

MEN ~~DON'T CRY~~ CAN BE RAPED

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Abstract

It is the general rule of interpretation that Penal provisions are to be given a strict interpretation, but this paper throws light on what happens when an archaic provision, present for almost 160 years, is scrapped, leaving a void in the law, not ready to be addressed by the legislatures or the society. We still live in a patriarchal society that teaches their daughters to sit with their legs folded and their sons to man up and not whine. We still are not ready to discuss the abuse of a man by the fairer sex, which is why, we are still okay with our rape laws as it currently exists to be, read as

“A man is said to commit “rape” has sexual intercourse with a woman”¹

Therefore, that the authors have decided to ask, what if the man is at the receiving end or what if the woman is at the inflicting end, how will the aspects of consent, free will, intention etc. apply. The authors question the validity of rape laws in the light of decriminalisation of Section 377 of Macaulay’s Penal Code, which has its roots on UK’s 1533 Buggery Act. This factor plays a pivotal role in raising such questions because 1967 witnessed progress by our while our colonial masters, however the hangover ensnared in our penal laws lingered on.

There will never be a right time, hence the authors wish to demand gender neutral rape laws, in respect of both the victim and the accused, and suggest the society move beyond the whole concept of ‘penetration’ and peno-vaginal sex, where the men dominate the woman.

KEYWORDS: *Section 377, Buggery Act, Macaulay’s Penal Code, Rape, Laws.*

Introduction

The concept of men being a patriarchal crime, directly emanating from the abuse of male power and privilege is as archaic as our penal code. Even the latest Criminal Law (Amendment) Act, 2013 which centrally covered a paradigm shift in rape laws, failed to defeat or contradict this theory, with not even a hint of gender neutrality when it comes to rape laws.

It has been argued on many fronts that biologically it is absurd to claim that a man has been a victim of rape by a woman, and when both the victim and the perpetrator are of the ‘stronger’ sex, the law conveniently convicted them of sodomy. An article from India Today, August 19th, 2014 read “Teacher among 4 booked for sodomy in Muzaffarnagar”² does not even hint that such uncalled-for act can even be termed rape,

¹ The Indian Penal Code, 1860, Section 375.

² Teacher among 4 booked for sodomy in Muzaffarnagar. (2014, August), *India Today* <https://www.indiatoday.in/india/north/story/sodomy-in-muzaffarnagar-government-run-protection-home->

because in no way could it be consensual in nature. Even though, the Protection Of Children from Sexual Offences Act, 2012 ("POCSO Act") protects children of both the genders, the adult male of the society has no place to raise his voice against a crime which would be a perfect crime if the tables were flipped. And now that Section 377 of the Indian Penal Code ("IPC") has been decriminalised³, they do not even have the ground to sodomy.

It was held by a two-judge bench of the Delhi High Court, that Section 377 was violative of the ideals of autonomy, privacy and liberty that "were grafted into the ecosystem of fundamental rights guaranteed by Part-III of the Indian Constitution."⁴ It was further stated that principle of inclusiveness which forms the core of the Constitution, was denigrated by the sustained suppression of the LGBT+ community. The judgment puts forward a progressive and bold claim aimed at reversing a century and a half era of oppression, thus being hailed as an impressive judgment. The aim being admirable, the quality of the judgment deserves mentioning as it blended principles of international law, along with both Indian

and Foreign judgments in addition to citing literature on sexuality as a form of identity.

However, very soon this was overturned when an astrologer, Suresh Kumar Kaushal challenged this verdict of the Hon'ble Delhi High Court stating that the implications of decriminalising the section included "national security concerns" that would result in military defeats with soldiers getting distracted as would be free to enter into consensual relationships with each other.⁵ Confounding, the Supreme Court's verdict lent judicial legitimacy to *Koushal's* thought process, as they overturned the *Naz Foundation* judgment and affirmed the constitutional validity of Section 377 on some bizarre grounds.⁶

However, on 6th September, 2018 the Supreme Court once again applied their minds and a colonial era law, that was decriminalised by our colonial masters in their country as back as 1967, criminalising "carnal intercourse against the order of nature", was discontinued at the hands of five judges of the Supreme Court of India. It was considered as a great leap towards a modern society and empowering the true ideals of the

teacher-booked-204666-2014-08-19#targetText=The%20incident%20took%20place%20on,station%20in%20Shamli%20district%20here.

