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# **FEMINIST REWRITING OF SAKSHI V. UNION OF INDIA: EXPOUNDING RAPE BEYOND THE PATRIARCHAL NOTION**

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## **ABSTRACT**

Feminist judgements and its jurisprudence is a philosophy which encapsulates equality between the sexes. The different approaches allow them to advocate gender neutral laws. The judiciary governance traditionally has not taken consideration of the feminist view of equal autonomy, selfhood, and bodily choices. The legislation, being a majority filled with men, have adjudicated laws from a male point which has and has been restricting women's basic rights of freedom and protection of their own body. A horrific crime as rape, has been in various legislations and judgements defined from the patriarchal view. Feminists according to Catherine Mackinnon view rape either as an action of violence or/and articulation of men's sexuality<sup>1</sup>.

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<sup>1</sup> Catherine Mackinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' 1983

## **Introduction**

I am writing this paper to provide an alternative feminist judgement to the case of Sakshi v. Union of India AIR 2004 SC 3566 <sup>2</sup>. I have decided to rewrite this judgement because of the court's inability to decide the case beyond the patriarchal and stereotypical approach. Further, I tried to include most of the petitioner's and the respondent's arguments to give a better overview of the judgement, after which I have reasoned my own arguments. Being a 2004 delivered judgement, I have not included nor mentioned any of the legal developments which have occurred after this judgement. The suggestions which were made by the court with respect to the child abuse and rape cases have not been added in the alternative judgement, but nevertheless I agree with the suggestions made. The taken case is a writ petition which was a PIL filed under Article 32<sup>3</sup>.

Prior to 2013, the provision under S.375 IPC<sup>4</sup> defined rape as a non-consensual sexual intercourse, crime upon women. The NGO Sakshi argued that the term sexual intercourse is being restricted to vagina-penile penetration and asked the court to take a broader interpretation which could include other types of penetrative assaults as well. The supreme court in 2004 decided that rape laws should not be expanded as it would create confusion in its interpretations.

*Sakshi Vs. Union of India - May 26<sup>th</sup> 2004*

*Petitioner : NGO-Sakshi*

*Respondent : Union of India*

*Case Number- Writ Petition 22 of the year 1997*

*Bench - A. Akshita J.*

- 1) Sakshi a non- governmental organisation who provides medical, legal, residential, and other psychological support for the victims of sexual assault/violence has filed a PIL under Article 32.

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<sup>2</sup> Sakshi v. Union of India AIR 2004 SC 3566

<sup>3</sup> The Indian Constitution, Article 32

<sup>4</sup> Indian Penal Code 1860, S.375

- 2) Relief claimed by Petitioners - Definition of sexual intercourse included in S. 375, should declare all the types of penetrative sexual activities. An order should be issued to the respondents that all types of penetrative sexual crimes (PSC) should be interpreted under s. 375 IPC as sexual intercourse.
- 3) The petitioner has argued that other kinds of PSC except vaginal penile, are litigated under S.377<sup>5</sup> and S.354 as lesser and different offences. The definition of Rape in IPC is outdated and the contemporary meaning of rape must be modified.
- 4) Further the petitioner adds that sexual intercourse and penetration is not defined under s.375 and is up for judicial discretion and interpretation. The narrow judicial interpretation violates the survivors and refuses them their fundamental rights under Article 14<sup>6</sup> and 21<sup>7</sup>. Further the special provision clause under article 15(3)<sup>8</sup> which allows the Constitution to make such provisions for the children and women, has turned illogical due to narrow interpretation of the rape.
- 5) The State has a responsibility to follow and honour the International conventions which India is a signatory of, including the United Nations Convention on Right of the Child.
- 6) Counter arguments by the Respondents- They filed a counter argument that the definition and its relevant interpretation of rape has clearly been defined in S. 375 IPC. All the other types of penetration are termed as unnatural sexual offenses under s.377, where none of its interpretations violate the fundamental rights under article 14,15 and 21. Further the punishment inflicted upon the offence under S.377 is no less than the provision of rape. S.376(2)(f) asserts punishment rape on a girl who's younger than 12 years other than the vagina-penile, all other offences shall be dealt under S.377.
- 7) The respondents submitted that in instances of incompatibility, further ratification of international treaties would not make the existing municipal laws ultra vires of treaties. The state could modify the laws making them consistent with the treaties, but these decisions lie with the state policies and are not enforceable under the court.

