

Definitional Snag in Anti-rape Laws in Bangladesh: A Comparative Note

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Abstract

In Bangladesh, rape is the most extreme form of sexual violence which destroys a women's life. Bangladesh, in line with its constitutional commitment, guarantees equal protection of law, and it guarantees freedom of movement for all subject to law by creating a violence free society for women. To this end, several laws are in place to deal with rape related crimes which contains strict punishment including death penalty. Despite having specific legal regime, rape incidence has been increasing at an alarming rate in Bangladesh. In this context, this article aims to study gaps that persist in existing anti-rape laws in Bangladesh. Acknowledging the fact that there are many procedural and practical challenges in the area of anti-rape laws, this article studies the definitional dilemma of 'rape' and its limited scope leaving many other types of rape beyond the legal coverage remains a big concern to ensure access to justice for rape victims. To expand legal protection to victims, this article examines the normative gaps in existing definitions of rape, studies contemporary legal developments in this area in other subcontinent countries, and concludes with suggestion that major definitional reforms are necessary in rape laws in Bangladesh.

1. Introduction

Rape can be defined as having sex with someone unwilling to do so and sexual activities, carried on forcibly by using violence or threatening behaviour.¹ Broadly speaking, the word 'rape' is meant to understand an unusual sexual activity and usually includes sexual intercourse committed forcibly or under threat of injury against the will of the person or with a person who is incapable to give valid consent because of under age of giving consent, mental illness, mental deficiency, intoxication, unconsciousness or deception.² So, rape may occur between same-sex or a male child or trans-gender people can be a victim of rape. However, despite the divergent views on rape suggesting same-sex rape or even a male can be a victim of rape, the anti-rape legislations in Bangladesh perceives the common understanding of rape where the male only as sole perpetrator and the female as sole victim.

Over the past decades, Bangladesh has adopted significant legislative actions to address the issue of violence against women generally and the crime of rape specifically.³ But Bangladesh's overall legal framework is not sufficiently strong in terms of ending rape, even to reduce the same; rather, here adequate laws coexist with high prevalence of rape occurrence. The increasing rate of rape suggests the notion that the existing legal framework suffers from several limitations that ultimately limits the scope of legal protection for a rape victim. Of them, narrow definition of rape under existing laws of Bangladesh remains one of the major

¹ Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/rape>.

² Merriam Webster, <https://www.merriam-webster.com/dictionary/rape>.

³ Rashida Manjoo, "Violence against Women, Its Causes and Consequences," 2014, <https://medicamondiale.org/en/violence-against-women/causes-and-consequences>.

factors to limiting legal protection for the rape victims. Hence, this article attempts to identify the definitional limitations of rape in context of comparative perspective. In particular, laws relating to rape in other sub-continent countries, e.g., India and Pakistan, have been considered here. Having idea from legal developments in these countries, some reformative steps have been suggested to provide wider protection for rape victims.

2. Methods

In this study, the author used descriptive qualitative research methods. The Book of Canon Law is the main source for obtaining all information regarding marriage from a Catholic perspective, while scientific articles and several relevant books are supporting sources. Apart from that, the author also conducted interviews to obtain information regarding Dayak Tarangk Customary Law, especially the law regarding divorce. According to the author, this interview process is important to carry out in order to find out what conditions must be met and how the traditional Dayak Tarangk divorce process is carried out. Therefore, this study will be explained descriptively, both the Catholic Church's perspective on marriage and the Dayak Tarangk Customary Law on divorce. The structure of this research will begin by explaining the Catholic Church's teachings on marriage, followed by a case synopsis, then explaining the Tarangk Customary Law regarding divorce, and ending with pastoral recommendations.

