

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 2 | Issue 1

2020

© 2020 *International Journal of Legal Science and Innovation*

Follow this and additional works at: <https://www.ijlsi.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for “free” and “open access” by the International Journal of Legal Science and Innovation at VidhiAagaz. It has been accepted for inclusion in International Journal of Legal Science and Innovation after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Legal Science and Innovation**, kindly email your Manuscript at editor.ijlsi@gmail.com.

Obscenity and Sexual Offences in India

MANISHA MUNDHRA¹

ABSTRACT

The paper focuses on loopholes of section 375 of Indian Penal Code even after the amendment of 2013. It points out three drawbacks that exist in the section. Firstly, the narrow of section 375 that fails to encompass the diverse sexualities and the marginalized section of the country. Secondly, the need of recognizing the rights of women, irrespective of her marital status. It points out India's international obligation and the constitutional inequality that exists against the women. Thirdly, the rise in the age of who can give consent forms another hindrance to the ground reality. This paper further tries to answer the possible solution or amendments that could be brought to overcome these problems. It is important to realize that many such suggestions have come and gone and the legislature has only answered to the public outrage and not to the changing need of the society.

I. PROBLEM AND POSSIBLE AMENDMENTS IN SECTION 375

The narrow definition of who can commit the crime of rape under section 375 of Indian Penal Code (hereinafter IPC) force us to focus on the marginalized cases of rape that has no recourse in law.² Since the crime can only be committed by a man, there are broadly three secluded categories who don't receive justice because of this drawback of law. Firstly, the cases where women rape women or have actively participated and assisted in the act secondly, the case where an adult man is raped either by a woman or by a man and lastly the assault of the transgenders. The cause of rape of these groups may vary from establishing dominance or to teach a lesson or out of mere fascination in case of transgenders. So to

¹ Author is a student at Jindal Global Law School, India.

² **Section 375 in The Indian Penal Code**

1[375. Rape.—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:— (First) — Against her will.(Secondly) —Without her consent.(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.(Fourthly) — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. (Sixthly) — With or without her consent, when she is under sixteen years of age. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.(Exception) —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.] STATE AMENDMENT

explain, if the same incident as that of in 2012 December gang rape occurs in women's jail where the violation was done by fellow prisoners, this would be some sexual assault based crime and not rape. Similarly, in case of active participation, a woman cannot be charged under gang rape even if she assists.³ The understanding of an adult man being raped is corrupted because of the existing social structures in the patriarchal society. The patriarchy believes that the power of subjugating is only with men and the concept of sex as a power relation⁴ does not really align with the idea that a man can also be raped. Secondly, the concept of controlling women's sexuality directly proportional to the standard of man's masculinity in the society which adds on to the power imbalance structures in the society. Further the social stigma of an effeminate man attached when a man claims he was raped acts as a hindrance to even discuss and individuals to report these rape. As for the transgenders they are highly marginalized section and are forced into activities such as prostitution for self-sufficiency. The minimum we could do is to start by integrating them into law and then proceeding to talk about their accessibility. The broader definition could be adopted by amending S-375 from 'A man is said to commit to rape' to 'a person who commits rape'. This would make the crime more gender neutral and accessible to all sorts of cases. With decriminalizing of S-377 it is important to realize the rights of diverse sexualities and the possibilities that may come up in future and make section 375 more of a gender neutral approach. As the constitution under article 15(C) recognizes the diverse sexual orientation we must submit to the cultural differences and uphold the constitutional principles of equality as pointed out by Justice Verma Committee⁵. The second step towards more gender neutral approach could be replacement of 'rape' to 'Sexual Assault' as pointed out by the Law Commission in 172ND report.⁶ The role of the language has to acknowledge in sensitizing and raising awareness towards more gender neutral approach and thus this change should be made. The word rape has been derived from the term 'rapio' which means to seize⁷. Therefore, sexual assault more is more suitable for the purpose of the section. The reservations of feminists can't be ignored wherein the gender neutral approach would take away the tool from female to fight against the violent patriarchal discourse. Even in UK the crime can only be committed by a man but the victim could be both under the Sexual

³Priya Patel v State of M.P (2006) 6 SCC 263

⁴MacKinnon, Catharine A. "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence." *Signs* 8, no. 4 (1983): 635-58. <http://www.jstor.org/stable/3173687>.

⁵Justice Verma Committee on Amendments to Criminal Law, 2013, pg- 51-52

⁶DubeDipa, Rape Laws in India, 2008, LexisNexis pg 57

⁷See *supra* note 4 pg-1

Offences Act, 2003⁸. This exception won't be able to encompass the cases like Priya Patel.

