

An Enquiry into Patriarchal Indian Jurisprudence in the Post-Nirbhaya Era

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Abstract

Rape is a word that evokes fear just by saying it. Even though it is the most violent form of crime, the stigma associated with it has persisted. The judiciary, police, and courts claim that the legal system has evolved to support women who have been victims of rape, as has been the case, allegedly, from Nirbhaya to Abhaya. The Chief Justice of India, B. R. Gavai, has drawn attention to India's developing legislative reforms intended to better protect survivors of sexual assault and redefine consent by denouncing the 1979 Supreme Court acquittal in a custodial rape case. There are additional stories of lengthy delays in starting investigations into allegations of sexual assault in India. Police delays are a common occurrence, according to Audrey D'Mello, Director of Majlis, a non-profit organisation that provides legal counselling to women and children who are victims of sexual and domestic abuse, who spoke to CNN. Ninety per cent of the 2,500 rape cases Majlisha worked on over the previous twelve years have had delayed FIRs, according to D'Mello. (Sashikala VP, CNN n.d.-b)

In 2022, there were 198,285 rape cases pending trial. By the end of the year, just 18,517 had been resolved. According

to a survey by the non-profit Commonwealth Human Rights Initiative, more than 90% of cases in that year remained unresolved. This backlog in trial courts, observable for years, denies the victim justice or even closure. (Sashikala VP, CNN n.d.-b)

This paper intends to investigate the evolution of the legal system from 2012 to 2024 in India. The paper uses qualitative analysis to draw an understanding of the trajectory of anti-rape laws in India and how much successful the prevailing Indian Penal Code and Bharatiya Nyaya Sanhita have been in providing justice to the victims of not only rape but also other crimes against women.

Keywords: *Rape, Nirbhaya, Abhaya, judiciary in India, delay of justice, women's bodies, representation, gender, politics of identity.*

Introduction

Since time immemorial, Western legal jurisprudence has been conceptualised through the figures of Greek and Roman female allegories, such as Goddess Justitia and Athena. But rarely has legal jurisprudence ever had a feminine lens. For centuries, women were kept outside the ambit of political, civil, economic, and most importantly, legal rights. Notwithstanding the matter of active female participation in rainbow political movements¹ like the French and the Glorious Revolutions, the politico-legal rights of women have always been ignored and purposefully suppressed by male political elites. The nineteenth and twentieth centuries witnessed an impetus for women's rights classified into three dominant waves of feminism. Among many topics of discussion, the

¹Rainbow Political Movement, popularised in 1984 by Rev. Jesse Jackson, were aimed at uniting marginalised racial and ethnic groups within the US political landscape. These movements led by liberal integrationists, socialists, trade unionists, feminists, LGBTQIA+ advocates, and racial minorities pushed for grassroots democracy, progressive US legislation, Governmental accountability and political inclusivity. Although the movements drew inspiration from the French Revolution (which too had similar political aspirations), unlike the latter, the US rainbow coalitions had active female representation.

violation of the female body by patriarchal violence, termed gender-based violence, has drawn widespread attention among scholars, preceding the feminist waves. Although gender violence and legal representation were key issues of contention amongst feminist salons, they were restricted to merely uncovering their philosophical underpinnings. Gender violence to date gets redressed from the perspective of an all-male patriarchal legal apparatus.

This paper shall reflect upon the infructuous legal procedures, judgments, judgements and *obiter dicta delivered* by the Indian Judiciary in dealing with rape, one of the many gruesome manifestations of gender-based violence. Carole Pateman in *Sexual Contract* argued that legal rights, particularly under statist social contract theory, were never applied equally to women, and in fact engendered a “sexual contract” of sorts. This contract legitimised patriarchal domination under the guise of consent (Pateman, 1988). To address the gender-based violence borne out of such legal inequality, Kate Millet’s *Sexual Politics* established rape as a core component of the patriarchal social order, functioning as a form of political intimidation and social control over women (Millet, 1970). Millet positioned rape as an institutionalised expression of male dominance. In this regard, the judiciary, being one such male-dominant institution, has miserably failed to curb and address gender disempowerment and violence. The Indian Judiciary is no alien to misogyny, especially when dealing with feminist movements as well as pan-Indian movements addressing rape and other *gender-based violence* (GBV)². Even in the post Nirbhaya India Era, laws *judicially reviewed*³ (Art 32, Art 137 and Art 226 of the Indian Constitution) by The

²In the paper, the word *gender-based violence* shall be written in the abbreviated form ‘GBV’.

