
POWER DIFFERENTIALS AND AGGRAVATED RAPE UNDER SECTION 64(2), BNS: A LEGAL AND STRUCTURAL APPRAISAL

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ABSTRACT

This paper examines how power imbalances make certain acts of rape more serious, focusing on aggravated rape under Section 64(2) of the Bharatiya Nyaya Sanhita (BNS), 2023. It looks at situations where people in authority—like police officers, public servants, or armed forces personnel—use their position to exploit victims who are often unable to resist due to fear or dependency. The paper traces the legal changes from the 1983 and 2013 amendments to the current BNS, showing how key cases like the Mathura case pushed reforms. The paper also recognizes that despite these changes, serious problems remain: unclear provisions in the new law, underreporting, weak enforcement, and bias in the justice system. By analysing these gaps, the paper argues that stronger implementation and survivor-focused reforms are needed to make the law effective in protecting victims of power-driven sexual violence.

Introduction

In India, women are portrayed as the Goddess Durga while also being described as "lustrous and seductive, making men unable to control their natural tendencies."¹ Crimes related to women are quite prevalent in our country.² Almost every person is aware of the term rape. But, most of them are unaware of a kind of rape that is committed under the custody of an authoritative body and is known as aggravated rape.³

Aggravated rape, as defined under the Bharatiya Nyaya Sanhita (hereinafter BNS) 2023, represents a particularly severe category of sexual violence that is distinguished from other forms of sexual offenses by the presence of specific aggravating factors. These kinds of acts (of sexual violence) are aggravated by the fact that the victim, in these situations, holds limited ability to resist or seek help due to dependence, vulnerability, or fear of repercussions. Under *section 64(2) of the BNS*, several categories of rapes are considered as "aggravated," which warrant more severe punishments. These include instances where the perpetrator is a police officer committing the act within the limits of their jurisdiction, in a station house, or on a woman in their custody; a public servant or their subordinate abusing their custodial authority; a member of the armed forces deployed in an area; or part of the management or staff of a jail, remand home, or other custodial institutions, targeting inmates. Similarly, aggravated circumstances arise when the act is perpetrated by a staff member of a hospital on a patient, or if committed by a relative, a guardian, a teacher, or any person in a position of trust or authority.⁴

Other severe aggravations include committing the crime during communal or sectarian violence, targeting a woman known to be pregnant, a woman incapable of giving consent, or one suffering from mental or physical disability. The law also considers repeated assaults on the same woman, infliction of grievous bodily harm, disfigurement, or endangerment of life during the act as aggravating factors. Moreover, rape involving control or dominance over the victim—be it through emotional, social, or situational dependence—is equally reprehensible.⁵

¹ *Soumya Ranjan, Custodial Rapes in India*, 2 *Jus Corpus L.J.* 952 (2022).

² According to the National Crime Records Bureau's (NCRB) 2022 report, a total of 4,45,256 cases of crimes against women were registered across India in 2022, marking a 4% increase from the previous year, which translates to nearly 51 FIRs every hour.

³ Ranjan, *supra* note 1.

⁴ Bharatiya Nyaya Sanhita, § 64(2), No. 45, Acts of Parliament, 2023 (India).

⁵ *Ibid.*

For the purpose of this paper, I will be focusing exclusively on aggravated rapes involving an element of “power differential”⁶.

The concept of power differentials plays a significant role in perpetuating sexual violence, including aggravated rape. It creates an environment where victims may feel compelled to submit to unwanted sexual advances due to fear of retaliation or further victimization. These differentials increase the victim's vulnerability and heighten the culpability of the perpetrator due to the exploitation of their position. The power dynamics inherent in aggravated rape amplify the trauma; it is not just an act of violence but “a betrayal of institutional trust”⁷. Such an act of violence is so severe and profound that the victim is unlikely to fully recover from the trauma for the rest of their lives.

This paper is thoughtfully structured into two main sections, followed by a concise conclusion. The first section offers a comprehensive historical overview of the legal evolution surrounding aggravated rape in India, tracing the trajectory of key legal reforms. It examines how these reforms have shaped, and been shaped by, societal attitudes and institutional frameworks. The second section critically analyses the persistent practical challenges that endure despite the advancements in legal frameworks. This section highlights the gaps between legislative intent and implementation, shedding light on systemic issues, such as judicial biases, enforcement inefficiencies, and the societal stigmas that continue to undermine justice for survivors.

