

## Inadequacy of Rape Laws: A Perspective

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### Abstract

The discourse of violence against women reveals the marginalized and exploited status of women; nevertheless it is an empowering one. The erasure of the female body in the colonial discourse can be contrasted with the felt presence of actual, living women in contemporary writing. Even if patriarchal violence aims at demolishing identity for a particular gender, its presence as a theme ensures that it is an issue society and the individual need to grapple with. Modernity and modernization, two aspects of modernism seem to ensure that the individual is sacrosanct and that the liberty of the individual honoured. However, the irony of most civilized societies is the spurt in rape cases. Its ensuing culture of fear is a lived reality, universally perceived. This culture of fear created by crimes of violence against women successfully restricts women through their incarceration to the private sphere. This reifies the patriarchal gender bias and spatially restricts women. Indian sociologists Veena Das and Ashis Nandy have commented on the amorphous nature of women's identity that ranges from goddess to the evil woman. They also note the attempts to regulate women through regulation of their sexuality. This aspect of spatial politics is amply corroborated by feminists from Susan Brownmiller to Katherine Donovan etc. Further, Feminist movements such as "Give us Back the Night" and Slutwalks have emphasized the need to restore the denied space to women. Diverse literary strategies have been adopted by writers to address this theme.

The discourse that addresses the theme of violence against women especially in the form of rape is an enabling one. Its aim is to empower women and bring justice to women. This discourse of corporeality succeeds a period of silence on such women's issues in the colonial period. One can trace the movement from the absence to the presence of the female body in the text. The movement from absence to the presence of the female body in the post-colonial discourse on violence is analogous to writing the female body in the text as suggested by Western feminists such as Joyce Carol Oates, Adrienne Rich, and Gwendolyn Brooks etc. This transition spelt the movement from the unnarratable female body to one that relocates women's corporal identity and problematizes issues of power and agency.

The inability of rape laws to deliver justice is well known. The problematic nature of the issue of consent and the amorphous, indefinable nature of concepts such as 'modesty', results in the non-conviction of the perpetrators of this crime. Literary representations attempt to capture the low rate of reporting, convictions, the challenges offered by the stigma and cultural bias towards the crime of rape along with an effort to draw attention to the half-

baked laws. Writers have depicted the trauma engaged in reporting the crime along with the low conviction rate. The elusive nature of justice is a theme that occurs as a recurrent motif in Indian writing vis-à-vis crimes of violence against women. This paper aims at an examination of some of these issues.

**Keywords:** Discourse, rape laws, gender discrimination, crime, violence, justice.

UNICEF provides a list of what violence against women (VAW) in South Asia includes. This list begins with female infanticide, dowry deaths; acid attacks and concludes with prostitution, honor killings, rape and wife-battering (UNICEF, 2001). Rape is one of the listed crimes of violence against women. The paradigm of rape as a crime of violence against women is the focus of this article. It attempts to see the manifold implications of this crime of aggression, the law pertaining to it with a view to provide a better insight into this area.

There are expectations from the law that it will ensure redress and curb the crime. However the problem is so deep-rooted that laws alone cannot ensure non-occurrence. Even today, the laws framed to deal with rape are in adept and flawed. Rape is an instance of violence against women which is a crime sexual in nature. Hence, the problematic of this crime have baffled even the legal system. For in this crime, the body, the self, the psychology and the identity of the individual is seriously affected. Thus, law which “ought to try and imitate justice” and deliver the same, is often seen fumbling, inadequate and highly debatable.

The intensity of the crime of rape is often seen as resulting from the bodily harm done to the victim. However, as many feminists have rightly pointed out there is a need to dislocate rape from the body. Some critics like Nivedita Menon feel that the solution may lie in relocation of selfhood outside the body. Though this seems a very welcome hypothesis, it is ridden with a number of problems. However, this may mean that the focus should shift more from the crime to rehabilitation. Would it also imply that the harm done to the bodily identity will be trivialized, so as to enable the victim to rehabilitate herself better? The relocation of selfhood outside the body seems to be quite an untenable possibility.