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<sup>5</sup> Indian Penal Code 1860, S.377

<sup>6</sup> The Indian Constitution, Art 14

<sup>7</sup> The Indian Constitution, Art 21

<sup>8</sup> The Indian Constitution, Art 15(3)

- 8) The Respondents have further relied on the 75th volume of the Corpus Juris Secundum <sup>9</sup>, which states that while genital intercourse of the women is a fundamental part of rape.
- 9) As a result, the legal issues in the current case before the Court include –
  - a) whether the interpretation of "rape" within Section 375 of the Indian Penal Code must cover all forms of PSCs
  - b) Whether the interpretation of the crime violates the victim's fundamental rights, namely Articles 14, 15(3), and 21.
  - c) If this Court could use its Judicial activism and power to expand the definition of rape and not amount to a breach of stare decisis.
  - d) Whether the Nation's international commitments could be considered into account in judgements even if the legislature does not constitute those commitments into the state's domestic laws.
- 10) Report 156 of Law Commission asserted that natural differences must be maintained among different forms of sexual harassment and assaults. The Commission's opinion is centred on the proposition that vaginal-penile rape is inherently different and is not comparable in seriousness to other penetrative assaults. What I perceive from this is that, historically rape is thought as vaginal-penile penetration, by which females lose their virginity and chastity, if married and unmarried respectively. Further such a thinking provides that unnatural types of PSCs do not destroy or hamper the woman's virginity or chastity. The access of male sexuality is seen as an important ingredient for the definition. The argument that might be used for the existing law's distinction are that the penile rape unlike other penetration with objects embraces the perils and risks of pregnancies. This is where the classic 'predefined meaning' of vaginal-penile rape comes where such a crime compromises a lady's position as for just one man.
- 11) These ideas stage out of the patriarchal angst to ascertain and claim the child's paternal legitimacy. Establishing the purity of a woman through her sexuality is a male-controlled model to control and manage the female's reproductive capability. In most of the world including India the children carry their father's name and not their mother's. Our Indian Penal Code has not been

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<sup>9</sup> Corpus Juris Secundum, 75<sup>th</sup> volume

criminalizing any other penetrative crimes inflicted upon women as our Indian Society still puts its emphasis even through the law on the patriarchal beliefs rather than the personal grievance perpetrated on females.

- 12) Here, I may agree that the current rape definitions might have been in sync with the old development processes. Nevertheless, in a democratic country as ours, a woman regardless of her current marital status must have all the legal rights and recourse in opposition to the violation of her body and sexual rights. Every rape survivor has a right to claim damages for the cognitive and emotional injury. Non-consensual sexual penetration is detrimental due to the clear denial of consent where inclusion or exclusion of specific bodily organs does not make a difference. As a result, we cannot presume and deduce that inserting male genitals into a female's body, or inserting other objects into her, does less distress than instituting genitals into a female's vagina.
- 13) The traditional approach of the control of every girl and women's womb by her father and husband, after the marriage does not justify these laws. Moving in the 21<sup>st</sup> century, the Indian laws must synchronize with the modern-day essentials which should be constructed to foster the women's fundamental integrity, respect, and sexual preferences. It may be noted that these laws might turn futile for the women who may be infertile, on contraception or sterilized. I would be turning a blind eye if I would not cite MacKinnon. He states, in his book "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" that our law has been treating women the manner which men see and treat them<sup>10</sup>. In this feminist and equal perspective, the current distinction platforms the sheer exclusive control over the sexuality of women by the males.
- 14) According to my understanding and common knowledge, penetration assaults through inanimate objects qualitatively could possibly lead to more danger. Though unnatural, these types of attacks and crimes may be worse than the vaginal-penile rape. They might be much more painful, abusive, dangerous, and arguably much more traumatic due to the incompatibility of the female body<sup>11</sup>.
- 15) It cannot be escaped that rape indeed is an expression of contention of power, hostility, and sexuality. Countless evaluation on incidents of rape indicate that the offenders are violent and are venting out their aggression through penetration by either genitals or objects. Thereby, any

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<sup>10</sup> Catherine Mackinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence* 1983

<sup>11</sup> Christine Cameron, 'A Feminist Critique of the Distinction Between Penile Rape and Rape with an Object', 1994

type of aggression and strength could be and is claimed by non-penile penetration. Rape includes compelling behaviours where a female submits to his will and thereby utilises her body without her will in both penile as well as non-penile rapes<sup>12</sup>. The fact that the assault took place using or without using her sexual parts may seem immaterial to the survivor's trauma.

