

“Thinking Rape Laws: A Comparative Study on Element of ‘Consent’ in Context of Rape Laws of India and Europe”

**Swati Yadav*

*Master of Laws in Access to Justice
School of Law, Rights and Constitutional Governance
Tata Institute of Social Sciences, Mumbai*

***Nikhil Adsule*

*Master of Laws in Access to Justice
School of Law, Rights and Constitutional Governance
Tata Institute of Social Sciences, Mumbai*

Abstract

Rape is an offense which violates a victim’s sexual autonomy and bodily integrity. In rape cases, our predominantly patriarchal and misogynistic society usually places blame on the victim rather than the accused. Though almost everywhere the offense of rape has been declared illegal still several such cases go unreported and ‘unprosecuted’. Over a period of time, rape laws have undergone legislative transformation and received varied judicial interpretations. From being defined purely as a forceful carnal intercourse against the will of the victim and requiring equivalent resistance from the victim, recently, the focus has been levied on non-consensual nature of this crime. Moreover, an attempt is made to do a comparative analysis of the legal definition of rape in India and some of the European countries to determine the importance of recognising ‘sex without consent’ as rape.

INTRODUCTION

Across the world, since time immemorial, rape and sexual violence have remained the cruellest form of gender based violence. The crime of rape robs a person of autonomy over his/her sexuality and bodily integrity. The **Resolution 48/104** of the UN General Assembly declared “violence against women, including rape, as a violation of human rights and gender violence”. Article 7 of the Rome Statute of the International Criminal Court classifies rape as an offence against humanity.

Rape is illegal everywhere. Across the world, the definition of rape is undergoing changes, removing marital exception and moving towards a consent-based definition. Still, no significant decline can be witnessed in instances of rape. India’s situation is more precarious with its capital, Delhi, having received dubious distinction of a “rape capital”. As per National Crime Records Bureau (NCRB) report “Crime in India, 2017”, a total of 32, 559 rape cases were recorded from all across the country. One woman reported a rape every fifteen minutes on an average in India in 2018¹. However, the picture painted by the statistics will always be incomplete in light of severe underreporting of such cases. Only a tiny fraction

¹ “NCRB data 2018: 1 rape reported every 15 minutes in India”, India Today (January 16, 2020), available at <https://www.indiatoday.in/india/story/ncrb-2018-woman-reports-rape-every-15-minutes-in-india-1635924-2020-01-11> (last accessed on May. 29, 2020 15:50 PM).

of sexual violence occurrences are reported to police; an estimated 99.1 per cent of instances of sexual violence are not recorded². Moreover, in 94.6% of cases accused of rape is none other than victim's relative³.

RESEARCH OBJECTIVES

1. To identify the significance and relevance of element of consent in legal definition of rape?
2. To conduct a comparative analysis of legal definition of rape in India and few European countries to determine whether 'consent' features as one of the constituent element or not?

RESEARCH QUESTIONS

1. What are the key elements of legal definition of rape?
2. What is the significance of element of consent in legal definition of rape?
3. What are the key elements of the legal definition of rape in European countries, viz., Germany, Italy and France?
4. What are the grounds of similarity or dissimilarity in the legal definition of rape in India and European countries vis-à-vis element of consent?

I. KEY ELEMENTS OF LEGAL DEFINITION OF RAPE

The traditional common law definition, derived from legal commentators of the seventeenth century, and still in prevalence is that rape is the unlawful sexual intercourse with a female without her consent, by force, fear or fraud. The classic definition of rape was formulated by Lord Edward Coke in 1628, and is the basis for modern-day rape laws: "Rape ... is when a man hath carnall knowledge of a woman by force and against her will"⁴. The Criminal Statutes often define rape with phrases like "by force", "against her will", "without her consent", "false and fraudulent representation", "threat or fear of bodily harm".

1. *Force*

Actual use of force against the victim's body to obtain sexual access is the most common understanding of rape. For years, physical "resistance" by the victim was considered essential to prove her lack of consent. In the case of *D.P.P v. Morgan* (1976) AC 182, the House of Lords made reference to "force" in sexual offences in following words:

²Pramit Bhattacharya, Tadit Kundu, "99% cases of sexual assaults go unreported, govt data shows", available at <https://www.livemint.com/Politics/AV3sIKoEBAGZozALMX8THK/99-cases-of-sexual-assaults-go-unreported-govt-data-shows.html>, (last accessed on May 27, 2020, 15:54 PM).

