**A PRACTICAL APPROACH TOWARDS REDEFINING LAWS ON RAPE**

**By**

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**What is rape?**

Rape is a crime of violence; it is not sex. At common law, rape was defined as the unlawful carnal knowledge of a woman, without her consent. Carnal knowledge was defined as sexual intercourse. Sexual intercourse implied genital copulation. Genital copulation, in turn, connoted the act of sexual intercourse. Unlawful carnal knowledge required sexual penetration, however slight. Today, in addition to the requirement of carnal knowledge, most rape statutes require force or threat of force against the will and without the consent of the victim. Numerous law review articles have been written on the requirements of force and against the will of the victim. The articles focus on the force requirement and not the penetration requirement, which is the male understanding of what is necessary when a woman is threatened with the crime of rape.

Rape is a heinous crime in our world. Now a days all civilized country enacted their own laws on this topic. India is not exception of this, it also enacted it's own law under Indian penal code,1860. Section 375 defines rape under our law which is known by all of us.

Rape is an invasion of a woman's body in which her private, personal inner space is violated. The act of rape denies woman autonomy by abridging her right to determine when, with whom, and how she will allow an individual to enter her zone of body privacy. In addition to the physical harm, the crime of rape grants man domination over the woman's zone of body privacy. Under the Indian Penal Code (IPC), the crime of rape occurs when the following happens:
"A male ... has sexual intercourse with a female not his wife ... and compels her to submit by force or by threat of [force] ... [or] has substantially impaired her power to appraise or control her conduct by administering ... without her knowledge drugs [and] the female is unconscious ... [or she] is less than 10 years old." reference to rape as sexual intercourse suggests that rape is not a crime if it is sex. But rape is not sex.

Some suggest that sexual intercourse has to include penetration of the vagina, however slight, and anything less is not rape because it is not intercourse. Thus, the touching of the female’s sex organ, without the penetration of the vagina, cannot constitute rape under the IPC. Rape, however, is not sex; it is a crime, and it is a crime of violence. The crime is complete when the act is done, or the social harm has occurred. The act is done when the female's private, personal inner space is violated, and that space is violated when an uninvited individual enters the zone of protected pleasures.

**What constitutes a sexual intercourse resulting in rape?**

The variations in definitions as to what constitutes sexual intercourse resulting in rape are part of the problem in defining what has to be completed. With respect to the raping of a woman by a man, most states require penetration of the vagina. Defining what has to be penetrated is significant because if rape is viewed as a crime against the woman, then any conduct that is perceived as violative to the woman should be classified as rape. Many statutes, with respect to the penetration element, provide that an offender has to engage in sexual intercourse. It is assumed that penetration has to be effectuated in order for there to be sexual intercourse. The statutes, however, fail to state what has to be penetrated--the vagina, the vulva, the labia, or the clitoris? Some states refer to penetration of the female organ without further defining penetration.

To penetrate is ‘to enter or force a way into; [to] pierce.’ Penetration is the ‘act or process of piercing or penetrating something.’ How do we determine what constitutes a sex organ? And what needs to be penetrated? And can it be penetrated? Even though there are numerous articles stating the force and against the will requirements are male responses to being attacked, the male question has not been addressed with respect to penetration. Penetration is required in addition to the force and against the will requirements. Penetration, too, is a male understood type conduct. The penetration of requirement does not necessarily require that the vagina is completely entered or that the hymen is ruptured. Is entering the vulva or labia sufficient?

Penetration, at common law, was defined as the penetration of the sexual organ of the female by the sexual organ of the male. What is the female sex organ: the vagina, the vulva, the labia? What is the male sex organ: the penis? The requirement of penetration by ‘some male organ type mechanism’ removed other types of conduct with the vulva from the crime of rape. The penetration of the vulva by the male sex organ is not regarded as rape by most jurisdictions. Some jurisdictions legislating penetration of the vulva, but required a showing of penetration of the vagina.

At early common law when rape statutes were initially written, women were deemed property of men. Virgin daughters were a valuable commodity belonging to their fathers; wives were the chattel of their husbands. The father or husband ownership right of women made rape a crime against property. Because rape was a property offense, the father or husband was the victim rather than the woman. Because fathers or husbands were the victims of rape, men wrote rape laws for their own benefit and therefore, included a penetration requirement. Penetration requires male type conduct and therefore, evolved as the measuring rod for determining when conduct had gone far enough to constitute a crime. One commentator has stated the following:
"Criminal law that reflects male views and male standards imposes its judgment on men who have injured other men. It is "boys’ rules" applied to a boys’ fight. In rape, the male standard defines a crime committed against women, and male standards are used not only to judge men, but also to judge the conduct of women victims.

