

RECONCEPTUALISING RAPE IN LAW REFORM

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While rape is a predominantly female social experience, the offence of rape continues to be viewed and defined in law from the male social perspective. Since penetration is central to the male idea of sex, it is also the focus of the offence of rape, regardless of its disconnect with female sexuality, desire, or violation. The Criminal Law (Amendment) Act, 2013, though progressive in many ways, is also steadfast in its adherence to the penetration paradigm. In this paper, I argue that rape should be viewed as a violation of sexual autonomy and bodily integrity, rather than an act of penetration, and the legal definition of the offence ought to be expanded accordingly. This would facilitate a more wholesome, gender-just approach to the crime.

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I. INTRODUCTION

Much has been said about the sociology, psychology and biology of rape. Much has been written and discussed about the law against it. Several attempts

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have been made, across the world, to effectively punish, and eventually prevent rapes. And in these historical, political, social, scientific, and legal processes, the way the term 'rape' is understood has undergone a great many changes. These changes have reflected themselves, inevitably, in the way laws have been reformed to deal with the offence, and have affected, in turn, the way society has perceived the act.

In this paper, I offer a re-conceptualisation of rape, and a more holistic, gender-just, legal framework to deal with it, taking the 2013 Amendment to rape-related provisions in the Indian Penal Code, 1860 as a frame of reference.¹

There has been much debate in Indian and international scholarship on nearly every aspect of the 2013 Amendment: the question of gender neutrality, the ambit of the law, its adequacy, and so on. But none of these debates have challenged the idea of what rape *is*, meaning that the starting point of all discussions has been rape as an act of unwanted penetration. I argue that this assumption is set in a male view of what constitutes sex, and does not consider what rape means for the victim. Therefore, this conceptualisation needs reconsideration.

II. UNDERSTANDING RAPE LAW AMENDMENT IN INDIA

'Rape laws', a crude, but convenient, term for laws dealing with rape, have been amended twice since the Indian Penal Code, 1860 ('IPC'),² and the Indian Evidence Act, 1872 ('IEA')³ were enacted. The first amendment was made in 1983, in the wake of the judgement of the Supreme Court in *Tukaram v. State of Maharashtra*,⁴ ingrained in popular memory as the *Mathura Rape Case*. The Supreme Court, reversing the judgement of the Bombay High Court, had acquitted the accused policemen of charges of custodial rape of a 14-16 year old tribal girl. The rationale was that she was 'habituated to sexual intercourse', that she had not successfully shown vitiation of consent by fear, and that she had not offered proof of her resistance against two fully grown policemen, in a police station, at night.

¹ No comment is sought to be made on the Criminal Law Amendment of 1983, beyond what is necessary to show that the trend of rape-law reform in India has been to address the specific problems that trigger them. Further, though I believe that a gender neutral provision of rape should include transgender persons, I shall use cisgender terms. Discussing the modalities of a law that includes transgenders would require inquiry (into the power dynamics amongst transgender persons) which goes beyond the scope of this paper. Similarly, while it is my position that marital rape, and consequently § 376B ought to be scrapped, I shall not attempt to make such suggestions because it requires and deserves far more detailed discussion than is possible here.

² Indian Penal Code, No. 45 of 1860, INDIA CODE (1993), vol. 2.

³ Indian Evidence Act, No. 1 of 1872, INDIA CODE (1993), vol. 2.

⁴ *Tukaram v. State of Maharashtra*, (1979) 2 SCC 143.

Perceived widely as a gross miscarriage of justice amongst the ‘intelligentsia’,⁵ and ordinary citizens alike, the judgement generated sufficient outrage for the creation of ‘autonomous organisations’, unaffiliated with any political party. These groups, in turn, created enough political pressure for the government to amend the law. Unfortunately, however, the Criminal Law (Amendment) Act, 1983 (‘1983 Amendment’),⁶ ignored several of the suggestions of women’s groups to make the law against rape more comprehensive.⁷ The changes included, instead, special provisions for aggravated forms of rape (such as custodial rape, gang rape, and rape by public servants), being added to the *IPC*, and the insertion of a reverse onus clause in the *IEA*.

