

Understanding Rape from the perspective of south Asian country.

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ABSTRACT

Rape is heinous crime against women where it used as weapon to harm women not physically but mentally and their dignity as well to control them, subordinate them. This paper aims to understand the rape legislation across south Asian countries where in-depth examination will take place regarding laws related to rape specifically in, India, Pakistan, Bangladesh, Nepal, Sri lanka, Afghanistan. Where two main issues will be considered here that is how these nation has defined rape where main focus will be what constitute rape in these nations and another issue will be what are the punishments are given against the rape and whether those punishments are sufficient or not, while dealing with these issue focus will be on how these laws have been evolved and whether these laws are effective in curbing the issue of rape.

KEYWORDS

Rape, laws, legal frame work, south Asian countries, punishments, sexual violence, violence against women.

Introduction

Women in south Asian region faces high rate of sexual violence in various forms, there are several reports which has been published talks about how women are victim of rape in these regions. This paper aims to encompass how in south Asian including India, Pakistan, Bangladesh, Nepal, Sri Lanka, Nepal and Afghanistan issue of rape is a severe matter where rape is used as weapon to control women, as stated by d costa in her studies in the south Asian region there are several times during the war where rape has been used a weapon to degrade the opponent and humiliate them. But this crime is not limited in to the field of war only but this is something which women face in her day to day lives.

According to WHO report On average, 736 million and up to 852 million women who were aged 15 years or older in 2018 (nearly 1 in three women) have experienced sexual violence at least once in their lifetime. The report has stated that these violence are either done by the intimate partner or non partner. Hence, this form of a violence remains pervasive in the lives of women and adolescent girls across the globe. Even if take an example of India, according to The Economics Times there were 31,000 cases of rape has been reported in 2022. And this number has been kept on increasing. Various scholars have attempted to understand the problem existing with law and violence against women and how despite having the legal framework within the country yet nation is failed to decrease the number of rape of victims.

Upendra baxi in his book Public Secrets of Law: Rape Trials in India has closely examined how the process of rape trials often become a space where there is intertwine between private and public realm of violence, power and justice. Where legal process is deeply influenced by cultural norms and social hierarchies which result into the re-victimization of survivors rather than justice. Where viticm are treated with shame and discrimination.

Goonesekere in Violence, Law, and Women's Rights in South Asia, has explained about the intersection of law, violence and gender across various south Asian countries like, India, Pakistan, Nepal, Sri Lanka, Afghanistan, where analysis of different form of violence against women has been evaluated which includes domestic violence, sexual harassment and rape and how these region has legally responded to this form of violence. The author has argued here that despite having the existence of legal frame work within the country these regions has failed to protect the women from the violence and author highlight the reason for ineffective laws are deep rooted

patriarchal norms within the society. Where not only there is inadequate enforcement mechanism but also lack of the political will.

Bhasin in her book *Understanding Gender* has highlighted a very significant aspect where the author has explained how social conditioning of the society plays a significant role in the inequality among genders and perpetuated violence against them. She has explored how gender roles are socially constructed and perpetuated through various institutions, such as the family, education, media, and religion. And leads toward the inequality an injustice. Where particular focus is on south Asian region, and her analysis is rooted in the socio cultural context of this region. Hence here socio cultural context is central theme to understand violence against women. It can be said that why there is failure of law protecting the women because a mere having law is not sufficient especially when there is existence of inequality and injustice from the beginning, here its very important to look after the fact how we are raising our children, if we are raising our boys that they are strong and entitled to treat women however they want then there is higher chances of failure of a legal framework within the country. She has addressed the main problem.

Oxfom report titled the law is not enough is powerful critique of the limitations of legal reforms in addressing the pervasive issue of sexual violence in India, where it has highlighted the legal changes not sufficient to address the root causes of sexual violence, to address this issue there is requirement of the holistic approach which situates the holistic approach within the broader socio cultural context. The report also highlighted the need of humans right based approach where the focus is shifted from merely perpetrators the rights of the victim. Which includes treating them with dignity and providing them with necessary support to rebuild their lives.

