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# **EXAMINING THE SCOPE OF GENDER NEUTRALITY IN RAPE LAWS A CASE COMMENT ON PRIYA PATEL V. STATE OF MADHYA PRADESH**

AUTHORED BY - TEJASVINI HARITH

## **Introduction**

Conversations on rape in India are necessary. In the year 2021 alone, India registered 31,677 cases of rape. In the year 2020, it was 28,046.<sup>1</sup> With regards to crimes against women, rape is at fourth place. However, these figures, as reported by the National Crime Records Bureau are potentially incomplete. The inhibitions are with respect to the demography of the data group. The rape laws of India are designed as a crime attributing roles to each gender. The man playing the part of the perpetrator and the woman playing the part of a victim. Is it really a stretch of the imagination to consider the offence of rape beyond this framework? The short answer is no. Rape is a violation of a person's bodily autonomy. And that is not restricted to gender. Neither as a perpetrator nor as a victim. The Indian Judiciary stumbled upon one such case which begged to redefine rape beyond its narrow scope. This was the case of *Priya Patel v. State of M.P.*<sup>2</sup> However, the verdict was less than admirable. Through this piece of writing, I will highlight the deficiencies in the not just the judgement, but also the laws that seek to protect victims of rape. I shall also attempt to make a case to expand the definition of rape beyond the present paradigm as a means to protect the bodily autonomy of people who do not conform to the same.

## **The Case of Priya Patel v. State of Madhya Pradesh**

A woman was returning home from a sports meet via Utkal Express. At the station, she met one Bhanu Pratap Patel who claimed to have been sent by her father to pick her up. Feeling feverish however, she accompanied him to his house. This is where she was raped. While she was being raped, the appellant

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<sup>1</sup> 1, CRIME IN INDIA, 262, (National Crime Records Bureau 2021)

<sup>2</sup> *Priya Patel v. State of M.P. & Anr.*, (2006) 6 SCC 263

Priya Patel witnessed the incident. Despite the pleas of the woman to be saved, the appellant slapped her, shut the door, and left the place. Bhanu Pratap Patel was charged under Section 323 and 376 while the present appellant under Section 323 and 376(2)(g).

## The Revision before the High Court of Madhya Pradesh

The validity of the charges against Priya Patel was contested in the High Court of Madhya Pradesh via a revision. The High Court held that although a woman may not be charged for the commission of rape, she may be prosecuted under the offence of gang-rape if she facilitates the same. The court reasoned that it was in accordance with Explanation 1 of the concerned section.

## The Verdict of the Supreme Court of India

The Supreme Court felt differently from the High Court. One must note however, that they relied on no precedents, scholarly articles, journals, or other legal texts rather, they relied more upon interpreting the literal text of the law which thus, provided for the following judgement.

Firstly, they held that rape is an act performed by a ‘man’ upon a ‘woman.’ As a result, any notion to the contrary was not considered. This is in line with Section 375 which, verbatim, states, “*Rape— A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: —xx xx xx xx xx*”

*Explanation. —Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape”<sup>3</sup>*

As per Section 376:

“(2) *Whoever, --xx xx xx xx xx*

*(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:*

<sup>3</sup> Indian Penal Code, 1860, §375, No. 45, Acts of Parliament, 1860

*Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years, Explanation I.-- Where 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.”<sup>4</sup>*

While interpreting the language of Section 376(2)(g), the court declared that it was “conceptually inconceivable” for a woman to commit rape. To explain this, they zoomed into the phrase “common intention” within Section 376 and its interpretation according to Section 34 of the Indian Penal Code.

As per Section 34:

*“Acts done by several persons in furtherance of common intention. —When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.”<sup>5</sup>*

Within Section 376(2)(g), the phrase “in furtherance of their common intention” was construed as the common intention to commit rape. While the court recognized that the nature of acts in consonance with ‘common intention’ may differ, the court held that a woman cannot be said to have the intention to commit rape, reiterating the notion that it was conceptually inconceivable. Therefore, the charges against the appellant under the Section 376 were dismissed and it was left upon the trial court and high court to charge her for abetment to rape.