These amendments altered the conceptualisation of rape in the sense that the law recognised the coercive power which comes with a position of authority. It acknowledged that the presumption of innocence of the accused, and the burden of proving guilt beyond reasonable doubt, was unjust when the victims of the crime were so utterly powerless.⁸ In so doing, the understanding of rape evolved from an act of force to an act of power. However, these changes, the reader will note, were aimed specifically at addressing the lacunae exposed by *Mathura’s Case*. Therefore the observation of the Supreme Court, that the amendment had failed to empower victims of rape to report cases, or to increase the rates of conviction, or, indeed, to prevent victims from being re-victimised on the stand, is not surprising.⁹

Almost thirty years after the *1983 Amendment*, another heinous incident of gang-rape came to light on the night of December 16, 2012. A 23-year-old, middle-class girl had been vaginally and anally penetrated by a group of men using their hands, their penises, and an iron rod. She did not survive the assault. The incident took over the news cycle and agitated the middle class like never before. Protesting masses demanded a stricter, more comprehensive legislation, since the law’s understanding of rape had thus far been limited to penile-vaginal intercourse. Other forms of penetration were, indeed, covered by § 377, *IPC*, which proscribes carnal intercourse against the order of nature,¹⁰ but the censure asso-

⁵ See, An Open Letter to the Chief Justice of India written by Upendra Baxi, (1979) 4 SCC J-17.

⁶ Criminal Law (Amendment) Act, 1983, No. 46, Acts of Parliament, 1983 (India).

⁷ Maithreyi Krishnaraj, *The Women’s Movement in India: A Hundred Year History*, 42(3) Soc. CHANGE 325, 329-330 (2012).

⁸ Shraddha Chigateri, Mubashira Zaidi and Anwesha Ghosh, *Locating the Processes of Policy Change in the Context of Anti-Rape and Domestic Worker Mobilisation in India*, prepared for the United Nations Research Institute for Social Development (UNRISD) project WHEN AND WHY DO STATES RESPOND TO WOMEN’S CLAIMS? UNDERSTANDING GENDER EGALITARIAN POLICY CHANGE IN ASIA 20-21 (April, 2006).

⁹ *Delhi Domestic Working Women’s Forum v. Union of India*, (1995) 1 SCC 14: 1994 Supp (4) SCR 528, at paras 534 G-H, 535 A-B.

¹⁰ § 377, Indian Penal Code, 1860: Unnatural offences.-

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

ciated with the offence was against homosexuality, rather than rape. The underlying idea, discussed in detail in the next section, being that non-consensual, penile-vaginal intercourse was an offence graver than any other kind of sexual violation.

The Criminal Law (Amendment) Act, 2013,¹¹ was enacted within five months of the incident. The amended provisions are highly progressive.¹² The understanding of 'consent' embodied by the statute clearly conveys the intention to shift focus away from the actions and sexual history of the victim, and onto the actions of the accused. Hence, a lack of resistance, or submission, is distinguished from overt agreement or consent. Further, consent is required, not as a one-time *carte blanche*, but for specific sexual acts. Although it may be conveyed in words, gestures or other forms of verbal or non-verbal communication, the fact that consent must be unequivocal, leaves little room for victim-blaming, if judges stay true to the philosophy and purpose of the provision. Similarly, the amendment takes into account the vitiating effect of unequal power relations on consent, prescribing a harsher sentence for a broad range of circumstances in which the victim is in a disadvantaged position compared to the perpetrator.

The definition of rape has also been greatly expanded. But, as with the 1983 *Amendment*, the changes made to the *conceptualisation* of rape seem geared to respond to the problems highlighted by the incident that prompted the amendment. Thus rape now includes, beyond penile-vaginal penetration, penetration of the mouth, anus, urethra, or any other part of a woman's body by a penis, by manipulation, by 'applying the mouth', or by an object.

