7 years. The judge can impose a lesser punishment than the minimum prescribed with adequate and special reasons¹⁴. But the recommendation to add section 114A in the Indian Evidence Act, 1832, the presumption of guilt of the accused if the victim in her statement admits that she did not consent for the sexual intercourse, was accepted and inserted in the Criminal Law (Amendment) Act, 1983. Since the presumption under section 114A is rebuttable, the non insertion of the explanation to section 375 or adding of free and voluntary consent in the section makes no change from the earlier provision. The Criminal Law (Amendment) Act, 1983, amended sections 375 and 376 and inserted sections 376A, 376B, 376C and 376D.

¹² Stephen Knight, *Libertarian critiques of consent in sexual offences*, UCL J.L. and J. 2012, 1(1), 137-165.

¹³ *Ibid.*

¹⁴ This provision has been misused in many cases even without specifying the special reason for reduction of sentence less than the minimum prescribed.

The Government of India directed the Law Commission to submit a report for revising IPC. The Delhi State Commission for Women also submitted its recommendations to the Law Commission. In its report the Women's Commission¹⁵ submitted that the rate of rape in Delhi is twice as that of the whole country. In 88% of the cases, the accused are relatives and acquaintances and 89 % of the cases have happened at home.¹⁶ The Commission recommended amendments in section 375 to include incestuous rape within its ambit.

In the report there was a discussion that virulent form of sexual assault on woman is not addressed in sections 354, 376 and 509 of IPC. The Commission recommended that the existing sections should be amended and sexual assault should be defined to include all violence of sexual violence on woman. This report was not placed in the Parliament.

The Supreme Court of India requested the Law Commission to examine the feasibility of making recommendations for amendment of the Indian Penal Code in view of the precise issues¹⁷ in the Writ petition filed by Sakshi, an NGO, regarding widening the definition of rape by incorporating all sort of penetration within the purview sexual intercourse.¹⁸ The Commission, after detailed discussions with women organizations, gave various recommendations, including, changes for widening the scope of section 375

¹⁵ Government of India, *156th Report on Indian Penal Code*, p.161

¹⁶ *Ibid.*

¹⁷ The precise issues are the restrictive interpretation of "penetration" in the Explanation to section 375 defeats the very purpose and object underlying section 376(2)(f) in view of widespread prevalence of child sexual abuse and the need of inclusion of all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/anal penetration and object/vaginal penetration within the meaning of the expression "penetration", treat the penetrative abuse of a child below the age of 12 as unnatural offence under section 377 IPC or as outraging the modesty of a woman under section 354, depending upon the 'type' of penetration ignoring the 'impact' on such child and continue to treat non-consensual penetration upon such a child as offence under section 377 IPC on par with certain forms of consensual penetration (e.g. consensual homosexual sex) where consenting party can be held liable as an abettor or otherwise. It also suggested to substitute the definition of 'rape' with the definition of 'sexual assault' and make it gender neutral, and define the expression 'consent', a new section, section 375A with the heading 'Aggravated sexual assault' is sought to be created. This new offence seeks to synthesize the offences now categorized under sub-section (2) of section 376 as well as sections 376B to 376D.

¹⁸ Government of India, *172nd Report on Review of Rape laws*, 2000.

by making it gender neutral, changes in sections 376, 376A to 376D, insertion of a new section 376F dealing with unlawful sexual contact, deletion of section 377 of the IPC and enhancement of punishment in section 509 of the IPC. The Committee also recommended various changes in the procedural laws.

The Government of India appointed a Committee on Reforms of the Criminal Justice System in the year 2000 to examine the fundamental principles of criminal jurisprudence, to examine whether there is a need to amend the substantive criminal law and procedural law in tune with the demand of the time and the need of the society. The Supreme Court sought the opinion of the Committee on the widening of the definition of rape as suggested by Sakshi in its Writ Petition. The considered opinion of the Committee to the Supreme Court was that such an interpretation is not reasonable. The Committee therefore recommended that other forms of forcible penetration including penile/oral, penile/anal, object or finger/vaginal and object or finger/anal should be made a separate offence prescribing punishment broadly on the lines of Section 376 of IPC. The Committee also discussed the scope of granting death penalty to rape. After long deliberations, the Committee did not pursue with the death penalty in view of the interest of the victim. The Committee recommended sentence of imprisonment for life without commutation or remission.¹⁹

The Criminal Law Amendment Bill, 2003, was introduced in the Rajya Sabha after the submission of the Report of the Committee on Reforms of the Criminal Justice System, 2003. The Bill did not contain provision for amendment of rape laws, but substantial amendments in the procedural law were proposed by the Bill. It contained provisions for enhancement of punishment for perjury, introducing plea bargaining, amendment in section 195 IPC. The Criminal Law (Amendment) Act, 2005 was passed on 11th January 2006.

