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THE NEED FOR BROADENING THE PRINCIPLES LAID DOWN IN SECTION 375 AND 377

AUTHORED BY - SAMRIDDHI AGGARWAL

1. ABSTRACT

This research paper investigates the necessity to widen the concepts outlined in Sections 375¹ and 377² of the legal frameworks in order to address critical concerns such as marital rape, necrophilia, and the implementation of gender-neutral laws. This paper talks about the present definitions of both the sections and further discussed how these definitions came up from what they were initially. The definitions of rape and sexual offences has come up a long way from what they were as per Indian Penal Code, 1860.

This research paper talks about widening the scope of these sections and discusses 3 major relevant points - Marital Rape, Necrophilia and Gender Neutrality. Marital Rape and Necrophilia are 2 acts which are not considered as offenses as per the current provisions of the Indian Penal Code but there is an urgent need to do so. Gender neutrality is also a major requirement in all such laws or maintain gender equality and the rights of all citizens. Lastly, the paper discusses how these changes can be brought about. Overall, this paper advocates for the expansion of legal principles to include marital rape as a criminal offence, comprehensive laws against necrophilia or its inclusion in existing ones along with gender-neutral laws to ensure equal protection for all individuals regardless of gender or sexual orientation and to suggest changes.

2. KEYWORDS

Rape, necrophilia, section 375, section 377, sexual offences

3. Research Methodology

The research employs a variety of qualitative research methodologies, such as legal analysis, comparative study, and academic research. This study's methodology strives to provide a

¹ Indian Penal Code, 1860

² *Ibid.*

thorough grasp of the subject matter by drawing on current legal frameworks, case studies, and scholarly perspectives. To get a complete grasp of the issues associated to marital rape, necrophilia, and gender-neutral legislation, a thorough assessment of existing literature, including academic articles, legal statutes, and pertinent case laws, is done. Additionally, a thorough legal analysis is carried out in order to objectively assess the provisions of Sections 375 and 377 of the legislative frameworks under consideration. This entails examining pertinent laws, precedents, judgements, and legal interpretations in order to comprehend the present scope, restrictions, and implications of these provisions. When discussing difficult themes such as marital rape, gender neutral laws and necrophilia, ethical factors are taken into account. This research methodology takes a multifaceted approach, combining legal analysis, comparative study, case studies, and expert interviews to provide a thorough investigation of the topics at hand.

4. INTRODUCTION

a) Section 375 & Section 377 as per the Indian Penal Code, 1860:

Section 375 of the Indian Penal Code defines the offence of rape while Section 376 defines its punishment. As per section 375,

“A man is said to commit "rape" if he--

- a) 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
- b) 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
- c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven 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 eighteen years of age.

Seventhly. When she is unable to communicate consent.”

The definition lays down the exceptions as well.

Furthermore, Section 377 of IPC reads “Unnatural offences—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1 [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

b) How did the present definitions come up about?

The definition of rape was first laid down in Indian Penal Code, 1860, as most of the other offences. Section 375 of IPC 1860 defined rape focusing on non-consensual sexual intercourse with a woman against her will. However, this initial definition was quite narrow and gender-specific. Following this came the Criminal Law (Amendment) Act, 1983³. This Act widened the definition of rape to a much larger extend covering areas such as gang rape and custodial rape. This amendment came after the infamous Mathura Rape case wherein a 14–16-year-old tribal girl was raped by 2 policemen inside the police station when she had gone to file a case of her abduction.

In 2004, in the case of Sakshi vs. Union of India⁴, a public interest litigation was filed in the Supreme Court seeking a ruling that non-penile penetration should be classified as rape. Though the apex court dismissed this PIL, the Court’s encouragement to change the definition prepared the path for the change of law. This case highlighted the significance of protecting the privacy and identity of rape survivors and emphasized the need for witness protection measures to ensure access to justice for survivors.