³The Economic Times, available at <https://economictimes.indiatimes.com/news/politics-and-nation/in-94-6-per-cent-cases-of-rape-accused-known-to-victim-ncrb/articleshow/61915418.cms?from=mdr>, (last accessed on May 27, 2020, 16:00 PM).

⁴Sir Edward Coke, *The Second Part of the Institutes of the Laws of England*, Volume I.

“The crime of rape consists of having unlawful sexual intercourse with a woman without her consent and by force. These words mean exactly what they say. It does not mean that there has to be a fight or blows have to be inflicted. It means that there has to be some violence used against the woman to overbear her will or that there has to be a threat of violence as a result of which her will is overborne.”

Thus, resistance by the victim against the force used by the assailant was considered a crucial component which decided whether a particular act was against the will of the victim or not.

2. *Against her will*

The concept lays focus on the behaviour of the victim. The hesitancy in depending exclusively on the testimony of the complainant gave way to an objective "resistance standard" to demonstrate lack of readiness on the part of the victim. As an outward expression of her absence of permission, a victim is needed to physically resist the assailant. This resistance by the victim is expected to be vehement and continued until the offense is consummated. However, this standard is largely criticised for its ‘generalising tone’. The presumption that all victims will act likewise when confronted with the same scenario is inherently faulty. The requirement of resistance visualises offense of rape in terms of the victim's actions instead of assailant's guilty behaviour; thus condemning the victim for failing to resist. This test is blatantly unreliable in situations when cognitive faculties of victim are in abeyance; in situations of drunkenness, sleep, idiocy etc., victim has no or very feeble power to resist the act.

3. *False and fraudulent representation*

The maxim “*fraus omnia vitiate*” translates as “fraud vitiates everything”. In *R. v. William Case*,⁵ a medical practitioner had sexual intercourse with a girl aged fourteen by pretending that it was a medical treatment and the girl made no resistance owing to her innocent belief that she was being medically treated. Wilde CJ stated:

“She submits under a misrepresentation that it was some act necessary and proper for her cure; she made no resistance to an act which she supposed to be quite different from what it was: what she consented to was something wholly different from that which was done, and, therefore, that which was done, was done without her consent.”

Thus consent obtained through fraudulent means or by misrepresentation is vitiated and tantamount to “no consent”.

4. *Threat or fear of bodily harm*

Consent given under threat of bodily injury is no consent in law. Threat does not necessarily mean only violent threats of plausible bodily harm but also includes indirect threats such as loss of employment, disruption of friendship, coercion and so on.

⁵ (1850) 4 Cox 2.

One of the most crucial components in rape laws is of “consent”. This component has been dealt in detail in the following section.

II. SIGNIFICANCE OF ELEMENT OF CONSENT IN LEGAL DEFINITION OF RAPE

Consent is another significant element in the legal definition of rape. Consent refers to a self-perceived attitude that can be defined as "an enduring organisation of motivational, emotional, perceptual and cognitive processes with respect to some aspect of the individual's world".⁶ Consent can be given either through words or through conduct. The Black Law's Dictionary defines consent as “concurrence of wills”.⁷ This concurrence can be both explicit and implicit. As per Rule 70 of Rules of Procedure and Evidence of the International Criminal Court “consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence”. This becomes more crucial when psychologists increasingly recognise “psychological paralysis” or “freezing” as common response to sexual assault

The biggest misfortune of our civilization is that a woman's right to privacy and the right to say “no” to sexual advances are still largely unrecognised. In most of the countries, especially ‘developed’ European countries, until now the legal definition of rape lacks the ‘element of consent’ and is solely defined in terms of force and violence used by the assailant. This lack of consent as one of the constituting element in legal definition of rape leads to travesty of justice in several cases. Even though when the 35th General Recommendation of United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), states that “failure to investigate, prosecute and punish and to provide reparation to victims/survivors of such acts [gender-based violence against women] provides tacit permission or encouragement to acts of gender-based violence against women. These failures constitute human rights violations.”