3. Results and Discussion

3.1. Statutory Definition of Rape

The Penal Code, 1860 (hereinafter referred to as PC, 1860) remains the basic law that contains provision for different types of sexual violence against women including rape. 'Rape' has been explained in section 375 of the PC, 1860 which states as follows:

A man is said to commit 'rape' who has sexual intercourse with a woman ...against her will; without her consent; with her consent which has been obtained by putting her in fear of death or of heart; 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; with or without consent, when her age is under Fourteen years of age.⁴

Section 375 enumerates five situations where a man commits rape and the section further explains that penetration is sufficient to constitute the sexual intercourse which is the necessary element to the offence of rape.⁵ However, this section, with exception clause, further proceeds to state that sexual intercourse by a man with his own wife, who is not being under the age of thirteen years, is not rape.⁶

The Women and Child Repression Prevention Act (WCRPA), 2000, as central law in the area of violence against women and child conceptualizes 'rape' as having sexual intercourse (without lawful marriage) with a women not under sixteen years of age, against her will or consent obtained by fear or by fraud, or with a women under sixteen years of age can be termed as rape and in the latter case, consent of woman is immaterial.⁷ That means, section 9 of the WCRPA is the reaffirmation of the definition given in the PC, 1860 with updated age

⁴ The Penal Code, 1860, §375.

⁵ Id., Explanation.

⁶ Id., Explanation.

⁷ The Women and Child Repression Prevention Act (WCRPA), 2000, §9.

factor which is sixteen here (fourteen in the PC, 1860). However, like the PC, 1860, the WCRPA also determines the threshold for whether a sexual intercourse amounts to rape or not on two factors: age of the victim and the consent given to the intercourse. Moreover, while the PC, 1860 impliedly excludes the marital rape of a girl over the age of thirteen, from the ambit of rape, the WCRPA, 2000 remains silent regarding this issue and by incorporating the words “without lawful marriage” in the definition clause of rape, ultimately recognizes the stand of PC, 1860 that sexual intercourse with lawfully wedded wife does not amount to rape even if it is done against her will or without her consent.

3.2. Definitional Dilemma in Existing Legal framework

The definitional dilemma regarding ‘rape’ in the existing laws creates confusion in many respects. Under the existing anti-rape laws, age of victim, presence of consent to the sexual intercourse and penetration which has been explained as the form of sexual intercourse, are the three factors that must be taken into consideration to constitute rape.⁸ But in all these three areas, some gaps exist. One of the most challenging gaps in the existing definition of rape is the requirement of ‘penetration’ to constitute the offence of rape. According to Black’s Law Dictionary, the term penetration is defined as the insertion of the male part into the female parts to howsoever slight an extent.⁹ That means, rape defined under the Penal Code covers that form of rape constituted by penile-vagina interaction only and leaves other forms of penetration, such as oral, urethral or anal penetration, outside the ambit of rape.¹⁰ Further, the Penal Code mentions nothing about any other ‘object of insertion’ except human penis as a means for penetration which ultimately results in no rape in case any other object or body part is inserted in the vagina of the victim. Moreover, this penetration-based definition covering penile-vagina interaction only covers forcible intercourse committed by men over women whereas vice versa; such as forcible intercourse by female over man or forcible intercourse between same-sex may also take place which is completely outside the purview of rape definition. So, defining rape narrowly is particularly problematic one and the definition can keep numerous instances of sexual violence amounting to rape outside the perimeter of what is statutorily defined as ‘rape’.¹¹

Under the existing laws, the expressions, having sexual intercourse “against her will” and “without her consent” bear great significance in defining rape.¹² The notion “against her will” entails that intercourse has been conducted by a man with a woman despite her resistance and opposition; contrarily, ‘without her consent’ denotes an act done with the combination of reason and calculation.¹³ Undoubtedly, the woman consents only when she acts freely to submit herself in front of the person for consummation. If a man can prove that the victim woman has given consent to the sexual intercourse the perpetrator will be released

⁸ PC, supra note 4, 7.

⁹ Hanry Campbell Black, *Black’s Law Dictionary* (ST. Paul, Minn: West Publishing, Co, 2009).

¹⁰ WCRPA supra note 7.

¹¹ Sumaiya Anjum Troyye, “Redefining rape: A medico-legal call for justice,” *The Daily Star*, 2020, <https://www.thedailystar.net/law-our-rights/news/redefining-rape-medico-legal-call-justice-1977101>.

