

Rape: Violation of the Chastity or Dignity of Woman? A Feminist Critique of Indian Law

By Usha Tandon and Sidharth Luthra
FICHL Policy Brief Series No. 51 (2016)

1. Introduction

When sexual violence against a woman is inflicted, how should the law conceptualise and formulate that offence? Should such an offence require proof of the violation of the chastity or the dignity of the woman?¹ If it is based on chastity and virginity, the offence is perceived as being against the honour of family, especially the father or the husband, reducing the woman to mere property. If it is based on dignity, it is perceived as being against the person of the woman and is built upon a woman's understanding of abuse and violation of her bodily integrity. Should the offence of rape be based on a gender-neutral, gender-protective or a gender-corrective model of equality?

This policy brief argues that, since rape is a form of gender based violence, the law should be built upon women's paradigm and experiences, perceiving rape as a violation of the dignity and sexual autonomy of the woman rather than as an infringement of her virginity or chastity. Based on this argument, the Indian law on rape is critically examined in the following pages.

2. Setting the Context

2.1. Chastity and Modesty-Patriarchal Notions

In Indian society, which is essentially patriarchal, notions of chastity and morality are gender based notions associated with women who are required to go through these tests time and again,² whereas men are exempted from such checks and enjoy their lives with impunity. The chastity and morality of women is linked with the ideology of honour. Both men and women embody notions of honour, but differently, as the woman is the repository and the man is the regulator of this honour. The honour so posited in a woman is, importantly, located in her body.³ In the name of culture, tradition

- 1 The authors use 'dignity' as a feminist expression, whereas the term 'chastity' is understood as patriarchal.
- 2 During the period of exile of Lord Ram, his wife Sita was subjected to fire-ordeal to prove her chastity when she rejoined him after being rescued from the kidnapper Ravana.
- 3 Prem Choudhary, *Contentious Marriages, Eloping Couples*, Ox-

and religion,⁴ the chastity of women is regarded as being of prime importance. Virginity in a girl, by and large, is still a pre-requisite for her marriage, whereas men and boys are beyond these parameters and are not obliged to observe the yardsticks of chastity and morality in the same way.

It is believed that the offence of rape ruins the chastity of the woman and brings dishonour to the family. Thus the rape victim is disqualified from social or married life. An unmarried girl after rape is not regarded fit for marriage, as she is considered to have lost her virginity. A married woman who is raped is divorced or rendered homeless by the husband, as she has lost her chastity and honour, and also brought shame and disrepute to the family. In some cases a victim of rape goes as far as ending her own life. For no fault of the victim she is subjected to extreme maltreatment and deprivation.⁵

2.2 Dignity as a Feminist Expression

In the context of sexual assault, the term 'dignity' in relation to woman takes cognisance of the violation of her bodily integrity, of self, and of her right to live a dignified and safe life. It regards rape as a dehumanizing crime against her body rather than a crime against the property of her father or husband. Rape in this context is seen as a crime against basic human rights of women that destroys the persona of a woman and pushes her into mental and physical trauma accompanied by fear, shame and stigma. Rape as an infringement of the dignity of a woman takes into account the humiliating, terrifying and traumatic event in a woman's life that can lead to an existential fear and a state of powerlessness.

2.3. Rape as Gender Based Violence

Gender based violence ('GBV') is as a form of brutal dis-

- ford University Press, New Delhi, 2007, p. 16.
- 4 Kanad Sinha, "Be it Manu, be it Macaulay: Indian Law and the 'Problem' of the Female Body", *Journal of Indian Law and Society*, 2014, vol. 5, p. 74.
- 5 Vimala Veeraraghavan, *Rape and Victims of Rape: A Socio-Psychological Analysis*, Northern Book Centre, New Delhi, 1987, p. 1.

crimination against women. It is defined by the Committee under the 1979 Convention on the Elimination of All Forms of Discrimination Against Women as “violence that is directed against a woman because she is a woman or that affects women disproportionately”, thereby underlining that violence against women is not something occurring to women randomly, but rather an issue affecting them because of their gender.⁶ Furthermore, the 1993 Declaration on the Elimination of Violence against Women specifies that violence against women is a manifestation of unequal power relationships between men and women and a violation of women’s human rights.⁷ Rape is a universally recognized form of GBV which is inflicted against a woman because she is a woman.