³ The Jammu & Kashmir Criminal Law (Amendment) Act, 1983

⁴ 1999 CriLJ 5025, 1999 (5) SCALE 376, (1999) 6 SCC 591

Further amendments came after another infamous case, namely the Nirbhaya Gang Rape⁵ in 2012. It led to the introduction of the Criminal Law (Amendment) Act, 2013. This amendment expanded the definition of 'rape' as it was and introduced several key changes to the law. It replaced the term "rape" with "sexual assault" to include a wider range of non-consensual sexual acts. It recognized the concept of "genders other than female" as potential victims of sexual assault. It introduced stringent punishments, including the death penalty in cases resulting in the victim's death or leaving her in a persistent vegetative state. It criminalised acts such as acid attacks, stalking, and voyeurism.

The latest amendment⁶ came in 2018 which focused on strengthening the legal framework to address sexual offences and ensure the safety of women and children. It introduced the death penalty for the rape of girls under 12 years of age. It mandated the completion of rape investigations within a specific timeframe. It also established fast-track courts to expedite rape trials.

Another notable change was when Section 377 was abrogated and consensual sexual intercourse between 2 individuals of same-sex was decriminalised. Section 377 had made such acts of penetration illegal regardless of consent. This was repealed after the Supreme Court made a landmark decision in Navtej Singh Johar vs. Union of India⁷ (2018).

Even after all these changes, the definition of rape still has scope and the need to be broadened.

5. WHERE IS THE CHANGE NECESSARY?

WHAT IS ITS NEED?

I. Marital Rape

Marital rape is still not considered an "offence" under Indian laws. As of 2023, over 70 countries have criminalised this act, yet India isn't one of them. The law does recognise the said principle in case the spouse is below 15 years of age. However, why not for adults?

⁵ Mukesh & Anr vs State for Nct of Delhi & Ors on 5 May, 2017,

⁶ The Criminal Law (Amendment) Act, 2018

⁷ Navtej Singh Johar vs Union of India Ministry of Law and Justice on 6 September, 2018, AIR 2018 SC 4321; W. P. (Crl.) No. 76 of 2016; D. No. 14961/2016

In 2005, the Protection of Women from Domestic Violence Act, 2005⁸ was passed which does consider marital rape as a type of local violence. As per this Act, a woman can go to the court and get legal partition from her husband for marital rape. This act merely established marital rape as a ground for divorce or legal partition, rather than an offence.

In 2015, the issue of marital rape was brought upon in the Parliament. It was then that the idea of criminalising marital rape was dismissed with the view that "marital rape cannot be applied in the country since marriage was treated as a sacrament or sacred in the Indian society". However, if this notion is to be held true, shouldn't the individuals being involved in such a sacred ceremony be regarded as such by each other too? The prevalent belief that permission is assumed inside the institution of marriage creates an environment that ignores couples' autonomy and bodily integrity. Marital rape needs to be criminalised. Not only is it against the whole concept of "marriage being sacred", it is also violative of the basic rights of a citizen of India.

Fundamental Rights⁹ guarantee all citizens of India the right to privacy¹⁰ and to live a life of dignity¹¹. By virtue of these, women should have the freedom to not engage in sexual acts with any person they want, be it their husband. Additionally, allowing such a freedom isn't just a question of law, but rather also the morality of the country.

According to National Family Health Survey – 5 (2019-2021), "Among married women aged 18-49 who have ever experienced sexual violence, 83 per cent report their current husband and 13 per cent report a former husband as perpetrator." Among the 83 per cent of women, a large 84 per cent said that their husbands "physically forced her to have sexual intercourse with him even when she did not want to".¹² Another issue with the reports showing marital rape or sexual violence by the husband on the wife is the 'underreporting'. The NHFS also found that a large number of wives were unwilling to disclose such information and report the violence. Thus, this shows the urgent need for reform in case of marital rape.