## **The Issue with the Priya Patel Judgement**

Considering the uncommon nature of this case, it is astonishing how the verdict delivered was almost indifferent and lacked any sense of judicial inquisitiveness. It is curious that the Court did not make a single reference to precedents, jurisprudential texts etc. The Court failed to go beyond the literal

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<sup>4</sup> Indian Penal Code, 1860, § 376, No. 45, Acts of Parliament, 1860

<sup>5</sup> Indian Penal Code, 1860, §34 376, No. 45, Acts of Parliament, 1860

words of the Code and dusted their hands off the issue in a brief judgement. There is also an unsettled contradiction within the law itself, that is, Section 376 uses the word 'persons' to direct liability in gang rape. This is in contrast to Section 375 which explicitly uses gendered terms. Therefore, one may interpret the former as a gender-neutral offence. Yet, the bench paid little regards to the same.

The simplicity of the facts seemingly masks the wider debate it is a portal to, which the judge clearly missed. And that is of redefining rape as a gender-neutral offence.

It is evident that a woman was guilty of having facilitated the commission of rape, however, she escaped with little liability under the penal provisions of the same. The fallacious nature of the judgement can be attributed to not only the lack of imagination on part of the judges but also the inadequacy of the penal provisions for rape. The following sections thus, strive to challenge the 'conceptual inconceivability' of a woman forming the intention to rape.

## **Assessing the Progress made by Legislation towards Gender Neutrality: A Female Perpetrator Perspective**

A case to be noted is *State v. Sheeodayal*<sup>6</sup> wherein, the judges opined that a woman was capable of outraging another woman's modesty, in the year 1956. Though not about rape, it was a first of its kind judgement in making a woman liable for the same. For the longest time, the benchmark for rape however, was penile penetration. In the year 1996 in the case of *Sudesh Jhaku v. K.C. Jhaku*,<sup>7</sup> the court reflected upon the inadequacy of the definition of rape. The definition then was restricted only to penile penetration of the vagina. The contention here was that non-penile penetration, be it with an object or any other part of the body, of any orifice of the victim, was treated as less than rape with little regards to the grievousness of the same. The judge of the Delhi High Court, Jaspal Singh, also used this opportunity to criticize the narrow definition of rape and proposed for the first time, complete gender neutrality of rape laws in India. The debate to include non-penile penetration was carried forward in the case of *Sakshi v. UOI*<sup>8</sup> in 1999, albeit, with respect to protection of minors and

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<sup>6</sup> State Government, Madhya Pradesh v. Sheeodayal Gurudayal, 1956 CrLJ 83 M.P

<sup>7</sup> Smt. Sudesh Jhaku v. K.C.J. And Others, 62 (1996) DLT 563

<sup>8</sup> Sakshi v. Union of India (Uoi) And Ors, 1999 CriLJ 5025

women from sexual abuse. This issue was handed over by the Supreme Court to the Law Commission which in turn, produced the 172<sup>nd</sup> Law Commission Report in the year 2000.<sup>9</sup> The Report was one that proposed complete gender neutrality of rape laws being driven by the need to protect young boys from sexual abuse. The Justice Verma Committee in 2012 was formed following the Nirbhaya Rape Case. This committee too, was in favour of extending the definition of rape beyond penile- vaginal penetration and proposed gender neutrality in the rape laws of India. These recommendations guided the Criminal Law (Amendment) Act of 2013 where the definition of rape was finally broadened to include any form of penetration though retaining the gender specific nature of the crime.<sup>10</sup> It is also relevant to note that the driving factor for gender neutrality was want to protect minor boys from abuse. That manifested itself into the Protection of Children from Sexual Offences Act which is gender neutral with regards to the victim.<sup>11</sup>

Legislation on rape has made progress since 2006. However, even today, the law fails to recognize that a woman may perpetrate rape like a man may be the victim, although, the latter has received more recognition than the former. The definition of rape has expanded beyond penile penetration, yet the law does not recognize a woman can do the same. Furthermore, non-consent of a male in heterosexual intercourse is yet to be construed as rape in society at large let alone laws in India. This is owing to another deficiency in the rape laws. And that is regarding what it means to rape or be raped.