The Merriam Webster dictionary defines rape as “unlawful sexual activity and usually sexual intercourse carried out forcibly or under threat of injury against the will, usually of a female”. This goes to show how a particular gender (i.e. female) is targeted and controlled through this crime.

It is the collusion of sexual violence in this crime that makes it very difficult for most countries to frame laws punishing marital rape. It is riddled with problems of consensual sex and the line that demarcates absence of consent. It is also ironical that most societies associate chastity with honour but are prone to this crime in which there is a loss of honour. In Hindi the phrase used for the crime of rape (i.e.izzatlootna) clearly connotes that women are treated as property of their men folk.

### **The Paradigm of Rape**

Rape challenges the premise and promise of secularism and democracy. It is not just a human rights violation but in the paradigm of rape the expressed misogyny manifests itself as a denial of basic fundamental rights. And by creating a phobia in many minds it results in a widespread impact, as even those who are not victims live in impending fear of the possibility.

Rape then acts as a ploy in the hands of men as it is outside marriage thereby heaping contempt on the victims for not safeguarding their embodied self. It is a weapon expressing power that men, whether literate, illiterate; of upper castes or lower castes, in uniform or without, have over the other gender. While other grievous crimes that do bodily harm to both men and women are serious enough, rape perpetrates a crime of much greater magnitude as it overlaps a denial of bodily rights, reproductive rights and human rights violation. The outcome of rape is serious for a woman on whose body the crime is perpetrated and she is denied by this ghastly act the right to know what a pleasurable consensual sexual act means to a virgin. Thus, the emphasis should not be merely on the jeopardy of selfhood but on it as a crime.

### **The Dilemma of Rape Laws**

The Indian state's predilection to uphold its patriarchal nature is seen in the nature of the rape laws. Section 375 of the Indian Penal Code defines rape as: "Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. A man is said to have committed rape, according to the section, if he has sexual intercourse with a woman in circumstances falling under any of the following:

- against her will,
- without her consent,
- With her consent when the consent has been obtained by putting her or any person in whom she is interested in fear of death or hurt.
- With her consent if her consent is given because she believes the man to be her lawfully married husband, when the man knows he is not.
- With her consent if she is unable to recognize "the nature and consequence" of that to which she gives consent because of intoxication or unsoundness of mind.

- With or without her consent if she is under sixteen years of age”

According to the Indian law, other forms of sexual assaults which are at times more grievous such as penetrations by other objects are not recognized. While many countries in the world have modified their rape laws, India still carries on with the same old definition that amounts to limited conveyance of justice. The need of the hour is a comprehensive rape law and definition which can take into account the various aspects of sexual assault that have been ignored. A wider definition of rape is required to replace the antiquated law. *The Encyclopedia of Women and Gender* which is a study of sex similarities and differences and the impact of society on gender defines rape as “the nonconsensual oral, anal or vaginal penetration of the victim by the penis, fingers or other parts of the body, or by objects, using force, threats of bodily harm, or by taking advantage of a victim incapable of giving consent.” In America, all 50 states have revised the laws defining rape. So is the case in many other countries.

Since the rape of women is 10 times more common than the rape of men, it can therefore be classified as gender-based violence. It disproportionately affects women and girls, has implications of sexual, psychical, psychological and economic abuse and is the result of women's subordinate status in society.

### **What Rape Statistics Reveal:**

The NCRB data up to the year 2011 reveals that rape is India's fastest growing crime; 792% increase since 1971 with paradoxically a dismally low conviction rate of approximately 27%. This is one of the major reasons encouraging perpetrators of violence against women. The dilemma today is that though we have more victims gathering courage and reporting the crime, the poor conviction rate continues to encourage the perpetrators. So if there are better laws, speedy disposal of verdicts and publicity of convictions and punishment, it may lead to a lower incidence.