A Legal History of Aggravated Rape in Indian Jurisprudence

The Indian Penal Code, 1860 (hereinafter IPC), didn't originally contain provisions related to aggravated rape. However, some cases of the late 1980s resulted in significant revisions to the law relating to rape.⁸ The first was the Pratap Misra Case⁹, followed by the Rameeza Bee case, and then came the well-known Mathura Case¹⁰.

⁶ *Power differential in this context* means “the difference in power/authority held by the accused and the victim, which exacerbates the commission of the crime”.

⁷ Justice J.S. Verma Committee, *Report of the Committee on Amendments to Criminal Law* (2013) (India).

⁸ Content for Postgraduate Courses, Component II, Pathshala e-Text: Aggravated Rape (2015), available at: https://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S000020LA/P001795/M025756/ET/151377029210AggravatedRape.pdf.

⁹ Pratap Misra v. State of Orissa, MANU/SC/0120/1977.

¹⁰ Tukaram v. State of Maharashtra, (1979) 2 SCC 143.

The Pratap Misra Case

The case involved the gang rape of a 23-year-old pregnant woman who was five months along at the time. She was married to a man who was already married when he married her. The couple was on vacation at a wildlife park and staying at a guest house when a group of men from an adjoining room demanded entry into their room. The couple initially objected, but when the men came back, they opened the door. The men then took turns raping the woman after forcibly removing her husband. A few days later, the woman suffered a miscarriage, which the prosecution attributed to the severe trauma inflicted during the attack¹¹.

The Supreme Court did not believe the prosecution's version, and based on the absence of injuries on the prosecutrix's body and the accused's private parts, it concluded that the intercourse was consensual.

Given that the prosecutrix had previously worked as a midwife alongside a doctor, the Court observed that "*she would have known how much resistance was required.*" Ultimately the court surmised that the intercourse was with the "tacit consent" of the prosecutrix and with the "connivance" of her husband.

The court's ruling was criticized for its over-reliance on medical evidence, failing to consider the prosecutrix's potential lack of resistance due to her pregnancy and her awareness that any trauma could endanger the life of her unborn child, as well as the fact that the accused were trained NCC cadets. The criticism also pertained to the moralistic stand taken by the court; it had gone to the extent of calling the prosecutrix a "*concubine*"¹², primarily due to the fact that the prosecutrix was in a relationship with a man who was already married.

The Rameeza Bee Case

In this case, it was claimed that the policemen had brutally murdered her husband, Ahmad Hussain, and gang-raped Rameeza Bee. It was a dull account of the night when she was raped by a series of policemen. However, one of the rapists, a constable, was kind enough to provide her with a mug of water so she could wash herself. She had lost her husband but there was no space or time for grief¹³. The police officer in defence incriminated Rameeza Bee a prostitute

¹¹ *Pratap Misra v. State of Orissa*, supra note 3, ¶ 3.

¹² *Pratap Misra v. State of Orissa*, supra note 3, ¶ 10.

¹³ Vasanth Kannabiran, *Taken at the Flood: A Memoir of a Political Life* ch. 3 (Women Unlimited 2020).

and her husband as a pimp. A commission¹⁴ was established to conduct the inquiry; it rejected the police's claims about Bee and her husband and found the police accountable for both of the alleged offenses. Even after the commission's objective and clear conclusions, the case was moved to Karnataka to ensure the police officers had a fair trial.

Vasanth Kannabiran, who closely witnessed the hearings by the commission¹⁵, writes in her book that “for her, personally, this case brought on the realisation that *there is no dramatic shattering of glass, no loud screams or the clash of cymbals in the background when rape happens*. Gang rape (especially by those in positions of power) can occur when several inebriated men arrive one after the other to complete their “business,” and the woman whispers in a low voice, “*How many more are there?*” And that a rapist can, in fact, give her a mug of water to wash herself—an act of ultimate kindness. The hearings of the Mukhtadar Commission taught us important lessons that helped us get ready for the Mathura campaign.¹⁶

This case served as further evidence of the disturbing glamour around the rape, and the total absence of protection for a woman who had been sexually attacked and subsequently charged with prostitution.

The Mathura Case

Here, a tribal girl, Mathura, the victim aged 16, was called to the police station since an FIR for kidnapping had been filed against the man with whom she was in a relationship. The allegation was that two policemen who were posted at the station had sent Mathura’s companions out of the station, and one of them had raped her in the lavatory attached to the station.¹⁷

A rape accusation had been dropped against the accused persons by the Sessions Court. The medical study was the primary source of their conclusion that Mathura was “habituated to intercourse.” It said that intercourse was consensual, and *in order to “sound virtuous” before her “lover,” Mathura had alleged that she had been raped by the policemen.*¹⁸

¹⁴ *The Mukhtadar Commission of 1978* (India).

