

Sexual Violence: Escaping the Body

Nivedita Menon

= Women from different class, caste, community or race all share a lived experience of sexual violence. In this paper, Menon is not analysing the sexual biasness in the legal system nor the indifference of authorities rather **she is concern with what goes wrong even when laws is 'on our side'**.

Rape/Sexual Assault

= She began with two assumptions:

1. Laws cannot comprehend the complexity of sexual experiences. Even when justice appears to be delivered, patriarchal and misogynist values get re-enacted and re-sedimented through the legal discourse.
2. The body or sex are not natural but produced by discourses. Their reality is not denied what is denied is the assumption that this reality can be accessible outside cultural contexts or society.

=Legal system is operational only because it categorised and defined certain actions as crimes, violence, traffic rules, etc. law fixed meanings just as it fix the meaning of the body as male or female sex and accordingly judges applies law (especially in family and marriage as in granting divorce, alimony, property, child custody, etc)

Defining Rape: The Legal Discourse

= Section 375 of Indian Penal Code (IPC) explains rape in terms of 'penetration' as a sufficient constitution for rape on the conditions that it is without her consent, or consented under duress or intimidation, under intoxication, deceived as his wife, or if she is under the age of 16 years.
= It excludes marital rape.

= Menon then listed related sections of the IPC including Section 377 (sexual intercourse 'against the order of nature' or sodomy) [**but as of 2018, 377 has been scrapped by the Supreme Court. This book was published in 2004 so some laws discussed here needs to be updated**)]

= Rape became a public agenda in the 1970s. The police rapists was acquitted for raping a young girl in a police custody in Mathura. Rape and sexual violence were one of the most visible and strongly articulated issues in the women's movement. They demand **redefinition of 'consent'** which the law Commission recommended that the accused should prove that the victim has consented rather than making the victim prove that s/he had not consented. However, the Criminal Law Amendment enacted this demand partially in 1983, where it is applicable only to custodial rape alone.

= Flavia Agnes observed that **'penis penetration'** continues to be the governing principle around which rape case revolves. The problem is that while in other criminal offences, use of weapons caused more injury and hurt and deserving of severe punishment, in the case of sexual assault, injury caused by iron rods, bottles or sticks doesn't amount to rape. (**However, after the Nirbhaya incident Criminal Law Amendment Act was passed in 2013 where definition of penetration also extended to other objects as well. This book was published in 2004 so some issues that are discussed needs to be updated**)

= Nevertheless, one relevant issue brought up by Agnes Flavia is that the term 'rape' be replaced by 'sexual assault' because this definition will cover all forms of attacks like 'attempt to rape and violation of women's modesty' and ensured that punishment is determined by the injury caused to the woman.

Defining Rape: Feminist Discourse

= Firstly, sexual violence exist and it is a reality before the establishment of laws. Secondly, feminists want the law to recognise this reality and grant legitimacy.

= She outlined 3 feminist positions on what rape is =

- 1) Rape is violence, not sex
- 2) Rape is violence, but a unique form of violence because of its sexual character
- 3) Rape is violence and violence precisely is sex

Rape is violence, not sex:

= This position can be seen in two pieces of legislation 1) Michigan State's Criminal Sexual Conduct Act of 1974 and 2) Canadian legislation on rape, 1982. These laws had considered viewpoints from feminist lawyers, academicians and women's groups.

- 1) Michigan State's Criminal Sexual Conduct Act created 'a ladder of offences' or levels of sexual misconduct. Each level covers a range of sexual assaults which was differentiated according to the amount of coercion used, with or without penetration, extent of injury, age and incapacitation of the victim.
 - = the accused plead guilty easily
 - = often the term 'rape' do not match the actual incidents of sexual assault
 - = less case of rape reported but more arrests and convictions for conduct of sexual conducts were made.
- 2) Canadian legislation defined rape as a form of assault.
 - = It shift focus on the assault/violation of a person rather than the sexual intercourse.
 - = It does away with the crime of rape away from Canada as it established a **gradation scheme** of sexual assault.
 - = Creates 3 offences of sexual assault distinguished in terms of violence used, no distinction made between penetration, and other sexual acts.

Rape is violence, but a unique form of violence because of its sexual character

= This position can be found in the document suggesting amendments to the rape law in India in 1993. This draft is a feminist statement on sexual violence. It reflects a negotiation of meanings of sexual character between the feminists and the law

= The draft covers a range of sexual assault to cover a range of such crimes against women and children.

= Definition of rape only to vaginal penetration by penis fails to account for other assaults that is sexual in nature. The draft would covered changes in Sections 375(1) and (2), and existing 375, 376, 377, 354 and 509 would be deleted. (To repeat again these laws has been updated after the Nirbhaya case.)

= Anyways, the draft makes two radical points:

- 1) The harm of sexual assault lies in the 'violation of person's bodily integrity' not in causing physical harm.
- 2) Criminalisation of marital rape.

