

A JURISPRUDENTIAL AND LEGISLATIVE ANALYSIS OF THE CRIME OF RAPE IN INDIA

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ABSTRACT

Rape, today is one of the biggest social problem not just in India but across the entire world as well. There are many theories; biological, psychological, and social, regarding why human show this bizarre trait of violent behavior towards the opposite sex. It is an unwanted biological feature? Or is it all about power and control over the opposite sex. There are also multiple speculations of rape being a gender biased hate crime, is there more to it? Is rape a passion driven act or something else? All these questions will be chronologically answered in the following research paper. The research paper also intends to cover the major and significant case laws which by far have contributed to the development of laws in India. Starting with the Mathura rape case, which has been a landmark judgment when it comes to the evolvement of jurisprudence in criminal law. It further giving birth to the Criminal Law Amendment Act, 1983. Then leading to the famous Aruna Shanbaug rape case where the victim suffered lifetime injuries and the court blatantly rejected the contention of forced anal intercourse to be rape. Also throw some light upon the Bantala rape case which took place in 1990 where three female health officers, were assaulted in the utmost gruesome manner by CPI(M) party workers. The Nirbhaya rape case is a must when it comes to development of rape laws in India. The recent rape cases which shook the nation such as Unnao and kathua rape cases will also be covered in the current paper. A very recent case, infamously known as the Hyderabad rape case or the Priyanka Reddy rape case will also be stressed upon. Apart from the case laws that will be discussed in the paper, the another aim of the paper is to also stress upon the potential matters of concern which have not been yet adjudicated upon such as the contention that male rape is possible, especially after the Naavetej singh Johar judgment, and the concept of forced homosexual intercourse. Is it time to make the rape and sexual assault laws gender neutral? Furthermore some Chinese made mobile phone applications have been observed to become a

platform where certain people try to glorify rape, sexual assault and acid attacks, will this not ruin the entire efforts of the social activism and the legal arms of India which have tried to fill in the fault lines caused by this very misogynistic mentality? All these questions will be attempted to answer in the instant paper.

UNDERSTANDING THE NOTION OF RAPE

Rape has been long perceived as a socially unacceptable phenomenon, for long psychologists, social reformers, religious preachers and scientists have come up with different types of theories on why humans tend to rape. Now rape is generally and widely understood as a sexual intercourse of a forced nature between two individuals where either one of them is unwilling or lacks consent. The above said definition seems as a common understanding of rape worldwide. *Prof. Randy Thornhill* in his writing “The Biology of Human Rape”ⁱ perceives the notion of rape as an unwanted result of biological adaptation of males to ensure the reproductive success of their species. The aggressiveness he relates to threatening of the survival of a species, although there seems no biological when it comes to gruesomeness in such kind of offences. He further quotes that rape is a bizarre naturally occurring phenomenon, which is quite visible in the nature as well, but seems to have been mutated into some unwanted rare behaviour observed in human males, explaining this he also cited Darwin’s natural selection and adaptation theory, where adaptation may cause certain individuals to behave in such a manner. He does not justify the concept of rape but rather gives a causation theory for as to why humans tend to have such unwanted and twisted notions about rape.

Prof. Katharine K. Baker on the other hand perceives rape as a commodity; she explains that rape is nothing but an act of “commodification”ⁱⁱ. She thus differentiates between lovemaking and sex, sex she defines to be casual and lovemaking to be the traditional form of consensual sex. She blames the pornography industry and the agenda of the political schools which normalise sex and treat it casually like hunger. She believes that such approach of the sex education system does not help in curbing the act of rape but rather facilitate it in the long run. Therefore, she describes sex as a commodity and stealing of commodity as rape.

In a scholarly article by *N.M. Malamuth & M.F. Heilmann*, they view rape with different lenses, unlike the previously discussed. They put an emphasis on the psychological aspects such as,

how the accused might have grown up, their perception of social relationships, the authors specifically state that if the accused perceives social relations to be maintained by force, domination and violence, then such individuals have a higher possibility to commit the offence of rape. They further try to analyse as to from where does this “sexual aggression”ⁱⁱⁱ come, which takes them to the adolescent age of that particular individual, where the individual might have been brought up in an environment where using force to satisfy relationship is acceptable. The same was also referred and relied upon by *Stephen Gold* in “Review of: Sex, Power, and Conflict: Evolutionary and Feminist Perspectives”^{iv}.