Delaware’s unlawful sexual intercourse statute is common to most jurisdictions. Delaware’s statute provides that one is guilty of a class A felony when the person intentionally engages in sexual intercourse "without the victim's consent." Sexual intercourse is defined as "[a]ny act of physical union of the genitalia or anus of [one] person with the mouth, anus or genitalia of another person. It occurs upon any penetration, however slight." Sexual intercourse is also defined as “[a]ny act of cunnilingus or fellatio, regardless of whether penetration occurs." Cunnilingus is "any oral contact with the female genitalia." Sexual contact is "any intentional touching of the anus, breast, buttocks or genitalia of another person, which touching, under the circumstances as viewed by a reasonable person, is sexual in nature. Sexual contact shall also include touching of those specified areas when covered by clothing." For the woman, the physical contact of her genitalia, her clitoris, her sex organ by the penis or any object may be considered to be as violative as the penetration of her vagina.

**A Practical Approach towards Redefining.**

The narrow legal definition of rape, recently reiterated in the Sakshi case, has been criticized by Indian and international women's and children's organizations, who insist that broader interpretations are needed to protect victims, and also to serve justice. Rape is defined in India as intentional, unlawful sexual intercourse with a woman without her consent. The essential elements of this definition under Section 375 of the Indian Penal Code are ‘sexual intercourse with a woman’ and the absence of consent. This definition therefore does not include acts of forced oral sex, or sodomy, or penetration by foreign objects; instead those actions are criminalized under Section 354 of the IPC, which deals with ‘criminal assault on a woman with intent to outrage her modesty’ and Section 377 IPC, covering ‘carnal intercourse against the order of nature’.

The narrow definition of rape has been criticized by Indian and international women’s and children’s organizations, who insist that including oral sex, sodomy and penetration by foreign objects within the meaning of rape would not have been inconsistent with any constitutional provisions, natural justice or equity. Their reasons have been succinctly encapsulated in a recent Public Interest Litigation before the Supreme Court in Sakshi v. Union of India:
... the interpretation [by which such other forms of abuse as offences fall under Section 354 IPC or Section 377 IPC] is ... contrary to the contemporary understanding of sexual abuse and violence all over the world. There has been for some time a growing body of feminist legal theory and jurisprudence which has clearly established rape as an experience of humiliation, degradation and violation rather than an outdated notion of penile/vaginal penetration. Restricting an understanding of rape reaffirms the view that rapists treat rape as sex and not violence and thereby condone such behaviour.

But in Sakshi case, the Supreme Court did not interpret the provisions of Section 375 IPC to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina penetration, finger/anal penetration, and object/vaginal penetration within its ambit. Instead, the judges sought refuge behind the strict interpretation of penal statutes and the doctrine of state decisis - a view that any alteration [in this case, of the definition of rape] would result in chaos and confusion. In the present case, the respondent authorities has been trying to treat sexual violence, other than penile/vaginal penetration, as lesser offences falling under either Section 377 or 354 of the IPC and not as a sexual offence under Section 375/376 IPC. But it has been found that offences such as sexual abuse of minor children and women by penetration other than penile/vaginal penetration, which would take any other form and could also be through use of objects whose impact on the victims is in no manner less than the trauma of penile/vaginal penetration as traditionally understood under Section 375/376, have been treated as offences tailing under Section 354 of the IPC as outraging the modesty of a women or under Section 377 IPC as unnatural offenses.

A plain reading of Section 375 of the IPC would make it apparent that the term "sexual intercourse’ has not been defined and is, therefore, subject to and is capable of judicial interpretation. And the Section also does not in any way limit the term penetration to mean penile/vaginal penetration. Limiting the understanding of "rape" to abuse by penile/vaginal penetration only, runs contrary to the contemporary understanding of sexual abuse law and denies majority of women and children access to adequate redress in violation of Article 21 of the Constitution. Sexual abuse of children, particularly minor girl, children by means and manner other than penile/vaginal penetration is common and may take the form of penile/anal penetration, penile/oral penetration, finger/vaginal penetration or object/ vaginal penetration. It is submitted that by treating such forms of abuse as offenses falling under Section 354 IPC or 377 IPC, the very intent of the amendment of Section 376 IPC by incorporating Sub-section 2(f) therein is defeated. The said interpretation is also contrary to the contemporary understanding of sexual abuse and violence all over the world.

**Rape laws in other countries:Comparative Analysis**

A purposive approach is being adopted in some of other countries so that the criminals do not go untouched on mere technicality of law. A strong reliance was also placed on some decisions of House of Lords to substantiate the contentions and the most notable being R v. R where it was held as under:
‘The rule that a husband cannot be criminally liable for raping his wife if he has sexual intercourse with her without her consent no longer forms part of the law of England since a husband and wife are now to be regarded as equal partners in marriage and it is unacceptable that by marriage the wife submits herself irrevocably to sexual intercourse in all circumstances or that it is an incident of modern marriage that the wife consents to intercourse in all circumstances, including sexual intercourse obtained only by force. In Section 1(1) of the Sexual Offences (Amendment) Act, 1976, which defines rape as having ‘unlawful’ intercourse with a woman without her consent, the word 'unlawful' is to be treated as mere surplus age and not as meaning ‘outside marriage’, since it is clearly unlawful to have sexual intercourse with any woman without her consent.’