The above discussion shows that the Government of India, the Law Commission and the judiciary had taken lot of efforts to stream line the law relating to rape. For one or the other reasons, many of the suggestions of the

¹⁹ Government of India, *Report of the Committee on Reforms of Criminal Justice System*, 2003.

Committee and the guidelines of the courts were not taken into consideration in its true spirit. The increasing number of gruesome cases of rape compels to find out the real causes and the possible remedy. Drastic changes are required from the initial stage of reporting of the crime to the police, the victim's rights, process of investigation, prosecuting system and the trial process. The real problem starts after the incident. Recording the statement of the victim by the police, testifying before the court where the defence lawyer's examination precipitates the victim's psychological problems, more than what is required as evidence for the case, character assassination by the defence lawyer, society's prejudicial approach towards the victim and unwarranted sexual demands make the offence of rape more horrid.

Death penalty or castration of the offender is not a solution to minimise rapes. Speedy and effective justice delivery by strengthening the prosecution agencies, ensuring efficiency, transparency and accountability of the stakeholders of the system are the important steps to reduce these crimes. A mere amendment in the provision of punishment in the substantive law does not serve the purpose. Adequate amendments are required in the substantive and procedural laws.

III. SUGGESTIONS FOR AMENDMENTS IN THE INDIAN PENAL CODE, 1860

The Criminal Law Amendment Bill, 2012, pending before the Parliament, is intended to make certain effective amendments in the existing law. The Bill has incorporated the recommendation in the 172th Law Commission Report to make section 375 of the IPC gender neutral to replace the word 'rape' by 'sexual assault'. The awarding of less than the minimum required punishment at the discretion of the judge after recording special reason was sought to be deleted from the section. The age when one can give consent is raised from sixteen years to eighteen years. The Bill contains provision for 'incest'.²⁰ The Bill seeks to penalise mere membership in a group of persons having a common intention to commits sexual assault by altering the existing

²⁰ Clause 376(2)(e) reads, "being a relative of, or a person in a position of trust or authority towards, the person assaulted, commits sexual assault on such person..."

sub section dealing with gang rape²¹. Four more subsections are added to section 376(2) penalising sexual assault by persons holding dominant positions²², of persons suffering from mental or physical disability²³, causes, grievous bodily harm or maims or disfigures or endangers the life of a person²⁴ and commits persistent sexual assault²⁵. The Bill has introduced certain changes in the procedural law as well. The bill proposes a provision in the Indian Evidence Act, 1832, that prevents the adducing any evidence relating to the previous character of the preosecutrix while considering 'consent'²⁶.

However, the proposed provisions in the Bill are not adequate to address the rising number of heinous crimes more amendments are required in the Bill.

Adding a grave offence like incest in the subsection will not serve the purpose effectively. Extremely odious and debased conduct of the father, brother, uncle and near relatives of the victim within the roof is a more atrocious act than rape by a stranger. Treating incest as an ordinary offence of rape and giving the same punishment will distort the severity of the offence. To impose a severe penalty to the near relations and persons in position of trust and authority who more often than not commit the offence of sexual assault on the members of the family or on unsuspecting and trusting young person is essential in view of the enormous number of incest in the country.

²¹ See, the Criminal Law (Amendment) Bill, 2012, cl. 376(2)(e).

²² *Ibid*, cl. 376(2)(i).

²³ *Ibid*, cl. 376(2)(j).

²⁴ *Ibid*, cl. 376(2)(k)

²⁵ *Ibid*, cl. 376(2)(l).

²⁶ The Criminal Law (Amendment) Bill, 2012, cl. 53A reads, "In a prosecution for an offence under section 376 or section 376A or section 376B of the Indian Penal Code or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of his or her previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent." Clause 146 proviso reads, "Provided that in a prosecution for an offence under section 376 or section 376A or section 376B of the Indian Penal Code or for attempt to commit any such offence, where the question of consent is in issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to his or her general immoral character, or as to his or her previous sexual experience with any person for proving such consent or the quality of consent".