¹² Al Yasin Razi, “A Collation of the Definitions of Rape under the Penal Codes of Bangladesh and India,” *SSRN Electronic Journal*, 2022, <https://doi.org/http://dx.doi.org/10.2139/ssrn.4067668>.

¹³ Id.

from the accusation of rape. So, consent plays a decisive role to consider whether rape occurs or not. But the concept of 'consent' is not clear in existing anti-rape laws. No where in the Penal Code nor in the WCRPA, 2000, states about clearly what constitutes voluntary consent in matter of rape.

It is worth to mention here that section 90 of the PC, 1860, attempts to put light on the concept of consent, but it also suffers from some legislative vagueness. This section states that a consent is not a consent as meaning under the Penal Code if it is given by a child being under the age of twelve; or by an insane person in intoxicated condition being unable to understand the nature of the act; or under the fear of injury or misconception of fact.¹⁴ This section further proceeds to state that consent claimed to be given under fear or misconception of fact must be coupled with the knowledge of the perpetrator that the consent is given under fear or misconception.¹⁵ Here, though PC 1860 attempts to articulate the situations where consent cannot be taken in to consideration to determine whether it is rape or consensual sex, the requirement to prove the mental state of the perpetrator that he has knowledge that the consent is given under misconception creates complication while trialling a rape case.

According to section 90, consent if given as influenced by in fear of death or of hurt or by fraud does not amount to consensual sex. In this regard, the stereotyped notion is that there must have signs of resistance if there exists fear of death or hurt and absence of signs of resistance or force indicates that the sex is consensual here. Based on this stereotyped view, when a rape case comes before the court, courts have tended to require evidence of 'force' or resistance to demonstrate a lack of consent, leading to interpretation of rape. In fact, consent is an ongoing process and every step of the way to rape requires separate consent. For example, a women may give consent to kissing, touching but not intended for sexual intercourse; or even if she goes for consensual sex and later on, she withdraws herself from the intercourse or disagrees to its continuation and the other party uses force to continue such activities, her previous consent cannot be interpreted as consent to having intercourse with the perpetrator. In absence of any hard and fast rule to determine whether the consent to sexual intercourse is voluntary or whether it is given under any misconception of fact, it is really difficult to prove whether it is rape or consensual sex.

Another significant gap that persists in rape related laws in Bangladesh is that the age standard to give consent is not uniform. According to the PC, 1860, having sexual intercourse with a women without her consent can be termed as rape if she is not under fourteen years of age and even if she gives consent to the intercourse, it will amount to rape if her age is under fourteen.¹⁶ However, the age is sixteen years under WCRPA, 2000, though the latter will prevail.¹⁷ That means, sexual intercourse done with a women not under the age of sixteen is rape if there is no consent comes from her part. Conversely, the statutory age limit of consent is twelve under the Penal Code,¹⁸ which is not in compliance with age limit prescribed in anti-rape laws nether is in line with the age standard prescribed for giving consent in other laws.

¹⁴ PC, supra note 4, §90.

¹⁵ Id.

¹⁶ PC, supra note 4.

¹⁷ WCRPA, supra note 7, § 3.

¹⁸ PC, supra note 14.

In addition, the provision stating that sexual intercourse by a man with his own wife is not rape if the wife is not under thirteen years of age fuels the situation more. By this provision the PC does not criminalize forcible intercourse with a child wife and the WCRPA, 2000 reinforces the provision by stating that the sixteen year age limit, below which sexual intercourse is considered rape, does not apply to cases where the perpetrator is married to the victim.¹⁹ These provisions technically permits forcible intercourse with child wife, in other word, marital rape and impliedly encourages child marriage which is clearly prohibited under the Child Marriage Restraint Act (CMRA), 2017. The CMRA prohibits child marriage by criminalising contracting,²⁰ allowing,²¹ or solemnizing²² of the same. The Act prescribes eighteen years for female and twenty-one years for male for contracting marriage.²³ Hence, allowing intercourse with child wife if she is at thirteen years of age poses a legal vacuum in matter of cases where intercourse takes place with wife aged between thirteen to eighteen.