Prof. Julie Goldscheid in her writing “Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement”, refers to rape as a gender motivated hate crime. According to her rape is a passion driven crime where the rapist perceives himself as a dominant being, who is superior to the opposite sex, and to enforce his dominance which often is driven by anger, rage, and emotions of vengeance. The action of rape is thus driven by passion which is a result of patriarchal values such as toxic masculinity. Furthermore, the casual and common use of undesirable words such as ‘slut’ or ‘whore’ seems to be generally (for more info. please refer to the concerned paper) used when the accused in committing the act of rape or sexual assault. This according to Prof. Julie clearly indicates towards a type of hatred or bias towards women. Also, it can reasonably be speculated that the rapist might have a bad or a negative relationship with a female in his family or social circles. This is exactly what causes such gender “hatred”^v resulting in a heinous crime.

The last theory I would like to relevantly quote here is that of *Stephen R. Gold*, who coined the “control theory”. In here he had put an emphasis on rapes connected with alcohol, he goes on to quote that majority of the times either one person or both the persons are involved in the consumption of alcohol or drugs, and thus he says the control of self and the situation is lost. I however disagree with this contention, as it seems quite shallow in nature, it does not consider other factors than intoxication. Apart from the control theory we might have something to learn from the other theories as well. The biological theory gives us an idea as to from where the unwanted phenomenon of rape has come into picture due to an adaptation in males. I am still of an opinion that all of the theories cannot be completely applicable in the demographic and cultural context of India, the afore- mentioned perspectives might be quite relevant to their

fullness when it come to the United States. India has not yet properly developed such jurisprudence in the field of criminology which I suppose.

In case of the Indian society, things such as cultural differences, economic class difference, communal violence driven crimes are the aspects which stand much of relevance. As far as India is concerned, we can see that the division of the society is such that there is more scope of sexual violence to take place based on communal or class-oriented conflicts. In India we can see the following factors as the driving forces behind the heinous offences of rape:

1. Communal Violence
2. Lack of Sex Education
3. Over exposure to pornographic content
4. Twisted sexuality/ Sexual aggression
5. Hate crime

The above stated are the factors which may be relevant in the case of India. However more ground research is yet to be done when it comes to clinical research in India.

GENESIS OF RAPE LAWS IN INDIA

In the late 20th century and the modern 21st century has been a golden period for the development of the jurisprudence behind sexual offences against women. In this particular time period, we have witnessed a dynamic change in the social theories regarding sexuality and gender. To understand as to how we came here where we are, we will have to take an observant notice of the significant landmark cases which led us here.

To put forth a chronological order, I would start with, *Tukaram v. State of Maharashtra, 1972* also infamously known as the Mathura rape case. The incident took place in the Gadchiroli district of Maharashtra. The victim (Mathura) was a minor and married off to someone the parents of the girl objected to, to resolve the dispute the brother of the girl went to the police, where the victim and her husband and her in laws were summoned. Everyone else was asked to wait outside the police station except the victim, who was sexually assaulted by the two accused policemen. The matter went to the trial court where the court acquitted the accused saying that rape cannot be determined as the victim was use to sexual intercourse, this decision

was appealed in the Bombay high court which over turned the decision of the lower court saying that “*passive submission due to fear induced by serious threats cannot e construed as consent*”^{vi} which seems like a commendable decision of the Bombay high court. This decision was the further challenged in the hon’ble supreme court of India which opined that, with regard to facts and circumstances of the case there were no marks of injury to the victim’s body or no any evidences by which resistance to the alleged act of the accused can be inferred also the victim being habituated to sexual intercourse went against her.

