

A Critique on the Application of Rape Laws

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Introduction

Every time an incident of sexual violence comes to light, our social media always blaze up with talks about how epidemic it is becoming. They also focus on how woman and children are now at a high risk of facing such constant ravishment and how such offence and offenders do not see the light of justice.¹ Unfortunately, all of these are true, and we are unable to do anything at all to stop it. After few days of movement and posting pitiful status on social media sites, we get back to our routine work. But we don't seem to talk about the existing lacunae in our rape laws and overhaul of these laws.² At least 187 women were raped and 29 women faced sexual harassment all over the country in last three months, according to Ain o Salish Kendra (ASK).³ World Health Organization (WHO) reported that 35% women worldwide have experienced physical or sexual violence at the hand of intimate partner or non-partner and according to a report by UNICEF approximately 120m girls worldwide have experienced "forced intercourse or other forced sexual acts in some phases of their lives."⁴ Numbers of cases are creating alarming situation frequently in the country but punishment of the perpetrators is not taking place. The existing laws are old and need proper clarification. Redefining rape by increasing the age of consent mentioned in the provision and by scrutinizing particular sections of The Evidence Act, we may be able to get in tune so that at least a better number of convictions get to see the light of justice.

Current Scenario

Rape is a pervasive social problem. It causes most severe traumas of all, multiple long-term negative consequences like posttraumatic stress disorder (PTSD), depression, suicidality, periodical sexual victimization and chronic physical health problems. For some victims, Post assault help seeking experience becomes a "second rape" which is a secondary victimization to the initial trauma. Currently, we belong to a race where rape survivor is the one to be blamed, treated like criminals and further proceedings are forced to put back for hours and days. Even sometimes they are the ones who are told to track down the criminals due to the negative assumptions of law enforcement officers even after being mentally and psychologically broken. All these bureaucratic steps deter her to wait for the decision of law enforcement organization. Hence for the survivor, getting some cash and to leave the case in the middle is tended to be thought as more of an easy solution to settle things up. As a result, voice of justice is silenced and doomed to weep. But this is a welcoming errand for us as HCD has recently issued 18 guidelines for ensuring safety and justice for the rape victims, including DNA tests, recordings of complaint by the officer-in-charge of the police station, providing necessary services especially for women or girls with disabilities who are victims of rape.⁵ But there are still some remaining loopholes. Some countries of Asia including Philippine have recently enacted legislation

¹Jalal Uddin Ahmed, The Fault in our Laws: Analyzing the legal aftermath of Rape, TheFutureLawInitiative, May 12, 2017, <http://futrlaw.org/the-fault-in-our-laws/>

² Ibid

³<https://www.thedailystar.net/country/187-women-raped-29-women-faced-sexual-harassment-last-3-months-in-bangladesh-1556101>

⁴Eithen Dowds, An International legal response to #MeToo, rape and sexual abuse is needed, The Conversation, May 4, 2018, <http://theconversation.com/an-international-legal-response-to-metoo-rape-and-sexual-abuse-is-needed-95617>

⁵. Cops must record rape complaints without delay: HC <[http://www.thedailystar.net/country/sexual-assault-in-bangladesh-police-must-record-rape-complaints-without-delay-high-court-1582306](http://www.thedailystar.net/country/sexual-assault-in-bangladesh-police-must-record-rape-complaints-without-delay-high-court-1582306#ampshare=http://www.thedailystar.net/country/sexual-assault-in-bangladesh-police-must-record-rape-complaints-without-delay-high-court-1582306)>

redefining rape and commanding state assistance to the victims. In the meantime, victims in our country are still treated negligently by having blatant vagueness in investigating process.⁶ Bangladesh ensures women's participation in its society which is unthinkable in other Muslim majority countries.⁷ But still evident official statistics and daily news of violence in media outlets reveals that combating sexual violence is a far cry in our present society.

Constitutional Safeguards against Sexual Violence

First of all, our constitution has safeguards and legal protections for women. The constitution promises a secular and socialist society free from oppression "in which the rule of law, fundamental human rights, freedom, equality and justice, political, economic and social rights will be secured for all citizens."⁸ Article 28(1) state that the state shall not show discrimination among citizens on the basis of religion, race, caste, sex or place of birth.⁹ It sets out the equal rights of women and men in all spheres of the state and public life.¹⁰ Article 27 of the constitution declares every citizen is equal before law and will get equal protection of law which really is a very broad concept in a Muslim majority country like Bangladesh.¹¹ Article 29 promises to give equal opportunity to all. Provisions for women empowerment and equal rights are only secured here but there are no article stating about the protection of women from oppression and their safety in public life. Though having shortcomings existing laws regarding rape are adequate in Bangladesh. But as constitution is the 'fundamental' and 'highest law' of the state and any other law repugnant to constitution are void, there should be strong statutory principles stating protection of women from oppression and ensuring their safety in public life. Though article 31 provides right to protection, the actual scenario speaks something else. Only few cases of sexual violence see conviction, according to court and prosecution sources.