The Delhi State Commission for Women in its report *The Situation of Woman and Girls in Delhi Report 1997* stated that the rate of rape in Delhi is twice as that of the whole country. In 88% of the cases, the accused are relatives and acquaintances and 89 % cases have happened at home.²⁷ The National Crime Records Bureau's statistics shows the rising number of incestuous crimes that are committed in the country.²⁸ The 156th Law Commission also suggested inclusion of incestuous rape in section 375.

The 172nd Law Commission Report also recommended provisions for incest and proposed to include rape committed by father, grandfather or brother or any other person being in a position of trust or authority towards the other person within its ambit.

Hence there is a need to consider incest as a separate sexual assault and requires severe punishment than an ordinary case of rape. A wide meaning should be given to incest. A new clause 376C and an explanation can be inserted in the Criminal Law Amendment Bill, 2012, as follows:

375C: Whoever being a relative of the woman through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the woman or who is living in the same or shared household with the woman, commits an act of incest within the family with any ancestor or descendant, a brother or sister of the whole or half blood or an uncle, aunt, nephew or niece of the whole blood, grandparents, parents, offspring, siblings, or grandchildren, adopted child or a surrogate, having authority over the victim shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.

Explanation-For the purpose of this section, domestic relationship and shared household shall have the same meaning as in section 2 of the Protection of Women from Domestic Violence Act, 2005 (43 of 2005).

²⁷ Government of India, *Law Commission 156th Report on Indian Penal Code*, 1997.

²⁸ Crimes in India, NCRB statistics, shows that, in rape cases reported during 2011, in Delhi, 442 reported cases the offenders are known to the victims. Out of this 20 are parents/close family members, 48 relatives, 156 neighbours and 218 other persons known to the victim.

The addition of two sub clauses (k) and (l) dealing with sexual assault causing grievous bodily harm or maiming or disfiguring or endangering the life of a person and persistent sexual assault in the present Bill shows the legislatures interest to treat grave forms of sexual assault to be punished severely. The gruesome acts of violence committed by the offenders are not totally addressed in these two subsections. Hence, there is a need for adding 'Aggravated Penetrative Sexual Assault' as a separate offence in tune with the Protection of Children from Sexual Offences Act, 2012. Clauses 376(2) (k) and (l) shall be deleted and the following clauses can be added in the Bill.

375A. A person is said to commit "Aggravated Penetrative Sexual Assault", if:-

- (a) whoever commits penetrative sexual assault on a woman; or
- (b) whoever commits penetrative sexual assault on a woman using deadly weapons, fire, heated substance or corrosive substance; or
- (c) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the woman;
- (d) whoever commits penetrative sexual assault on a woman, which—
 - (i) physically incapacitates the woman or causes the woman to become mentally ill as defined under clause (1) of section 2 of the Mental Health Act, 1987 or causes impairment of any kind so as to render the woman unable to perform regular tasks, temporarily or permanently; or
 - (ii) whoever commits penetrative sexual assault on a pregnant woman;
 - (iii) inflicts the woman with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the woman by rendering her physically incapacitated, or mentally ill to perform regular tasks; or

- (e) whoever, taking advantage of a woman's mental or physical disability, commits penetrative sexual assault on the woman; or
- (f) whoever commits penetrative sexual assault on the woman more than once or repeatedly; or
- (g) whoever commits penetrative sexual assault on a woman knowing the woman is pregnant; or
- (h) whoever commits penetrative sexual assault on a woman and attempts to murder the woman; or
- (i) whoever commits penetrative sexual assault on a woman in the course of communal or sectarian violence; or
- (j) whoever commits penetrative sexual assault on a woman and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or
- (k) whoever commits penetrative sexual assault on a woman and makes the woman to strip or parade naked in public.

376(1A): Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for life and shall also be liable to fine.

As per section 160(1) of the Code of Criminal Procedure (Cr.P.C), the attendance of persons before the investigating officer who are acquainted with the facts of the case is essential for collection of evidence in a criminal trial. However, the proviso to the section excludes male persons below the age of fifteen and women from appearing before the police officer in the police station to give the statement. This provision is to a large extent misused by the police officers in sexual offence cases. The victim is literally subjected to a second rape in police station by the police officers while they are compelled to present in the police station to narrate the whole incident amidst the sarcastic comments of the police. There is no substantive punishment provided for penalising these officers for violation of section 160(1) Cr.P.C..