⁸ Chapter II: *DOMESTIC VIOLENCE*, Section 3(d)(ii) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman

⁹ Part III of the Indian Constitution, Articles 12-35

¹⁰ Article 21 of the Indian Constitution

¹¹ *Id.*

¹² <https://www.thehindubusinessline.com/data-stories/data-focus/marital-rape-most-married-women-are-sexually-abused-by-their-husbands-says-nfhs-data/article65409875.ece>

II. Necrophilia

Necrophilia refers to a sexual attraction, fixation, or act involving sexual contact with a dead body. This act is morally and ethically wrong. It is criminalised in various countries, but India is not one of them yet again. While hearing a recent case on May 30th¹³, the Karnataka High Court held that having sexual intercourse with a woman's dead body will not attract the offence of rape. It was held that this offence was not punishable under Section 376¹⁴ of the Indian Penal Code as there is no provision in the IPC for it. Partially allowing the convict's appeal in a rape and murder case, a bench of Justices B. Veerappan and Venkatesh Naik recommended that the Centre should amend the IPC to protect the dignity of the dead. "It is high time for the Central government to amend the provisions of Section 377 of IPC " to include dead bodies of men, women, and animals, the court said. Additionally, Necrophilia presents a unique challenge to the Indian legal system, necessitating careful consideration of consent, morality, and respect for the deceased. While legal measures differ between jurisdictions, comprehensive legislation expressly addressing necrophiliac actions is urgently needed. By recognising the inherent violation of dignity and guaranteeing adequate sanctions for violators, communities can work to respect the rights of the deceased while also preserving the legal system's integrity. It must be understood that the act of necrophilia not only diminishes the dignity of the deceased but also fails to offer proper legal remedy for their relatives. It violates the deceased and his/her family's right to live with dignity.¹⁵

Necrophilia has seen a major uprising in the recent years. One of the most prominent cases was the gruesome Nithari serial killing¹⁶ case or the Surendra Koli vs State of U.P. case in 2006 wherein after investigation it was found that a businessman along with his servant had killed dozens of children and had sexual intercourse with the bodies afterwards.

In another horrifying case in 2019, A Bengal serial killer or the 'Chain Man' was given the capital punishment for killing a number of women and raping them. Police said that Sarkar, who is a married man and has three children, had allegedly even inserted sharp materials into the genitals

¹³ Rangaraju @ Vajapeyi vs State of Karnataka on 30 May, 2023

¹⁴ Punishment for Rape

¹⁵ Article 21, Constitution of India

¹⁶ AIR 2011 SUPREME COURT 970, 2011 (4) SCC 80, 2011 AIR SCW 3628, AIR 2011 SC (CRIMINAL) 608, 2011 (3) ALL LJ 203, 2011 (4) AIR JHAR R 606, 2011 (4) AIR KANT HCR 32, 2011 (2) CALCRILR 314, 2011 (2) SCC(CRI) 92, 2011 (2) SCALE 490, (2011) 100 ALLINDCAS 132 (SC), 2011 CALCRILR 2 314, (2011) 1 CHANDCRIC 508, (2011) 1 ORISSA LR 917, (2011) 1 DLT(CRL) 607, (2011) 2 CRIMES 56, 2011 CRILR(SC MAH GUJ) 253, (2011) 1 CRILR(RAJ) 253, 2011 CRILR(SC&MP) 253, (2011) 3 MAD LJ(CRI) 606, (2011) 2 RECCRIR 1, (2011) 1 CURCRIR 450, (2011) 2 SCALE 490, (2011) 73 ALLCRIC 446

of some of his victims after killing them.¹⁷

III. Gender Neutral Laws

Even after so many changes and amendments in the past, rape laws remain a law against men in theory. There is an important and essential need for it to become gender neutral as soon as possible. Section 375 defines rape as “an act committed by man.” Why is it that the society and justice system still fail to recognise that rape is not limited to any gender or sex. Recently a lot of awareness is being spread about rapes and sexual offences being committed against men, not only by other males but by females as well. It is high-time that the justice system starts accounting for such instances and provides males with a statutory remedy for such injustices against them.

