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Consent Matters: A Comparative Study of Rape Laws in India, UK and Canada

SOYONIKA GOGOI¹

ABSTRACT

Rape in ordinary terms can be defined as a crime of violence done by a man to a woman without her consent. Consent being the vital factor determines whether sexual intercourse can be termed rape or not. Unfortunately, marital rape of women above 18 years is still not considered as rape under our Indian Law and implementation of laws against husbands who force their wives to have sexual intercourse with them without their consent is the need of the hour and a relationship with a name should not be an exception to the concept. In common law, rape is defined as unlawful carnal intercourse without the woman's consent. Rape can be said to be an invasion of a woman's body in which her private and personal space is violated. Over the years, the Indian laws for rape have undergone a legislative transformation and received various judicial interpretations. An attempt is made to do a comparative analysis of the statutory rape laws in the United Kingdom, Canada and India. International conventions drafted for protection of any kind of violence against women and girl child is also included here. The modern concept of 'Stealthing' is also included as it is recognised as an offence in common terms but has still not found a place under any of the Acts formulated to protect crimes against women. The conclusion comprises the overview of the study and the drawbacks in the legislations of each country and their way out.

Keywords: Rape, Consent, laws, comparative study, stealthing, drawbacks.

I. INTRODUCTION

Rape is a universal issue affecting every nation and every community globally. It occurs in many different contexts and affects individuals belonging to all classes and segments of society. The victims of rape are girls, boys, women and men. Rape takes place in households, offices, prisons, during war and conflict, in public spaces, hospitals, and institutional places of shelter and residence. Particularly susceptible to rape are individuals belonging to marginalised sections and communities, such as ethnic or racial minority groups, prostitutes, the disadvantaged, homeless and deserted, and individuals of alternative gender or sexuality who are particularly vulnerable to rape.

¹ Author is an Assistant Professor at B.M.S. College of Law, India.

Perpetrators range from fathers, brothers, intimate partners, husbands, friends, strangers, occupational or institutional authority individuals, members of the armed forces, or police. Rape is a crime that leaves visible and invisible scars on its victims. It has a range of impacts on the physical and mental health of the victim, leaving the person struggling with injuries, problems of reproductive and sexual health, depression, anxiety, trauma and tendencies of suicide. It is an affront to the person's bodily and sexual autonomy, agency, and integrity. The harms and impacts of rape are mediated by the social context of the location where the rape occurs and the degree of assistance and care a victim can access. Rape has profound ideological and social origins, and it is often a misunderstood crime in a patriarchal and sexist culture like the one that prevails in many parts of the globe. This misunderstanding impacts the assessment, categorisation and quality of care and therapy that a rape victim is receiving.

Victims of rape are entitled to the right to life, privacy, dignity, and health. While rape itself infringes or violates these freedoms, police, medical practitioners, courts, and community post-rape therapy often violates these privileges and re-traumatizes the victim. Denial of victims' rights is through insensitive and biased behaviours of criminal justice staff, profoundly invasive and unscientific medical practices, and thoughtless processes in court.

Statutory laws for rape have been framed where the term 'rape' has been defined and also the punishment that is imposed for such an offence. "In more than half of the states, statutory rape is a felony only if one of the participants is at least several years older than the other; if the two people are extremely close in age, but one of them is underage, some states will not treat this as a crime or may treat it just as a misdemeanour. However, not all states have close-in-age laws"². "The punishment for any form of rape is generally a lengthy prison sentence, the specific duration of which will be based on the laws of your state. In addition, a convicted defendant normally will have to register as a sex offender for life."³

II. INTERNATIONAL CONVENTIONS

(A) Council of Europe Convention on preventing and combating violence against women and domestic violence (also known as the Istanbul Convention)⁴

The convention aims to prevent any form of violence against women and also focuses on victim compensation. It aims to prevent, prosecute and eliminate domestic violence as well. This

² FindLaw, "Rape Crimes Defined, Common Defenses and Rape Penalties", available at: <https://criminal.findlaw.com/criminal-charges/rape.html> (last visited on November 9, 2021)

³ Supra Note 2, 4

⁴ Council of Europe, "Preventing and combating violence against women" available at: <https://www.coe.int/en/web/genderequality/violence-against-women> (last visited on November 10, 2021)

convention calls on all members in the society, including the men and boys, to help Europe reach its goal of creating a violence-free **Article 36** of the Convention obligates the parties of this convention to take the necessary legislative measures to ensure that engaging in any non-consensual act of a sexual nature is criminalised.