³Art 32 of IC: Empowers the Supreme Court to issue writs for the enforcement of fundamental rights.

Art 32 of IC: Empowers the Supreme Court to issue writs for the enforcement of fundamental rights.

Art 137 of IC: Grants the Supreme Court the power to review its own judgments or orders.

Art 226: Empowers High Courts to perform judicial review over administrative and legislative actions.

Supreme Court lacks gender sensitivity. Laws reviewed by the Indian judiciary have never been augmented for women's empowerment.

The paper shall discuss the gradual and moral degradation of the Indian judiciary in dealing with rape vis-à-vis expeditious and discrete justice dispensation.

Research Methods Employed

1. Feminist Jurisprudential (Black-Letter) Analysis: This research tool analyses the law as it is written, i.e. statutes, case laws, rules, and legal principles and the ways in which they reflect or reinforce patriarchal assumptions. This approach examines gender-biased language, judicial reasoning, and legal concepts such as the "reasonable man," neutrality, and objectivity, showing how these often distort women's lived realities (West & Bowman, 2019⁴). Feminist scholars using doctrinal analysis critique how legal provisions in areas such as rape, property, labour, or family law systematically disadvantage women or fail to address structural gender inequalities.

2. Socio-Legal Feminist Method: move beyond legal texts to study how law operates in everyday life and how gendered power relations shape people's experiences with legal systems. This approach uses qualitative tools such as interviews, focus groups, case studies, ethnography, and court observations to understand how women and marginalised groups encounter the law in practice. It highlights gaps between "law on the books" and "law in action," revealing how social norms, institutional practices, and power hierarchies influence access to justice, legal decisionmaking, and enforcement (MacKinnon, 1983⁵).

⁴West, R., & Bowman, C. G. (2019). *Research Handbook on Feminist Jurisprudence*. Edward Elgar Publishing Limited.

⁵MacKinnon, C. A. (1983). *Feminism, Marxism, method, and the state: Toward feminist jurisprudence*.

Theoretical Overview

Carole Pateman, in her book *Sexual Contract* (1988), argued that legal rights for women have been hindered because a truly “free and equal” individual, the subject of contract law, has historically been defined as male, leaving women in a subordinate position (Pateman, 1988)

Kate Millett, in *Sexual Politics* (1970), argued that rape is not merely an individual act of violence, but a series of institutions that help maintain male dominance in a patriarchal society. She explained that rape functions as a form of social control by instilling fear, reinforcing women’s subordination, and demonstrating the power men collectively hold over women’s bodies. Millett emphasises that the threat of rape operates as a pervasive mechanism that disciplines women’s behaviour, limits their autonomy, and normalises gender hierarchy. Thus, in Millett’s analysis, rape is fundamentally ideological: it is embedded in cultural norms, male sexuality, and institutional structures that legitimise and reproduce patriarchy.

Justice too long delayed is Justice denied. These iconic lines were given by Martin Luther King, Jr. (*Letter From a Birmingham Jail* [King, Jr.], n.d.-b), and have repeatedly been propagated by the Indian Judiciary as well. The Indian Judiciary has been facing a serious crisis of conscience and credibility. Its reactions to rape cases, especially those involving survivors, have frequently wavered between formalism and institutional insensitivity, occasionally descending into overtly sexist and misogynistic reasoning. Instead of continuously emphasising survivor autonomy, dignity, and constitutional rights, discourse has often perpetuated victim-blaming narratives, moral scrutiny, and patriarchal presumptions. In addition to undermining public

trust in the legal system, this inconsistency exposes a deeper failure to internalise the transformative ethos of gender justice ingrained in post-reform and constitutional rape jurisprudence.

