

The Deep Rooted Gender Biasness in Section 375: Analysis

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ABSTRACT

In this research paper the researcher basically deals with the Section 375 of the Indian Penal Code, 1860. The researcher aims at analyzing this section in detail. The researcher will be dealing with meaning as well as the essential elements of rape. In this era, each and every country is focusing on the concept of equality. Even our constitution provides for the equality under various articles but our Indian Penal Code is still gender biased. We often call women as a weak gender and frame laws for their empowerment. But the term equality does not denote only upliftment but rather it denotes equal status. In our country the fake feminism is going on and the main reason of that is that laws are excessively favoring women. The researcher through this paper also makes an attempt to highlight the various provisions of the constitution that are being violated in reference to Section 375 of Indian Penal Code, 1860. An attempt is also made to highlight the necessity to make this section gender neutral. The recent development regarding this subject matter will also be focused under this research paper and researcher also aims at finding the view of Supreme Court on the same.

KEYWORDS: Rape, Men, Biased, Gender Neutral

INTRODUCTION

Women are given many rights in present scenario as we are moving towards development we are also emphasizing on the concept of gender equality. But in order to empower women we are somewhere neglecting other genders. We are making laws for protection and upliftment of the women but our some of the laws entirely favors women and neglects man. The Section 375 of the Indian Penal Code, 1860 deals with the concept of the rape. In layman's language rape means to force someone to have sex when they are unwilling, using violence or threatening behaviour. Under IPC according to the definition its laid that a "man is said to commit rape" and then essentials are given. Howsoever it's very controversial that we claim for equality and here in this section we are assuming women to be always victim. We do not recognize male or transgender as the victim. It's high time to make this law gender neutral as in this kalyug even the male as well as transgender are raped.

Rape Under IPC

In layman's language rape means to force someone to have sex when they are unwilling, using violence or threatening behaviour.¹ When we think about the word 'rape' we often make perception in our mind that women must be the victim and men must be the offender. But it's not every time the same. In our changing world the filthy truth is that even men are being raped by men. It is the Section 375 of the IPC that deals with the term rape. The cases of rape have been increased in India in recent times. According to Section 375 of the IPC:-

¹(Sept.31,2019),<https://dictionary.cambridge.org/dictionary/english/rape>

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- A man is said to commit "rape" if he—
- 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
 - 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
 - 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
 - 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.
Explanation I.—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.

Exception I.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.²

Meaning of Sexual Intercourse

It implies penetration to any extent, of the penis into the vagina, mouth, urethra, or anus of a female. The phrase “to any extent” includes mere slightest or partial penetration of male organ into the vagina, mouth, urethra, or anus of a female is sufficient to constitute sexual intercourse.³

The causes of Rape in India are:-

➤ Blaming for pro active clothing

In India often the women are judges on the basis of clothes they wear. If a women wear shorts clothes then its automatically assumed that she wants to expose herself in inappropriate perform and that her clothing is itself a consent.

➤ Encouraging rape victims to compromise

Whether it be male or female we Indians mostly believe in the concept that let the things remain in house to maintain the respect and dignity and to create havoc by filing case. This encourages the rape offender. Often compromise in the name of reputation is found to be the best solution for this.

➤ Lack of self control

The offence of rape is committed against a men or women because people lack self control. Often sexual videos that arouse you sexually are available on the Internet and then people losses self control. They often lose their self control and become animal and they feel so provoked that they just need to have sex then no matter that whether they get in the right or the wrong way.⁴

➤ Essentials ingredients to constitute the rape

The following are the essential to constitute rape:-

• Against her will

An offending act is said to be done “against will” of a women when it is done despite her resistance and opposition. Will and consent seem to be synonymous but are distinct from each other. Though every act done “against the will” of a

person will also mean that it is done “without the consent” of the person, an act done “without the consent” of a person does not necessarily mean against the will.” “Without consent” would denote an act being done in spite of opposition of the person. The element of active opposition will not be present when something is done against the will of the person.⁵

• Without her consent

It implies exercise of free and untrammled right of the former to forbid or withhold what is being consented to.