The crime rate reported by the National Crime Records Bureau (NCRB) amazes one: a crime every 17 seconds. What is even more amazing is that among the crimes listed by the crime bureau, rape, molestation, sexual harassment, murder and dowry deaths were reported more frequently than dacoity, arson or counterfeiting. According to the 'Crime Clock 2005; one crime against women was reported every 3 mins. There is one rape every 29 minutes amounting to 48 rape cases in one day. The report also states that the figures could be much higher as only those which were reported are listed on the clock.

Delhi tops the list of unsafe metros in India. In over 98% of the cases the accused was known to the victim. What is interesting is that 90% of those arrested on charges of rape are completely illiterate or school dropouts. Besides, 23% cases were reported from areas like

Nangloi, Sultanpuri, Gokalpuri, Mangolpuri, where slums exist and economically weaker sections reside. There is definitely a correlation between illiteracy, ignorance and poverty and less esteem for women and the crime of rape in these statistics.

### **Rape Laws and Justice:**

From time to time several individual cases have come into the lime- light as they are glaring cases of reported rape. Some of them are those of Mathura, Rameeza Bi, Maya Tyagi, Suman Rani, Mukti Datta, Piyadarshini Mattoo, Hetal Parikh and that of Sarita Rani in Haryana. These cases have galvanized women's groups into action and to seek better redressal for the victims along with the campaign to change the Rape laws.

Law, a discourse endowed with power and one that has an impact on many aspects of life, has ever been problematical. The discourse of law is grounded in patriarchy. While law is very important as a deterrent to crimes against women, the history of law reforms in fields such as rape, domestic violence etc. goes to show that it is not enough '*per se*' to empower women. A constant problem for women lawyers and those committed to bring about a change in women's lives through law is the dilemma to determine which line to follow: the principle of equality or the principle of difference. The dilemma remains today like ever that is it in the interest of women to be treated differently for their unique gendered qualities or whether they are treated at par with men. Current jurisprudence in the field of the Indian rape laws reveals that the principle of difference may at present achieve greater justice in the given situation.

Keeping this in mind, the Indian government has approved bold changes in the criminal procedure code (Cr. PC). The aim of these reforms is to reduce the agony of rape victims. Completion of rape trial cases in two months, woman judge to hear cases as far as practicable are some of the proposals which are a part of the Cr. PC Amendment Bill. Investigations and recording of statements of victims at a place of their choice or their residence and as far as practicable by a woman police officer are some of the other changes. In another significant move victims will have the right to appeal against acquittals which was the prerogative of the state alone. This provision can act as a deterrent to collusions between the accused and the prosecution as witnessed in the Priyadarshini Mattoo case. The victim can also avail of the option to be questioned in the presence of a family member or a social worker of the area. The aim of these reforms is to give protection to the victims who are often discouraged by the proceedings to even report.

The National Commission for Women's report for the year 2005 has stressed the need for a new law on sexual assault. The Law Commission has already examined and suggested review of laws pertaining to rape and sexual assault. The report, also examining sexual harassment, stresses the infringement of women's right to gender equality under Article 14, right to live life with dignity under Article 21 and right to a safe environment free from sexual

harassment. The still pending draft Bill based on these proposals is hoped to bring relief but is still waiting to be passed. The Indian Penal Code 1860 still remains the basis for laws pertaining to rape. The immediate rectification of these colonial, outdated laws should be taken up to ensure the prevention of violation of certain Fundamental Rights of Women in India. Hopefully, when these amendments are implemented justice in rape cases will be accessible and effective.

### **Crime and Conviction in Rape: Some gaps**

Most figures of the crime of rape go to show that there is amazing discrepancy between cases filed and convictions. The first step in the long journey towards justice begins with the reporting of the offence. However, due to the legal tangles the criminal act of rape often goes unreported. Rape survivors are traumatized and due to the stigma associated with it are unable to speak of the horrifying experience. Another deterrent that discourages reporting is that 84% of the rapists are known to their victim (according to the NCRB report). Since the rapist is either the father uncle or brother, the families tend to hush up the matter and do not report the crime.