The scope of the law in terms of who may be victims and perpetrators also remains severely gendered and constrained. The proposal to make the law gender neutral was opposed by most feminist groups, citing the patriarchal social reality of the country. It was argued that, given the power structures of Indian society, the perpetrators of rape were almost always male, and the victims, female. The offence of rape, to reflect these conditions, would have to be gender specific.¹³ This does not explain, however, why homosexual rape (of men by other men, or of women by other women), and the rape of, or by, transgendered persons was not included. The reason cannot be that § 377 already covers these acts because, by that logic, the expansion of the definition to include acts beyond penile-vaginal intercourse amongst heterosexuals would also be redundant. Further, the social sanction and outrage against an offense under § 377 is very different from that

Explanation- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

¹¹ Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013 (India).

¹² Mrinal Satish, *Forget the Chatter to the Contrary, the 2013 Rape Law Amendments are a Step Forward*, THE WIRE (Aug. 22, 2016), <https://thewire.in/60808/rape-law-amendments-2013/>.

¹³ Flavia Agnes, *Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law*, 37(9) ECON. & POL. WKLY 844, 847 (2002).

against rape, and the provision is used today more as a sword against consenting homosexual adults, than as a shield for victims of rape (with the exception of cases of child sexual abuse).¹⁴

III. THE TRADITIONAL CONCEPTUALISATION OF RAPE

The manner in which the term 'rape' plays out in the popular subconscious has changed drastically over time. The entry of rape into the domain of crimes was not as a crime against the human body, but as a property crime, an offence against the father, the brother, or the betrothed of the woman, and a violation of his proprietary right over her. Moreover, it was considered to be rape only when it was inflicted upon a virgin.¹⁵

Even as the common law definition of rape evolved to mean "the carnal knowledge of a woman without her consent",¹⁶ the act continued to be understood from a very *male* perspective. The victim was required to show that the carnal knowledge was obtained against her will, by use of force. Further, she was required to prove that she had used sufficient force to resist the attack, which, it has repeatedly been argued, is a typically male response to a physical attack. Women are not ordinarily socialised to respond to force with force.¹⁷ Similarly, carnal knowledge had to be obtained by sexual intercourse, which in turn meant penile-vaginal penetration.¹⁸ This is not difficult to understand, given that rape, as previously discussed, emerged as a property crime, and was conceptualised by men. The consequence of penile-vaginal penetration was seen to be graver than other forms of physical violation, since it could result in a pregnancy and disturb patrilineal succession by casting doubt on paternity. The male focus on penile-vaginal penetration was a manifestation of the need to control the reproductive capacity of women.

Compared to this idea that rape is basically *sexual intercourse*, just missing consent, is Brownmiller's conception of rape as violence. For her, the focus of the act ought to be the imposition of the will of one person, by sheer physical and/or social force, on another, and not the penetration itself.¹⁹ Mackinnon contests this idea of rape as violence. It is her position, simplistically put, that in the paradigm of male supremacy where violence is often eroticised as sexual, it is nearly impossible to distinguish rape from sex. The issue is less whether there was force, since the socially male understanding of sex considers *some* degree of force intrinsic to sex. The real issue is whether, given hierarchical gender relations and

¹⁴ *Id.*

¹⁵ SUSAN BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 18 (1975).

¹⁶ WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 210 (1769).

¹⁷ Susan Estrich, *Rape*, 95 *Yale L.J.* 1087, 1092 (1985-86).

¹⁸ Lundy Langston, *No Penetration- And it's Still Rape*, 26(1) *PEPP. L. REV.* 1, 4 (1998).

¹⁹ Brownmiller, *supra* note 15, at 378.

the eroticisation of violence ad domination, the consent given by a woman can ever be meaningful.²⁰

IV. 'RAPE' IN THE 2013 AMENDMENT

With the incursion of feminist jurisprudence into law-making and judicial discourse, there have been several reforms in the laws against rape. Yet, the centrality of penetration remains. And the *2013 Amendment*, despite being a forward-looking piece of legislation, is also bogged down by this obsession with penetration. While the ambit of the 'act' of rape has been expanded from penile-vaginal intercourse to penetration of other orifices using substitutes for the penis,²¹ the essence of the act continues to be (some kind of) *penetration*. In fact, the provision justifies criminalising the touching of the *labia majora* as rape, also, by *deeming* it to be penetration.²²