The desire for sex or lust is not always the sole explanation of rape. Rape is an issue of power and control, with men using physical and other forms of violence to maintain a dominant position over women. In some cases, it is a manifestation of rivalry between two or more groups. Incidents of rape can be politically motivated to inflict retribution on political opponents. The targeting of women for gender-specific violence is not unique to the armed conflict. The use of rape as an instrument of war to terrorise the enemy has been widespread and pervasive throughout history.⁸ Feminist scholars such as Susan Brownmiller, Andrea Dworkin, Catherine MacKinnon, Sharon Marcus, and Susan Estrich have demystified rape as a crime of power and control rather than one motivated solely by sexual desire or passion.

3. Rape Law: Should it be Gender-Neutral or Gender-Specific?

The concept of equality has traditionally been understood as ‘treating likes alike’, aiming to avoid differential treatment of similarly situated persons. Based on this concept, gender equality may have two approaches. The first approach – known as ‘formal equality’ or ‘gender neutral’ – ignores the gender differences between men and women, treating them ‘alike’; the second approach acknowledges these differences by treating them ‘not alike’. The problem with the formal approach is that it does not take into consideration biological and gender differences between women and men and disadvantages to women in the long run. In its desire to treat men and women equally, it promotes ‘gender blindness’ which reinforces dominant standards based on male experiences and interests. As a result, there is an additional burden on women to achieve male standards when in fact the social and economic reality of women is not similar to that of men. The difference model of equality sees men and

women as differently ‘situated’ and therefore not needing the same treatment. The problem in relation to this approach arises not in the recognition of difference, but in how it treats the difference. In recognising the difference, the ‘protectionist model of equality’ may reinforce the social assumptions that perceive women as modest, weak, subordinate and in need of protection. The ‘corrective model of equality’ takes into account diversity, difference, disadvantage and discrimination, but instead of reinforcing them, tries to correct the discrimination and imbalances. It focuses on assumptions behind the differences and their outcomes for women that help to identify and correct disadvantage.⁹

When applied to the offence of rape, the gender-neutral, formal model of equality, treating man and woman alike, is not acceptable from a feminist perspective for two reasons. First, social realities are not the same for men and woman; second, as has been explained above, rape is a form of GBV, and women suffer this sexual violence as a class, based on their gender whereas men suffer it as individuals. The ‘protectionist model’ reinforces the stereotyped gender roles wherein woman is seen as the property of the man to be protected and preserved, inviting the law to protect the virginity and chastity of woman. The ‘corrective model of equality’ is most desirable in this context as it takes into consideration the dignity, self-esteem, sexual autonomy and bodily integrity of woman.

4. Responses of Law

4.1 Originally Rape Was Perceived as a Violation of Women’s Dignity

The offence of rape in the early Vedic period was perceived as an invasion of a woman’s bodily integrity, an infringement of her self-esteem and dignity. Chastity of a woman was regarded as the most supreme virtue in those times. Vedic texts enjoined upon the woman to remain chaste and pure throughout her life and placed a corresponding duty upon the males to protect women from all outside evils. But if she lost her purity by forcible sexual violence, despite such protection, society did not discard her; she was to be treated with kindness and accepted back. Chastity of the woman was a highly cherished value, but did not negate the importance of woman as a whole.¹⁰

4.2 From Woman’s Dignity to Man’s Property

The gradual decline in the position of women in later centuries, specifically in the medieval period, was linked to for-

6 See General Recommendation No. 19 (1992) (<http://www.legal-tools.org/doc/f8d998/>). The Convention is available at <http://www.legal-tools.org/doc/6dc4e4/>.

7 1993 UN Declaration on the Elimination of Violence against Women, Preamble.

8 See generally Amnesty International, *Rape and Sexual Abuse: Torture and Ill Treatment of Women in Detention*, 1992; Human Rights Watch and Women’s Rights Project, *Double Jeopardy: Police Abuse of Women*, 1992.

9 UNIFEM, South Asia Regional Office and PLD, *CEDAW, Restoring Rights to Women*, 2004, pp. 24–25. See also Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India*, Sage Publications, New Delhi, 1996, pp. 175–177.

10 See www.prusharth.com/index.php/2015/08/23/offence-of-rape-in-vedic-period (accessed on 8 April 2016). Considering the space constraints, the authors are not going into the caste and class system of that time and are only providing a general brief overview. See S.K. Dogra, *Criminal Justice Administration in India*, Deep & Deep Publications, New Delhi, 2009, Chapter 2.

eign invasions of India. This led to a change in the attitude of men towards rape. The offence which was once a disgrace or dishonour to a woman and her inner self, ceased to be so, and became a wrong done to a man in the enjoyment of his property, her father or her husband. She was a chattel and nothing better than a commodity. Whenever any foreign actor infringed the owner's rights, he had to pay a price, not for the damage suffered by the commodity itself, but due to the wrong done to the owner. This argument can be further supported by the treatment meted out to the victims at that time. Once chastity was lost, women were no longer considered pure. Their contaminated bodies, in which a foreign body had entered, were no longer necessary for the society. The family, including the father or husband, discarded them as useless beings no longer fit to serve them.¹¹