(B) The United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee)⁵ has in the past five years urged several European states to bring their legislation on rape in line with international standards, including the **Istanbul Convention**, and to define rape based on the **absence of consent**.

(C) On consent, the UN Handbook⁶ for legislation on violence against women recommends that legislation should remove any requirement that sexual assault be committed by force or violence and any requirement of proof of penetration.

(D) UN General Assembly, Declaration on the Elimination of Violence against Women (1993)⁷ – Encourages the States to take proper steps to ensure that the law enforcement agencies and officers who are responsible for implementing the policies for preventing, investigating and punishing violence against women receive training to sensitise them to the needs of women.

(E) Rome Statute of the International Criminal Court⁸ – Rapes and other acts of sexual violence, whether or not in moments of armed conflict, are included as "crimes against humanity" when committed in a common or systematic way.

(F) UNSC 1889 on Women, Peace and Security (2009)⁹ - Highlights state responsibility for ending impunity and prosecuting those accountable for all types of violence against women and girls engaged in armed conflicts, including rape and other sexual violence.

III. SEXUAL OFFENCES ACT, 2003 IN UNITED KINGDOM

The Sexual Offences Act, 2003 is an Act of the Parliament United Kingdom. The Act came into force on 1st May 2004, and it repealed most of the sections of the Sexual Offences Act, 1956. The Act applies to England and Wales only. Scotland has its own sexual offences Act that is, the Sexual Offences (Scotland) Act, 2009 and North Ireland has the Sexual Offences

⁵ *UN Women*, "key international and regional laws, instruments and agreements", at: <http://www.endvawnow.org/en/articles/1125-key-international-and-regional-laws-instruments-and-agreements-.html>

⁶ *Department of Economic and Social Affairs, Division for the Advancement of Women*, "Handbook for Legislation on Violence against Women" available at: <https://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>

⁷ *Ibid*

⁸ *Supra* Note 5, 5

⁹ *Supra* Note 5, 5

(North Ireland) Order, 2008. The Sexual Offences Act (SOA), 2003 represents ‘a large-scale revision of the law of sexual offences’. It substituted more particular and explicit wording for older sexual offences legislation. It describes and sets in English law legal rules for rape. It is also the primary law dealing with the sexual abuse of children.

“When it is impossible to prove whether the offence occurred before or after 1st May 2004, section 55 Violent Crime Reduction Act 2006 applies. In order to rely on section 55, each offence should be charged in the alternative under the old and new regimes. It will be conclusively presumed that the time when the conduct took place was when the old law applied if the offence attracted a lesser maximum penalty: otherwise, it will be presumed that the conduct took place after the implementation of the new law. The Act is divided into two parts. Part 1 sets out the available sexual offences and Part 2 the notification requirements (sometimes referred to as the sex offenders register) and the range of preventative civil orders.”¹⁰

Since the implementation of the earlier version of the SOA in 1956, the growth of society has brought not only advancement but also many challenges such as increasing worries about child sexual abuse and new types of sexual abuse such as voyeurism. These crimes were not reflected in the 1956 SOA, nor were they punishable or covered by other laws. In the Home Office's words, the older sexual offence law was ' archaic, incoherent and discriminatory ' and ' simply a consolidation of the law of the nineteenth century.'¹¹

The Sexual Offences Act 1956 did not include the definition of many important terms. The definition of consent was not a part of the Act, but with the passing of time Government had taken measures to improve the arrangements to protect the public from sex offenders. *“The Sexual Offences Act, 2003 was introduced with the aim of making a ‘new provision about sexual offences, their prevention and the protection of children from harm from other sexual acts, and for connected purposes’.”¹²*

The SOA, 2003, has redefined and clarified a few terms and has also introduced new types of sexual offences. The definition of rape has been widened under the SOA, 2003 and included ‘penetration to another person’s mouth along with the terms vagina and anus already mentioned in the SOA, 1956. The Act also mentions new types of sexual offences that have not been previously included, such as assault by penetration, non-consensual voyeurism, sexual

¹⁰ Sexual Offences Act, 2003

¹¹ *Law Teacher*, “Sexual Offences Act 2003 – Summary”, available at: <https://www.lawteacher.net/acts/sexual-offences-act-2003.php> (last visited on November 10, 2021)

¹² *Ibid*

penetration of a corpse and others.

(A) Rape under the sexual offences act, 2003

Rape is defined under Section 1 of the Sexual Offences Act, 2003. It reads as follows –

“A person (A) commits an offence if—

1. he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
2. B does not consent to the penetration, and
3. A does not reasonably believe that B consents.”