In this article the main questions need to address is what are the laws against rape in south Asian country and how south Asian countries have defined rape in their law. Also another question Which needs to be addressed here is what are the punishment is mentioned in their legal framework and whether those punishment is sufficient or not?

METHODOLOGY

In this paper the methodology which has been used is primary and secondary source of data where statutory provision of the south Asian countries including India, Pakistan, Bangladesh, Nepal, Sri Lanka, Afghanistan, has been used apart from that case laws has been considered here and reliance has been made on various news articles and different organization reports. Here Data was collected from the penal codes and legal statutes of South Asian region, where reports and articles from legal scholars, NGOs, and international organizations were reviewed to provide context and insights to understand how the legal framework of the south Asian region perceives law and what are the punishment given to the offender of this crime, also to understand and look into whether these laws are sufficient or not and if not what is the reason behind for ineffective of this law.

What constitute a rape – from south Asian countries perspective

To understand the problem of rape its important to look at what constitute rape, what is the definition of rape. The rape has been defined by the law in south Asian countries as:

1- India- In *Bhartiya Nyaya Sanhita* has defined rape where provision of rape is covered by section 63. This Section defines the term ‘Rape’ It illustrates that “A man is said to commit “rape” if he— Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such women or makes her to do so with him or any other person; or applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, there are seven circumstances has been given which is :—

1. against her will;

2. without her consent;
3. with her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt;
4. with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;
5. with her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent;
6. with or without her consent, when she is under eighteen years of age;
7. when she is unable to communicate consent.”

2. Bangladesh - According the penal code of 1860 Bangladesh section 375 has defined what rape is where it says if A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions: Firstly. Against her will. Secondly. Without her consent. Thirdly. With her consent, when her consent has been obtained by putting her in fear of death, or of hurt. Fourthly. With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly. With or without her consent, when she is under fourteen years of age. Explanation. Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Exception. Sexual intercourse by a man with his own wife, the wife isn't being under thirteen years of age, is not rape.

3. Pakistan- Section 375 of Pakistan Penal code defines rape as follows: if A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions, (i) if its against her will; (ii) if it's a without her consent; (iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt; (iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or (v) with or without her consent when she is under sixteen years of age. Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

4. Nepal - in Nepal rape has been defined as an if a man engages in sexual intercourse with a woman without her consent, with or without consent of girl child aged below eighteen than that will be regarded as committing rape

5. Afghanistan - Article 636 of the country's penal code states: A person who uses force or other threatening means or threats to commit sexual intercourse and who abuses the inability of victims receives his/her consent, or feeds him/her with poisonous substances or other substances that cripple his/her intellectual or mental capacities, or penetrate his organs or other objects in her/his front or back way, is known as the offender of sexual assault.

Legal battle of rape survivors and their impact in the these regions

Every day there is violence committed against women in many form where sexual assault and rape is one of the forms where perpetrator uses it as weapon to harm the women physically and mentally and dignity of the women. But its very disheartening to see how these crimes get underreported and there is failure of victims to get justice. There are various instances where the victim chooses not to approach court and there are instances where they chose not to fight against only the predator but against the society and for the rights safety and security of the others.

1.India

There are many cases where a story of rape survivor has shocked the nation and forced the society to question at whether there is an end to the suffering or violence against women. And one of the most crucial examples of that is case of Nirbhaya. In *Mukesh & Anr v. State for NCT of Delhi & Ors* (2017) (Nirbhaya Case) -Following the brutal gang rape and murder of a young woman in Delhi in 2012, this case led to nationwide protests and a major overhaul of India's rape laws. The Criminal Law (amendment) Act, 2013, introduced stricter penalties, broadened the definition of rape, and established fast-track courts for rape cases. There is another landmark judgement which is known as *Vishakha v. State of Rajasthan*. this judgement resulted into the formulation of guidelines for preventing sexual harassment at the workplace, known as the "Vishakha Guidelines" Where it expanded the scope of sexual violence protections and laid the groundwork for subsequent legal reforms, including the Sexual Harassment of Women at Workplace (prevention, Prohibition, and Redressal) Act, 2013.