The present rape definition in a sense, leaves a “no legal redress” condition for potential child victims of marital rape. Moreover, by embracing a female victim-centric definition, where only male has been considered as perpetrator, issues like male rape victims or rape by same sex or transgender people are not addressed properly in the definition, leaving them without redress against rape occurred against them.

3.3. Comparative Study on Reformative Approach

The present anti-rape laws in Bangladesh suffers from many loopholes; such as definitional ambiguities, absence of legal coverage, etc. The existing narrow definition of rape covering the age-old concept of penile-vagina interaction only and leaving other forms of penetration, such as oral, urethral or anal penetration and same -sex or female dominated forcible intercourse outside the ambit of rape, ambiguity in formulating a substantive definition of ‘consent’ and the divergence regarding the age of giving consent by a victim, etc. create impediments for victims to get justice against rape. So, there is an urgent need to redefine rape under the penal laws because a strongly drafted legal coverage is the precondition to an effective legal protection strategy.

To expand legal protection to victim, the first imperative is to broadening the scope of rape definition so as to include all kinds of abusive sexual intercourse within the purview of

¹⁹ Supra note 8.

²⁰ The Child Marriage Restraint Act (CMRA), 2017, § 7. This section states that if any adult male or female contracts a child marriage, it shall be an offence punishable with imprisonment which may extend to 2(two) years, or with fine which may extend to 1 (one) lakh taka or with both. This section proceeds to stating that if minor contracts a child marriage, he shall be punished with detention which may extend to 1 (one) month or with fine not exceeding 50 (fifty) thousand taka or with both. Minors are exempted from punishment if they are under the charge of parents or any other who allows the marriage.

²¹ Id., § 8. It states that where a person either as a parent or a guardian or any other capacity does any act to promote or to allow conducting the child marriage, he commits an offence and punishable with imprisonment which may extend to 2 (two) years but not less than 6 (six) months or with fine which may extend to 50 (fifty) thousand taka.

²² Id., § 9. It defines solemnizing or conducting a child marriage as offence which is punishable with imprisonment which may extend to 2 (two) years but not less than 6 (six) months or with fine which may extend to 50 (fifty) thousand taka.

²³ Id., § 2. This section defines child marriage as where either or both of the contracting parties are minor, below the age of 18 (in case of female) and of 21 (in case of male).

rape. To this end, reference can be taken from the neighbouring countries, where definitional reformative development has already been taken place, such as, India. In India, the anti-rape laws have undergone several reformative efforts since adoption of Penal Code, 1860. But the reformation followed by Nirbhaya case brings the most significant change in the definitional scope of rape in India. In 2012, the whole nation was shocked because of horrific rape of Nirbhaya, who was named so by media because of statutory bar not to disclose victim's identity.²⁴ She was brutally gang raped by six men on a bus in Delhi. Her internal organs were removed, and her private parts were horribly disfigured, causing severe injuries that finally took her life. Though all the six perpetrators were strictly convicted, there was nationwide protest and widespread public outcry following the Nirbhaya case. In response to this outrage, the government moved swiftly for the reformation of anti-rape laws and the Justice J.S. Verma committee was established to recommend changes to the criminal code.²⁵ Considering the suggestions proceeded by the Committee, in 2013, an amendment has been done to the rape related provisions which has drastically changed the definitional scope of rape. Section 375 of the Indian Penal Code (herein after referred to as IPC), 1860 contains the provision relating to rape and it explains rape as follows:

A man is said to commit "rape" if he (a) 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 (b) 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 (c) 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 woman or makes her to do so with him or any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

First. Against her will.

Secondly. Without her consent.

Thirdly. 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.

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.

²⁴ The Indian Penal Code (IPC), 1860 (India) § 228(2).