The second loophole is the Exception 2 of section 375 which states that a husband cannot rape her wife who is above 15 years of age. The acknowledgement by the judiciary that rape infringes on fundamental rights of women⁹ and on the other hand the legalization of marital rape implies towards a legal fiction. Right to make reproductive choices was further recognized under Article 21 and as part of personal liberty in the Puttaswamy¹⁰ judgement and this right is also compatible with the United Nations International Conference on Population and Development (UNPIN 1994). It recognized women's right to make reproductive decisions and to not bear coerced pregnancies, including that of their spouses as a fundamental right of a woman. The international obligations of India, such as The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and Declaration on Elimination of Violence against Women 1993 ("DEVW") should also be adhered to ensure human rights of the women are not infringed and does not treat them as secondary citizen. In the case of *The Chairman, Railway Board v. Chandrima Das*¹¹ the court held that rape is not a crime against individual but against the society and deprives the victim the right under Article 21 right to life with human dignity. It is not surprising that it does not mention Article 14 but article 21 again the understanding is violation of her honor and morality and not that of her right to equality. With right to privacy as a fundamental right¹² the case of *Maharashtra v. Madhkar Narayan* recognizes the sexual privacy and points out it is not open to any or every man to infringe on women's privacy and further paves a way for criminalizing marital rape. The attitude of the legislature has been so laid back in the matters of reforming rape laws that only when aggravated cases such as Nirbhaya and Mathura take place that the law makers are forced to respond to the outcry of the country. Is the government waiting for an 'aggravated' case of marital rape? Despite the suggestions to criminalize marital rape in 42nd law commission report as back in 1971 and the Verma committee report in 2013, the legislature has failed to take action¹³. The legislature is probably in the fear of losing its vote bank from the orthodoxy and is thus reluctant to change the law. In time when marriage is recognized as partnership among equals law is

⁸ Dine Janet, Gobert James and Wilson William on Cases & Materials on Criminal Law. 2011. Oxford University Press, pg 300-301

⁹ **BodhisattwaGautam v. Subhra Chakraborty (1996) 1 SCC 490**

¹⁰ **K.S. Puttaswamy v Union of India, (2018) 1 SCC 809**

¹¹ Satish Mrinal, on Discretion, Discrimination and the Rule of Law. 2017. Cambridge University Press pg- 172-173

¹² August 24, 2017 Times of India <https://timesofindia.indiatimes.com/india/right-to-privacy-case-all-you-need-to-know/articleshow/60202146.cms>

¹³ See supra note 4 pg- 59

supposed to cater to the need of the evolving society. The view of C.R. V UK in European Commission of Human Rights, endorsed in the judgement that rape is a severe attack on women's autonomy and physical integrity regardless of marriage or other intimate relationship should be adopted.¹⁴ This view is even accepted in Australia, Canada and even South Africa that has criminalized marital rape.¹⁵ In Australia in 1976 the immunity of marital rape was removed. In Canada in R v J.A., and in South Africa in 2007 Criminal Law (Sexual Offences and Related Matters) Amendment Act established that the relationship of the perpetrator and the victim does not constitute any valid ground for change in trial proceedings.¹⁶ Researchers have also pointed out that the psychological effect of marital rape is far worse than rape by a stranger.¹⁷ The factors could be experiencing multiple assaults and that too by someone who they presumably love and trust. As opposed to short-term effects when raped by a stranger such as anxiety and fear the psychological effects of marital rape is long-term such as sexual dysfunction and depression and problem in establishing a trust relationship in ordinary course of life.¹⁸ But, in India the opposers have argued that poverty, illiteracy, customs and the understanding of marriage as a sacrament are the reasons that we cannot criminalize marital rape. It is important to understand that law needs to evolve itself with time and legalizing it would be the first step towards changing the attitude of police, prosecutors. It is important to understand that many of these crime go unreported because of the understanding that marital rape is acceptable or not as heinous as other type of rape. The idea that consent is given at the time of marriage points toward how the law's understanding of consent aligns with the patriarchal understanding of the consent and this becomes another bumper in criminalizing marital rape. The man's perspective or understanding of the consent is law's understanding of the consent can be best explained through the Mahmoodfarooqui¹⁹ case. Wherein, if the offender 'infers' from the victim's behavior that consent exist than the court also accepts that the consent was given. And to top it over if the victim fails to perform standard victimization behavior such as resistance or trauma after rape, the concept of consent goes in to the dustbin and a 'feeble no' can be understood as yes as this is what was understood by the offender. The understanding of consent is also understood in parallel to the victim's resistance to the act. In Pratap Mishra and Mathura case the court say there is no evidence of injuries and resistance, therefore the