Any kind of crimes that are committed against women, especially those that get the civil society to act on behalf of the victim, have proved that the pillars of democracy have been insatiable in their *modus operandi*. Apart from gender stereotyping, cases are being dragged on for years; the best example would be Nirbhaya. This paper began by tracing the case of the Nirbhaya Rape Case, which had shaken one of the pillars of our democracy. Protests, demonstrations, and marches to the President's office for seeking justice for a brutal murder, to the latest case of Abhaya Rape and Murder, which not only brought the Civil society together but questioned whether the concept of justice being delivered is just a gimmick? Another point to note is that courts are not exempt from the widespread perpetuation of gender stereotypes and misconceptions that continue throughout the prosecution, trial, and sentencing phases of sexual assault cases. Point to note is Indian Penal Code (IPC) gave way to Bharatiya Nyaya Sanhita (BNS), where wordings have been changed, but have the proceedings or the timeline to provide swift justice been updated?

The judiciary's patriarchal viewpoint was demonstrated in its rulings on Section 498A, Section 3 and 4 (cruelty or dowry harassment) of the IPC, where it declared that the law was being abused, *Dara Lakshmi Narayana vs State of Telangana*, where the court emphasised that misuse of the above-mentioned Section to harass husbands and the family had to be restricted. (Editor, 2025). In *Archin Gupta vs State of Haryana*, the Supreme Court held that the Section would not be applicable (Editor, 2025b). This case showed

that women have to suffer a lot if they try to get justice for themselves. It can be argued that the judiciary's increased focus on misuse of Sec 498A is because women rarely approach the police as the first step. Secondly, domestic violence occurs behind closed doors over long periods, making it difficult to keep track of specific time and date, because of which the court avoided quashing the FIR.

What again must be noted is that, according to NFHS data (Maitra & Central Sanskrit University, New Delhi, 2025), shows that 1% of abused women ever actually filed a complaint. The low conviction rate, poor investigation, hostile witnesses, and immense societal pressure force women to withdraw cases for preserving family dignity. Silencing of victims and pushing them back into such abusive marriages in the guise of saving marriages are some problems associated with such cases.

Nirbhaya Rape Case

In the case of *Mukesh & Anr vs State For Nct Of Delhi & Ors* on 5 May, 2017, the accused were only arrested between the 18th to the 21st of December, 2012, which gave the accused ample amount of time to escape. The police, as a machinery of the state and enforcer of the law, had failed from the very beginning to capture the accused, leaving a time gap for them to escape. The CJI had inaugurated a "fast track court," but the biggest question is that to charge the perpetrator, it took 13 days. After 4 days of her death (29th December, 2012), the Delhi police finally filed a charge sheet, and that too because of immense media pressure. Almost two months into the case, the accused were officially charged with 13 offences. The question of the hour was: "What was the judiciary doing between the period of March and August instead of going forward with trial proceedings for the victim to get justice?" (Toi-Online, 2024)

Before the 2013 amendment the Criminal Law (Amendment) Ordinance, 2013. The IPC's rape law was patriarchal because it gave women's bodily autonomy and consent less weight than male power, marital authority, and social morality. Definition, consent, and adjudication were the three interconnected levels at which this patriarchy functioned.

The pre-Nirbhaya rape law under the IPC was patriarchal in that it prioritised male authority and social morality over women's physical autonomy and consent. The definition of rape under Section 375 was limited to penile-vaginal penetration, reflecting a male-centric view of sexual injury that excludes various types of sexual abuse suffered by women. The marital rape exception institutionalised the concept of irrevocable consent within marriage, providing husbands with legal sexual rights over their wives' bodies. Consent was viewed as resistance rather than autonomy, placing the responsibility on women to establish their own scenario or cause. By focusing on the survivor's sexual background and personality rather than the accused's actions, evidentiary procedures further strengthened patriarchy. In general, the law served more as a tool to maintain patriarchal family structures, control female sexuality, and normalise male dominance than as a mechanism of justice – the Nirbhaya case compelled the legal system to address these flaws. Some things that leave a very question mark are Akshay Singh's petition on the 2017 judgement, which was duly rejected, and the order was upheld on December 19, 2019 (Toi-Online, 2024). 20th March 2020 was marked as a new dawn of justice. To reach an open society where more such discussions are held just after Nirbhaya's death, discussions and debates were opened on rape culture and systematic patriarchy. (Kanga 2023)