I submit that from a victim's point of view, penetration is not the essence of the offence of rape. It is the denial of sexual autonomy. Subjecting the victim, without her/his consent, to any overtly sexual act, whether penetrative or not, and the humiliation and degradation that accompany this physical invasion, make a travesty of the autonomy of an individual to determine who (s)he wishes to engage in sexual interactions with, at what time, and to what extent. This was recognised as the 'harm' caused by rape even in the report of the Justice Verma Committee.²³ Till the definition of rape was limited to penile-vaginal penetration, the factor that distinguished rape from, say, acts amounting to sexual harassment, was the possibility of pregnancy. Aside from disturbing patrilineal succession, a pregnancy could be a huge physical, emotional and financial burden on the victim. However, once the definition was expanded by the *2013 Amendment*, this distinction disappeared. But the focus continued to be penetration. Touching the *labia majora* of a woman without her consent is a violation of sexual autonomy. It is degrading and humiliating *per se*, and not because the law has deemed it to be penetration. Similarly, fondling a woman's breasts, or touching one's penis to her breasts, or ejaculating onto her face or body or into her mouth without ever touching her, or making her suck on one's testicles, or even forcing a kiss on her, is no less invasive, violative, and humiliating than the kinds of penetration now recognised as rape.

I submit that there is no longer a reason to distinguish penetration from other overtly sexual acts. For one, ever since the focus of the crime became the

²⁰ CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 172-78 (1989).

²¹ Brownmiller, *supra* note 15, at 378. "And while the penis may remain the rapist's favourite weapon...it is not in fact his only tool. Sticks, bottles and even fingers are often substituted for the 'natural' thing".

²² § 375, Explanation 2, Indian Penal Code, 1860, read with § 375(c), Indian Penal Code, 1860.

²³ JUSTICE J.S. VERMA, JUSTICE LEILA SETH, AND GOPAL SUBRAMANIAM, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW 94 (Jan. 23, 2013).

woman,²⁴ the possibility of conception has not been as much of a concern as the violation of bodily integrity, and the physical, mental and emotional injury caused by it.²⁵ If this were not the case, there would be no rationale for expanding the ambit of the act to non-penile-vaginal penetration. Moreover, if the harm sought to be prevented was conception, the perpetrator could wear a condom, or pay for the contraceptive pills of his victim, and escape liability. For another, the obsession with penetration draws from a male understanding of what sex itself means. The idea that sexual intercourse is necessarily some sort of penetration, preferably penile, is an inherently male concept, linked to male pleasure. A female's orgasm does not *require* any kind of penetration, and is far more likely to be achieved by the stimulation of the clitoris.²⁶ "Women do resent forced penetration. But penile invasion of the vagina may be less pivotal to women's sexuality, pleasure or violation, than it is to male sexuality."²⁷ It is important to highlight this because the politics of sexual intercourse cannot be separated from the politics of rape. Rape is about power, it is about violence, but it is also an inherently physical act, intrinsically linked to sex. How we understand sex, therefore, is inevitably linked to how we understand rape.

V. THE PERCEIVED RISKS OF A BROADER DEFINITION

The criticism against expanding the definition of rape beyond penetration is that it runs the risk of over-criminalisation, and consequently, dilution of the value of criminal sanction. I submit two counter-arguments. First, any kind of criminalisation poses the danger of over-criminalisation, and is likely to have some unintended consequences. For instance, the Protection of Children from Sexual Offences Act, 2012 ('POCSO') criminalises all sexual contact with a minor, presuming that a minor is incapable of consenting. In the process, it also criminalises consensual sex between minors, thereby denying their autonomy and evolving capacity. But this does not mean that the criminalisation itself is invalid. It serves the legitimate aim of protecting children, who are vulnerable to grooming and predation by adults, from sexual abuse. What is required, is for the theory and practice of law to develop a more nuanced understanding of consent, and for there to be a targeted education programme that empowers citizens (minors and majors alike) to consent meaningfully. Similarly, the reconceptualization of rape to include non-penetrative sexual acts serves the legitimate purpose of recognising the denial of a victim's sexual autonomy as criminally punishable. It would, therefore, be a legally and socially sound step forward.