²⁵ The national level demonstration and massive public outrage after the Nirbhaya case led the government to act quickly and as a result Justice J.S. Verma committee was set-up to suggest amendments to criminal laws. The committee made recommendations on a wide range of issues dealing with all kinds of sexual crimes including marital rape should be removed. With respect to the punishments for rape, the committee was of the view that such offences need to be graded and they enhanced the punishment. The Committee further recommended the insertion of certain offences such as Voyeurism, Stalking and Intentional Touching in the Penal code. In consonance with the report given by the Justice Verma Committee the Criminal Law Amendment Act 2013 came into force on the 3rd of February, 2013, which introduced comprehensive changes in the Indian Penal Code, 1860, Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872. The most important changes were made in the definition of rape laws. Earlier, the law was restricted to only penile-vaginal intercourse but the new amendment substituted the section 375 of IPC and widened its ambit by including any bodily penetration as rape.

Fifthly. 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.

Sixthly. With or without her consent, when she is under eighteen years of age.

Seventhly. When she is unable to communicate consent.

Explanation 1. For the purposes of this section, "vagina" shall also include labia majora

Explanation 2. Consent means 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:

Provided 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.

Exception 1. A medical procedure or intervention shall not constitute rape

Exception 2. Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.²⁶

The IPC takes a progressive response while defining rape by covering vaginal penetration as well as oral, urethral or anal penetration as a means of committing rape. Moreover, keeping in pace with today's different perverse sexual behaviour, it states that insertion of any body part or object (other than the penis) to any extent shall amount to rape. That means fingering the vaginal, urethral or anal orifice or insertion of any sex-toy or object of the same may amount to rape under the present definition. Going beyond the requirement of penetration or insertion of any object to female body part, it recognizes that manipulation of any part of the body of a woman is enough to constitute rape if such manipulation takes place for causing penetration; and, it clearly states that if a man orally stimulates the vagina, urethra, mouth or anus of the victim, rape commits.

Along with broadening the scope of acts that may amount to rape, IPC elaborately narrates the situation under which, the stated actions if taken place, results in rape. The IPC has given fullest effort to highlight what constitutes 'consent', a decisive factor to prove rape. The IPC views consent as 'no consent' if it is obtained by fear of death or hurt or the giving consent is not in condition to understand the consequence of consent. Moreover, it attempts to take a strong stand stating that absence of physical resistance to the penetration can not be considered as 'consent' to the rape.

This is the most significant amendment, because to determine whether the sexual interaction was 'consensual' or 'non-consensual' a very common tendency is to see whether there is any sign of resistance from the victim. If there is no sign of resistance on the part of victim, it may lead to assumption that it was consensual or the victim is habitual to sexual acts which, though indirectly, may shift the burden on the victim to prove that she (victim) is of 'good character' while trialling the rape case. In Bangladesh, laws permit to proceed with character evidence against victims just to impeach credibility of a rape victim by an attempt to prove that the victim is of immoral character and the rape was consensual.²⁷ Though in 2022, this discriminatory provision has been repealed, still there is room to place question injurious

²⁶ IPC, *supra* note 24, § 375.

²⁷ The Evidence Act, 1872, § 155(4). This provision has been repealed by an amendment in 2022.

to the character of victim²⁸ with an intention to establish the sexual intercourse consensual. So, reformation in Indian jurisprudence, by containing express provisions stating that absence of physical resistance by the victim can not, *prima facie*, be considered as 'consent' to sexual activity is a progressive development which can be referred to in Bangladesh to relieve a rape victim from the burden of proving herself a woman of 'good character', in case, there is absence of signs of resistance which usually leads to assumption of consensual sex.