Post-Nirbhaya rape law under the IPC marks a substantial transition from a morality based, patriarchal paradigm toward a rights-based approach to women's bodily autonomy, but remains flawed. The Criminal Law (Amendment) Act of 2013 broadened the definition of rape under Section 375 to include non-penile actions such as oral, anal, and object penetration, recognising the lived reality of sexual abuse beyond male-centric conceptions of intercourse. Permission was redefined as an unequivocal voluntary agreement, undermining previous assumptions that silence or lack of opposition indicated permission. The law also recognised aggravated types of rape, including gang rape and custodial rape, and increased sanctions under Section 376, indicating a more serious approach to combating sexual assault. Procedural improvements discouraged victim-blaming and shifted attention to the accused's conduct.

However, from a feminist jurisprudential standpoint, the continuation of the marital rape exception reflects a patriarchal prioritisation of marriage over women's independence. While the post-Nirbhaya changes constitute watershed legal breakthroughs that prioritise dignity and consent, they fall short of removing patriarchal dominance in the private realm, leaving substantive gender justice only partially realised.

Unnao Rape Case

The Unnao rape case demonstrates fundamental flaws in the operation of the Indian court, particularly in its failure to provide speedy, survivor-centric justice in a case where the accused were a powerful lot. Although the judiciary eventually delivered a conviction, its initial institutional lethargy allowed for extended injustice, undermining the transformative promise of post-Nirbhaya rape-laws. A

prominent criticism of how the case was tackled was the delay in court involvement. Despite the survivor's repeated complaints and obvious threats to her life, the judiciary took decisive action only after widespread public outcry and media scrutiny.

This reactionary strategy reflects a larger structural issue: courts frequently engage forcefully only when a case gains political or national attention, leaving less-publicised survivors exposed to the different societal conditioning, one being stigma and threats from affiliated groups that spread hate against victims. Furthermore, the judiciary originally failed to protect the survivor and her family's right to life and dignity. The death of the survivor's father in police custody, as well as the fatal attacks on witnesses, occurred under judicial supervision, indicating that witness protection and monitoring systems were not being enforced effectively. Feminist jurisprudence criticises this as a failure to recognise that sexual abuse cases are ingrained in power imbalances, necessitating proactive legal protection rather than formal adjudication. The Supreme Court's subsequent actions—CBI transfer, trial relocation, and monitoring—were praiseworthy, but they served more as remedial than preventative measures. This reveals a judiciary that is still primarily case-centric rather than system-centric, addressing injustice after it has already happened rather than eliminating the circumstances that allow it.

The Unnao case shows that although the Indian judiciary has the authority to protect the Constitution, it frequently does so selectively and belatedly. From a feminist standpoint, delaying justice in sexual assault cases—particularly those involving political power—amounts to denying justice. A more proactive, sympathetic, and power-sensitive judicial approach to sexual violence cases is

required, as evidenced by the judiciary's inability to foresee and combat patriarchal intimidation.

Pallochi Rape Case

The Pollachi rape case (2016-2019), *K. Arulanantham vs State of Tamil Nadu*, in which many women were sexually exploited and blackmailed by a group of men in Tamil Nadu, demonstrates how patriarchy operates through technology, social shame, and institutional apathy. The accused utilised intimate films to coerce and repeatedly abuse women, showing that sexual violence is not just physical, but can also be psychological, digital, and coercive. This case reveals that sexual violence endures not only owing to individual criminal behaviour, but also as a result of institutionalised patriarchy throughout society and the court system. Though the judiciary finally performed its responsibility, its delayed and reactive action highlights a long-standing feminist concern: justice for women in India frequently relies on perseverance, visibility, and public pressure rather than automatic constitutional protection. True gender justice necessitates a judiciary that is not only punishing in the wake of the event, but also proactive, power-sensitive, and survivor-centric.