¹⁵ She was able to attend the hearings as Rameeza Bee was represented by Vasanth Kannabiran’s husband before the commission.

¹⁶ See *Kannabiran*, supra note 13, ch. 3.

¹⁷ *Tukaram v. State of Maharashtra*, supra note 4, at 144–45.

¹⁸ *Tukaram v. State of Maharashtra*, supra note 4, at 146.

When the matter reached the High Court, the defendants were found guilty at first, but the Supreme Court acquitted them on a subsequent appeal, overruling the High Court's proposition that "the case was one of merely passive submission and it didn't involve consent." The SC's decision was influenced by the fact that there were no injuries on Mathura's body. To the assertion that she had screamed, which went unheard, the Court termed this assertion as a "tissue of lies." Hence, the Court acquitted the men of the charges of rape¹⁹.

This decision of the court was also criticized due to the reason that it (again) failed to consider the girl's precarious circumstances at the time of her summons to the police station, where accusations had been made against the man she was in a relationship with. It did not consider the power differential between the policemen and her.²⁰ The court had unfortunately failed to explain that how it can expect a young girl "when trapped by two policemen inside the police station, to successfully raise alarm for help?", and "why non-resistance should imply consent?"

As Vasanth Kannabiran notes that "for the nascent women's group who were just beginning to coalesce, *the Rameeza Bee Case* was a brutal orientation to the patriarchal nature of the law, and they finally graduated with the Mathura anti-rape campaign." These cases highlighted the Indian juridical response to rape - "women have had to fight to be able to prove that they were raped, that the action was non-consensual and against the obstacles created in the name of the innocent-until proven guilty doctrine."²¹

Against this backdrop of these cases, as well as the violent protests and women's rights groups following the Mathura Case, the government eventually considered amending the rape laws in 1983.

The 1983 Amendment

The amendment²² introduced the offence of aggravated rape in the IPC [under sec 376(2)] for the first time. The four circumstances where rape was considered aggravated and involved power differential were:

¹⁹ *Tukaram v. State of Maharashtra*, supra note 4, at 146–50.

²⁰ *Pathshala e-Text: Aggravated Rape*, supra note 8.

²¹ R G Kar Case Shows Stricter Rape Laws Are Necessary, *The Indian Express* (13 Apr. 2024), <https://indianexpress.com/article/opinion/columns/r-g-kar-case-shows-stricter-rape-laws-are-necessary-9552728/> (last visited Dec. 27, 2024).

²² *Criminal Law (Amendment) Act*, No. 43, Acts of Parliament, 1983 (India).

1. If a police officer committed rape within the limits of the police station in which he was appointed, or in the premises of a police station, or on a woman in his or his subordinate's custody;²³
2. Similarly, if a public servant took advantage of his official position and committed rape on a woman in his or his subordinate's custody;²⁴
3. if a man on the management of a jail, remand home or any place of custody, or in charge of a woman's or children's home committed rape on an inmate of such place of custody or home;²⁵
4. if a man on the management or staff of a hospital took advantage of his position and committed rape on a woman in the hospital;²⁶

The amendments also made a change in the 1872 Evidence Act – a charge of aggravated rape would now bring in a presumption under Section 114A²⁷. This presumption and the amendments took care of the Mathura type situations. The court would have to assume non-consent in a Mathura-style scenario if the victim testified—as she did in that instance—that she did not consent to the sexual contact.²⁸

The amendment also provided for higher sentences for aggravated rape. A minimum sentence of ten years was prescribed. A court could only impose a sentence of less than ten years in prison if they could give "adequate and special reasons." The maximum punishment for aggravated rape was imprisonment for life.²⁹

The Delhi Gang Rape Incident & Justice JS Verma Committee

On December 16, 2012, the brutal gang rape of a 23-year-old medical student on a bus and her abandonment on the roadside shocked the nation, sparking widespread outrage and protests. A national push for reform and a review of the laws safeguarding women was sparked by this

²³ Indian Penal Code, § 376(2)(a), No. 45, Acts of Parliament, 1860 (India), as amended.

²⁴ *Id.*, § 376(2)(b).

²⁵ *Id.*, § 376(2)(d).

²⁶ *Id.*, § 376(2)(e).

²⁷ Indian Evidence Act, § 114A, No. 1, Acts of Parliament, 1872 (India), as amended by *Criminal Law (Amendment) Act*, No. 13, 2013 (India) (*presumption of lack of consent in prosecutions for aggravated rape where victim testifies non-consent*).

²⁸ *Pathshala e-Text: Aggravated Rape*, supra note 8.