2. Pakistan

In this country Zina Ordinance (Hudood Ordinance) of 1979 considered as a milestone to govern a rape law, under this ordinance significant changes has been introduced for the legal framework to govern rape laws within the country however there were certain flaws in this ordinance which was later on highlighted by the other cases. *Mukhtar Mai Case* (2002) is one of the example which highlighted the flaws of Hudood ordinance. in this case a gang rape survivor, went to the court which grabs the attention internationally and put significant pressure on the Pakistani legal system to better protect rape victims. This case also played a role in galvanizing support for the Women's Protection Act. Another case which shocked the nation is the *Zainab Ansari case* which highlighted the shortcomings of existing legal framework and police procedure to addressing the sexual violence in the Pakistan

3. Bangladesh

Here one of the landmark judgements known as *Bangladesh National Women Lawyers' Association v. Government of Bangladesh* (2009) is a case which involved the gang rape of a 14-year-old girl, where the Supreme Court of Bangladesh ordered the government to form a monitoring cell to oversee the investigation and trial of rape cases. This emphasized the need for systemic changes in handling rape cases, leading to better enforcement of existing laws.

4. Nepal

In Nepal the very important case known as the *Sita Rai case* led to the contribution in legal reforms of rape laws which resulted as 2017 amendment of Nepal's rape law, where for the first time marital rape has been recognized. The same thing happened in the *Sapna Pradhan Malla v. Govt of Nepal* where court has given the direction to the government to amend the laws related to gender based violence.

5. Sri Lanka

The major contribution was made by the *Rizana Nafeek Case* (2005), which led to the amendments to penal code of Sri Lanka where the definition of rape was broaden and sever punishments were introduced in the code. Another case was *Silva v. Attorney- General*, which can be, consider as a milestone for the rights of rape victim where court has recognized for the first time about the psychological impact of rape on victims. Here court also reinforced the legal standards for evidence and victim protection in rape trials.

Punishments For the Rape in south Asian Countries?

1 India

Bhartiya Nyaya Sanhita's section 64 to 70 covers about the punishment for rape, which constitute what kind of punishments will be given to the offender also in what situation. Where Section 65 of the law discusses punishments for rape in certain cases. Those who rape a woman under 16 years old may face 20 years to life in prison and a fine to pay for the victim's medical expenses. Those who rape a woman under 12 years old may face

similar punishment. Section 66 states that if a rape causes the victim's death or leaves them in a vegetative state, the perpetrator may also face 20 years to life in prison. Section 67 deals with marital rape, with offenders facing 2 to 7 years in prison. Section 68 addresses rape by a person in authority, with penalties of 5 to 10 years in prison and a fine. Section 69 covers rape under false pretenses, punishable by up to 10 years in prison. Section 70 discusses gang rape, with each member of the group facing 20 years to life in prison.

2 Pakistan

Penal code of Pakistan has given the provision for the punishment of rape where Section 376 of the Pakistan Penal Code (PPC) outlines the punishment for the offense of sexual assault. It states that whoever commits sexual assault shall be punished with imprisonment for a minimum of 10 years and a maximum of 25 years, along with a fine. If the offense causes harm to the victim, the punishment is imprisonment for life and a fine. In cases where sexual assault is committed by multiple people, each person involved will be punished with imprisonment for life. If the victim is a minor or has a disability, the punishment is imprisonment for life and a fine. Public servants who commit sexual assault using their official position will also face imprisonment for life and a fine. Section 376A of the PPC protects the identity of the victim by stating that anyone who prints or publishes information that may reveal the victim's identity in cases of sexual offenses will be punished with imprisonment for up to three years and a fine.

3 Shri Lanka

Penal code of shri Lanka Section has given the provision for the punishment of rape where section 364 talks about the Punishment for Rape which says- Section 364(1): The basic punishment for rape is rigorous imprisonment for a term not less than seven years and not more than twenty years. Additionally, the offender is liable to a fine and may also be ordered to pay compensation to the victim. Section 364(2): The punishment is more severe if the rape is committed under aggravating circumstances, such as when the victim is under 16 years of age, if the rape results in the victim's death, or if the rape is committed by a group of persons. In such cases, the punishment can include life imprisonment.