IPC prescribes eighteen years as the standard age for giving consent which is in line with internationally recognized age of adulthood and clearly states that consent is immaterial when the sexual activity takes place with a woman under the age of eighteen. Moreover, India has increased the marital rape exceptions to fifteen years of age and later, by adoption of legislation at domestic level, any sexual activity with a child below eighteen was criminalised²⁹ which essentially increased the age of consent even for married girls to eighteen.³⁰

Though the IPC has filled out much of the lacune that the traditional definition of rape suffers from and made the rape related laws up-to-date, some gaps still remain. It retains the same conservative approach towards marital rape. On the contrary, Pakistan having the same origin of Penal Code from British Rule does not have the exemption clause for marital rape by an amendment done in 2006.³¹ The Protection of Women Act, (Pakistan), 2006 by an amendment, reinstated section 375, in the Pakistan Penal Code which uphold the traditional penile-vagina centric rape definition that can be constituted by penetration only under the situations mentioned in the Code.³² PPC enumerates the same five situations under which rape occurs under the PC, 1860 in Bangladesh. Here, unlike Penal Code in Bangladesh which exempted marital rape from the scope of rape, the PPC simply removed the exemption clause from it, thereby marital rape has been criminalised and legal protection ceased for husbands who avail forcible sexual intercourse with their wives.³³

The findings of a combined analysis of the definitions of rape found in the Penal Code, Indian Penal Code, and Pakistan Penal Code shows that Indian anti-rape laws are more progressive than those in Bangladesh and Pakistan as it develops a comprehensive definition of rape covering all forms of penetration in any medium. On the other hand, while Pakistan Penal Code continues to use the outdated, penetration-based definition of rape, it has taken the bold step of eliminating the exemption clause for marital rape. Bangladesh, conversely,

²⁸ *Id.*, § 4. This section allows to place irrelevant question which is otherwise relevant.

²⁹ The Protection of Children from Sexual Offences Act (POSCO), 2012 (India) § 2.

³⁰ Taslima Yasmin, "Rape of a Child Bride: Laws locked in a time warp," *The Daily Star*, 2020, <https://www.thedailystar.net/opinion/news/rape-child-bride-laws-locked-time-warp-1996057>.

³¹ The Protection of Women Act, 2006 (Pakistan). This Act attempted to repeal anti-women rape laws and reintroduced the rape laws from the commonly inherited colonial Penal Code as stated in section 375 of the Code. See Taqbir Huda, "Why is marital rape still legal in Bangladesh?," *The Daily Star*, 2017, <https://www.thedailystar.net/opinion/society/why-marital-rape-still-legal-bangladesh-1438600>.

³² The Pakistan Penal Code (PC), 1860 (Pakistan) § 375. According to this section, A man is said to commit 'rape' who has sexual intercourse with a woman ...against her will; without her consent; with her consent which has been obtained by putting her in fear of death or of heart; 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; with or without consent, when her age is under sixteen years of age.

³³ *Id.*

continues to lag behind with its century-old definition of rape and its exclusion of marital rape from the definition of rape. Despite the fact that the definitional anti-rape laws in these three jurisdictions differs, all three of them share the trait of not having adopted a gender-neutral definition of rape that would have included incidents of rape that were centred around same-sex or transgender or cases where the male is the victim and female is in the role of perpetrator.

Section 375 containing rape definition with marital rape exemption was inserted by British colonial rulers when they enacted the Penal Code in 1860, and it illustrates the nineteenth century mindset of English lawmakers.³⁴ In an overtly patriarchal context of the nineteenth century British India, where there is nothing like women's rights or protection and child marriage was sweepingly endorsed by cultural norms and religious sanctions, criminalizing sexual abusive activities to women and increasing the age of consent to 13 for married girls was probably the best that could've been done at that time.³⁵ But in present era, when States are internationally and nationally committed to work for eliminating all forms of discrimination and violence against women and to end child marriage as a strategy to achieve sustainable development goal, presence of this kind of law is not only misnomer but also puts the entire women-centred activities at question. In this backdrop, to meet the demand of time, India has already updated the anti-rape laws with some limitations, such as marital rape, gender neutrality in rape laws etc. Even, by making marital rape a crime, Pakistan surpasses Bangladesh in this regard as well. In this context, there is a pressing demand to revise the existing legal definition of rape to expand wider legal protection to victims.