Rape is violence and violence precisely is sex

= This position can be seen in Catherine Mackinnon's work on rape. Social relations between sexes where men dominate and women submit is sexual.

= Violence against women is eroticised thus, violating women has sexual content.

= What is normal sex for a man often does violates woman.

= For Mackinnon a hierarchal and violent relationship between men and women is sex. Then the question arise if violence is sexuality and sexuality is male then where is the space for feminists to receive notions of pleasure, pain or fulfilment.

= Law is a crucial weapon to fight sexual violence against women. Along with Andrea Dworkin Mackinnon drafted an ordinance on pornography where all forms of sexual assaults should be

recast as civil not criminal offences hoping it will ensure more conviction. Civil court case would leave the legal procedure in the control of the victims rather than handing over to state
= But Mackinnon is criticised by other feminists for essentialising women into a natural category whose relations with men are fixed into static patterns of domination and power.
= Discussion on these 3 positions were made for the purpose that there is a need to criminalise whole range of behaviour which women feels normal yet they feel humiliated and uncomfortable.

= Feminist analysis of rape reveals 1) limitation of law and its inability to encompass lived experience of women 2) seeking to legitimise this experience and write the experiences of women and minor children into the law.

Menon explained these observations in this chapter accordingly:-

Law as the primary Legitimizing Discourse

= When laws are enacted, it distinguished between what are crimes and what are legitimate social behaviour. Hence, laws are effective means to legitimate a dominant behaviour as it will award punishments who doesn't comply to dominant norms. What is important for the feminists is that law is the dominant mode of constituting the self or one's identity.
= Often this dominant norm that has been legalised by the legal system may not be emancipatory for the marginalised sections. The feminists are against such dominant norms.
= Laws are above tribal customs. Sometimes this can have serious negative implications for tribal communities and for women as women enjoyed more autonomy in marriage under the tribal customs than what is prescribed in the Hindu Marriage Act.

Sexual Violence and the Binary Logic of Law

= There has been less convictions of rape/sexual violence. Flavia Agnes gave few reasons:

1. In cases of rape woman 'stands outside the power equations between the state and the accused' as it is a private matter it is impossible for women to prove the case beyond reasonable doubt.
2. Rape is a criminal offence so it is a crime against the state. The rape victim is represented by the Public Prosecutor, the state makes the preliminary investigations and collects evidence. However, the negative point is that biasness and indifferences from the police and public prosecutor can hamper the progress of a case.
3. In case of custodial rape or rapes by army personnel the state should take responsibility. But state have wavered many times in taking up the responsibility. Some examples are – in 1992 a District Court in Rajasthan acquitted rapists on the ground that upper caste men would not touch, let alone rape, a lower caste women. The CBI also casted doubt on the victim's testimony, humiliating her and so on.
= the point is law exist to protect our rights but these are enforced by men who have no understanding of what sexual assault means to a woman. Misogynistic and sexist interpretation of law by insensitive judges and lawyers.
= But there has also been cases where laws have been interpreted progressively if the judiciary wishes.

= to follow Carol Smart argument that law is based on binary logic of truth – guilt or innocence, consent or non-consent, truth or untruth. But this binary logic doesn't make sense for rape cases because the legal notion of consent or non-consent is completely irrelevant to women's experience of sex.

= For this purpose, Menon cite the example of a young girl who was promised marriage but later was abandoned when she got pregnant. She filed a case for rape pleading that her consent was given on the false pretext of marriage and as such it was not a valid consent. The court rejected her plea.

= Strictly speaking, in terms of consent/non-consent legal discourse she was not rape.

= but she was cheated and exploited. Wrongs was done to her but she cannot get justice because of the binary logic of rape laws. This is the 'ambiguity' of women's experience of sex to which the law is unable to respond.

= Under section 90 of the IPC, a consent is not consent if it is given under misconception of the fact. This provision would have convicted the man for cheating and fraud if not for rape but again, Menon argues that despite this legal provision it wouldn't have worked because trial would have been 'sexualised'. She gives an example of a girl who was asked for sexual intercourse by two policemen to avoid arrest in 1955. She went to court claiming that she consented because the policemen lied to her about the arrest warrants against her. The court acquitted the accused since the woman consented even though under the misapprehension of facts.

Consent and the Age Factor

= When sexual assaults takes place the responsibility to prove 'lack of consent' lies with the victim rather than the accused to prove that 'consent' was given.

= Martial rape is not criminalised as consent of a married women is always assumed.

= This comes to another crucial factor for determining the legitimacy of consent that is **age**.

Section 375 of the IPC, says that man having intercourse with his wife who is not below the age of 15 is not a rape. Feminists point out that marriage of a woman below 18 is not legal and to recognise such marriages under Section 375 is an **anomaly**.