In this case, the judiciary's initial passivity and over-reliance on procedural formalism were a major point of contention. Despite the gravity of the claims and the large number of victims, early judicial monitoring failed to secure a prompt investigation, survivor protection, and accountability from local law enforcement. The case was transferred from the state police to the CBI only after an outpouring of public anger, confirming the idea that judicial urgency is frequently influenced by media and political pressure. Despite apparent concerns of intimidation and social reprisal, the judiciary failed to establish witness and victim protection procedures

promptly. According to feminist critiques, courts cannot remain impartial arbiters in circumstances of significant power imbalance; neutrality in such cases effectively benefits the accused. (Karthikeyan 2025)

Although the subsequent verdicts and harsh punishments represented a significant vindication of justice, the judiciary's function in this case was primarily corrective rather than preventive. Courts intervened after institutional failure had already hurt survivors, rather than proactively addressing the conditions—political intervention, police involvement, and social stigma—that allowed for protracted abuse.

Even though the judiciary eventually upheld accountability, its tardy and reactive intervention highlights a recurring feminist concern: in India, justice for women frequently depends more on persistence, visibility, and public pressure than on automatic constitutional protection. A judiciary that is proactively protective, power-sensitive, and survivor-centric from the beginning is necessary for true gender justice rather than just relying on punitive measures undertaken after the fact.

Abhaya Rape Case 2024

The Alleged rape and murder incident of a trainee doctor in R.G. Kar Medical College and Hospital, Kolkata and related issues vs State of West Bengal And Others- SMW(CrI) No. 2/2024, happened on August 9, 2024, while the victim fell asleep in the hospital's seminar hall following a 36-hour shift. Rape followed by murder was confirmed by a post-mortem, which showed strangulation, genital torture, and multiple areas of bleeding on the deceased's body.

Sanjay Roy, a civic volunteer with police ties, was detained as the main suspect based on CCTV footage and forensic evidence such as bite marks and DNA. In January 2025, a Kolkata court convicted him to life imprisonment without parole, fined him 50,000, and ordered 17 lakh compensation for the family. The court ruled that the case did not qualify for the death penalty as it constituted the “rarest of rare” instance. Critics of the case say in the Abhaya rape case point to the perceived leniency of Sanjay Roy’s life sentence and delays in supplementary investigations. Protesters and doctors’ associations said that justice was not fully served because the verdict failed to impose the death penalty despite the savagery (Sashikala VP, CNN, n.d.-b)

The January 2025 Kolkata court decision ordered life imprisonment without parole, but denied the death penalty, placing it outside the “rarest of rare” category. The victim’s family and activists criticised the low compensation for the heinous crime, and the victim’s parents refused to accept the 17 lakh in court. The judge chastised Kolkata Police for their apathy, citing antedated records and mismanagement of evidence from the outset. Hospital officials, including the former Principal Sandip Ghosh, were accused of concealing data and propagating a fake suicide narrative, casting doubt on institutional transparency.

The Supreme Court transferred relevant matters to the Calcutta High Court for supervision in light of ongoing investigations. Public uproar revealed systemic inadequacies to protect women doctors and provide prompt, rigorous justice.

Judicial Decisions Sparking Public Debate

Judges frequently relate victims’ experiences of rape or sexual assault to give judgments based on their preconceived notion

of previous cases and frame them as the 'ideal victim. For example, in the case of *Sri Rakesh B vs State of Karnataka 2020*, the accused was granted bail despite the judge's remark that the victim falling asleep after the alleged rape was "unbecoming of an Indian woman". (Deswal 2024)

Similar judgments with superfluous notes about a victim's 'promiscuity' and morality, her social habits—whether she drinks or smokes—and her general demeanour have been made in cases of rape or sexual assault. This reflects a deeper issue of a specific judge's worldview or their preconceived notions about decrees, frequently at the expense of the victim and her rights.

It is especially detrimental when these ideas are joined with social practices and norms to produce a culture in specific orders or decrees. A notorious example was a decision by the Madhya Pradesh High Court last year in which the judge ordered the accused molester to tie a rakhi on the victim's hand as a condition for his bail.