4.3 Fatherhood and Property, Virginity and Chastity

During British India, in an era of codification of Indian laws, the offence of rape was defined in the Indian Penal Code of 1860 ('IPC'),¹² drafted by Lord Macaulay. As per Section 375 of IPC, the definition of rape requires coercive non-consensual sexual intercourse by a man with a woman. The explanation to the Section stated that penile penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. The requisite condition necessary for rape to be committed is that there must be the commission of sexual intercourse by the man with the woman. Thus, the offence of rape required proof of penetration of the vagina by the penis. This requirement excluded all other possible ways in which women may experience sexual abuse or violence that are no less humiliating, for example, insertion of the penis into the woman's mouth or anus or insertion of fingers or other objects into her vagina. The feminist analysis of this requirement reveals that penetration of vagina by the penis to the exclusion of all other forms of penetration protects the rights of the legitimate father rather than the woman's integrity and dignity. The penile penetration requirement is linked to the patriarchal notions of chastity and the fear of pregnancy by someone other than the legitimate father.¹³ Section 377 of the Penal Code is, on the contrary, gender neutral.

Furthermore, marital rape has been excluded from the purview of the offence of rape. A husband in India can be prosecuted for raping his wife only in two situations: (i) when his wife is below the age of 15 years,¹⁴ and (ii) when the wife is living in judicial separation under the decree of court.¹⁵ Where the husband forcibly imposes himself on his wife (above 15 years of age), and the sexual encounter becomes a horrifying experience for her, generating fears of

violence from the husband, the law does not regard it as a crime.¹⁶ This frames the law of rape on male norms and standards, ignoring the woman's situation.

Moreover, under IPC Section 375 a man can be prosecuted for rape if he had sexual intercourse with a woman when he knew that he was not her husband and the woman had consented believing him to be another man to whom she was lawfully married.¹⁷ A similar mistake about the identity of the accused made by an unmarried, widowed or divorced woman provides her with no protection even if the man knows that she consented to the sexual intercourse believing him to be someone else.¹⁸ Thus, if a woman consents to sexual intercourse believing the man to be her husband, and the man knows that he is not her husband, the offence of rape is committed, but this is not applicable in case of a woman outside marriage.

In order to convict a man of rape, the test is penetration without the woman's consent. Since there are generally no witnesses to the act of rape, the prosecution has to rely on the testimony of the victim along with any other relevant evidence, such as medical evidence, to show that the woman had not consented to penetration. The accused could offer evidence that the complainant was previously unchaste as being habitual to sexual intercourse in order to discredit her testimony.¹⁹ Although the law was repealed in 2003, medical tests continue to assess women's past sexual history through 'two-finger' tests assessing the chastity of the victim to determine the issue of consent.²⁰ The linking of chastity to the requirement of consent has resulted in a denial of women's sexual autonomy and dignity.²¹

The judiciary has in some cases reinforced patriarchal notions of chastity and virginity in judgments while awarding sentence to the rapist. In cases where the medical report indicated that the woman had been habitual to sexual activity before marriage, lower sentences were imposed on rapists. In contrast, in cases where the offender had raped a virgin, the sentence was relatively higher. Courts tend to impose lower sentences when a victim who was unmarried when the offence was committed gets married during the

11 *Ibid.*

12 The Code is available at <http://www.legal-tools.org/doc/6a8f6b/>.

13 See Ved Kumari, "Gender Analysis of Indian Penal Code", in Amita Dhanda (ed.), *Engendering Law: Essays in Honour of Lotika Sarkar*, Eastern Book Publications, Lucknow, 1999, p. 144.

14 Indian Penal Code, 1860, Section 375, Exception.

15 *Ibid.*, Section 376-A.

16 See Katherine O'Donovan, *Family Law Matters*, Pluto Press, University of Michigan, 1993, p. 1; and Shikha Chhibbar, "Sexual Violence in Private Space: Marital Rape in India", FICHL Policy Brief No. 52 (2016), Torkel Opsahl Academic EPublisher, Brussels, 2016 (<http://www.legal-tools.org/doc/084bd1/>).

17 See Indian Penal Code, 1860, Section 375 fourthly.

18 *Supra* note 13.