In clause 166A²⁹ it is desirable to specify punishment for dereliction of duty by the police officers in sexual offence cases. In many of these cases, the accused persons are acquitted because of faulty investigation by the police. The police is reluctant to register FIR in such cases. After registering FIR, no proper immediate investigation is conducted, which ultimately helps the accused to get an acquittal in the trial. If strict punishment is provided in the Penal Code for dereliction of duty by the police officers, proper investigation can be ensured to a great extent. Hence the following clauses may be inserted to the Bill.

166A(c): Any police officer refuses to register the FIR in sexual assault and aggravated penetrative sexual assault cases on the basis of the information given by the complainant, or after registering the FIR, fails to investigate or makes inordinate delay in conducting the investigation, he shall be punished with imprisonment for a term which may extend to 5 years or fine or with both.

(d) Any police officer in violation of Section 160(1) provisos of the Code of Criminal Procedure, 1973, compels any victim of sexual assault and aggravated penetrative sexual assault to come to the police station to record the statement shall be punished with imprisonment for a term which may extend to 2 years or fine or with both.

Section 195 IPC³⁰ provides punishment for giving or fabricating false evidence with intent to procure conviction of offence punishable with imprisonment for life. In the same way, in many cases the witnesses in connivance with the accused give and fabricate false evidence to get an acquittal to the accused in serious offences. The conviction rate in criminal

²⁹ Section 166A reads: "Whoever, being a public servant,—

(a) knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter, or

(b) knowingly disobeys, to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation, shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both."

³⁰ Section 195 I.P.C. reads: "Giving or fabricating false evidence with intent to procure conviction of offence punishable with imprisonment for life or imprisonment. Whoever gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which by the law for the time being in force in India is not capital, but punishable with imprisonment for life, or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished".

cases is as low as ten percent due to perjury. Perjury is committed by the witness on his/her own volition or under threat/ allurements/inducement of third party.³¹ In order to avoid large number of acquittals in sexual offences, those who are giving and fabricating false evidence, which leads to the acquittal of the accused should also be punished, so that witnesses will be reluctant to give false evidence in favour of the accused person(s). Hence adding a new provision as section 195B is desirable.

195B. Giving or fabricating false evidence with intent to procure acquittal in sexual assault and aggravated penetrative sexual assault cases: Whoever gives or fabricates false evidence or turns hostile to the prosecution, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be acquitted of an offence of sexual assault and aggravated penetrative sexual assault, shall be punished with simple imprisonment for two years, and shall also be liable to fine.

IV. SUGGESTED AMENDMENTS IN THE CODE OF CRIMINAL PROCEDURE, 1973

Justice delivery system is under an obligation to deliver prompt and inexpensive justice to the needy without in any manner compromising on the quality of justice or the elements of fairness, equality and impartiality. The current criminal justice system, owing to its adversarial nature and age old legislations governing it, is unable to provide fair and expeditious dispensation of justice in criminal cases. Speedy trial of a criminal case is considered to be an essential feature of the right to a fair trial, but has remained a distant reality. Many a times, the inordinate delay in conducting trial contributes to acquittal of guilty persons either because the evidence is lost or because of lapse of time, or the witnesses not remembering all the details or their not coming forward to give true evidence due to threats, inducement or sympathy. Whatever may be the reason, it is justice that becomes the casualty. The ultimate aim of criminal law is protection of right to personal liberty against invasion by others – protection of the weak against the strong, law abiding against lawless, peaceful against the violent. To protect the rights of the citizens, the State prescribes the rules of conduct,

³¹ Government of India, *111th Report of the Parliamentary Standing Committee on Home Affairs on the Criminal Law (Amendment) Bill, 2003*, 2005.

sanctions for their violation, machinery to enforce sanctions and procedure to protect that machinery³². The acquittal rates in sexual offence cases are very low. To strengthen the criminal justice system all functionaries should work effectively. A mere amendment in the substantive law alone is not sufficient. Amendments in the procedural law, in tune with the substantive law are necessary. Suitable amendment should be introduced for improving the investigation, expediting trial procedures, appointing efficient prosecutors for conducting sexual offence cases, making the functionaries accountable for their inaction, giving more participatory role to victims of sexual offences, constituting sufficient number of special courts, etc.