¹⁴ See supra note 3 pg-113

¹⁵ See supra note 3 pg-113

¹⁶ See supra note 3 pg-114

¹⁷ See supra note 4 pg-167

¹⁸ See supra note 4 pg-168

¹⁹ Mahmood Farooqui v State. 2017. Delhi High Court

offenders are acquitted.²⁰ It is to be understood as if that the absence of resistance is to be understood as the presence of consent. It is important to realize that as for the matter of marital rape this cannot be the underlying understanding of consent. The law does not recognize that a woman who is above sixteen and married has the same right as the women who are unmarried. It is reinforcing the idea of women as property of husband who is incapable of giving consent or having right to her bodily integrity as soon as she is married or rather sold off. So it is important to realize that the rights of woman do not change after marriage against her husband.

The third and the most gullible to be misused is the increase of age from sixteen to eighteen of who can give consent. The law further points out a paradox here, it states that a girl who is fifteen, is capable of giving consent to her husband but the same girl if unmarried is incompetent to give consent. It is to deny yourself the truth, if sexual activities of teenagers are ignored in the age of globalization and internet. But, it is important to understand that ground reality and with changing perception towards understanding marriage be it because of feeling of independence or the late age of getting married, teenage are far more active in their sexual life. So, in order to avoid the misuse of the law in the hands of bureaucrats or parents who may frame a wrong charge against the boy it is important to introduce the concept of 'assent'. The concept of 'assent' should be introduced for both enough protection and discretionary power to the teenager to decide for themselves. This agreement is a weaker than understanding of consent and it could be unilaterally revoked²¹. It is important to understand that many would argue that it may encourage teenage to engage in sex and could be easily misused by the teenagers in the heat of revenge. It is to understand that the tedious judicial trials do not encourage teenagers to spend most of their future in these judiciary proceedings. Moving forward, with the concept of assent it could be same as understood in the contract law. In contract law the contract is voidable if the child revokes it consent as they do not possess the 'legal-capacity, this is why most deals require adult co-signers. It should be understood that parents cannot revoke assent so this gives teenagers enough discretionary power. It is to understand that this only a thin sheet provided to teenagers and not to the offenders. If, once said that assent was not there it is to be understood that she is not of the 'legal-capacity' and admitted to trial without any doubt. By denying the teenager right to make decision, according to neuroscience and psychological evidence we are retarding their growth and

²⁰ See supra note 9 pg-77-78

²¹Drobac A. Jennifer on Age-of-consent laws don't reflect teenage psychology. Here's how to fix them. 2017.<https://www.vox.com/the-big-idea/2017/11/20/16677180/age-consent-teenage-psychology-law-roy-moore>

maturation.²² Therefore the concept of assent should be included within the age gap of sixteen to eighteen to mold law according to the need of the time.

The commission recommends the restructure of s-375 as editing 'A man commits rape' to 'A person commits rape' and removal of exception 2 and introducing assent. Amending sixthly back to the age of sixteen and introducing the concept of assent as 'eightly'. Eightly – If she revokes assent. Where the assent is described as something unilaterally revocable even after six months of act.

II. CONCLUSION

The aim of the paper was to point out the problems in the law structured and not how it plays out in the judiciary. Therefore, it focuses on the problematic sources of the law which date back to 1860 even after 2013 amendment. The paper tries to provide the possible solution to all the problems focused on. The understanding and need for the change has to be understood through the inspiration of these suggestions to have an impact. This inspiration is the structure of society and its needs, as it was back in 1860. It is to understand that it is not her modesty but her individual right that is being infringed. The inclusion diverse sexualities by broadening the definition and the concept of assent points out the changing needs of the society. The judiciary using its discretionary to further embed the stereotypes could be avoided if the source is to be understood this may solve the problem. Something as basic as equal rights for women have to be fought till today forces us to take a reality check. The mere discussion and responses customized to cater the needs of political agenda has further contributed to the futile changes in the law. If the legislature could only at least discuss and deliberate on the issue of marital rape it could act as an eye opener to the orthodoxy. But the indifference nature and to answer to only the boiling questions of the hour from the international media and the country is what leaves a gap for some heinous crime to be committed. Therefore, the suggestion of the law commission should at the least be deliberated upon as it comes after a lot of research and ground work.

²²See supra note 19.