4 Bangladesh

Section 376 of penal code of Bangladesh deal with the punishment for rape where it has stated that whoever commits rape 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, unless the woman raped is his own wife but is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

5 Afghanistan

In Afghanistan there are few articles which talks about the punishment for rape that is Article 637 of this law stipulates that the perpetrator of the crime of rape is sentenced to long imprisonment. Article 638 states that whenever a man has sexual intercourse with a minor, his act is recognized as rape and the consent of the victim is not valid. Article 639 states that committing the crime of rape is recognized in the following circumstances as aggravating case and is punishable by life imprisonment.

Are those laws sufficient to stop rape?

On the basis of above discussion, it can be held that result of this analysis is that region of the south Asian has attempted to define the rape and with the passage of the time horizon of definition of rape has been broadened where with the detailed aspect of what constitute a rape has been covered in their code. There are many case law which has impacted the society and advocate the safety and the rights of the others where state were forced to take serious action against the offenders. For example in India the laws has been amended and strict measures has been taken, earlier where Indian penal code has been replaced by Bhartiya Nyaya Sanhita in which the definition of rape has been broadened and severe punishment has been introduced in the BNS. On the other hand

in Pakistan, government was forced to improve the flaws existing in the Hudood ordinance, in Nepal court directed to the govt of Nepal to strict actions against gender based violence. Where in Bangladesh the horizon of rape has been expanded more where the recognition of victims of rights became important where it was held that psychological impact on rape survivor is a serious offence and action should be taken to ensure the rights of the victim and rebuild their lives. But unfortunately despite having these laws crime against women has not been stopped.

Who is responsible, government or society?

After the detailed analysis of laws against rape and prescribed punishment for this offence in south Asian country, it's become important to discuss who is responsible to the failure of those laws and rising rapes rape cases within the country is it solely responsibility of the government where state is unable to provide effective mechanism for the addressal of the issue, because there is a lack of political will? According to report of Association of Democratic Reforms 151 sitting MPs and MLAs face cases of crimes against women, where among those 16 are charged with rape. If law maker is already charged with the crime against women can, we expect them to be the protectors for the safety of women.

Or we should hold institutions responsible for the rising number of the crime against women or cases of the rape, there are instances where institutions is itself has conducted discrimination against the rape victim, despite having organization specifically for the safety of women numbers are still increasing because there are numerous examples where police has failed to comply with the victims and led to the injustice, where they have refused to register the case against the offender or has humiliated the victim. Or whether society is responsible for the failure of these laws because as stated by the Bhasin or Baxi its apparent that root cause for the violence against women lies in the social and cultural norms, where it plays a very significant role in the inequality and injustice of the women.

There is no denial that laws in this region has improved with the time or it can be said that it was forced to be improved cause it wasn't sufficient, but the problem is still the same and women are still facing the challenge to even conduct their day to day business or we can say it is the biggest obstacle in their empowerment, and in India the number if rape victim is not seem to be deteriorated soon, so question is what can be done?

Conclusion

It is evident on the basis of above discussion that the attempt has been made to curb the challenge of rape where various punishments has been introduced, definition of rape has been broadened and state has taken measures to provide security towards women but persistence of rape in region of south Asian country reflect how its not solely a legal issue but it is deeply intertwined with social, cultural and institutional challenges where only legal framework of a nation can not be held accountable alone, we have to have a holistic approach to understand the existing problem within the society with respect to socio and cultural aspect, there is need to question the political will of state to protect the women and there is need to have a stronger machinery which can look after the enforcement mechanism where it can evaluate whether there is effective implications of law is taking place or not. There is need to change the narrative of society towards rape victim so they can not be re-victimized. Hence, there is need to have an approach where it only cover what punishment should be given to perpetrator but look into what rights should be given to the victim. However, there is a problem which exists in these laws and that is no nation in the south Asian region has defined specifically about male rape or rape of transgender, neither there is any provision regarding this nor there is any punishment, in present time there is need to look at the rising sexual violence against gender be it a male, female or transgender. It should not be limited to violence against women only cause if there is existence of violence against a male, female and transgender then there should be existing law against those violence to protect them.

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