Sexual violence legislation: Bangladesh

Apart from constitutional safeties, Bangladesh is signatory of various treaties and conventions regarding sexual violence and numerous legislations are also prevalent here.

Punishments for acts of sexual violence are guided by the country's Penal code of 1860 which proposes punishment of up to 10 years and fines and if the woman raped is his wife and is under twelve years of age, the punishment would be up to two years of imprisonment or fine or both.¹² Though this term is erratic with its shortcomings for not having anything to say about marital rape and attaining spontaneous consent on the part of the accused.

The Prevention of Oppression against Women and Children Act 2000¹³ which is called

⁶WORLD REPORT ON VIOLENCE AND HEALTH. Chapter 6. SEXUAL VIOLENCE *See at* chap6.pdf, https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.who.int/violence_injury_prevention/world_report/en/full_en.pdf&ved=2ahUKEwjR4_6UvtngAhWYSH0KHSwKCR0QFjABegQIBxAB&usq=AOvVaw2ymgMO8AJXZxs_ccjdvsZK&cshid=1551188170331, Page 150, April 1 1999

⁷ Bettina Wassener, Success in a land known for disasters, N.Y. Times, April 09.2012
<http://www.nytimes.com/2012/04/10/world/asia/success-in-a-land-known-for-disasters.html>.

⁸ Article 28(1), 27 The Constitution of the people's republic of Bangladesh, Nov.4,1972, *available at* http://bdlaws.minlaw.gov.bd/sections_detail.php?id=367§ions_id=24547.

⁹*ibid.*

¹⁰*ibid.* Art.28(2).

¹¹*ibid.* art 27

¹² Section 376, THE PENAL CODE, 1860

¹³RokeyaRahaman, CEDAW must be fully ratified, The ProthomAlo, 11th March 2017, *available at* <http://en.prothomalo.com/opinion/news/141791/CEDAW-must-be-fully-ratified>

Nari-O-Shishu Nirjaton Domon Ain provides various types of protection to the victim. But this also doesn't give us a conclusive definition of rape and makes 'forceful sexual intercourse' essential for defining rape.

Bangladesh ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1984 concerning on four articles. In 1997 it withdrew its reservation on two articles while the reservation on other two remained. But it has been 33 years since the ratification took place, still the struggle against violence and discrimination has not seen a great success. Still the four ratified articles are not implemented properly let alone the full implementation of CEDAW.¹⁴

The latest Domestic Violence (Prevention and Protection) Act of 2010 provides various types of protection for women. Under the protection of this Act abused women shall get shelter, medical facilities and sometimes compensation as per order of the court. The number of cases filed under DVPP Act is slow at the outset. Lawyers don't feel like fighting for these cases as those are not profitable.¹⁵ Simplifying legal definitions, along with reforming the terms, conditions and punishments for breach of community services can be suggested for the progress.

These laws and conventions are somehow directly related to the violence against women and some are indirectly related. But overall these are conducive to upholding the rights and privileges of women.

Controversial Factors Assisting Perpetrators Get Acquittal: *Scrutinizing the term "Consent"*

One of the crucial existing lacunae is the definition of rape. In rape trials, the focus is basically on who perpetrated the crime or if the penetration happened or not¹⁶. But no one has to say whether the act was consensual. This is erratic! Legal definition of what attitude or behavior constitutes sexual assault is quite clear. But there's still remained confusion about what consent means. This is an unequivocal voluntary agreement by a person engaging in sexual activities.¹⁷ Under Canadian laws, the convicted cannot subjectively believe there was consent; he must demonstrate his reasonable belief in the consent for which he determines to do the same.¹⁸ This Canadian standard seems to be praiseworthy and should be for us to follow. An unambiguous, purposive and affirmative notion of consent which at least deter the prosecution authority not to relay on myths. In Sweden, they are voting for the change of their rape laws, backed by its prime minister that will shift the burden of proof to the accused¹⁹. The change would need a spontaneous consent to be given before the contact occurs. And the accused need to prove they attained this. Moreover, "Yes means Yes" approach is taken as an unambiguous and affirmative standard of consent but "No means No" approach is not considered in the same way. This approach faces criticism and requires a physical resistance too instead of having an unequivocal oral resistance on the part of the victim. We should not rely on such archaic standards where we know in most cases victims might not be in a position for physical resistance. Hence, the burden on victim makes them responsible to prove resistance on their part.

