

CONCEPT OF 'RAPE' UNDER INDIAN LAW: DEPIVATION OF TRANSGENDER PERSONS

Santanu Chakrabarti

Associate Professor, Faculty of Law,
ICFAI University, Tripura.

ISSN 2277-7733

Volume 13 Issue 2,
September 2024

Abstract

Indian legislators have enacted a new substantive criminal code namely Bharatiya Nyaya Sanhita, 2023 replacing the old colonial legislation Indian Penal Code created by the then British rulers in 1860. Many new notions have been introduced and many provisions of the old Act have been discarded considering their relevancy in the present era. Apart from men and women, transgender persons have also been recognized as a gender in the new Act which was not the position in the old legislation. But the concept of 'rape' as an offence has not at all been changed, the same idea of committing the crime by a man against a woman has been retained in the new Act also, no victimization of a transgender has been considered herein. But in many developed countries including U. K. and U.S.A., this crime is conceptualized as gender-neutral. The famous judgement passed by the Hon'ble Supreme Court in National Legal Services Authorities vs. Union of India [(2014) 5 SCC 438], the Apex Court categorically affirmed that the fundamental rights granted under the Constitution of India would be equally applicable to the transgender persons following which, the Transgender Persons (Protection of Rights) Act, 2019 was enacted by the Indian Parliament. Accordingly, the provisions containing the concept of rape should suitably be amended so that the trans genders may also be accommodated as the victims of rape.

Keywords: IPC, Bharatiya Nyaya Sanhita, 2023, Rape, Transgender Persons, Constitution of India.

Indian Penal Code (IPC), a colonial legislation framed by the British rulers of the then British India in 1860 has recently been replaced by the Indian legislation Bharatiya Nyaya Sanhita, 2023. This Act has become effective from 1st July, 2024 throughout the territory of India. This new legislation has introduced many new concepts which are of immense usefulness in today's notional views and has also discarded many useless matters contained in the old IPC which have no relevancy in the present day affairs. But in respect of subject matter relating to 'rape', the new Act has not been able to get rid of its colonial legacy.

Present Indian Scenario - Legislation of the Transgender Persons (Protection of Rights) Act, 2019 by the Parliament of India following the decision of the Hon'ble Supreme Court of India in National Legal Services Authority vs. Union of India¹ recognized rights of the transgender persons in India to some extent and also prohibited discrimination against this community in many respect. Accordingly, the newly introduced Bharatiya Nyaya Sanhita, 2023 has suitably accommodated this community in the definition of *gender*² which was not the position in the erstwhile IPC in which statute *gender* connoted men and women only³.

¹(2014) 5 SCC 438

²Section 2(10) BNS

³Section 8 IPC

But it reveals that the definition of ‘rape’ is absolutely same in the new statute⁴ as was described in the old one⁵. Here, all the ingredients to constitute the offence (usually, forceful penetration of the penis of the perpetrator into the vagina, anus or mouth of the victim without the victim’s consent) are considered such as may be caused by a man against a woman only. The legislators did not consider the position of a transgender person in case such person becomes victimized under the similar situation.

Comparison With Some Other States: Many developed States in the world have defined the concept of *rape* irrespective of any gender identity. The Sexual Offences Act, 2003 which created ‘rape’ a statutory offence in England and Wales describes a person to have committed this crime against another person if the former causes certain acts against the latter in the manner mentioned in that Act⁶. ‘Rape’ is federally defined in the USA as the ‘ penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim’⁷. Canadian law has not defined ‘rape’ as an exclusive offence but the same has been categorized there under the term of ‘sexual assault’ which involves force or the threat of force and sexual touching without the consent of the victim⁸. Hence, the law applicable in Canada in this respect is also gender-neutral.

International Position

The commission of the offences of *rape* and sexual violence is prohibited under the Geneva Conventions, customary international law, statutes of the international criminal courts of the erstwhile Yugoslavia and Rwanda and the present International Criminal Court (ICC). No clear definition as to ingredients of these offences have been provided by these bodies. Accordingly, different international tribunals have developed their own connotations in respect of these subjects through the processes of evolution.

In the *Akayesu* case⁹, International Criminal Tribunal of Rwanda defined *rape* as “a physical invasion of sexual nature, committed under circumstances which are coercive.” In *Furundzija* case¹⁰, the International Criminal Tribunal of Yugoslavia defined *rape* more precisely as ; (1) the sexual penetration, however slight : (a) of the vagina or anus of the victim by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator ;(2) by coercion or force or threat of force against the victim or a third person. In *Kunarac*¹¹, the International Criminal Tribunal of Yugoslavia defined *rape* as “ the sexual penetration, however slight :

⁴Section 63 BNS

⁵Section 375 IPC

⁶ Section 1 *Supra*

⁷Uniform Crime Report

⁸Igor Vilkhov-‘ Sexual Assault’ in Vilkov Law, 22nd March, 2024

⁹ ICTR, September, 1998

¹⁰Prosecutor vs. Furundzija Case No. IT-95-17/1-T, 10 December, 1998

¹¹Prosecutor vs. Kunarac, IT-96-23/1-T, 22 February, para 460

(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim.

The Rome Statute (which created the International Criminal Court) defines *rape* as “the invasion of the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the genital opening of the victim with any object or any part of the body. To constitute *rape*, the invasion must be committed by force or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against person incapable of giving genuine consent”¹².

‘Akayesu’ case¹³ defined *rape* in gender-neutral terms. Traditional definitions of *rape* are gender particular, i.e., only a woman could only be a victim of *rape* and a woman could only be a perpetrator as an accomplice. The ‘Furundizija’¹⁴ and ‘Kunarac’¹⁵ case definitions took a more traditional view presuming a male to be the sole perpetrator, unless the woman was an accomplice or used as an object, but recognized the gender-neutrality of the victim. The ICC definition¹⁶, in contrast, is gender neutral in terms of victim and perpetrator.

Constitutional Status

Apart from the above comparative analysis, it is also to be noted that the Hon’ble Supreme Court of India was pleased to affirm that the fundamental rights granted under the Constitution of India would be equally applicable to the transgender persons in the above-mentioned case of National Legal Services Authority vs. Union of India¹⁷ and as such, non-inclusion of the transgenders in the list of victims of the offence of *rape* seems to be absolute deprivation of their rights guaranteed under Articles 14 and 21 of the Constitution of India liable to be declared as ‘ultra vires’.

Conclusion

In the light of the above discussion, the Indian legislature should think as to the appropriate steps to be taken for overcoming the shortcoming in question which may be possible by suitably amending the law in such a manner that the transgender persons can be categorized as the victims of *rape* in appropriate circumstances.

¹²Rome Statute, Elements of Crimes, Articles 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1

¹³*Supra*

¹⁴*Supra*

¹⁵*Supra*

¹⁶*Supra*

¹⁷*Supra*