When a women who has attained the age of majority gives her consent to man for sexual intercourse prior to penetration then it is not rape. No matter how much force is subsequently used by him, no matter how much reluctance is developed by her subsequent to penetration.

According to Section 90 of the IPC, the it does not amount to consent if given under Consent known to be given under fear or misconception.—A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception;

or Consent of insane person.—if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent;

or Consent of child.—unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.⁶

• Consent obtained under fear of death or hurt

If the consent of women is taken by putting the woman or any other person whom she is interested in the fear of death or hurt is not consent would not amount to rape.

• Consent obtained by Fraud

The consent obtained by the fraud is no consent. To attract provision of clause 4 its necessary to prove that consent was given by prosecutrix under the belief that accused was another person to whom she believed herself to be married. When consent is given be her for sexual intercourse in the belief that she had been married to the accused, the clause is not attracted.⁷

Example: A consent given by a women under assumption that a medical practitioner through sexual intercourse is medically treating her ailment then this won't be a valid consent.

Is promise to marry a victim a misconception of fact vitiating her consent?

Sexual intercourse with a girl above sixteen years of age who voluntarily agrees for sexual intercourse on assurance of marriage does not amount to rape.⁸

⁵ State of UP v. Chhoteylal,(2011) 2 SCC 550

⁶ Indian Penal Code 1860,S.90

⁷ Krishraj v. State,(1969)

⁸ Hari Majhi v. State of West Bengal,1984

² Indian Penal Code,1860,S.375

³ PSA Pilla's, Criminal Law,(14thed.),2019

⁴ PSA Pilla's, Criminal Law,(14thed.),2019

Sexual intercourse with a graduate, who is aware that appellant is already married but is willing to start home with him, cannot be said that consent is obtained by fraud.⁹

Consent for sexual intercourse induced by the promise of marriage is not the true consent, if it is proved that accused from very inception of making promise had no intention to marry her.¹⁰

• **Consent of Insane or Intoxicated Woman**

If a woman is insane or under intoxication then it means she is not in her senses. Then if someone tries to obtain her consent then it won't be a valid consent.

Illustration:- A and B are at pub. A is woman and B is man. A is drunk and not in her senses. B ask A for sex. Here A under intoxication gives her consent for the same. Here the consent of the A cannot be said to be valid as it is given under the effect of intoxication.

• **Consent of women under 18 years of age**

It provides that sexual intercourse with a woman under eighteen years of age will amount to rape, whether it is done with or without her consent.¹¹

The objective behind such provision is that the consent of minor is taken to be no consent. A person is said to be minor because he is not mature enough to understand the consequences of an act or the meaning of the proposed act. Its only after 18 years that a person becomes mentally develop to understand the consequence of the act and is in position to make a right decision.

➤ **Biasness of Section 375 of the IPC**

We often call out for the equality. But here the question is that whether laws are give equal protection to all? The answer is no. The Section 375 of 1860 neither recognizes man as the victim and not transgender as the victim.

Attempt to make S.375 as gender neutral

In 2013, the Congress government passed an ordinance which substituted 'sexual assault' for 'rape'. This ordinance made the recognition of male as victims and female as perpetrators but the word 'rape' as outlined in S.375 of the IPC was a significant omission in case of males. The offence of rape does not recognise men as victims and female as perpetrators even today. This shows that the centre was reluctant to make rape laws gender neutral in nature and hence, used the term "sexual assault" when males become victims. In 2013, Justice Kailash Gambhir had made a remark that women out of anger and frustration tend to convert consensual sex as an incident of rape which defeats the very purpose of S.375.¹²

➤ **Recent development**

The petition was filed by NGO named Criminal Justice Society of India through, Advocate Ashima Mandela,

⁹ Kondapalli Laxman Rao v. State of Andhra Pradesh,1999

¹⁰ Anurag Soni v. State of Chhatisgarh, AIR 2019 SC 1857

¹¹ Bishnu Dayal v State of Bihar, AIR 1981 SC 39

¹² Mayank Barman, Geneder biases in the Indian Penal Code: A look at the provisions ,(Oct.1,2019,3:31 PM),<https://www.youngbhartiya.com/article/gender-biases-in-the-indian-penal-code-a-look-at-the-provisions>

contending that Section 375 violates Article 14,15 and 21 of the Constitution as it does not account for rape of men and transgender.