Even international law now says that rape may be accepted as "the sexual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or of the mouth of the victim by the penis of the perpetrator; by coercion or force or threat of use of force against the victim or a third person." Similarly, Article 2 of the Declaration on the elimination of Violence Against Women reads as follows:
Violence against women shall be understood to encompass but not limited to ... Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.

Judgments by the Australian courts reveal that insertion of objects into the victim's vagina and anus amount to rape. The definition of rape states that sexual penetration of the body is necessary but the slightest penetration of the body of the female by the male organ is sufficient. Emphasis on the word "slightest" reveals the intent behind the definition is to give the victim and not the criminal the benefit of the doubt.

With compare to this law, law of India under penal code not cover the penetration of mouth and if such happened then that not amount to rape under our present law above all in India it is observe by our Hon'ble courts that in case of rape if any woman help to commit such rape she will be not charge for the offence of rape as she help to commit the rape but in England it happens and their punishment are also more than us so any one before committing this must think and in the mind of people there is some fear about law and it's punishment.

Where as in Pakistan, rape law, more or less are same like us but there is slide difference is that? The Hudood Ordinance?. Rape law, current in effect in Pakistan states that either the perpetrator must confess to raping his victim or there must be an eye-witness testimony from at least four Muslim adult males in order for the perpetrator to be convicted. Otherwise, the woman who reports the rape can be prosecuted herself for fornication if she is unmarried and adultery if she is married.

In Canada Traditional rape laws were gender specific, providing that only women could be victims of rape and only men could be rapists. In recent years an increasing number of states have rewritten their rape laws to be gender neutral. In these states it is possible, although unlikely, for a woman to be charged with raping a man. In Canada, statutes prohibiting sexual assault apply to both male and female perpetrators and victims.

In France we also found rape law almost just like us where also penetration is required for committing this offence. Criminal code of France republic states in its code as follows:

Any act of sexual penetration, whatever its nature, committed against another person by violence, constraint, threat or surprise, is rape. Rape is punished by fifteen years' criminal imprisonment.

**Whether women can rape another woman?**

In State Govt. V. Sheodayal (1956 Cr LJ 83 M.P) M.P High court opined that modesty of a woman can be outraged by another women u/s 354. But apex court recently in Priya Patel V. State Of M.P And Anr. (JT 2006 (6) SC 303) held that it is inconceivable that women can rape another woman. Actually in this case victim cried for help when husband of appellant was going to rape her. Appellant reached on the spot, instead of helping the victim or prevent her husband from raping the women, slapped the victim, bolt the door from outside and left the scene. She was charged for committing gang rape u/s 376 (2) (g) of IPC 1860. Trial court as well as Madhya Pradesh high court maintained the charge but supreme court, relaying upon biological facts, construed statutory provision in favour of the woman and held that a woman cannot be charged for gang raping another women u/s 376 (2) (g) of IPC 1860. Section 376 (2) (g) of IPC 1860 says:

"Whoever commits gang rape shall be punished with rigorous imprisonment for a term which shall not be less than ten year but which may be for life and shall also be liable to fine."

Explanation 1 appended to this 376 (2) (g) defines gang rape. It tells that when a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Section 34 of IPC 1860 is also deal with common intention. Common intention, which is given under S. 376 (2) (g) is same to which is given under S.34. Apex court in this case also discussed S. 376 (2) (g) in line with S.34, that is "act in furtherance of common intention". Now questions arise:

What was the need of S. 376 (2) (g), when S. 34 was already there? What would be situation if S. 376 (2) (g) were not there?
Of-course the object of insertion of S. 376 (2) (g) was to inflict harsher punishment on guilty of offence of gang rape owing to high gravity of offence. If S. 376 (2) (g) were not there then even all culprits of gang rape could be convicted under S 376 r/w S 34. An analogy can be drawn from apex-courts interpretation that for conviction under S. 376 (2) (g) or Section 34, every culprit must be able to commit main act. But in Barendra Kumar Ghosh v. King Emp. (AIR 1925 PC 1) appellant was standing outside with pistol and postmaster was shot dead by other accused. His defence that he was standing outside near the door and had not shot at the postmaster was not accepted by the court. The privy -council observed that even if the appellant did nothing as standing outside the door, it is to be remembered that in crimes as in other things they also serve who only stand and wait.