²⁹ *Indian Evidence Act*, § 114A, supra note 28.

horrifying tragedy. To address these concerns, the government formed a committee led by Justice J.S. Verma to review the existing laws on sexual offenses and recommend improvements. The committee's recommendations³⁰ formed the basis for the Criminal Law (Amendment) Act, 2013.

The 2013 Amendment

It expanded the scope of aggravated rape. It added two more situations, in addition to the circumstances that had been added by the 1983 amendments, in the list of aggravated rape involving power differentials; these are rape by a member of the armed forces in an area where he is deployed by the Central or State Government³¹, and rape by a relative, guardian, or teacher, or by a man in a position of trust towards the woman³².

The 2013 amendments also removed the discretion of judges to reduce the sentence below the minimum punishment by providing “adequate and special reasons”, and although the minimum punishment was retained at 10 years, the maximum punishment was increased to imprisonment for the rest of the person’s natural life³³. However, a charge under Section 376(2), IPC continues to attract the presumption under Section 114A of the Indian Evidence Act³⁴.

BNS overtaking IPC

Despite the recent overhaul of archaic criminal laws and the introduction of the Bharatiya Nyaya Sanhita (BNS), 2023, which replaces the Indian Penal Code of 1860, substantive changes to the law on aggravated rape remain elusive. The key provisions addressing aggravated rape have undergone little more than a renumbering exercise and are now codified in Section 64(2) of the BNS. The essence of the older provisions remains, reflecting continuity rather than transformation in addressing such serious offences, despite the new legislation's promise of reform. The purported overhaul introduced by the BNS has not eliminated the ambiguities surrounding Section 64(2). Clauses (a) and (b) of this provision clearly state that an act amounts to aggravated rape when the victim is in the custody of the perpetrator or in the

³⁰ *Justice J.S. Verma Committee*, supra note 7.

³¹ *Indian Penal Code*, § 376(2)(c), supra note 21.

³² *Id.*, § 376(2)(f)

³³ Interview: ‘Though India’s Rape Law Has Been Overhauled, It Still Lacks a Sentencing Policy’, Scroll.in (22 Dec. 2016), <https://scroll.in/article/823982/interview-though-indias-rape-law-has-been-overhauled-it-still-lacks-a-sentencing-policy> (last visited Dec. 24, 2024).

³⁴ *Pathshala e-Text: Aggravated Rape*, supra note 8.

custody of someone subordinate to the perpetrator. However, a critical gap remains unaddressed: it is unclear whether a police officer or public servant would be liable under this specific provision if he commits rape against a woman who is in the custody of his superior. Although there is a clear power differential in such circumstances, it is unclear whether Section 64(2) would classify this as "aggravated rape."³⁵

Other Challenges Undermining Justice

Despite progressive legal reforms and stricter punishments for aggravated rape, persistent systemic challenges undermine the delivery of justice in India. These include underreporting, evidentiary obstacles, and judicial reliance on stereotypes. There also arises problems due to the counterproductive provision of mandatory minimum punishment, which leads to the decline in judicial discretion and results in a lesser rate of conviction.

One of the significant challenges faced by the Indian legal system is the high level of underreporting of (aggravated) rape cases. Social stigma and cultural taboos surrounding sexual violence lead to a reluctance among victims to report their assaults. Survivors often find themselves re-victimized not only by the (authoritative) perpetrators but by the very system meant to protect them. This was evident in the speech of the then-opposition leader in the Lok Sabha, Sushma Swaraj, who, while condemning the December 16, 2012 gang-rape in Delhi and demanding speedy justice and the hanging of the accused, stated that *'even if the 23-year-old survived, she would be a "zinda laash (living dead)", traumatised for life'*.³⁶

Inadequate networks of assistance for survivors exacerbate this. Unlike countries such as the UK and the US, India lacks a coordinated network of specialized survivor support services, including trauma counselling, financial aid, and victim protection during trials.³⁷

Moreover, the evidentiary hurdles in rape cases are formidable. In instances such as custodial rape, where law enforcement officers or other authorities are the perpetrators, *it is easier for the officials to destroy evidence*³⁸. The difficulty of securing convictions in such cases reflects

³⁵ *Bharatiya Nyaya Sanhita*, § 64(2), supra note 4.

³⁶ Delhi Protest, Hindustan Times (Dec. 14, 2014), <http://www.hindustantimes.com/photos/india/delhiprotest/article4-974637.aspx> (last visited Dec. 24, 2024).