²⁴ Here, the term "woman" is not used biologically, but socially. In a heteronormative, male supremacist paradigm, the "acted upon" is socially female, whereas the "actor" is socially male.

²⁵ Satish, *supra* note 12.

Also *see*, Article 2(b), Declaration on the Elimination of Violence Against Women, 1993: "Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere trafficking in women and forced prostitution."

²⁶ Langston, *supra* note 18, at 25.

²⁷ Mackinnon, *supra* note 20.

Moreover, given the complexity of social reality, a line drawn anywhere runs the risk of being arbitrary. For instance, while research has shown that there is often little difference between the brain of a teenager, and a person in their mid-20s, the age of consent has been set at 18.²⁸ Much like the definition of rape, the age of consent has evolved over time, and has almost always faced criticism from different quarters. There has never been consensus on when a child is old and mature enough to consent, nor has there been agreement on precisely what amounts to rape. But this does not mean that every change in the age of consent has been over-reaching, just as every expansion of the definition of rape does not automatically amount to over-criminalisation.

This inherent danger in criminalisation brings me to my second point. The reason an expansion of the definition of rape causes discomfort is not the possibility of over-criminalisation, but because it goes against long-standing beliefs, nurtured and perpetuated by patriarchy, about sex and rape. This is the same conditioning that makes judges less likely to believe that a woman was raped on a date, or when she was voluntarily intoxicated, and her rapist “thought she consented”, compared to when she was bound and gagged or physically forced.²⁹ But, as is widely accepted now, there is no universal rape script, and rape cannot be defined from the point of view of the perpetrator.³⁰ There is no reason, then, to hold on to this male/perpetrator driven conceptualisation of rape.

The second perceived risk posed by this expansion is likely to be that a provision against rape, so defined, will be misused (the Hail Mary argument against any law which seeks to protect a marginalised social class). My response to it is two-fold. *First*, the mere possibility of misuse is no reason not to enact a law that addresses a systemic issue. Instead, mechanisms ought to be developed to check misuse. *Secondly*, it is intriguing that the clamour of misuse only surrounds social justice legislations/provisions (§ 376, § 498-A, § 498-B, reservation for socially and economically backward classes, and so on), while tax evasion by the rich and powerful is conveniently rechristened ‘avoidance’. Similarly, there is no outrage against the frequent use of other provisions in the *IPC* during family or property disputes. This is not to suggest that the misuse of some laws justifies the misuse of others, but that the prevalent understanding of ‘misuse’ inevitably comes from a place of privilege, and ought not to be allowed to undermine legitimate legal efforts to solve social problems.

²⁸ Carl Zimmer, *You're an Adult. Your Brain, Not So Much*, N.Y. TIMES (Dec. 21, 2016), <https://www.nytimes.com/2016/12/21/science/youre-an-adult-your-brain-not-so-much.html?mcubz=2&module=ArrowsNav&contentCollection=Science&action=keypress®ion=FixedLeft&pg-type=article>.

²⁹ See generally, *Mahmood Farooqui v. State (Govt. of NCT of Delhi)*, 2017 SCC OnLine Del 6378, Ashutosh Kumar J.

³⁰ See Rebecca Chennells, *Sentencing: The “real rape” Myth*, 82 GENDER & THE LEGAL SYSTEM 23 (2009).

VI. THE MYOPIC REACH OF THE PENETRATION STANDARD

Finally, penetration is a standard that is unjust not only to women, but also to male victims of rape. The obsession with penetration, for which, ordinarily, a voluntary act is required: using one's penis/fingers/tongue/or an object to penetrate, implies that the penetrator initiates the act, or, at the very least is an equal participant in it. Especially in so far as the penis is concerned, the assumption is that there can be no penetration without arousal. An erection is equated with the desire to have sex, an assumption which is not borne out by fact.³¹ Thus, the rape script, with its emphasis on penetration, makes it impossible to visualise the penetrator, the purportedly empowered one, as a victim of rape.³² It prevents the law from taking note of the myriad non-penetrative acts which might violate the sexual autonomy and bodily integrity of a man, for instance, a woman sitting on a man's mouth. It also prevents an understanding of the many extraneous factors that may make a sexual act non-consensual for the penetrator, such as blackmail, the threat of force, manipulation, or even the inability to refuse or resist due to a past relationship.³³ Thus it becomes impossible to view women as rapists, for how can they rape if they are the ones traditionally being penetrated, and therefore, assuming the passive role?³⁴