It should be highlighted that the 'Rakhi defence' is completely unfounded in our legislation. Although the Supreme Court ultimately overturned the decree, it is not the only example of such an improvised, illogical and insensitive judiciary. In truth, a similar situation occurred when former Chief Justice of India (CJI) S. A. Bobde asked an accused rapist whether he would "marry the victim" as a condition for the court offering him "help" (Deswal, 2024). Again, this 'judgement' was proposed only by C. J. I. Bobde is not a part of our jurisprudence. What is deemed as the 'marriage compromise' has also surfaced in other judicial decisions. In a society that adheres to the doctrine of state decisions and judicial precedents, such observations and decisions can have a substantial impact on the action and reasoning of lower

courts. The judiciary's violation of its mission in support of regressive and patriarchal ideologies exemplifies the worst aspects of activism. (Deswal 2024)

The skin-to-skin contact judgment (Bombay High Court, Nagpur Bench). In a 2021 decision, a judge determined that "physical contact for sexual assault under Section of the POCSO Act would mean 'direct physical contact, i.e., skin-to-skin' ". (Rajagopal, 2021)

The accused, who had touched a juvenile girl's breast and sought to remove her garments, was acquitted under the fact that there was no real skin-to-skin contact under the POCSO Act, but was eventually convicted under a less rigorous part of the Indian Penal Code (IPC), resulting in a drastically reduced punishment. The Supreme Court eventually overruled this ruling, emphasising that the intent of the conduct, rather than whether there was skin-to-skin contact, is what matters in sexual assault proceedings.

Last year, on 21st July 2025, the Supreme Court vocalised the fact that it is ashamed to hear recent incidents of crimes against women. The Supreme Court Women's Association wanted pan-India guidelines and reforms; one such suggestion was mandatory castration. They also urged that Sec 63 under Bharatiya Nyaya Sanhita 2023 shall be punished by live castration in case of horrendous rape of women and children. And these records are available to citizens, especially women, so that they can identify repeated offenders and take precautions. These records are only available to lawyers. (Bakshi and Law 2025)

The Court also mentioned the weakness that such incidents provoke public opinion, hence decentralisation of para-legal services and more awareness about the law should be made available to villagers. The Court did mention Hathras and

Unnao while giving these suggestions. Another drawback mentioned by the judiciary is the provision of ineffective assistance to victims and a deterred investigation, which makes law enforcement ineffective. (Bakshi and Law 2025)

Concluding Arguments

The case studies examined above paint a very grim picture of the Indian judiciary, despite the harrowing circumstances and tackling of the Nirbhaya case. In legal parlance, human rights violations, along with violations of the body (*vis-à-vis* dignity), are tantamount to executive and legislative inaction (Teltumbde, 2025)⁶. Rarely does the judiciary or its gatekeepers, namely the Justices, face criticism for their repetitive proven misdealing. Indian judges have never been held accountable for the same, and on rare occasions when they have come under impeachment trials, resigning was considered the safest option. The noble purpose of this deliberation was to critique the third organ of the government, namely the Judiciary and its serious misdeeds when dealing with the issue of gender-based violence. As a conciliatory effort, the Judiciary, along with lawmakers across the country, should spend public taxpayers' money in fruitfully result-oriented Standing Committees on creating gender-inclusive socio-legal spaces.

The authors deliberating on this topic have kept the domain restricted to judicial lenses (owing to cognitive bias and paucity of time), but are hopeful of future research being conducted on GBV through intersectional analyses of race, class, caste, ethnicity, language and others. In the 1950s, Nehru had envisioned empowerment of half of the Indian population, thus ".....when she moves.... the entire nation moves", but the enlightened thought of gender inclusivity

⁶Teltumbde, A. (2025). *Whither human rights in India?* Viking.

slowly died its natural death over the years (Nehru, 1936⁷). With democratic backsliding since 2014 and communal policies replacing inclusive legislations, a grim question haunts us all-Is the Indian Judiciary at all neutral in its review of female-centric laws? (line rephrased)

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