The foundation for the criminal justice system is the investigation by the police. The success or failure of the case depends entirely on the investigation. But unfortunately, many of the cases are acquitted due to the fault of the investigation. In many cases the accused is represented by a competent lawyer of his choice. The job of the prosecutor is not lucrative as compared to a private lawyer. Unless the prosecution system is not strengthened, there will always be disparity in quality. In the adversarial system, the burden is on the prosecution to prove the case beyond reasonable doubt. The State has to take effective steps to enhance the competence of the prosecutors. If the State is not able to provide an effective prosecution system, the victim should be given a chance to participate throughout the proceedings with the help of an independent lawyer of his/her choice. Moreover, the lack of coordination of the investigation and prosecution will also adversely affect proper trial. There is need for amendments in the trial procedure also. The following are the amendments suggested in the Cr.P.C. for an effective and timely conduct of sexual offences.

In section 9³³ of Cr.P.C., the subsection 1a may be inserted:-

1a: For the purposes of providing a speedy trial, the State Government shall in consultation with the Chief Justice of the High Court, by

³² *Supra* n. 19, p.5.

³³ Section 9 reads, "Court of Session. (1) The State Government shall establish a Court of Session for every sessions division".

notification in the Official Gazette, designate, for each district, Special Sessions Courts to try the offences of sexual assault and aggravated penetrative sexual assault cases.

V. VICTIM'S RIGHT TO APPOINT A LAWYER

Section 302 Cr.P.C provides permission to conduct prosecution by private person by filing an application before the court. But in practice, even if applications are filed by the victim for appointment of independent lawyers for conducting the prosecution, majority of the judicial officers are reluctant to allow such applications and even if appointed they are allowed only to assist the prosecutor under section 301 of Cr.P.C. The draft Criminal Law Amendment Bill, 2003, contained a provision that the victim may be permitted to appoint a lawyer to “coordinate” with the prosecution. But it was not incorporated in the Act. It is not necessary that in all cases the Prosecutors are experts in conducting prosecution effectively and is one of main reasons in the low conviction rate in criminal cases. The present Bill has proposed a proviso³⁴ to section 24(8)³⁵ that the court may permit the victim to engage an advocate of his choice to assist the prosecution. However, that amounts only to an assistance provided under section 301. Hence, the proviso may be substituted by the following:

Provided that the court may permit the victim to engage an advocate of his choice to conduct the prosecution under this subsection.

As aforementioned, the State Government shall constitute Special Courts for speedy disposal of cases relating to sexual assault and aggravated penetrative sexual assault. In these Special Courts experienced criminal lawyers shall be appointed as Special Public Prosecutors. For this purpose, a sub clause shall be inserted in section 24(8) as follows:

³⁴ Section 24(8) proviso reads: “Provided that the court may permit the victim to engage an advocate of his choice to assist the prosecution under this subsection”.

³⁵ Section 24(8) reads, “The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor”.

24(8)(1): The State Government shall, by notification in the Official Gazette, appoint a Special Public Prosecutor for every Special Court for conducting cases of sexual assault and aggravated penetrative sexual assault cases.

In cases of sexual offences, to avoid retraction of first information statement given by the victim to the police, section 154³⁶ shall be amended by incorporating provisos as provided below:

Provided that such statement of the victim shall also be recorded by audio video electronic means.

Provided that the statement of the victim shall preferably be recorded under Section 164 of the Code of Criminal Procedure.

The delay in submitting the final report of the case within ninety days by the police officer helps the sexual offenders to get bail as of right under section 167 of Cr.P.C. In order to avoid such rights and influencing the investigation by the accused, a time frame should be mentioned in section 173 Cr.P.C in sexual assault and aggravated penetrative sexual assault cases. Hence section 173(1A)³⁷ may be substituted as:

(1A) The investigation in relation to sexual assault and aggravated penetrative sexual assault of a child and a woman may be completed within three months from the date on which the information was recorded by the officer in charge of the police officer.

³⁶ Cr.P.C., s. 154(1) reads: "154. Information in cognizable cases.- (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. Provided that if the information is given by the woman against whom an offence under section 354, section 375, section 376, section 376A, section 376B and section 509 of the Indian Penal Code is alleged to have been committed or attempted, then such information shall be recorded, as far as possible, by a woman police officer."

³⁷ Section 173(1A) reads: "The investigation in relation to rape of a child may be completed within three months from the date on which the information was recorded by the officer in charge of the police officer".