19 Indian Evidence Act, 1872, 155(4) and 146 (now repealed with 2003 amendment).

20 Positively, the Supreme Court of India has recently ruled that "the two finger test and its interpretation violate the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot *ipso facto*, be given rise to presumption of consent", *Lillu @ Rajesh & Anr vs State Of Haryana*, D/O, 11 April 2013.

21 Shomona Khanna and Ratna Kapur, *Memorandum on Reform of Laws Relating to Sexual Offences*, Centre for Feminist Legal Research, 1996, p. 11.

trial.²² The High Court's suggestion for mediation in rape cases aimed at marrying the victim with the rapist²³ is a slur on the constitutional authority pledged to uphold the dignity of the women.

4.4 Gradually Reverting from Modesty to Dignity

As stated above, the IPC of 1860 had perceived rape as penile vaginal penetration. An act equally harrowing in nature or jeopardizing a woman's dignity and the right over her own body was not considered rape if the violating organ was not the penis or the violated organ was not the vagina. In 2013, the Government of India constituted a committee following the mass movement on anti-rape law after the brutal gang rape of a student in Delhi on the need to amend the criminal law.²⁴ Accepting recommendations of the committee's report, IPC Section 375 was amended after the Criminal Law (Amendment) Act, 2013, to define rape as "penetration of penis, to any extent, into the vagina, mouth, urethra or anus of woman; insertion to any extent, of any object or a part of the body not being the penis, into the vagina, the urethra or anus of a woman; manipulation of any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of the body of such woman or applying his mouth to vagina, anus, urethra of a woman". The definition is extended to include those cases where the perpetrator makes her do any of the above acts with him or any other person. Thus, the said amendment has rightly broadened the meaning of rape from "sexual intercourse by a man with a woman", to any kind of penetration whether penile or non-penile moving beyond the chastity of women towards the dignity of women.

5. Conclusion

The definition of rape since 2013 incorporates women's experiences of abuse of bodily integrity, widening the scope of definition to include any manipulation of the woman's bodily orifices by a man's penis, any part of his body, or any foreign object. Indian law-makers missed an opportunity, however, to criminalise marital rape. They failed to address sexual abuse of women at the hands of their husbands. This

remains a glaring example of the negation of women's dignity and sexuality, treating a wife as her husband's property to be used or abused at his will. Since virginity or chastity is not at stake in marital rape, the law reinforces patriarchal norms by failing to protect her dignity and sexual autonomy.

Since a woman's lack of consent is crucial to the crime of rape, the IPC takes care of mistaken identity of the man (as the husband) in case of a married woman, but it does not extend this beyond matrimony to divorcees, widows, and unmarried women. This shows how Indian law treats infringement of the chastity of married women as rape, but it does not treat in the same way the dignity of unmarried women, widows or divorcees, depriving them of exercising their choices with informed consent.

In India, especially in metropolitan cities like New Delhi, a pattern of rape has regrettably been observed in recent years. A girl is picked up from the road, dragged into a moving vehicle, raped or gang-raped in the moving vehicle or somewhere else, and is then thrown out at another location. In these cases, the issue of consent of the girl to sexual abuse is uncalled for. An explanation should be added to IPC Section 375 to bring such cases within the ambit of rape, making the consent of the girl an irrelevant consideration,²⁵ by that, strengthening the right of the woman to live with dignity.

Usha Tandon is Professor and Head, Campus Law Centre, University of Delhi, India. Sidharth Luthra is Senior Advocate, Supreme Court of India; Visiting Professor, Northumbria University, UK.; formerly, Addl. Solicitor General of India. The authors acknowledge the research assistance by Moatoshi AO, Dr. Monica Chaudhary, and Ms. Harleen Kaur (Assistant Professors, CLC, University of Delhi).

ISBN: 978-82-8348-030-6.

FICHL-PURL: <https://www.ficHL.org/pbs/51-tandon-luthra/>.

LTD-PURL: <http://www.legal-tools.org/doc/6347d2/>.

22 Durba Mitra and Mrinal Satish, "Testing Chastity, Evidencing Rape", *Economic & Political Weekly*, vol. xlix, no. 41, 11 October 2014, p. 52.

23 Cuddalore minor rape case. Justice Devadas of Madra High Court referred the case for mediation, suggesting marriage of the rape victim with the accused.

24 J.S. Verma, *Report of the Committee on Amendments to Criminal Law*, January 2013 (<http://www.legal-tools.org/doc/8712ed/>).

25 In Medieval Europe, when Roman women were abducted, the law stated that ensuing sexual activity was always considered to have been forced, see J.A. Brundage, *Law, Sex, and Christian Society in Medieval Europe*, 1987.