## **Redefining Rape Beyond the Paradigm of Gender Specific Roles of the Offence**

The lack of imagination on part of the Court may be attributed to how society is conditioned to perceive rape. The meaning of rape in India goes above and beyond the violation of bodily integrity and includes social connotations of dishonour upon the woman, a violation of her modesty and purity etc.<sup>12</sup> As observed in *Rafiq v. State of UP*:

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<sup>9</sup> ONE HUNDRED AND SEVENTY SECOND REPORT ON REVIEW OF RAPE LAWS, (Law Commission of India, 2000)

<sup>10</sup> The Criminal Law (Amendment) Act, 2013, § 9, No. 13, Acts of Parliament, 2013

<sup>11</sup> The Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012

<sup>12</sup> Harshad Pathak, *Beyond the Binary: Rethinking Gender Neutrality in Indian Rape Law*, 11, *Asian Journal of Comparative Law*, 367-397, (2016)

*“When a woman is ravished [in rape,] what is inflicted is not merely physical injury, but “the deep sense of some deathless shame.” ... Rape for a woman is deathless shame and must be dealt with as the gravest crime against human dignity.”<sup>13</sup>*

Another case *State of MP v. Madanlal*, it was stated that

*“[rapes] are crimes against the body of a woman which is her own temple. These are offences which suffocate the breath of life and sully the reputation. And reputation, needless to emphasise, is the richest jewel one can conceive of in life. No one would allow it to be extinguished. When a human frame is defiled, the “purest treasure” is lost. Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay.”<sup>14</sup>*

Viewing rape from this lens creates an invisible restriction on who is in the position to be a victim and who the perpetrator. It is only a woman’s honour that is extinguished in rape and it is only a man who possesses the ability to do so. Considering this interpretation, it becomes harder to accommodate the multi-dimensional nature of rape.

The remedy lies in redefining rape not as a violation of a woman’s chastity but as the violation of a person’s bodily integrity, whoever the perpetrator or victim may be.<sup>15</sup> As put in the case of *Bodhisattwa v. Shubra Chakraborty*, the Supreme Court held that “rape is a crime against basic human rights and is also violative of the victim’s most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21.”<sup>16</sup>

This definition differs from the above two notions of rape by virtue of taking a human rights approach over a socially constructed approach. Ameliorating the social constructs associated with rape is one possible way to bring more forms of rape within the ambit of the law.<sup>17</sup> This is an opportunity to hold more open discussions on what rape is and what it is not. Transgressing the personal space of an individual is rape. No societal constructs, no idealistic framework, just this bare definition is what it means to be raped. Thus, a female perpetrator, a male victim, a transgender perpetrator, a transgender

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<sup>13</sup> Rafiq v. State Of U.P, 1981 AIR 559

<sup>14</sup> State Of M.P v. Madanlal, (2015) 7 SCC 681

<sup>15</sup> *Id.* at 11

<sup>16</sup> Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty, 1996 AIR 922

<sup>17</sup> McKeever, N. *Can a Woman Rape a Man and Why Does It Matter?* 13, *Criminal Law, Philosophy* 599–619 (2019).  
<https://doi.org/10.1007/s11572-018-9485-6>

victim, homosexual rape would all fall within this inclusive definition of rape. The ‘conceptual inconceivability’ of a female perpetrator would not find merit in this definition of rape.