The term ‘vagina’ mentioned in the definition included ‘surgically constructed vagina’. In this sense, the Act has widened its scope by expanding its powers to the ‘male to female transsexual people. Whereas in India, under the Indian Penal Code, 1860, section 375 defines the term rape, and the definition restricts itself victims who are women, transsexual people do not find a place in the definition.

The Act also defines the important term ‘consent’ under section 74 as ‘For the purposes of this Part, a person consents if he/she agrees by choice, and has the freedom and capacity to make that choice.’ “*The issue of consent is central to the offence of rape and the three other principal offences in England and specifically involving non-consensual sexual activity, namely – (1) assault by penetration; (2) sexual assault; (3) causing a person to engage in sexual activity without consent.*”¹³ Section 75 of the Act introduced a number of ‘Evidence-based presumptions’ for consent. It described conditions in which it was assumed that approval was not provided. Section 76 also provided requirements for ‘conclusive consent presumptions,’ including the deceit of the ‘nature or intent of the appropriate law’ or the impersonation of an individual earlier known to the complainant.¹⁴

In India, under the IPC, section 375, consent means “*an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates a willingness to participate in the specific sexual act.*”¹⁵ Once the victim alleges that there is no consent, the charge is on the accused, and the statutory presumption raised against him must be dissipated. There is no other burden on the victim to determine the lack of permission. Under the Evidence Act, there is a presumption on the consent element favouring the victim.

¹³ Jesse Elvin, “The concept of consent under the Sexual offences Act, 2003”, *Journal of Criminal Law*, JoCL 72(519)

¹⁴ Supra note 11, 5

¹⁵ Indian Penal Code (45 of 1860) as amended by the Criminal Law (Amendment) Act, 2013

(B) R vs Bree ¹⁶– (Case related to consent)

Section 74 defines consent as *'if he agrees by choice, and has the freedom and capacity to make that choice*. The Court of Appeal explored the issue of capacity and consent, stating that, if through drink, or for any other reason, a complainant had temporarily lost her capacity to choose whether to have sexual intercourse, she was not consenting, and subject to the defendant's state of mind, if intercourse took place that would be rape. However, where a complainant had voluntarily consumed substantial quantities of alcohol but nevertheless remained capable of choosing whether to have intercourse and agreed to do so, that would not be rape.

(C) Punishment for the offence of rape under the sexual offences act, 2003

According to **Section 1(4)** of the **SOA, 2003**, a person guilty of an offence of rape is liable, on conviction on indictment, to imprisonment for life. The Act introduced the extraterritorial application by stipulating that the UK citizens, who commit an act that would amount to a sexual offence under the SOA 2003 outside the UK, could still be prosecuted as if they had committed it in the UK territory.

Whereas in **India, under the INDIAN PENAL CODE, 1860** under **Section 376**, a person guilty of an offence of rape is liable to be punished with rigorous imprisonment of not less than seven years but which may extend to imprisonment for life and with fine. But this provision has been amended by the Criminal Law (Amendment) Act, 2018 and states that the imprisonment shall be not less than ten years but may extend to imprisonment for life and with a fine. The Criminal Law (Amendment) Act, 2018 states that any person who commits rape on a woman under 16 years of age shall be punished with rigorous imprisonment for a term which shall not be less than 20 years but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine. The fine should be just and reasonable to meet the medical expenses and rehabilitation of the victim, and any further fine imposed under this section shall be paid to the victim.

(D) Rape of children against children under the sexual offences act, 2003

1. *In the United Kingdom, Section 5 of the Sexual Offences Act, 2003* states about the offence of rape of a child under 13 years of age. A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.
2. *In India, Section 5 of the Criminal Law (Amendment) Act, 2018*, provides for the insertion

¹⁶ 2007 EWCA 256

of a new section 376 AB in the Indian Penal Code. Sec. 376AB states that any person who commits the offence of rape on a woman who is under the age of 12 years shall be punished with rigorous imprisonment for a term which shall not be less than 20 years but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death.

(E) Regina vs GGM¹⁷ - (Case related to the rape of a child under 13 years)

The victim, who was born in July 1995, was raped by the appellant a number of times. The victim was below 13 years of age at that time. The offences came to light in 2009 when the victim disclosed them to the police. The appellant was arrested. Since the appellant was only 15 or 16 at the time of the sentence, the judge who passed the judgment reduced the sentence from 15 to 10 years, keeping in mind the immaturity of the appellant, his previous personal difficulties, and the significant significant conflict that he had with his mother. The Appellate Court, for the reasons that the accused set out, upheld the decision of the previous Hon'ble Court and considered that a 10-year sentence in the circumstances was appropriate.