VI. SANCTION FOR PROSECUTION

Before taking cognizance in prosecution of judges or public servants, sanction for prosecution from the appropriate Government is required. This privilege of want of sanction for prosecution in respect of certain offences has been given for a pious purpose i.e. for protection of honest public servants, who impartially discharge their duties from vexatious and frivolous prosecution. Privilege of need of prior sanction for prosecution has been overwhelmingly misused and especially by powerful public servants and businessmen. In the light of judicial pronouncements and practical experiences in court, it has been seen that this privilege is being misused by public servants in order to save them from prosecution. The sanctioning authority is generally the Head of the Department or any officer authorized to act as such by the Government. The sanctioning authority has been many a time found to be trying to protect the delinquent official. The law regarding sanction is a highly technical one and the accused, merely by exploiting this technicality of law are able to escape themselves from shackles of law. In sexual offence cases, the requirement of sanction for prosecution should be exempted so as to avoid delay in trial and unnecessary influence by the accused. Hence the following proviso can be added in section 197(1)³⁸.

Provided that any public servant accused of sexual assault and aggravated penetrative sexual assault shall be exempted from previous Sanction for Prosecution from the appropriate Government before taking cognizance by the court.

³⁸ Section 197 reads: "Prosecution of Judges and public servants. (1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government;

Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted".

VII. SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES BY APPROPRIATE GOVERNMENTS

Appropriate authorities are vested with the constitutional and statutory power to grant suspension, remission or commutation of sentences on various grounds³⁹. This constitutional power cannot be fettered by statutory provisions.⁴⁰ A liberal and promiscuous use of this power by the executive allows many offenders, who could have been given death sentence by the court but have been given life imprisonment is saved by the extant rules.⁴¹ The intended public purpose of exercising this power is many times hijacked by influential offenders; thereby, the purpose of the judiciary to punish the offender according to the gravity of the offence committed by him is defeated. Hence, the power of suspension, remission and commutation of sentences under Articles 72 and 161 of the Constitution and sections 432, 433 and 433A of Cr.P.C should not be exercised by the appropriate government in offence relating to sexual assault and aggravated penetrative sexual assault. The following provisos to section 432, 433, 433A and Constitutional amendments in Article 72 and 161 are suggested for the above.

In section 432⁴² the following proviso may be inserted:

Provided that the power under this section shall not be exercised in favour of a person convicted for an offence of aggravated penetrative sexual assault.

³⁹ See, INDIA CONST. art. 72 and 161 and Cr.P.C., ss. 432, 433 and 433A.

⁴⁰ State of Punjab v. Joginder Singh A.I.R. 1990 SC 1396.

⁴¹ K. V. Kelker, THE CODE OF CRIMINAL PROCEDURE, (Eastern Book Company, Luknow, 5th ed. 2003), p.739.

⁴² Section 432 reads, "Power to suspend or remit sentences. (1) When any person has-been sentenced to punishment for an offence, the appropriate Government may, at any time, without Conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced".

In section 433⁴³ the following proviso may be inserted:

Provided that the power under this section shall not be exercised in favour of a person convicted for an offence of sexual assault or aggravated penetrative sexual assault.

In section 433A⁴⁴ insert the following proviso:

Provided that the power under this section shall not be exercised in favour of a person convicted for murder by sexual assault or aggravated penetrative sexual assault, for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life.

In Article 72⁴⁵ of the Constitution insert the following sub clause:

(4) Nothing in sub clause (1) shall apply to any person convicted for the offence relating to sexual assault and aggravated penetrative sexual assault.

In Article 161⁴⁶ of the Constitution insert the following proviso:

Provided that this power shall not be exercised in cases where any person is convicted for the offence relating to sexual assault and aggravated penetrative sexual assault.

⁴³ Section 433 reads: "the appropriate Government may, without the consent of the person sentenced, commute-

(a) a sentence of death, for any other punishment provided by the Indian Penal Code;

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine ;

(d) a sentence of simple imprisonment, for fine".

⁴⁴ Section 433A reads: "Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."

⁴⁵ INDIA CONST. art. 72 reads: "the President of India shall have the power to suspend, remit or commute sentence in all cases where punishment or sentence is for an offence against any law relating to a matter to which executive power of the Union extends.

⁴⁶ INDIA CONST. art. 161 reads: "The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends".

VIII. NEED FOR CHANGE IN THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000

There is a rise in sexual offences committed by juvenile between the age of 16 years and 18 years. Considering the fact that children are attaining maturity much before the age of 18, appropriate amendments need to be made in the Juvenile Justice Act also.