I submit that the focus of rape laws on penetration makes the conceptualisation of rape inaccurate, incomplete, and unjust. It also prevents the evolution of a gender-inclusive law. But, why is a gender neutral law desirable?

The very fact that men get raped, more often by men, but occasionally also by women,³⁵ and have no redress in law, means that a whole segment of the population is excluded and made invisible before law. Merely because women are raped more often than men, does not justify this distinction. Moreover, our estimations of the number of male victims are likely to be severely understated *because* the act is not considered a serious crime, meaning that there have been no efforts to record its incidence.³⁶ This is a violation of Article 14, Constitution of India, which requires equal protection of laws to all persons placed in equal circumstances.³⁷ In this regard, it was argued by feminists in response to the *Criminal Law (Amendment) Ordinance, 2013*, which had sought to make the offence gender neutral, that men and women, as social classes, are *not* equally placed. The reality of rape is that it is a manifestation of the deep-rooted gender hierarchy in

³¹ Philip Rumney and Martin Morgan Taylor, *Recognising the Male Victim: Gender Neutrality and the Law of Rape: Part Two*, 26 *ANGLO-AMERICAN L. REV.* 330, 331-332 (1997).

³² Bennett Capers, *Real Rape Too*, 99(5) *CALIF. L. REV.* 1259, 1292 (2011).

³³ Rumney and Taylor, *supra* note 31 at 334.

³⁴ Rumney and Taylor, *supra* note 31 331-332.

³⁵ *See generally*, Rumney and Taylor, *supra* note 31.

³⁶ Michael Amherst, *Rape is Not Just a Women's Issue*, *THE GUARDIAN* (Mar. 17, 2010), <https://www.theguardian.com/commentisfree/2010/mar/17/stern-review-male-rape>.

³⁷ *INDIA CONST.* art 14.

society, overwhelmingly, an expression of male power against women.³⁸ However, this does not take away from the fact that men may be victims of rape by other men, as well as specific women, who by virtue of their particular circumstances, may be in a position of power over them. If rape is indeed an expression of power, anyone who is powerless may be a victim, and deserves recognition in law. Taken to its logical conclusion, this line of reasoning would suggest that the law should include women as perpetrators of rape against other women unconditionally, and against men, upon proof that they held a position of power (whether physical, or socio-economic, or a combination thereof) over the victim.

The reason why the law ought not to include women as perpetrators of rape unconditionally and in all circumstances is the potential chilling effect this might create against actual victims of rape, given the current gender hierarchy of Indian society. Since men are already in a position of power over women, and the justice system, starting from the police, up to the higher judiciary, is inherently and indisputably patriarchal, counter-complaints by men may be used to intimidate women into withdrawing genuine complaints of rape.³⁹

VII. A DEPARTURE FROM PENETRATION

The Canadian Criminal Code⁴⁰ and the UN Handbook for Legislation on Violence against Women,⁴¹ both suggest that the focus be taken away from penetration. Penetrative acts which currently constitute the offence of rape, as well as non-penetrative acts which violate the sexual autonomy and bodily integrity of the victim, would then be consolidated into ‘sexual assault’, with gradations based on harm. This approach was considered by the Justice Verma Committee, but was not recommended for India, because it was felt that ‘sexual assault’ did not carry the same social opprobrium as ‘rape’.⁴² I have two responses to this. *First*, that if this moral opprobrium comes from the idea that penetrative acts are more harmful than other acts, then it is antiquated, male-centric morality which ought to be discarded. *Secondly*, that if it is the term itself which carries the opprobrium, then the meaning of the term may be expanded to include non-penetrative acts as well, so that these acts may face the same censure. Clearly, this was the rationale motivating the expansion of the ambit of rape to include non-penile-vaginal penetration.