It was laid in plea that the definition of rape under S.375 of the IPC is the ultra vires for being discriminatory and violative of Article 14, Article 15 and Article 21 of the Indian Constitution.

It was submitted by the petitioners that S.375 of the IPC applies only to women as victims and men as perpetrators. It does not take into the account non consensual sexual assault inflicted on a woman to a man, by transgender to a man or by man to another man.

A bench headed by Honorable Chief Justice Ranjan Gogoi and Justice SK Kaul said that the issue raised in the petition is the subject matter of legislature and not of the judiciary.¹³

Why Section 375 is gender biased?

• **Biasness in definition itself**

According to Section 375 its definition start with a "man is said to commit rape if he". Here in this section it is clearly specified that only man can commit rape and then in the conditions given we only talk about the women as the victim. The definition itself recognizes male as the to offenders and female as the victims.

• **Promise of marriage**

If a man promises a woman to marry and indulges in sexual intercourse with her and then if he refuses to marry her then it amounts to rape. Similarly let's take a case. Suppose there is a boy who is of conservative mindset and does not believe in the idea of sex before marriage and still agrees to indulge in such activity only on the insistence of women who promises him to marry but doesn't marry, and then this should be also taken as a rape.

• **Age of Consent**

If a boy and girl who are of 16 years have a consensual sex then also the boy will be charged of rape. It provides that sexual intercourse with a woman under eighteen years of age will amount to rape, whether it is done with or without her consent.¹⁴ Here both the person are of same age and both are indulged in the same activity by the consent, then why one person is punished and one person is free for a similar act.

Is S.375 of IPC violative of Indian Constitution?

The Section 375 of IPC can said to be violative of:

• **Article 14**

Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.¹⁵ It provides for equality before law and equal protection of law. The definition clearly violates it.

¹³Times of India,(Oct.1,2019,8:00 PM) <https://timesofindia.indiatimes.com/india/sc-dismisses-plea-for-making-rape-law-gender-neutral/articleshow/62759126.cms>

¹⁴ Bishnu Dayal v State of Bihar, Air 1981 SC 39

¹⁵ Constitution of India,1950,Article14

- **Article 15**

Article 15 is a fundamental right that prohibits the discrimination by the state against any citizen on grounds 'only' of religion, caste, race, sex and place of birth. The word sex is clearly mention here but Section 375 recognizes only female as victims.¹⁶

- **Article 21**

Everyone has the right to life and personal liberty. The right to reputation also comes under right to life and personal liberty. If a man does not by his wish is involved in sexual activity then his privacy is infringed but absence of few provision makes it ultra vires of this Article.

Why do we need to makes this section gender neutral?

- **Equality**

The term equality should not be vague but should be used in real terms. If we can make laws to protect women then we should make laws equally to protect men. No law in the country should be gender biased. The right to equality is a fundamental right and it is right for all and not for specific group.

- **Ensure Justice**

In order to ensure justice in society it's important to make this section gender neutral. Justice given under preamble clearly lays that it is for all the citizens. It's the duty of the parliament to make laws that ensures justice to all.

- **Maintain congenial environment**

A congenial environment can be maintained in country only if proper justice is ensured. Today we are striving for women empowerment. A day will also come when we are going to strive for right of the males and transgender. In order to avoid disharmony in society and to maintain peace it's important that biasness should be removed.

CONCLUSION

This can be concluded that the Section 375 of the Indian Penal Code, 1860 recognizes rape as the offence against women and hence does not provide for rape committed against men or transgender. The Section 375 is violative in nature of provision of Article 14, 15 and 21 of the Indian constitution. The term equality does not mean empowerment of women but it means equality before law and equal protection of law. In India we always call out for women empowerment but that does not mean that other genders should be overlooked. Instead of promoting negative feminism it's high time to make our laws gender neutral and promote equality among all. Our legislature needs to pay an attention over this.

¹⁶ Constitution of India, 1950, Article15