³⁷ Daniyal Zameer, Mohd Saifullah Khan & Zubair, *A Critical Analysis of Indian Anti-Rape Laws in Brief Nexus to the Global Perspective*, 4(4) *Indian J. Legal Rev.* 304 (2024), APIS-3920-0001, ISSN 2583-2344.

³⁸ Shrenitha Anantula, *Custodial Rape: A Dehumanizing Violence Against Society*, 5 *Indian J.L. & Legal Res.* 1 (2023).

this systemic failure. This evidentiary hurdle is further exacerbated by the inefficiency of the judicial system, which is plagued by backlogs and delays in trials. Even though fast-track courts have been established, their operations are still inconsistent because of procedural delays; in the December 2012 gang rape case, for example, a fast-track court was established, and the case was resolved in eight months. Still, it took seven years for the offenders to be hanged.³⁹

Another significant obstacle to justice for survivors of violent rape is the judiciary's continued reliance on stereotypes. The Supreme Court of India has played a significant role in the historical development of the law pertaining to aggravated rape. However, Mrinal Satish contends in his book 'Discretion, Discrimination, and the Rule of Law' that *the court ironically created a stereotypical rape victim in the process of advancing the gender-sensitive approach to rape adjudication*⁴⁰. Instead of concentrating on the accountability of the offenders, judges frequently use preconceived ideas about victim conduct to cast doubt on the "moral character" of survivors. Satish emphasizes that these biases contribute to judicial leniency towards offenders, with courts sometimes treating rape as a lesser offense if the survivor is deemed "immoral" based on stereotypes⁴¹.

Furthermore, all these legislative and judicial developments have their basis in the deterrence theory of punishment, that is, harsher punishment deters, even though in penological thinking it has always remained questionable if harsher punishments deter. India, despite the introduction of harsher punishment, has registered no decrease in rape cases since 1983. On the other hand, the miniscule number of cases disposed off, and even smaller number of convictions in India over these years proves the adage that mere increase in the quantum of punishment does not deter unless there is also certainty of punishment. From 39.9% in 1984 to just 24% in 2012, the conviction rate for rape cases fell precipitously, with even worse outcomes seen for convictions for custodial rape.⁴²

³⁹ R G Kar Case Shows Stricter Rape Laws Are Necessary, *The Indian Express*, supra note 22.

⁴⁰ Mrinal Satish, *Discretion, Discrimination, and the Rule of Law: Reforming Rape Sentencing in India* ch. 3 (Cambridge Univ. Press 2017).

⁴¹ Ibid.

⁴² Ved Kumari & Ravinder Barn, Sentencing in Rape Cases, 59(1) J. Indian L. Inst. 1 (2017), <https://www.jstor.org/stable/10.2307/26826588> (last visited Jan. 4, 2025).

Conclusion

In summary, the legal framework surrounding aggravated rape in India, particularly those involving element of "power differential," has undergone significant evolution, especially in response to landmark cases and the public outcry they provoked. From the Mathura case⁴³ to the 1983⁴⁴ and 2013 amendments⁴⁵, history shows a change in emphasis toward acknowledging the seriousness of such crimes, especially those perpetrated by authorities in positions of power. The BNS 2023, which codified elements of the crime under Section 64(2)⁴⁶ while maintaining the essential concepts of earlier reforms, seems to have taken away the lawmakers' chance to actually change the laws governing aggravated rape.

Yet, despite these advancements, the implementation of laws remains fraught with challenges. Issues such as underreporting, evidentiary obstacles, judicial biases, and societal stigmas continue to impede the effective delivery of justice⁴⁷. The urgency for a more compassionate and robust legal approach is underscored by the nature of the crime itself, as aptly described by Justice A.S. Anand in *State of Punjab v. Gurmit Singh*⁴⁸: "where the horror of such act lies in the fact that it is perpetrated by those who are meant to uphold the law, turning protectors into predators." Although the law has evolved to represent a more organized approach to aggravated rape, its full effect will depend on removing structural obstacles and making sure the law is implemented efficiently, swiftly, and fairly⁴⁹. Only through continued efforts to address these obstacles can India hope to foster a more just and equitable legal system for the victims of aggravated rape.

⁴³ *Tukaram v. State of Maharashtra*, supra note 10.

⁴⁴ *Criminal Law (Amendment) Act*, No. 43, Acts of Parliament, 1983 (India).

⁴⁵ *Ibid.*

⁴⁶ *Bharatiya Nyaya Sanhita*, § 64(2), supra note 4.

⁴⁷ Zameer, Khan & Zubair, supra note 37.

⁴⁸ *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384.

⁴⁹ Zameer, Khan & Zubair, supra note 37.

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