This raises the question whether merely changing the definition of rape in law will change the way people, including policemen and judges, view the offence.

³⁸ Nivedita Menon, *Gender Just, Gender Sensitive, NOT Gender Neutral Rape Laws*, KAFILA (Mar. 8, 2013), <https://kafila.online/2013/03/08/gender-just-gender-sensitive-not-gender-neutral-rape-laws/>.

³⁹ *Id.*

⁴⁰ §§ 265 and 271-273, Criminal Code, R.S.C. 1985, c. C-46 (Canada).

⁴¹ UNITED NATIONS, HANDBOOK FOR LEGISLATION ON VIOLENCE AGAINST WOMEN (2009), <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>.

⁴² JUSTICE J.S. VERMA, *supra* note 23 at 111.

In all likelihood, it will not. The recent decision of the High Court of Delhi in *Mahmood Farooqui v. State (Govt. of NCT of Delhi)*,⁴³ is proof. The Court, though applying § 375, IPC as amended by the *2013 Amendment*, held that it was usual for one party to be hesitant, or even unwilling in a sexual encounter, and therefore, a “feeble no” would not be enough to convey a clear lack of consent. Doctrinal law may have come a long way, but it is still common for rape to be viewed as a crime against the honour of the family or community rather than against the victim. The rape script, which sees ‘chaste’ victims of rape, or women who physically resist an attack, as more deserving of justice compared to ‘unchaste’ victims, or women who did not resist enough, is still religiously adhered to.⁴⁴ By the same logic, the expansion of the ambit of acts which qualify as rape in the *2013 Amendment*, does not mean that they would all be treated on par. Judges are still more likely to convict for, or award harsher sentences to, rape which is penile-vaginal, than any other kind. However, this is not a problem that legislation can address on its own, and thus, must not be allowed to stand in the way of reform. It is a problem that needs to be solved through a number of simultaneous processes such as education, sensitisation, and training. At the same time, the power and role of the law as an agent of social change cannot be underestimated. If history is any indication, the law can be both an expression, and a catalyst of change. Consider, for instance, the prohibition of sati, or facilitation of education for women, or, indeed, the aspirational portions of the Constitution of India, such as Part IV, or Article 17.

Given this, I suggest the following changes in the language of provisions, in the *IPC*, dealing with rape:

First, that certain provisions which cover indisputably and overtly sexual acts, violative of sexual autonomy and bodily integrity of the victims, be collapsed into one offence called ‘rape’ or ‘sexual assault’. These include § 354 (assault or criminal force against a woman to outrage her modesty),⁴⁵ § 354B (assault or criminal force against a woman with the intent to disrobe her),⁴⁶ and § 375 (rape).⁴⁷ § 375, *firstly-seventhly*, and the explanations, provisos and exceptions appended to the provision should remain unchanged. Rape, so defined, should continue to be

⁴³ *Mahmood Farooqui v. State (Govt. of NCT of Delhi)*, 2017 SCC OnLine Del 6378, Ashutosh Kumar J, at paras 46, 47 and 78.

⁴⁴ MRINAL SATISH, *DISCRETION, DISCRIMINATION AND THE RULE OF LAW* (1st edn., 2016).

⁴⁵ § 354, Indian Penal Code, 1860:

“Whoever assaults or uses criminal force to any woman, intending to outrage, or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year, but which may extend to five years, and shall also be liable to fine.”

⁴⁶ § 354B, Indian Penal Code, 1860:

“Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing, or compelling, her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.”

⁴⁷ § 375, Indian Penal Code, 1860.

punishable by imprisonment of either description for not less than seven years, but extending to imprisonment for life. The gradation of punishment ought to be determined, not by the 'act' itself, but the manner in which it was committed. Thus, causing hurt or injury, threat or fear of death, wrongful restraint, or blackmail, among others, may be considered aggravating factors, meriting harsher sentences. The threat or fear of death or injury need not be explicitly stated, but may be implicit in the circumstances. This would be similar to the distinction between theft and robbery in the *IPC*. Other factors may also call for stricter sentences. For instance, where the act was committed as revenge or punishment, or where it was committed by a person in a position of trust, such as a relative, or intimate partner.