¹⁴ Ibid

¹⁵ Afrose Jahan Chaity, Domestic Violence Act Needs More Implementation, Dhaka Tribune, November 30th, 2016 <<http://www.dhakatribune.com/bangladesh/2016/11/30/speakers-domestic-violence-act-2010-needs-implement>>

¹⁶ Cara McGoogan, What can we learn from other countries when it comes to rape convictions? Lifestyle>Women, 22 December, 2017 <http://www.telegraph.co.uk/women/life/can-learn-countries-comes-rape-convictions/>

¹⁷ Psymhe Wadud, Clarity of 'consent' in rape law, TheDailyStar, July 4, 2017, <http://www.thedailystar.net/law-our-rights/clarity-consent-rape-law-1427827>

¹⁸ Ibid

¹⁹ Supra note 16

Basically, in patriarchal society like us this is also a trick that criticizing "No means No" rape laws is a conscious effort of keeping Martial rape outstanding.²⁰ Introducing marital rape laws seem to be utopian where existing law is hundred years old, not defining about 'Consent' clearly. The Penal Code of 1860 along with the Prevention of Oppression against Women and Children Act 2000 don't give us a conclusive definition of rape and make the penile penetration essential to commit offense. But in 2013, in India a special committee defined rape within broader amplitude, under the title of sexual offence. This amendment has brought various non-penetrative acts within the ambit of the same head of sexual offence.²¹

Impeaching Prosecutrix and Scrutinizing Our Evidence Act: Section 155(4) of the Evidence Act, 1872 states that "when a man is prosecuted for rape or an attempt to ravish, it may be shown that the Prosecutrix was of generally immoral character." In the case, *State vs. Abdul Majid*, where a divorcee with one child got raped by a neighbor in her own house. The judgment read, "The plaintiff is habituated to sex, so it was not possible to obtain any evidence of rape. The victim is of immoral character and involved in different unsocial and unethical activities". So, the accused got acquitted. Also in the case *State vs. Sri Pintu Pal*, filed in 2010 under the Women and Child Repression Prevention Act 2000, the accused was acquitted as the complainant was a domestic help and considered to be of "easy virtue".²² First of all, a woman's character and history of her past have nothing to do with the determination of consent which basically enables the perpetrator to go scot free. Secondly, it switches the spotlight on victim from the accused. The chances of victim shaming in crimes become easy then. The rapist, the defense lawyer and the society take a chance to prove the victim had prior consensual sexual relations. Thirdly, the section in its sense can also be illustrated that 'chaste' women can be raped only. Does that mean woman who is of "questionable morals" does not need to give any authorization?²³

Role of Public Prosecutor (PP) in Not Depending Solely on Medical Report: Most of the time the accused escape punishment for the sole dependency of the court on medical report. Medical report is crucial to prove or disprove a case but this is not all in all to be solely depended.²⁴ For instance, if a mother of two children got raped, even after prompt medical examination would probably fail getting the sign of "forceful sexual intercourse" stated as rape in the Penal Code, which was later adopted in the Women and Children Repression Prevention Act 2000. In such circumstance, it is the legal discernment of the PP to make the court believe on victim's account with other probable circumstantial evidences and social and legal aspects. Supreme Court advocate Khurshid Alam disagrees with the view that without medical evidence rape cannot be proved in the court.²⁵ In the alleged hearing of Bananirape case also, the victims claimed that they were invited as guest at 'Rain tree hotel'. So, neither the alleged rapist was a stranger nor did the victims showed up there unwillingly.²⁶ These two things "non-stranger" "willingly gone there" may create problems for the victims to get justice under the present legal framework. So, here also, this is the accountability of the PP to prove the case with his legal acumen considering relatable facts.