= The 1993 draft seek to remove this anomaly by fixing the minimum age of consent to 18. However, this decision was made after considerable debate: some members argued that 18 years is high that even consensual sex between adolescents (16-18 age groups) would become an offence. This can be seen as imposing high morality and puritanical laws. But 18 was fixed with the logic that's the voting age. So in order to avoid undue penalising adolescents' consensual sex, greater punishment has been laid down for the assault of children below 12. Thus, constituting 'consent' in a complex way.

= However, the final form of law doesn't include the draft recommendations. The committee still defined 'minority' in broader terms and although, they agree that there is possibility of criminalising sex between adolescents there would be very few cases where family would make false charge of sexual assault to save 'family honour and dignity'.

The Reinstatement of Dominant Norms through Discourse on Rape

= The idea of 'violation' is located within a patriarchal and patrilineal discourse. Even some feminists shares such understanding of rape. Few cases:-

- 1) Croatian feminists termed the rapes of women after the break up Yugoslavia as a 'method of ethnocide' or 'genocidal rape'. The understanding of ethnocide is that women are the bearer of men's seed and that the child belongs to the father's race. Thus, to call rape as a method of ethnocide, is a sort of reinstating the dominant masculine norm about nation and community that is why rape is considered as harm to the community.
- 2) It is also observed that even when conviction is secured, the process of trials and judgements can powerfully reinstate patriarchal and sexist norms. For instance, the

demand for 'objectivity' makes it difficult to establish a woman's innocence in an ambiguous situation. It is also common that women's virtue and chastity have been used as a corroborative evidence during the trials. It is problematic because it is kind of distinguishing women who are virtuous that needs protection and promiscuous women who cannot be raped.

- 3) Criminal Law Amendment Bill, 1983 during the discussion of the bill in the Parliament there was general discomfort on the sexual autonomy of women. Rape is to be punished but it was because the enforced chastity of women is the cornerstone of patriarchal society rather than it violates the women's integrity.

= Thus, activists are suspicious of using law as a strategy. So some felt that there is a need for seeking justice within not through the legal discourse per se – to reconstitute 'a sense of self'.

Sexual Harassment in the Workplace

= Sexual harassment often takes place at workplace, it permeates the very procedures of hiring and promotion.

= a reflection of gendered power relations.

= In the Supreme Court judgement on the *Vishakha vs State of Rajasthan*, 1997 it laid down guidelines for all employers to follow to protect women from sexual harassment. It is a violation of the rights to life, rights to equality and the right to practise any profession.

= Problems – non-implementation of guidelines, reluctance on parts of employers to set up committee, lack of enforcement machinery especially in unorganised sector, loopholes, etc.

Problems with the draft bill prepared by the National Commission for Women (NCW) on Sexual Harassment at Workplace

1. Preventive aspect is not highlighted in the bill as in the Vishakha judgement.
2. Doesn't include in the preamble the position on sexual harassment at the workplace and the purpose that the law seeks to serve.
3. Addressed only the organised sector.
4. Uses the term 'avoidable' instead of the term 'unwanted' physical contacts and advances in its definition.
5. Functioning of the complaint committee has not been clearly laid out.
6. No mechanism of appeal
7. No provision to take care of the situation where the employer is the accused.

= NCW is a govt. organisation and has often demonstrated its lack of feminist understanding
= other issues

1. But even with the most feminist committees with shared understanding there is difficulty in evolving a code that encompass range of behaviours that women experience as sexual harassment.

= The Saheli Report observed that there is a link between gender discrimination and sexual harassment, where gender discrimination is rampant sexual harassment finds an easy ground. However, distinction is to be made.

= **Forum against Sexual Harassment** while discussing a code for Delhi University argues that 'sexual harassment' must be precisely defined and should not try to encompass **sexism** as a whole.

= Ayesha Kidwai, one of the founders of **Gender Sensitisation Committee Against Sexual Harassment** (GSCASH), Jawaharlal Nehru University pointed out many gender injustice cases were brought up. GSCASH had to refer them to other disciplinary

bodies of the university. (GSCASH is already dissolved and it is replaced by the Internal Committee for Complaints)

2. Setting up of committees : whether it should be elected or nominated to committees
= Supreme Court guidelines left the responsibility of setting up the committee on the employer thus, nominations will reflect the interests of those in power.
= balance needs to be maintained between elected and nominated members
3. Employer is responsible for setting committees and formulating codes of conduct. Sometimes, no instances of sexual harassment is reported because when an employee is found guilty, 'he is out.'
4. Committees are expected by local supporters of the complainant to take into account internal political struggle. Basically, they expect the committee to fight against sexual harassment to work out other broader political agendas like combating caste discrimination, or authoritarianism of institutional heads.

= Saheli points that if a woman wants to pursue a case of sexual harassment, existing criminal law has to be referred to with all its limitations and sexist assumptions.

= Sexual harassment committees perform better when members have had a long term association with women's movement or other progressive political movement. Otherwise, it is just bureaucratic and oddly discriminatory itself.