After this judgement of the Supreme Court there was a lot of public outrage and a dozen of jurial criticism on the decision. Thus with regard to this, The Criminal Law amendment act, 1983 was legislated where; the §114(A) was added with a provision of “rebuttable presumption”^{vii} that if the victim at the time of trial says that there was no consent then it would be presumed that at the time of the commission of the offence the consent was absent, however this presumption would be rebuttable to guard the basic principles of criminal jurisprudence. Also, §376 was amended and added with sub sections (a), (b), (C), (d); where custodial rape was defined and made a punishable offence in addition to that the burden of proof once the sexual intercourse was established was shifted to the accused to prove that he did not commit the alleged offence. It also further added the provision for in-camera closed door trials, so that the image of the victim cannot be tarnished, and the dignity of the victim can be duly regarded. This perspective has however changed with time as the jurisprudence in this realm was developed later with the help of professors such as Dr. Upendra Bakshi, Dr.Raghunath kelkar, etc.

In 1990s in west Bengal an incident occurred where three women two of the state health ministry and one UNICIEF employees were travelling with a driver, they were stopped by a mob of around 30-40 CPI(M) workers who toppled the car^{viii}, dragged out to the paddy field and were brutally raped, this gives us a example of the mob lynching culture coupled with rape. Prasanta Sur, the health minister of that time defended the mob in his public statements^{ix}.

After more than a decade, due to the feminist movements across the globe the rape cases now are getting the due attention which was deserved. Thus the feminist movement in India took a turn in 2012 when the infamous Nirbhaya^x case came into light where a young woman was brutally gang raped by a gang of 5 men one of which was a minor, the brutality of the accused can be seen where the victim on medical examination reported to have her internal organs taken

out through her genitals, with the use on an iron rod. This case attracted a lot of outrage from the public nationwide and transformed into a movement. The juvenile was however given a less term as he was a minor; this was a shortcoming of the said judgement. Apart from only the outrage, the government of India set up the Justice Verma committee to come up with the solutions on the said social problem. Justice Verma committee^{xi} in their report submitted the following recommendations.

- The definition of rape to be broadened, by including any penetration of sexual nature and not limited to anal, vaginal, or oral penetration.
- Marital forced sexual intercourse to be considered as rape.
- Burden of proof to be on the Accused.
- At times, the sole testimony of the victim can be enough for conviction if consistent.
- A Rape Crisis Cell should be set up. The Cell should be immediately notified when a FIR in relation to sexual assault is made. The Cell must provide legal assistance to the victim.
- In case where the rape leads to the “persistent vegetative state” of the victim, the punishment would be not less than 20 years of Rigorous Imprisonment.
- The two “finger test”^{xii} to be excluded from the medical examination protocol. (to look at more recommendations, please refer to Fn.11)

With these and many more recommendation in the view, the Criminal Law Amendment Act, 2013 was legislated. It included most of the recommendations made by the Justice Verma committee such as elaboration on the scope of the “penetration”^{xiii} and added non penetrative acts in the definition as well, which classically goes against the definition of rape^{xiv}.

The effect of the Criminal law Amendment act coming into picture can be seen in the infamous Shakti mills^{xv} gang rape case, where the court held all the accused guilty including one juvenile. This seemed like a fruit for the efforts of the public in leading the movement during the Nirbhaya rape case.

Lately we have also seen cases such as Unnao rape case^{xvi} where the victim was raped at the house of a MLA^{xvii}, in the state of Uttar Pradesh, further the accused also entered into a conspiracy where he planned to eliminate the victim and her family by causing their accident. There has recently been a major outcry against this as well as the infamous Kathua rape case,

where in the state of J&K, six accused were convicted including one police officer for the rape of an eight year old in a gruesome manner. These two cases collectively shook the conscience of the country^{xviii} and led to major protests across the country.