Now imagine a situation: There are five persons, one of them is amputated with both the hands, decide to kill a man. Four go inside the room and stab the man and fifth person, amputated with both the hands stands outside do nothing. Question arises whether person who is amputated with both hands, cannot hold knife, can be charged for committing murder. Off-course he can be charged in pursuant of above-mentioned ruling of privy-council.

No doubt if apex court solely rely upon S. 376 (2) (g), it was difficult to charge the appellant owing to definition of rape in Section 375 but it is respectfully submitted that appellant can be charge u/s 376(1) r/w Section 34.

Prosecution also pleaded that in spite of the fact appellant cannot be charged under S. 376 (2) (g), but can be charged for abetment. But apex court left question to be decided by trial court. So now wait for trial court whether it would punish demons of humanity.

**Redefining Rape**

After a careful review of the rape law in vogue and an intensive deliberation with Sakshi v. Union of India , the National Commission for Women and the other organizations, the Law Commission in its 172nd report submitted to the Government of India recommended, inter alia that the law relating to ‘rape’ be made gender neutral, wider and more comprehensive to bring it in tune with the current thinking.

So the proposed re-cast Section 375 would read as :
Section 375. Sexual Assault: Sexual assault means-
(a) penetrating the vagina (this term shall include the labia majora ), the anus or urethra of any person with-
i. any part of the body of another person, or
ii. an object manipulated by another person except where such penetration is carried out for proper hygienic or medical purposes;
(b) manipulating any part of the body of another person so as to cause penetration of the vagina (which shall include the labia majora ), the anus or urethra of the offender by any part of the other person’s body;
(c) introducing any part of the penis of a person into the mouth of another person;
(d) engaging in cunnilinggus or fellatio; or
(e) containing sexual assault as defined in clauses (a) to (d) above in circumstances falling under any of the six following descriptions:
First - Against the other person’s will.

Secondly - Without the other person’s consent.

Thirdly - With the other person’s consent when such consent has been obtained by putting such other person or any person in whom such other person is interested, in fear of death or hurt.

Fourthly - Where the other person is a female, with her consent, when the man knows that he is not the husband of such other person and that her consent is given because she believes that the offender is another man to whom she is or believes herself to be lawfully married.

Fifthly - With the consent of the other person, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the offender personally or through another of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that to which such other person gives consent.

Sixthly - With or without the other person’s consent, when such other person is under sixteen years of age.
Explanation: Penetration to any extent is penetration for the purpose of this section.
Exception: Sexual intercourse by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault.

**Conclusion.**
Rape obviously is a very serious crime with severe trauma to the victim. The victims of rape are generally women. The crime of rape punishes victimizers for entering into an individual's most private sphere. Laws punish individuals for that invasion. Entering a woman's most private sphere does not have to include male type conduct in order for the invasion to be severely punished by law. Unlike men, women have at least two most private spheres-the clitoris and the vagina. The clitoris and the vagina are both female sex organs. The punishment for the invasion of either of those most private spheres should be identical.

The private sphere for women should be defined in women's terms and from a woman's perspective; otherwise, rape will continue to be a crime of violence on women by men, as defined by men. This practice permits men to continue, as they have from the beginning of history, to treat women as property. This affords men the right to touch a woman's body, even her treasures, until she resists to the point that he understands that she is resisting. As we approach the millennium, it is time for women to say "no." A woman's body is not the property of a man, and he is not entitled to touch, unless he gets permission. The mind of the women should also take in to consideration. There is no right for anyone to invade a woman's most private sphere. The severity of the punishment is generally related to the invasion. The severity of the invasion of a woman's body ought to be defined from a woman's perspective of intrusiveness. Rape is the invasion of the female sex organs by a male. Including the clitoris as a female sex organ in the definition of rape reflects the woman's perspective of intrusiveness. Consequently, because the clitoris, like the vagina, is a sex organ in which the non-consensual invasion is so intrusive, the invasion of it, like that of the vagina, is rape.

Nevertheless, proposal for reforms of the fifteenth Law Commission seems to be a progressive gender-neutral rape law in India. The proposed section 375, replacing the present one, if enacted, will, therefore, be a mere symbolic legislative exercise. A symbolic law, embodying certain values and expressing the consensus of the society to adhere to theses values, nevertheless, undeniably generates a process of creating social consensus and consequential conditions that are conductive to mobilize such a change. The proposed reforms in the substantive rape law, therefore, would undeniably give a further momentum to the untiring efforts of women’s organizations to do away with the ‘pro-male’, ‘male-oriented’ and ‘gender’ biased’ sexual morals reflected in the Indian Law relating to rape. It, if favorably responded to, by the legislature, would not only make the substantive rape law free from the century, but would also take the rape law in a new progressive direction in the new millennium.

***Note: The above essay is based on the knowledge and collection of articles in connection to various judicial pronouncements of different countries and view taken by eminent scholars and jurists. Hence i had retained the original wordings.***