Another major area of concern is recognising consent to be synonymous with submission.⁸ Often difficulty is experienced in making a distinction between consent and submission. For instance, in a New Zealand case of *M. v. M.*,⁹ a reluctant submission and one given after much persuasion were held to constitute consent whereas in *Lawson v. Lawson*¹⁰ unwilling submission was not considered consent. In India, if there is no consent but the victim submits to the act, it is not consent in law. 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. This change came after infamous *Mathura case*¹¹, where submission was

⁶ Krech and Crutchfield, Theory and Problems of Social Psychology (1st ed. 1948).

⁷The Black Law's Dictionary, available at <https://thelawdictionary.org/consent/>, (last accessed on May 28 2020 02:58 AM).

⁸ P. K. Menon, “The Law of Rape and Criminal Law Administration with Special Reference to the Commonwealth Caribbean”, available at <https://www.jstor.org/stable/759349>, (last accessed on May 29, 2020 7:00 PM).

⁹ (1957) N.Z.L.R.

¹⁰(1955) W.L.R

¹¹Tukaram & others v. State of Maharashtra, 1979 AIR 185.

misunderstood as consent, huge hue and cry was raised which lead to change in the law and subsequent recognition of custodial rape. Now the Explanation attached to **Section 375 of Indian Penal Code, 1860**, defines consent as “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”.

III. PRESENCE OF ELEMENT OF CONSENT IN LEGAL DEFINITION OF RAPE IN EUROPEAN COUNTRIES

The European Court of Human Rights upheld in the landmark judgment of *M.C v Bulgaria*¹² that the factor crucial in establishing the offence of rape is the ‘absence of permission’ rather than the evidence of resistance, on the person of survivor, to the force exerted. In this case, a Bulgarian teenager claimed that when she was fourteen years old two people had raped her. She said she didn't have the power to resist violently while the two men argued that she had fully consented to the act by not resisting it. Due to no indications of physical opposition on her part, the prosecutor ordered the closure of the inquiry. The European Court of Human Rights discovered that the inquiry of the case fell short of the criteria of Articles 3 (prohibition of torture and unfair and degrading treatment) and Article 8 (right to privacy and family life) of the European Convention on Human Rights. The Court held that “any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual’s sexual autonomy”¹³. Hence, the Bulgarian authorities “failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess sufficiently the credibility of the conflicting statements made”¹⁴.

In its recent report¹⁵, Amnesty International recorded that legal definition of rape in several European countries lack a comprehensive definition recognising all forms of non-consensual penetration of sexual nature as rape. This is problematic as most of the European countries have signed and ratified the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention). Article 36 of the Istanbul Convention obligates the parties to take the necessary legislative measures to ensure that engaging in any non-consensual act of sexual nature is criminalised. The Explanatory Report to the Istanbul Convention further specifies that prosecutions “will require a context-sensitive assessment of the evidence in order to establish on a case-by-case basis whether the victim has freely consented to the sexual act performed. Such an assessment must recognize the wide range of behavioural responses to sexual violence and rape which victims’ exhibit and shall not be based on assumptions of typical behaviour in such situations. It is equally

¹² M.C. v Bulgaria, No. 39279/98, ECHR 2203XII

¹³ Ibid.

¹⁴ Ibid.

¹⁵ The Amnesty International Report, available at: <https://www.amnesty.org/download/Documents/EUR0194522018ENGLISH.PDF> , (last accessed on May 25, 2020 at 18:30 PM).

important to ensure that interpretations of rape legislation and the prosecution of rape cases are not influenced by gender stereotypes and myths about male and female sexuality.”¹⁶

The UN Handbook on Violence against Women also proposes that legal definition of rape remove any requirement that sexual assault be committed by only force or violence and any requirement for evidence of penetration. It also advocates minimizing the instances of secondary victimization of complainant, in the trials, by creating a definition of sexual assault requiring proof by the accused of steps taken to ascertain whether the complainant was consenting or not. Even the CEDAW Committee has repeatedly urged several European countries to bring their legislation on rape in line with international standard and to recognise sex without consent as rape.

On International Woman’s Day, Council of Europe Secretary General, Marija Pejčinović Burić, raised her concern on non reflection of sex without consent as rape in legislations of various European countries. She bemoaned the fact that most of the European countries maintain force-based definition which requires evidence that the perpetrator used coercion or that the victim failed to fight back. This places huge burden on the those who have been raped to prove that they are the victims.