This takes us to the most recent case, famously known as the Hyderabad Rape case, or the Priyanka Reddy case^{xix}, the victim was brutally raped and burnt alive in a premeditated course of crime. The accused were later shot by the police claiming that they acquired a police pistol during a tussle with the police and tried to flee and thus were shot dead by the police following an encounter^{xx}. The general public was seen rejoicing the action of the police, even though the action of the police may be sufficient to set up an inquiry on them, it still poses one question which is are the rape laws in India fool proof, perhaps substantially but the mere fact that such an incident occurred tells us that the procedural aspect and application of the concerned rape laws are different in practicality. Or perhaps we as a judicial system should consider our own criminological studies^{xxi} on this topic, which would enable us to go to the root cause of the problem and eradicate it from there. The harsh punishment is fine, but it is equally important to study the convicts and their psyche in order to achieve a greater goal in the long-term perspective. Thus, a criminological development^{xxii} in this field seems like a must.

ADDRESSING RECENT SOCIAL ISSUES

Quite recently we witnessed the landmark judgement of *Navtej Singh Johar v. Union of India*, which decriminalised homosexual intercourse^{xxiii}; this has been a game changing decision when it comes to the LGBT community rights.

Though this judgement being a commendable one, there are also other possible problems regarding homosexual offences^{xxiv} which might take place in the future and for which our substantial laws might not be ready. This point arises when the criminal law amendment Act, 2013 does not seem to be gender neutral. The bare perception of the statute signifies that the offence of rape is gender specific and the perpetrator will always be a man and the victim a woman. However, the very gist of *Navtej Singh Johar v. Union of India* contradicts the same. This is because earlier homosexual intercourse was regarded as an unnatural offence under §377 of the IPC, but is not an unnatural offence anymore, thus the law itself recognises that

such a thing exists. Thus it would be myopic if we do not act on the reamendment of the definition of rape u/§ 375 and give it a gender natural meaning. If we give a brief look at the history^{xxv} of the notion of rape, then we might notice that the concept was homosexual rape was pre-existent even in the roman society^{xxvi}. We need to acknowledge the fact that the concept of rape as a social wrong has always been gender neutral^{xxvii} even for the perpetrator; the cases might be rare, but not non-existent, by not recognising the minority we would rather be causing a greater miss carriage of justice and defeating the basic principles of the “Rule of Law”^{xxviii}.

Well this is not the only mater for concerned when it comes to the social issues regarding sexual offences. The recent social media outrage against a social media app called “TIK TOK”. This is due to the reason that a few public figures with a vast number of followers on the application, have been seen posting certain videos which seem to glorify the act of forced sexual assaults^{xxix}, acid attacks and rape^{xxx}. This has become a public movement^{xxxi} as of now by targeting and pressurising the concerned authority to put up a ban on the same matter. It is quite logical to seek a ban on the same as it motivates people to do such acts and give the public such notorious ideas to commit offences.

CONCLUSION

This research paper had an intention of giving a brief idea and perspective of why this social issue of rape is of an utmost influence. In the paper i have tried to analyse as to why does rape exists as a phenomenon in humans. Some might put up the western theories straight into applications and give reasons behind the act of rape, but in my opinion, all the theories such as the biological, hate crime, commodification, or sexual anger. It is for sure that it has something to do with an individual psychology and thus cannot be generalised. Also, these theories may wary when it comes to the demographic patterns, cultural differences etc. Many people also try to link the same with a religion especially in India, which in my opinion is not justified and is nothing but a cheap attempt to communalise an utterly sensitive matter and a disregard to the victims. This argument goes for both the sides where certain people or news channels quote “temple rape”^{xxxii} to refer to kathua rape case, which seems another cheap attempt to communalise the sensitive subject and provoke the other community to react, similarly also in

the Shakti Mills case where certain elements tried to blame the entire Muslim community for the act, which also can be seen as a cheap attempt.

One thing by far is clear, that to find a solution out of this social issue, we need to strictly prevent the society from not communalise this, as it would not let us solve the problem but instigate it even more. In addition to that it is about time that we understand the importance of criminological aspect of the same, and develop a system which would help us to get into the root cause of the problem and then eradicate it from the very roots.

With this thought, I would conclude the paper and hope that the matter is given due attention without a communal or political blame game rather looking at it as merely a crime.

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