(F) Stealthing

This is a new concept of sexual assault but is not defined under the Sexual Offences Act, 2003 or any other country's legislation so far. "Stealthing is the pop-culture name to describe a "new sex trend" reported to be "on the rise". It refers to the act of deliberately removing a condom during sex without your partner's knowledge or consent. This catchy phrase doesn't mean there's a new trend but coins a new term for a kind of sexual assault."¹⁸

A man was discovered guilty of raping a female in a landmark decision in Switzerland after removing a condom without consent during what had been consensual sex up to that stage. He wasn't named, and the victim's name was not disclosed, so there are no details beyond the reality they met on Tinder. The Swiss Federal Supreme Court handed down a suspended 12-month sentence. The case is a first Swiss case, but it has no direct impact on the rest of Europe; rape law is wildly different across the continent. European human rights law has little to say about the crime except where it forks a separate article; it may be an infringement of privacy (Article 8) or an act of torture (Article 3), but there is no human right to sexual autonomy per se. Surprisingly, Germany adopted the term "no" only last year as a rejection of permission: a victim would have had to demonstrate they had fought back before.¹⁹

¹⁷ 2011 EWCA Crim 3332

¹⁸ Editorial, "Stealthing isn't a 'sex trend'. It's sexual assault – and it happened to me", *The Guardian*, May. 22, 2017

¹⁹ Editorial, "Is removing a condom without permission rape?", *The Guardian*, Jan.16, 2017

With no effective convictions under British conditional consent legislation for stealthing, although broader society may catch up with the concept that rape is about consent and not force, law enforcement is still required to rid itself of pervasive stereotypes about sexual assault. If awareness about stealthing increases and is recognised as a crime, then it must be ensured that those who come forward are supported.

IV. CRIMINAL CODE, 1985 IN CANADA

The Criminal Code is a law codifying most of Canada's criminal offences. The Code was first enacted in 1892, carried forward in 1906 and again in 1927, significantly amended and re-enacted in 1953-54, carried forward in 1970 and 1985 statute revisions.

*“Criminal Code was constituted with the principle that no person would be able to be convicted of a crime unless otherwise specifically outlined and stated in a statute. This Criminal Code has played a major part in Canada's history and has also helped form other legal acts and laws.”*²⁰

(A) Rape Under The Criminal Code, 1985

Rape was first statutorily defined in Canada in 1892. Section 266 of the Criminal Code, 1892 read:

“Rape is the act of a man having carnal knowledge of a woman, who is not his wife without her consent, or with consent, which has been extorted by threats or fear of bodily harm.”

When the crime of rape was finally codified in 1892, the consent standard was adopted with the language “rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent.” This statutory definition has remained largely unaltered to the present day. **“In Canada, rape is also defined to include intercourse with the woman's consent if that consent is extorted by threats or fear of bodily harm.”**²¹

Under Section 271, the Code describes the word ' Sexual Assault.' The sexual assault offence captures a broad variety of behaviours. Any physical use of force that is not consensual and performed in sexual nature can be a sexual assault. Examples include anything from slapping someone at a bar on the buttocks to outright rape. This offence substituted the more severe offence of rape that no longer appears in the Code of Canada.²²

²⁰ Criminal Code, SC 1892

²¹ Constance Backhouse and Lorna Schoenroth , *A comparative study of Canadian and American Rape law*, Canada-United State Law Journal (pg.175)

²² Criminal Code, SC 1892, s.271

(B) Punishment for the offence of sexual assault

“Everyone who commits a sexual assault is guilty of-

1. an indictable offence and is liable to imprisonment for a term not exceeding ten years and, if the complainant is under the age of 16 years, to a minimum punishment of imprisonment for a period of one year; or

2. an offence punishable on summary conviction and is liable to imprisonment for a term not exceeding 18 months and, if the complainant is under the age of 16 years, to a minimum punishment of imprisonment for a term of 90 days.”

(C) R. v. Chase²³ (Case of sexual assault)

Sexual assault appeal in which, after groping a young girls breasts, an accused was charged with common assault. The trial judge restricted the reach of sexual assault to uninvited genital touch, but the Canadian Supreme Court discovered that anything that violates the victim's sexual integrity would be found to be sexual assault. The common assault conviction was upgraded to a sexual assault.