³ *Navtej Singh Johar –v- Union of India*, WP (Crl.) No. 76/2016, order dated 12-07-2018

⁴ (2009) 160 DLT 277; W.P. (C) No.7455/2001 of 2009 (Delhi HC).

⁵ Pisharoty S. B. (December 20, 2013). It is like reversing the motion of the earth. *The Hindu*. <https://www.thehindu.com/features/metroplus/society/it-is-like-reversing-the-motion-of-the-earth/article5483306.ece>.

⁶ (2014) 1 SCC 1 (Supreme Court of India).

Constitution, it however created a huge vacuum when it comes to rape laws against men in India.

Let us take into consideration the two main case laws which help us create an ambit whereby applying the mischievous rule and harmonious construction, we can lead up to the conclusion that even adult men can be raped. The two main cases are *Sakshi-v-Union of India*⁷ which expanded the ambit of acts that can be covered under the definition of rape, and *Navtej Singh Johar –v- Union of India*⁸ which decriminalises consensual sexual behaviour between same sex adults, which can constructively read to be decriminalising sodomy.

The words ‘consensual’, in the latter judgment, is of material importance and can be read to establish that there can be non-consensual intercourse between adults of the same sex, however, the same shall not be covered under the law. This means that we can constructively read that if there is sex, beyond consensus between the parties, it will still be violative of the law, and since the parties here discussed are homosexual in nature, we can further read into the fact that the inflicting party can be a woman, and further so, the victim can also be a man. When reading into these intricacies of the judgment, we can also say that on the one

hand, where the so called ‘carnal intercourse’ is consensual in nature, the judgment validates it, but when the act in question is consensual in nature, it inherently refers to offences covered under Section 375 of the IPC, thus rendering Section 377 redundant in its entirety.

Further, the former case is of further importance, because it broadens the horizon of acts which can be termed as rape. After this landmark judgment dated as back as 2004 and the recent 2013 Criminal Amendment rape is committed

“when a man

1. *penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*
2. *inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*
3. *manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any ~ of body of such woman or makes her to do so with him or any other person; or*

⁷ AIR 2004 SC 3566

⁸ WP (Crl.) No. 76/2016, order dated 12-07-2018

4. *applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person*

the same is followed by the 7 circumstances and the following Explanation:

Explanation 1.—For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2. —Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.”⁹

Now, if we read both the both the judgments in harmony and considering the mischief rule, we can infer the following:

1. The main intention of the court was to prevent non-consensual sex
2. The acts did not just include penetration, it included cunnilingus as well

3. Covered use of any other tool or body part either directly or by way of manipulation

4. Covered, vagina, urethra, anus

This means, we can read that if a non-consensual act occurs, where the penetration either penial or any other is into the anus, it will still amount to rape. Then the correct question to ask here is why this cannot apply to men, because even they have an anus, and why can the perpetrator not be a woman, because having a penis is not mandatory to rape anymore.

The former case bears further importance because fundamentally the case had failed when the Court had adjudged that they are bound by the principles of stare decisis and strict interpretation of the law. Furthermore, it was observed that the intention of the Legislature is to be understood from the language used in the statute i.e., what has been said as well as what has not been said, must be focused on equally. Therefore, a construction that renders words meaningless after certain addition or substitution of words must be rejected and avoided altogether. It was on this interpretation that the definition of the term “Rape” was denied being amended to widen its scope as per the contentions of the petitioner.

⁹ S. 375, Indian Penal Code.

But, post the 2013 Criminal Law Amendment we stand at a different footing altogether, because the limitations faced by the Court in the *Sakshi case* were broken by this amendment and the definition of rape was subsequently widened. Ergo, presently, the Courts are not bound by stare decisis, the settled law has been unsettled by the legislators themselves, giving the Court a clean slate. Because, even they believe that these archaic laws have become obsolete, and such is the ground for the jurists to move beyond stare decisis and create an exception.