²⁰ supra 17

²¹ Ibid

²² Evidence Act too chaste for prosecuting rapists, thedailystar.net, June 6, 2016,

<https://www.google.com/amp/s/www.thedailystar.net/city/evidence-act-too-chaste-prosecute-rapists-1235023%3famp>

²³ Sairana Ahsan, Only the "Chaste" are Raped in Bangladesh, Share-net Bangladesh, June 27, 2016, <https://www.share-netbangladesh.org/only-the-chaste-are-raped-in-bangladesh>

²⁴ Bishakha Devnath, Many rapists escape thru' loopholes, The Daily Star, March 30, 2018

<http://www.thedailystar.net/frontpage/many-rapists-escape-thru-loopholes-1555585>

²⁵ Ibid

²⁶ Supra note 17

Age of Consent

Amidst of many debates about not getting justice in terms of rape prosecution, it is noted that how rarely critics have mentioned the legal age in which an individual of Bangladesh is considered to be mature enough to give consent. According to Bangladesh's Penal Code the age of consent is only 14. It's the low average age of consent which is considered to be the bigger concern. Such ambiguous law raises difficulties in terms of proving childrape and marital rape. Because children of 14-year-old don't attain such maturity to be free and to be able to decide private matters for themselves. But the section 375 of the Penal Code defined statutory rape as "with or without her consent, when she is less than 14 years of age".²⁷ Also, in exception of section 375 it made sexual intercourse (whether forcible or not) between spouse legal, if the wife not being under 13 years of age.²⁸ This is such an egregious provision providing for marriage as a defense of rape. But British Parliamentarians quickly won over by raising the age of consent in the UK to 16, though it took until 1991 for English Law to make such marriage a crime.²⁹

Sloppy Work by Investigation Officer (IO): In a rape case, investigation is the foremost part of the legal procedure. All evidence should be collected sincerely and meticulously otherwise any mistake by investigation officer can make the accused get acquittal. And there would not be any way to re-do it because by that time evidences might have been destroyed. In recent research on judgments of murder cases, the Police Bureau of Investigation (PBI) found that the perpetrators escaped in 123 cases.³⁰ This clearly indicates how negligently rape charges are being investigated.

Social Media Protests Need Legal Attention: Over the past few years there has been mass solidarity against sexual abuse all over the world. Like #MeToo and #TimesUp in Hollywood, #IBelieveHer in Northern Ireland and #Cuentalo in Spain.³¹ Women from all over the world arranging virtual protests, sharing their stories manifesting age old despondency. Hence legal and institutional response to such mass mobilization is a hard-core need. This will not solve all problems associated with crime. But it might go some way to assume how many sexual abuse incidents go untouched and to persuade other women not to hold their tongue in terms of violence.

Conclusion

Over and above, sexual violence is an invasion on human body and a violation of bodily probity. The existing statutory standards of proving rape falls short of being in tune as well as unable to ensure the constitutional rights of a woman. We need effective overhaul of The Penal Code and legislative concerns to deal this. I have already addressed prevalent legislations, legal system and their loopholes combating sexual abuse in Bangladesh. In my observations and findings, there are some recommendations that might help to reduce the number of victimizations of sexual violence and get offender under punishment:

- The Government needs to establish a monitoring cell under Ministry of Women and Child Affairs to take quick legal action against the perpetrators.³²
- Section 155(4) and 146(3) of Evidence Act, which authorizes the court to question on the immoral character of the Prosecutrix, need an overhaul.
- The concerned authorities should rethink about the definition of rape including specific clear actions which demonstrate 'consent'.

²⁷Supra note 12

²⁸ Ibid

²⁹ Niaz Alam, Does Bangladesh Have Age of Consent? Dhaka Tribune, 11th March 2017, Available at <http://www.dhakatribune.com/opinion/op-cd/2017/03/11/bangladesh-age-consent>

³⁰ Supra Note 24

³¹ Supra note, 4

³² Supra Note 16

- The authority concerned needs to amend section 375 of Penal Code which states the low average age of consent in the world and makes it to at least 16.
- The Government should make it a punishable offence when any failure on the part of the investigation agency takes place in collecting report.
- Sexual harassment most of times leads to sexual violence. That's why it needs to be stopped at initial stage. Sexual harassment complaint centers should be set up at work places and educational institutions with immediate effect to take charges.
- The Government should work to ensure transparent trail for the sake of victimized women and girls, covering the provision of appropriate support services.
- Due to social insecurity, rape victims and victims of sexual harassment don't seem to report the crime. Law enforcement agencies should take measures to make the case reported and ensure the victim to get the accused under punishment.
- More budget should be corroborated for the GO and NGO to implement the DVPP Act 2010 and raise awareness among people along with implementation authorities.
- Designing and launching targeted awareness campaign, outside the capital also, to educate and change the mindsets and attitudes with the help of schools, the media, and community and religious leaders.
- Political support must stop as the perpetrators use this as their safe heaven.
- We need to put it firmly in the mind of our patriarchal society that neither a woman's clothes nor her flirting and silence express her 'consent'.
- We need to stop victim blaming relying on rape myths rather ask what message perpetrators receive throughout their lifetime about rape and about "being a human".