(D) Consent under criminal code, 1985

In Canada, rape is also defined as involving intercourse with the consent of the woman if that consent is "extorted by threats or fear of bodily harm. Theoretically, at least, it is not necessary to prove the absence of consent where consent is extorted by the threat of violence. Conversely, if lack of consent can be proven by the prosecution, it is not necessary to prove that force was used or serious harm was threatened. While the central substantive issue is consent, British and Canadian courts rely primarily upon evidence of force and resistance in making their determination.²⁴

Section 150 of the Code provides that when a person is charged with any sexual offence under section 151, 152, 271, 272 or 273 in respect of a complainant under the age of 16 years, the argument that the complainant consented to the activity cannot be used as a defence.

Few Exceptions to it are –

- If the complaint is 12 or 13 years old, but less than 14 years, the consent given by the complainant can be taken into consideration if the accused is less than two years older than the complainant and also if the accused is not in a position of trust or authority towards the complainant

²³ 1987 2 S.C.R. 293

²⁴ Supra note 21, 11

- If the complaint is 14 years or more, but less than 16 years, the consent given by the complainant can be taken into consideration if the accused is less than five years older than the complainant and also if the accused is not in a position of trust or authority towards the complainant.

The accused cannot use the mistake of age as a ground for defence unless the accused has taken all appropriate measures to determine the complainant's age.

(E) R. v. Bernie²⁵ (Case of sexual assault and lack of consent)

The accused was a nursing assistant for disabled people in a home. After frequent cases of touching the breasts and testicles of those in the home to joke with the other staff, he was charged with a sexual attack. There was no allegation of sexual gratification. The accused was discovered guilty because of the touching nature and the victims 'absence of consent'.

(F) Burden Of Proof Under The Criminal Code, 1985

"Most sexual assault cases are prosecuted and defended on what the accused said or what the complainant said. Courts are well equipped to assess oral evidence. A person's evidence is analysed for its reliability, and it is judged based on a person's credibility. Evidence may be credible but not reliable – considering a witness recounting an event from 10 years ago. Ultimately, in Canada, the burden rests with the Crown to prove the offence beyond a reasonable doubt. Still, neither the evidence of the accused nor the complainants are held to any higher or lower standard."

(G) Sexual Interference Of Children Under The Age 16 Years

Section 151 of the Code provides for punishment of every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years.

(H) Sexual Exploitation Of A Young Person

Section 153 of the Code states that any person who is in a position of trust authority towards a young person commits an offence of sexual exploitation of the young person by touching, directly or indirectly, with a part of the body or with an object, any part of the body of the young person or inviting or inciting such young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites.

²⁵ 1998 1 S.C.R. 975

(I) Punishment For Sexual Assault Of Children Under The Criminal Code, 1985

For both offences, the accused is liable to imprisonment for a term not exceeding 14 years and minimum punishment of imprisonment for a term of one year; or is liable to imprisonment for a term not exceeding two years less than one day and minimum punishment of imprisonment for a term of 90 days.²⁶

V. CONCLUSION

An analysis of the laws relating to rape in the United Kingdom, Canada and India throw lights on certain developments which deserve commendation and other issues which call for change and reform.

India's rape laws and policies have seen a shift in the direction of incorporating the freedoms and views of rape victims into the criminal justice system and allied structures. The definition of rape has broadened its scope and now involves a stronger consent level. Several new offences have been integrated, including punishment for gang rape and repeated offenders. Victim compensation schemes have been implemented in all states that provide compensation to rape victims. The fine imposed on the accused is just and fair enough to cover the medical expenses of the victim, and any further fine imposed on the accused shall be given to the victim directly. Free first aid and medical treatment have been made compulsory. The accountability of police and medical personnel in responding to rape victims has been strengthened.

Though the statutory rape laws in India have developed over the years, it still does not include a lot of essential provisions. The Sexual Offences Act, 2003 of the United Kingdom has widened the definition of rape and includes the surgically constructed vagina, which now consists of male to female transsexual persons. But the definition of rape in the Indian Penal Code under section 375, only the term 'woman' is mentioned, which means the scope of this section is only limited to one particular gender. Secondly, the Sexual Offences Act, 2003 has expanded its jurisdiction in the sense that any UK citizen who is guilty of the offence of rape committing the act outside the territory of the United Kingdom shall be prosecuted in the same manner as if he had committed the act within the territory. Indian Law does not have any such provision of punishing any offender who is a citizen of India committing the offence of rape outside the Indian Territory.

Therefore, India should borrow a few ideas from the developed countries in order to strengthen its laws and widen its scope to include all sections of the society.**

²⁶ Supra Note 22, 11