The first priority intervention should be, in the context of present penile-vagina interaction based narrow definition, to redefine rape comprehensively so as to include all forms of penetration, through either penis or any object other than penis or part of the body and the penetration takes place into the vagina, mouth, urethra or anus of a woman and the definition should also include any kind of manipulation of the women's body to cause such penetration. To this end, penetration should be clearly explained and include appliance of mouth to the vagina, mouth, urethra, of a women as penetration.

The reformation approach should then go on to develop a comprehensive definition of 'consent', which is a crucial factor in determining whether or not rape actually occurs. 'Consent' should be explained in a way so as to include any words, gestures or any form of verbal or non-verbal communication of a women that communicates her willingness to participate in the particular sexual act and that consent must not in any way be inferred from the absence of signs of physical resistance from the part of the victim. Moreover, the consent giving age of the victim to the particular sexual acts must be extended to eighteen years, in line with the other consent related statutory provisions.

Steps should be taken to criminalized marital rape by removing the current discriminatory exemption provision to rape, which permits a husband to have forcible sexual relations with his lawfully wedded wife. The Women and Child Repression Prevention Act, 2000 (WCRPA) and the Penal Code 1860 should be revised accordingly, bringing the age requirement in rape-related legislation in compliance with laws that prohibit child marriage.

³⁴ Huda, "Why is marital rape still legal in Bangladesh?"

³⁵ Supra note 30.

Above all, the reformation should focus on formulating a gender-neutral definition of rape. To this end, 'Persons' should be used for offenders and victims, not gendered pronouns. With this legal amendment, rape involving transgender individuals or male rape shall be possible to be recognized legally; whereas, there is a legal vacuum exists in this sector in current legal regime. In this connection, it is worth to mention here that generally, cases of rape or forcible sexual intercourse against males are dealt with as 'unnatural offences' as an offence that involves "voluntary carnal intercourse" against the order of nature with any man, woman or animal.³⁶ While rape has been viewed as non-voluntary sexual activity, the Penal Code classifies this type of sexual offense as unnatural offence involving 'voluntary carnal intercourse'.³⁷ This section is silent regarding forced sexual activity. So, it is normatively incorrect to proceed with male rape cases as an 'unnatural offences'. Unfortunately, there is still a lack of awareness of this issue and no visible initiative is yet to proceed from the judiciary or legislative branch. Though, in 2019, a writ petition was filed with the High Court Division seeking its Directives to recognize rape of male as offence and to amend section 375 of the Penal Code to include 'person' in place of 'woman',³⁸ no substantive result is yet in place.

The socio-cultural situation in Bangladesh makes a women think herself subordinate to men and men are seen as protector, possessing masculine power.³⁹ Here, in most cases, this age-old cultural norms, dominant belief systems about appropriate female and male sexuality, stereotypical assumptions about gender roles find their ways in discriminatory legislation, sometimes by sidestepping the offence or sometimes by maintaining ambiguity in defining the scope of the offence.⁴⁰ This trend often permits conservative approach to defining a crime exhaustively failing to provide wider legal coverage. And this notion is evident in the existing conservative conceptualization of 'rape' as well. Existing definition of rape is a male dominated definition which indicates that women are sexually possessed as they are of weaker sex and rape committed only by male, the dominant community in the society. Moreover, the conservative approach towards 'marital rape' in the domestic laws in Bangladesh reflects the

³⁶ PC, supra note 4, § 377. This section states that 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. Explanation to this section states that penetration is sufficient to constitute the carnal intercourse necessary to the offence described to this section.

³⁷ Md. Zakir Hossain, "Legal Conundrum in Defining 'Rape' for Male Victims," Bangladesh Law Digest, 2019, <https://bdlawdigest.org/legal-conundrum-in-defining-rape-for-male-victims.html>.

³⁸ On January 14, 2021 a writ petition has been filed to seek HC Directives to recognise rape of male as offence. Dr Soumen Bhowmick, a social worker, Supreme Court lawyer Tasmia Nuhaiya Ahmed and Dr Masum Billah, director of human rights organisation Empowerment through Law of the Common People, submitted the petition as a public interest litigation to the HC. In the petition, they requested the HC to order the government to amend Section 375 of the Penal Code incorporating the word "person" in place "woman". They also urged the HC to ask the law ministry to form a committee consisting lawyers and civil society members to submit a report on the progress of amending Section 375 to the court every month.