If, for the sake of argument, we argue that part one of Section 377 which indirectly talks about non-consensual sex between homosexuals, has not been revoked and is still criminalised, in the form of forced Sodomy, we are differentiating two acts that are fundamentally the same on the basis of gender of the culprit or the victim, which inevitably will be violative of Article 14 of the Constitution. This is why, it boils down to the mere fact that we need to apply harmonious construction to the two sections and should identify the latter as Rape also.

Many PILs have seen the doors of the Courts for making 375 gender neutral¹⁰, where the

Court rejected the PILs on the same ground that they rejected Sakshi's case, stating that it is the legislators who can bring about such a change and the Courts have no say. But these cases preceded the judgment decriminalising Section 377. Another important fact to consider is the 172nd Law Commission Report and Justice Verma Committee Report, which advocated making gender-natural rape laws. However, the legislators did not see the recommendations as important enough to include it in the recent amendment.

Further, a recent case of September 2019, a man being forced to have sex but not 'rape' with five other men in Vashi, Mumbai attracted a lot of attention on social media. Big news houses like India Times categorized it as sexual assault and not rape just because the victim was a man. The articles read ¹¹

"A 36-year-old man was brutalised in a sexual assault by five unidentified persons at Vashi in Navi Mumbai, necessitating an emergency surgery to save his life police said on Wednesday"

The case was still registered under section 377 of IPC, which technically is redundant

¹⁰ Writ Petition (Civil) No. 8745 OF 2017.

¹¹ 36-year-old man gang-raped by five in Vashi; Undergoes emergency surgery. (2019, September), *Mumbai Mirror*.
<https://mumbaimirror.indiatimes.com/mumbai/crime/>

36-year-old-man-gang-raped-by-five-in-vashi-undergoes-emergency-surgery/articleshow/71310362.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cspst

and invariably does not exist post the judgment. So much so, that the victim ended up retracting his statement stating that the same were self-inflicted injuries. This, we believe, is the biggest fault in our society, not only are people hesitant to speak up, the patriarchy imposes on such men, who have been violated, to live in denial. On similar tracks, we see male survivors being additionally burdened due to the perception that they are effeminate or even possess homosexual attributes, all of which are taboo topics even for men, that would not be equally felt by female survivors.¹²

However, we also agree, that making rape gender-neutral can open floodgates of difficulties in its implementation, because it will be difficult to establish the perpetrators in the crime, it can also lead to counterclaims, when a girl claims that she was raped, the man can in turn claim that in reality, he was the victim of the situation. However, we believe that a few circumstances of abuse cannot lead to the denial of the whole right, because, inherently speaking every law in some way or the other has been abused. Further, since circumstantial evidences form a huge part of the law even currently, such issues can be dealt with, on a case to case basis.

Nevertheless, it is crucial to mention here, that we do not say that both the sexes suffer from cases of rape equally, or that the grief of one is greater than the other, we are not taking a feminist or a misogynist stand, all we are trying to establish here is that every individual of the society needs a voice against such a heinous crime, violating their body and soul, and such voice should be free from gender-stigmatization, since it is already laden with social stigma of shame and non-acceptance.

Conclusion

In conclusion, we would like to point out that rape law of the land has evolved from a strict act of penal-vaginal in nature, to include penal-orifice to further expand up to penetrative-orifice, all including non-consensual in their essence. Then why not evolve it completely, why leave out the possibility of it being abused by a whole fraction of the society, why leaving a half of the society voiceless? It is high time, we agree that if Penal statutes continue to be strictly interpreted, the archaic law is going to see the detriment of society. When the lawmakers have identified the need to bring a reform, even the judges can strike an exception to general rule of strict interpretation here. Ideally, the whole idea

¹² India's laws should recognise men can be raped too. *Centre for Civil Society*. <https://ccs.in/indias-law-should-recognise-men-can-be-raped-too>

behind these principles of statutory interpretation is to render justice and to ensure that every single voice is heard, and if a whole part of the society, eventually has to suffer, because these very interpretations that were supposed to render justice, bind the courts from providing the same, then isn't the

whole institution a faux at the end. This is why we believe that the laws relating to rape, should be interpreted beyond literal and strict interpretation and be the tool that these interpretation theories are supposed to be and render justice.