Even if a rape survivor crosses the first hurdle of reporting the crime she can anticipate the nightmare the police investigation is likely to be. Besides, the insensitivity of the police, the victim faces an equal apathy in the medical examination. Government hospitals are ill-equipped to handle such cases with sensitivity and care. There is no privacy in Government hospitals. Insensitivity and lack of staff to handle the victim make it highly traumatic. It is for these reasons that the rapists are often confident that they will go scot-free and if reports are to be believed, 80% rapists walk free.

In such a situation, the likelihood of convictions is rare. Court cases dragging for years along with lax investigations spell doom for justice. The outcome is that there are more acquittals than convictions. Very often the lengthy, expensive proceedings are unaffordable for victims. Thus, justice becomes elusive and almost impossible in the given situation. Sometimes, the character of the victim is maligned to escape. "The accused would attack the moral character of the woman", says Indira Jaisingh of the Lawyer's Collective. "It would be the woman on trial rather than the offender". In the Bhanwari Devi case to a low caste woman was raped by upper caste men. To the outrage was added the callousness of the argument that why would upper caste men rape a low-caste woman. Besides, the legal defence of the accused often tries to establish that the victim was known to the accused and the 'rape' may actually have been consensual sex.

A newspaper report states that out of every 100 rape cases in India only 10 are reported and out of every 100 accusations only 5 are convicted. The low rate of convictions goes to reveal the failure of the whole system to bring the offenders to book. Thus, the system

and society allow this crime to flourish. Brinda Karat, women rights activist says that the whole process – from registering an FIR to the courtroom is so insensitive that a woman goes through rape not just once but twice over. She says, “The police ask the victim to repeat what happened to her in the presence of the accused. It is almost as if the victim is on trial and not the accused. The low rate of convictions thus indicates that the myopic judiciary and inadequate rape laws amount to greater suffering for the victims. Thus, we require resolute political will to amend and implement these laws so as to bring justice to the victims and thereby discourage recurrence of such crimes. Law happens to be one important component of the recipe required to handle this crime which indeed needs to be handled with kid gloves.

**Spousal rape and Law:** Many countries all over the world, till recently included “the marital exemption” in their rape laws. These laws which were sexist and allowed marital rape tacitly defined rape as “the forcible penetration of the body of a woman who is not the wife of the perpetrator” (Russell, 1991). Most legislation has allowed the law to remain unchanged due to the understanding that marriage implies a special agreement for sexual intimacy. Infact even the Hindu conventions of marriage and ‘mantras’ suggest that the father is giving the bride to the groom for satisfying his ‘kama’. Thus, an unequal relationship is established by the conventions in marriage. It is for this reason that framing a law to punish marital rape is difficult in certain societies. In fact, India has failed to take cognizance of this reality. Even in the Western culture the marriage vows “to love, honor and obey” and consent is taken for granted in marriage.

Rape occurs in the absence of consent. Legal experts who realize the trickiness of the situation feel that by marrying, a woman is not necessarily consenting and that too consenting for all times to come and definitely not consenting to rape. Studies have revealed that in many cases of spousal rape, it is used to overpower the wife, who is about to desert her marriage or is unable to accept it. In her work on *Rape in Marriage*, Diana Russell says, “wife rape cannot and must not be subsumed under the battered woman rubric”. This caution needs to be taken as most rapist husbands are wife batterers as well.

Fast-track courts, dedicated courts with women judges, more and sensitized police force these measures will fail if the over-hauling of archaic laws and refurbishing of the legal machinery is not done with immediate effect. Gender inequality leads to greater violence against women. Hence all measures to re-form society are needed in order to root out violence against women.

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