Secondly, overtly sexual acts must be distinguished from sexual overtures, demands, or requests for sexual favours, and sexually-coloured remarks, which are covered by § 354A.⁴⁸ Overtly sexual acts would necessarily require physical contact, either directly (such as fondling a body part) or indirectly (such as ejaculating on a person). They would include acts which are ordinarily part of a sexual encounter including, but not limited to, disrobing, kissing or petting, and any kind of penetration, done without the consent of the victim. The distinction between acts which require physical contact and those which do not is meant to prevent the provision from becoming overbroad, and to preserve parity between the offence and its sentence.

Thirdly, the provision ought to be entirely gender neutral insofar as victims are concerned, and conditionally gender-neutral as concerns perpetrators. A woman may be prosecuted for rape of another woman in all circumstances, and of a man when it can be shown that she was in a position of power or authority over him, thereby changing the gender relations between them. In such cases, the burden would be upon the victim to show that such a power hierarchy existed in order to invoke § 114A, *IEA*, which should also be amended accordingly.⁴⁹ Subject to these conditions, §§ 376A-376E should also be made gender neutral. For § 376D (gang-rape),⁵⁰ where the victim is male, and the perpetrators are either all female

⁴⁸ § 354A, Indian Penal Code, 1860: Sexual Harassment and Punishment for Sexual Harassment.

⁴⁹ § 114A, Indian Evidence Act, 1872: Presumption as to Absence of Consent in Certain Prosecution for Rape.-

"In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m), clause (n) of sub-section (2) of the Indian Penal Code, where sexual intercourse by the accused is proved, and the question is whether it was without consent of the woman alleged to have been raped, and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent."

Explanation.- "In this section, 'sexual intercourse' shall mean any of the acts mentioned in clauses (a) to (d) of Section 375, Indian Penal Code"

⁵⁰ § 376D, Indian Penal Code, 1860: Gang Rape.-

"Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape, and shall be punished with rigorous imprisonment for a term which shall not

or a mix of men and women, it would be sufficient to show that any one of the perpetrators was in such a position vis-à-vis the victim.

VIII. CONCLUSION

In this paper, I argued that the legal definition of rape (in India) continues to be deficient in its scope, despite amendments, because of its focus on penetration. This focus stems from a male understanding of sex, and therefore, does not account for the (socially female) victim's bodily integrity and sexual autonomy. The obsession with penetration also prevents a more gender-just and inclusive conceptualisation of rape. 'Men' as penetrators are almost impossible to imagine as victims, and 'women' as passive recipients of the penetration, cannot be visualised as perpetrators.

It is my position that the 'harm' sought to be addressed in criminalising rape is no longer an unwanted pregnancy or "defilement". It is the destruction of the victim's sexual autonomy and violation of her bodily integrity. This is evident from the expansion of the definition of rape in the *2013 Amendment* to include forms of penetration other than penile-vaginal. There is nothing to explain, therefore, why non-penetrative sexual acts which cause the same harm to the victim, are not understood as rape. Expanding the scope of the offence beyond non-consensual penetrative acts, I submit, serves a legitimate purpose, and would not amount to over-criminalisation. Furthermore, the perceived risks of such an expansion are more a reflection of entrenched, patriarchal, heteronormative views of what *really* amounts to sex, combined with privileged speculation, than tangible risks.

I propose a conceptualisation of rape in which any explicit, overtly sexual act done without the consent of the victim is punished on the same footing as penetration currently is. Gradations of sentence may be based on the manner in which the act was committed, the purpose for which it was committed, and the person who committed it. In this paradigm, the culpability for rape could be determined based not only on the unequal power dynamic between genders, but also on specific circumstances which reverse the said dynamic.

This reconceptualization of rape would place the sexual autonomy and bodily integrity of the victim at the focus of the offence, rather than an antiquated, male notion of sex and rape. And in so doing, it would give voice to the thousands of victims of rape, both male and female, who have, thus far, found no redress in the law.

be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of the person's life and with fine".