³⁹ Katharine M Christopherson Puh et al., "Tackling Legal Impediments to Women's Economic Empowerment," *International Monetary Fund Working Paper* 037 (2022), <https://www.imf.org/en/Publications/WP/Issues/2022/02/18/Tackling-Legal-Impediments-to-Womens-Economic-Empowerment-513392>.

⁴⁰ Id.

prevalent socio-cultural norm that husband is the superior authority and he has the total authority including sexual dominance over his legally wedded wife⁴¹ and that norm is backed by the stereotyped belief about male -female gender role as prevalent in Bangladesh. Moreover, stereotypes about the perception of masculinity that male is the ultimate decision maker and they are superior to women in terms of intellect, strength, quality, has a significant role in the underreporting of incidents of sexual violence against males.⁴² In a patriarchal setting, prevalent mindset is that getting raped means that loss of 'manliness' for the man. This perception of masculinity notably discouraged the male rape to be addressed with substantive legal interventions.

In the context of present definitional lacunae, the legislators ought to think about filling the significant gaps in existing anti-rape laws in Bangladesh by including all the victims of rape who currently fall outside the purview of existing laws, such as males and transgenders, marital rape, etc. It is suggested that the definition of rape should be revised to encompass all rape victims and offenders, regardless of gender, within its scope.

4. Conclusions

Bangladesh is constitutionally committed to ensure justice and to guarantee equal protection of law for all. This commitment can be materialized only when government will be able to put in place legal frameworks that promote, enforce and monitor gender equality, including repeal or reform of discriminatory laws. While evaluating existing anti-rape laws in Bangladesh, it is found discriminatory as based on traditional male dominated conceptualization of 'rape' where only females are the victims and male, as belonging to dominant class, are the perpetrator. Because of masculinity issue, existing rape definition does not include male rape, whereas, in last few years incidents of rape towards male has risen. Moreover, due to long-standing sociocultural views about gender roles that maintain women's submissive status to men, the issue of 'marital rape' still exists. This is a sharp contrast to Bangladesh's ongoing attempts to do away with the ban on child marriage. So, there is an immediate need to review the current anti-rape legislation in order to increase the legal protections for victims of sexual abuse. Redefining the definition of rape should be the first area of urgent action in order to achieve this. Making sure that all acts of gender-based sexual violence are properly criminalized and outlawed by law is essential to enhancing the effectiveness of the current anti-rape legislation. Whether a person is victim or not, whether he is eligible for protection and justice mainly depends on how the criminal and civil protections are formulated, how the laws provide legal coverage in this particular area of violence. If an abusive act is not criminalized, not prohibited by law, a victim survivor cannot even claim the protection of law. So, reformation should start from conceptualizing the crime of rape gender-neutral, irrespective of relation between the victim and perpetrator, which goes beyond the old concept of penile-vagina intercourse and includes any bodily penetration as rape and the consent giving age should be in line with the law of the majority in practice,

⁴¹ Afroza Begum, "Protection of women's rights in Bangladesh: A legal study in an international and comparative perspective" (University of Wollongong, 2004).

⁴² Rummana Foisal Nafiu, "The legal struggle of defining male rape in Bangladesh," Dhaka Tribune, 2021, <https://www.dhakatribune.com/bangladesh/laws-rights/248770/the-legal-struggle-of-defining-male-rape-in>.

which is eighteen years in Bangladesh. In this regard, it may be worthwhile to take into account the recent changes to anti-rape laws in neighbouring nations, especially India, in order to create a thorough definition of rape. While it is certainly not intended to imply that Bangladesh must adopt all the laws of other nations that have similar socio-economic perspectives and shared origins for their Penal Codes, it is a tacit intention to take into account recent developments in those nations as they may offer compelling examples that will be pertinent to Bangladesh's context and aid in the creation of effective anti-rape legislation.

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