Furthermore, the third gender has been given recognition in India, however they are not safeguarded against sexual offences or offences such as law, as of today. Additionally, enacting gender-neutral laws would entail extensive adjustments to legal definitions, procedures, and educational activities. It must be understood that it is not easy to implement gender-neutral rules in the context of rape. One major source of concern is the possibility of abuse or false charges, particularly in jurisdictions with insufficient legal safeguards and due process. However, it is critical to address these issues while also acknowledging that false charges are uncommon and should not be used to undermine the urgent need for gender-neutral legislation. To enable successful application and understanding of the new legal framework, considerable legal reform, training for legal professionals, and awareness campaigns would be required. It is high time that laws are made more inclusive of all genders with the increasing social awareness that one has in today's liberal society.

6. SUGGESTIONS

The Parliament needs to discuss these issues and work on them as soon as possible, bringing about a much required and needed change. Moreover, citizens of the country should try to bring in awareness regarding such issues and any others they deem important.

As of now, Section 375 and other laws relating to law and sexual offences should be made gender-neutral to begin with so that, not only females or males, but people belonging to the third gender have remedy available to them as well in cases of harassment.

¹⁷ <https://www.ndtv.com/india-news/bengal-rapist-and-serial-killer-sentenced-to-death-8-more-cases-pending-2258522>

Section 377 should be amended to include other cases of “unnatural sex” as well in case some definition does not fall within the ambit of ‘rape.’ Offence of ‘Necrophilia’ may not fall under Section 375 directly; however, it can be included under Section 375. This is because a dead person cannot essentially give consent and the act cannot be said to be done without their will as the person does not have any life or decision. Such an act could, however, constitute the offence of “unnatural sexual intercourse” as given in Section 377. Furthermore, for marital rape to be decriminalised, Exception 2 of Section 375 of IPC needs to be removed which clearly states that “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape”

7. CONCLUSION

This research work has thrown light on the urgent need to widen the concepts outlined in Sections 375 and 377 of the legal system, with a special emphasis on marital rape, necrophilia, and the relevance of gender-neutral regulations. The definition of rape has changed a lot over the years but a need for change is still felt. Numerous other aspects relating to sexual offences are still not covered under this definition and a lot of times, offenders and criminals walk free due to this unclear definition.

A question we need to ask ourselves here is that why is that an amendment or change in law comes only after a heinous crime has been committed? An argument might be that the need for a law on a certain topic might not be felt until it’s been done but numerous areas have already been highlighted over the years where a change is required. Marital rape, necrophilia and rape against men aren’t new crimes. They have happened in the past and are happening currently as well. We should realise the urgency of changing the current definition of rape and sexual offences so no criminal can walk free and no victim can walk unjust. In conclusion, the necessity of broadening the principles laid down in Section 375 and 377 to meet the evolving needs of society must be recognised and worked upon by the justice system to ensure equal protection under the law and safeguard the fundamental rights of individuals.

In many jurisdictions, marital rape, a horrible crime that impacts countless people, goes unrecognised and untreated. By extending Section 375's principles to include marital rape, it is important to recognise that permission must be freely given in all forms of sexual encounters, regardless of marital status. This step is critical in fostering gender equality, individual rights, and

delivering justice for marital rape survivors. Furthermore, the study reveals a worrisome vacuum in regulation surrounding necrophilia. The lack of concrete regulations addressing this heinous crime not only diminishes the dignity of the deceased but also fails to offer proper legal remedy for their relatives. It is critical to expand the concepts outlined in Section 377 in order to expressly criminalise necrophilia, recognising it as a violation of the sanctity of the dead and protecting society norms and values. Furthermore, the importance of gender-neutral laws cannot be emphasised enough. The current legal system frequently reinforces gender stereotypes and discrimination. By broadening the gender-neutral concepts of Sections 375 and 377, the law can offer equal protection and justice for all individuals, regardless of gender or sexual orientation. Within the legal system, this action will encourage inclusivity, equality, and respect for individual rights. Finally, it is clear that the ideas outlined in Sections 375 and 377 regarding marital rape, necrophilia, and gender-neutral laws need to be expanded. Addressing these critical challenges allows countries to aim for a legal system that protects human rights, equality, and justice for all. Legislators, policymakers, and society as a whole must recognise the importance of change and endeavour to create a legal framework that represents these core values. Only by implementing significant changes will we be able to secure a more just and equal society for future generations.