However, the picture isn’t purely bleak as few of the European countries have started making changes in their definition and making them more “consent-centric”. One such example is Germany where an amendment was made to the legal definition of rape to make it consent-based. This 2016 amendment introduced the concept of “no means no” into the German anti-rape legislation. Pre 2016 amendment, rape could be punished only if the victim showed visible signs of resisting assailant. This requirement for the victim to physically resist in order proving occurrence of rape was done away with. The amended law attempts to close the blatant loopholes in legal definition of rape by recognising sexual activity that goes against the “discernible will” of the victim as rape¹⁷. In 2019, Greece became the ninth country of the European Union to recognise sex against consent as rape.

¹⁶Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul, 2011, para 192.

¹⁷No means no': Germany broadens definition of rape under new law, available at: <https://www.dw.com/en/no-means-no-germany-broadens-definition-of-rape-under-new-law/a-19385748> (last accessed on May 29, 2020 13:14 PM).

IV. COMPARATIVE ANALYSIS OF LEGAL DEFINITION OF RAPE OF INDIAN AND EUROPEAN COUNTRIES VIS-À-VIS ELEMENT OF CONSENT

Countries	Germany	France	Italy	India
Definition	<p>Section 177 of Criminal Code of Germany- Whosoever coerces another person by force; by threat of imminent danger to life or limb; or by exploiting a situation in which the victim is unprotected and at the mercy of the offender to suffer sexual acts by the offender or a third person on their own person or to engage actively in sexual activity with the offender or a third person.</p>	<p>Article 222 of the Criminal Code – any act of sexual penetration, of any nature whatsoever, committed against another person by violence, constraint, threat or surprise is rape.</p>	<p>Article 609, Criminal Code defines rape – whoever by force, threat or abuse of authority forces another person to suffer or commit sexual acts.</p>	<p>Section 375 of IPC- Against her will, Without her consent, Consent with fear of death or bodily harm, Consent under intoxication, unsoundness of mind, With or without consent when under 18 years of age, Unable to communicate consent.</p>

<p>Element of consent</p>	<p>Post 2016 amendment to the definition sexual activity without consent is considered rape. New law considers all forms of non-consent sufficient. Any verbal or physical clue of non-consent is sufficient. Earlier complainant was required to have resisted physically to prove that sexual assault actually happened.</p>	<p>Legal definition of rape is force-centric and not based on lack of consent.</p>	<p>The definition lacks reference to consent. However, the Italian Supreme Court has held that the proof of violence does not require proof of resistance from the victim as in many situations victim might have stop resisting to put an end to unbearable situation. Nonetheless Italian law still requires that the accused committed the act intentionally and he was aware that complainant was not consenting. But, in situations, where defendant is not aware they cannot be held guilty.</p>	<p>Explanation 2 of Section 375 of IPC defines consent as “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.”</p> <p>Proviso- 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”.</p> <p>In India, the legal definition of rape is consent based. The definition draws a clear demarcation between consent and submission.</p>
---------------------------	--	--	--	---

Non-inclusion of element of consent in the legal definition of rape leaves open door for misinterpretation of rape laws and travesty of justice. In many a cases courts uphold lack of

resistance to be an indicator of consent on part of complainant. In order to avoid such wrong it is crucial for European countries to recognise sex without consent as rape and include definition of consent in their rape legislations.

V. RECOGNITION OF ELEMENT OF CONSENT IN INDIAN RAPE LAWS

The legal definition of rape in India has evolved significantly through judicial pronouncements, legislative interventions, and efforts of civil society. Consent is the most important component of rape legislation in India. .

1. *Consent obtained on false promise of marriage*

The false promise does not ipso facto vitiate the approval as it depends mainly on whether the accused had the same fraudulent purpose from the start. In *Pradeep Kumar Verma v. State of Bihar*,¹⁸ it was held that the victim's consent would be vitiated in situations where the accused had made a false representation intentionally to obtain the victim's permission without the intention of marrying her. It was also observed that if the facts show that the accused did not really entertain the victim's desire to get married from the outset, the victim's consent will be of no use to the accused to exonerate him from the ambit of Section 375.