## The Legacy of the Priya Patel Judgement

Despite having been laid out by the Supreme Court of India, subsequent cases have been skewed with regards to following this precedent. In the case of *State v. Meena Devi*,<sup>18</sup> the Sessions Judge held the defendant liable under Section 376 of the Indian Penal Code for shoving the prosecutrix into a room and bolting the door from outside, thereby facilitating the commission of rape. However, in *State of Rajasthan v. Hemraj & Anr.*<sup>19</sup> in the year 2008, the second appellant was held not guilty by the Supreme Court of India on the exact same principle of the Priya Patel judgement. The number of cases on this topic are considerably few and have done little to stir up the nation. Want of protection against a female perpetrator is a rare issue thus, the penal provisions are relatively undisturbed. However, had a man performed the exact actions of Priya Patel, he would have been liable under Section 376. There is quite apparently a double standard. The appellant escaped liability solely by virtue of being a woman.

While the aforementioned sections provide arguments against the ‘conceptual inconceivability’ of a woman forming the ‘intention’ to rape, a pertinent question would be with regards to the effect of gender-neutral rape laws on society. This is not a novel concept. Over seventy-seven countries across the world have gender neutral rape laws.<sup>20</sup> These include the likes of the United States of America, the United Kingdom, Denmark, Sweden and more. Taking the case of Sweden, the nation amended the definition of rape to ‘sex without consent’ in 2018. No ifs and buts. As a result, the conviction rate for rape rose by over 75%.<sup>21</sup> Any ambiguity in the minds of the victims about the legitimacy of their experience was dispelled with this amendment. Cases like Priya Patel, though rare, give an opportunity to discuss the feasibility of such changes within our own country.

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<sup>18</sup> *State v. Meena Devi*, Sessions Case No. 87 of 2006

<sup>19</sup> *State Of Rajasthan v. Hemraj & Anr.*, (2009) 12 SCC 403

<sup>20</sup> Anushka Yadav, *Gender Neutrality of Rape Laws*, 4 (4) IJLMH Page 2155 - 2160 (2021), DOI: <https://doij.org/10.1000/IJLMH.111604>

<sup>21</sup> Emma Batha, *Rape conviction rates rise 75% in Sweden after change in the law*, REUTERS, (Oct. 29, 2022, 11:53 PM), <https://www.reuters.com>

However, there are apprehensions. Flavia Agnes in her report *Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law* raised justified concerns that the implementation of gender-neutral rape laws from a female perpetrator point of view would possibly lead to increased sexual harassment to an already burdened female population.<sup>22</sup> It may subject the women to more unnecessary hurdles in filing rape complaints and be manipulated as another tactic to shift the fault on the victim. While justified in her concerns, the purpose of gender neutrality in rape laws is to extend the span of justice to victims of rape who do not conform with the societal standards and framework of it. Furthermore, her concerns are still speculative as it does not factor in the willingness of people to come forth as victims in a non-conforming definition of rape.<sup>23</sup> The right to preserve one's bodily autonomy is not restricted to a specific gender. The laws cannot be blind to that. In a world where bodily autonomy is accorded a higher priority over gendered notions of sex, Priya Patel, a woman, would have been held guilty of facilitating rape with the intention to do so. The promise of law is to protect the very citizens who are governed by the same. According protection to a select group for a non-gendered offence would go against the promise of Article 14 being right to equality.<sup>24</sup> Making the rape laws gender neutral is a possible path to redefining the patriarchal notions of rape and might even take the bite out of its perception as a means to establish male dominance and superiority upon a female submissive object.<sup>25</sup>

The judges of the Priya Patel case just failed to explore the possibilities.

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<sup>22</sup> Flavia Agnes, *Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law*, 3, *Eco. & Pol. Wk.*, (2002), <http://www.jstor.org/stable/4411809>

<sup>23</sup> Pathak, *supra note 11*

<sup>24</sup> INDIA CONST. art. 14

<sup>25</sup> McKeever, *supra note 1*