As soon as a juvenile in conflict with law is produced before the Juvenile Justice Board, if the Board feels that the juvenile in conflict with law is below the age of 16 years, the matter has to be considered by the Juvenile Justice Board. If the juvenile in conflict with law is above the age of 16 years and below the age of 18 years, and who has attained sufficient maturity of understanding the nature and consequence of his conduct on that occasion, the act would be treated as an offence and he has to be tried in the ordinary criminal court. For this purpose the Juvenile Justice Board can follow the same procedure followed by a Magistrate under Section 7⁴⁷ of the Act.

⁴⁷ Section 7 reads, "Procedure to be followed by a Magistrate not empowered under the Act.- (1) When any Magistrate not empowered to exercise the powers of a Board under this Act is of the opinion that a person brought before him under any of the provisions of this Act (other than for the purpose of giving evidence), is a juvenile or the child, he shall without any delay record such opinion and forward the juvenile or the child, and the record of the proceeding to the competent authority having jurisdiction over the proceeding."

(2) The competent authority to which the proceeding is forwarded under sub-section (1) shall hold the inquiry as if the juvenile or the child had originally been brought before it".

IX. CONCLUSION

The Supreme Court, High Courts and the Law Commission of India have from time to time reiterated the need for appropriate amendments in the substantive and procedural laws for tackling the issue of sexual offences against women but are still remaining dormant. Many of the guidelines issued by the Courts are not followed. Elaborate guidelines were laid down by the Delhi High Court in *Delhi Commission for Women v. Delhi Police*⁴⁸ to effectively tackle the rising menace of sexual offences against women in Delhi.

⁴⁸ Order dated 23.5.2009 in W.P.(CRL) 696/2008. The Guidelines laid down were:

- a. Every Police Station shall have available round the clock a lady police official/ officer not below the rank of Head Constable.
- b. As soon as a complaint of the offence is received, the duty officer receiving the complaint/ information shall call the lady police official/officer present at the police station and make the victim and her family comfortable.
- c. The duty officer, immediately, upon receipt of the complaint/information intimate to the "Rape Crises Cell" on its notified helpline number.
- d. After making preliminary inquiry/ investigation, the investigation officer along with the lady police official/ officer available, escort the victim for medical examination.
- e. The Assistant Commissioner or Police shall personally supervise all investigation in to the office .
- f. The statement of victim shall be recorded in private, however, the presence of family members while recoding statement may be permitted with a view to make the victim comfortable. In incest cases where there is a suspicion of complicity of the family members in the crime such family members should not be permitted.
- g. The investigation officer shall bring the cases relating to "child in need of care and protection" and the child victim involving incest cases to the Child Welfare Committee.
- h. The accused should not be brought in the presence of victim except for identification.
- i. Except the offences which are reported during the night no victim of sexual offence shall be called or made to stay in the police station during night hours. The Social Welfare Department of the Govt. of NCT of Delhi shall ensure that Superintendents of the Foster Home for Women will provide necessary shelter till formal orders secured from the concerned authorities.
- j. The Investigation Officer shall ensure that in no case the accused gets the undue advantage of bail by default as per the provisions of Section 167 Cr.P.C. it is desirable that in cases of incest the report under Section 173 Cr.P.C is within 30 days.
- k. Periodical training to deal with rape cases should be provided to the Police Officers, Juvenile Police Officers, Welfare Officers, Probationary Officers and Support Persons. A Training Module be prepared in consultation with the Delhi Judicial academy.
- l. The police should provides information to the Rape Crises cell regarding the case including the arrest and bail application of the accused, the date of filling of the investigation report before the magistrate.
- m. The police should keep the permanent address of the victim in their file in addition to the present address. They should advise the victim to inform them about the change of address in future, etc.

Awarding capital punishment or castration of the offender is not the solution. The Delhi incident shocked the conscience of society and the solidarity of the people all over the country is commendable. Even then during this period many more incidents of rape were reported from various parts of the country, which shows that the perpetrators of this crime are not concerned about the anguish of the people or the plight of the victim. Unless the whole system relating to criminal justice administration system is revamped, the problem cannot be tackled effectively. Hence, it is the state's responsibility to implement appropriate laws to address the need of the society. The state has to strengthen the investigating system, prosecution and the judiciary. If the above suggestions are carried out the problem can be solved to a considerable extent.