2. *Distinction between consent and submission*

A mere helpless submission or less or no resistance does not automatically signify lack of consent. A leading case in this arena is infamous *Mathura*¹⁹ rape case. In this case a tribal girl was gang raped in police custody. The apex court of the land acquitted the accused as the victim had "made no alarm", there were "no visible marks of injury on her body and she was habituated to sexual intercourse". This judgement led to huge uproar as the Supreme Court had indulged in character assassination of the victim and equated submission to consent. This led to change in Section 114(a) of Indian Evidence Act which recognised that in situations where a woman was raped by anyone in position of responsibility or dominance, the court should presume that the woman who says she did not consent is telling the truth. This made the idea of 'consent' an integral part of rape legislation.

3. *Rape Shield Law*

Another leading judgement, *Sakshi v. Union of India and Ors*²⁰ led to amendment in Section 155(4) of Indian Evidence Act, 1908 and allowed for entry of "rape shield law" in India. Section 155(4) allowed defence lawyers to discredit rape victims' testimony by proving that she is of "immoral character". After amendment in 2002 cross-examination of rape victims was prohibited. Thus, rape shield law protects a sexual assault victim from unnecessary cross examination and mud-slinging in the court of law. The defence lawyer cannot cross-examine victim on her past sexual conduct or disclose her identity.

¹⁸ 2007 IV Cri.LJ 4333 (SC).

¹⁹ Supra Note 11.

²⁰ Writ Petition (cr.) 33 of 1997.

The *Nipun Saxena v. Union of India*²¹ issued clear directive against disclosure or publication of identity of victims of sexual assault. The Court prohibited disclosure of names of victims or publication of any such material which will make it easier to discern the identity of the victim. Moreover, Section 228A of IPC bars disclosure of identity of victims of sexual assault cases. This Section reads that any person who makes known the name and identity of a person who is an alleged victim of an offence falling under Sections 376, 376A, 376AB, 376B, 376C, 376DA, 376DB or 376E commits a criminal offence. Sub-Section (2) of Section 228A bars **making known the identity of the victim** by printing or publication under certain circumstances described therein.

4. Marital Rape

It is very unfortunate that despite such advancements made in the legal definition of rape in India, marital rape is still not recognised. It is yet to be recognised in India; the idea that marriage leads to unequivocal and perpetual consent for sex is inherently. The most disappointing aspect of legal definition of rape in India is the exception carved out in Section 375 which exempts marital rape of minors. Even though statutory rape is considered unlawful in India irrespective of consent of minors but Exception in Section 375 still persists. This provision has received immense criticism however recently some positive development is made in this arena. In a leading judgement²², the apex court read down the exemption provision and declared sex between a man and his minor wife rape.

CONCLUSION

In recent judgement of Delhi High Court in *Mahmood Farooqui v. State (Govt. of NCT of Delhi)* the meaning of the word consent, which distinguishes sexual intercourse from rape, was diluted. Although it understood the dynamics of non-consensual sexual activity, it still could not resist itself from reiterating the common rape myth that a feeble ‘no’ by a female could imply ‘yes’. It could not decipher fully that little or no resistance and a feeble no was a real rejection of approval. This case is blatant example of what is wrong with having a seemingly perfect piece of legislation on paper but lacking the will to implement and interpret it progressively. Indian rape laws are one of the most progressive rape legislations on paper. However, the black letter of law is rarely followed in spirit. Thus, change in law should be complemented by change in perception as any form of sexual assault without the consent is an assault on the dignity of the victim.

Consent is a crucial component of rape laws. Lack of this element in the rape legislations lead to travesty of justice, severe underreporting of cases and gross violation of human rights of victims. Non-recognition of ‘sex without consent’ as rape by several European countries is a matter of grave concern. It is crucial for every progressive, egalitarian and democratic nation to continue unshackling itself from preconceived biases, rudimentary customs, age old traditions and aim at constructing a more equitable and just society.

²¹ (2019) 2 SCC 703 : (2019) 1 SCC (Cri) 772

²²Priyanka Mittal, “Supreme Court: Sex between man and minor wife is rape”, available at, <https://www.livemint.com/Politics/PIVZ4ei8ePvvqR3HfaInRO/Supreme-Court-says-sexual-relations-between-man-and-minor-wi.html> (last accessed on May 30, 2020 02:23 AM).