- 16) The Respondents stated that there is no need to expand the said laws as many provisions clearly and satisfactorily address the punishment for non-penile assault. In my opinion, having retribution under other sections should not influence the decision to widen the rape laws. The need to alter the understanding of rape is important not just from the legal view but to shift from the mindset of losing chastity and virginity towards violation of her fundamental rights, personal autonomy, and sexual freedom. S.354 and 377 are the two sections that currently engage with different types of Penetrative assaults. Section 354 makes it unlawful for using violent means against a female with the intent to violate her modesty. The maximum penalty is a two-year jail sentence and a monetary fine. This provision, in my judgement, is insufficient to deal with any type of penetration since the terminology is ambiguous, is up to judicial discretion and additionally the penalty is minimal.
- 17) S.377 has been used to prosecute sexual actions and crimes of unnatural nature. However, S.377 is not a correct and acceptable provision which could be permitted to deal with other forms of penetration. This section explicitly prohibits intercourse regardless of the fact if it is voluntary or not, because it deviates from the universally acknowledged natural activities. Under this provision, there is no distinction between a 'victim' and then an 'offender' it punishes both the type of offenders who non-consensually indulges in unnatural crimes and those who willingly perform the acts. I cannot accept the argument that S.377 provides equivalent detrimental provision, it is no way logical and appropriate. Under our laws, even IPC numerous felonies can bear the same monetary and detention punishment, but it cannot be the logical that we can bunched all the crimes together in a single provision.
- 18) The Indian constitution in its article 14 provides equal legal immunity and fair treatment to all citizens by the state. Here, Sakshi, the Petitioner claims that the failure to include most types of penetrative violence in the explanation of rape leads to unsatisfactory reach of fairness for survivors of these abuse and thereby violates Article 14's provisions. I concur that the present

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<sup>12</sup> Craig T. Palmer, 'Twelve Reasons Why Rape Is Not Sexually Motivated: A Skeptical Examination' 1988

practices are not fitting, because of the lack of proper regulations, victims are denied their right of restitution for the inflicted injuries.

- 19) The landmark judgement in *Vishaka Vs. State of Rajasthan*<sup>13</sup>, the court held that sexual harassment in work environment is a direct infringement of the rights provided under article 21. To be forced into non-consensual intercourse is a traumatic event which is in breach of a woman's basic right to her body and sexual dignity. The experiences suffered by the victims often leave severe post-traumatic stress and anxiety disorder which in various cases interferes with their daily activities. The respondent authorities to not expand the definition of rape and to exclude the concerning violent activities is an infringement of article 21. I agree that the victims under the age group of 12 have indeed been restricted to the benefits and rights Article 15(3) unless only if they are the victims who have suffered vaginal-penile rape. The respondents by their interpretation of the rape laws have prevented access to the special exemptions for children provided by the constitution by article 15.
- 20) The petitioner here has been arguing that India being a signatory to international treaties has the obligations to pursue them. This Court stated in *Madhu Kiswar v. State of Bihar*<sup>14</sup> that the State had a responsibility of implementing the principles of the CEDAW that established that discrimination against female, breached the ideals of equality and the freedom for human integrity. Additionally similar reliance was upheld on CEDAW by the court in the case of *Githa Hariharan v. RBI*<sup>15</sup>, which had encouraged that the signatory nations should take ample legal actions to circumvent discrimination against females. If there is no discrepancy between the domestic and the international laws, it was asserted that the courts have a responsibility to give an appropriate consideration to the assigned international treaties and other regulations such provided while legislating the domestic laws. It has been observed that the Supreme Court has many times asserted in taking India's global statutory obligations into consideration while addressing local concerns.
- 21) Landmark decision of *Kesavananda Bharati v. State of Kerala*<sup>16</sup>, established the notion that statutes should be construed in accordance with the international legal provisions provided by UN Charter. C. H. Alexander contended that the norms of common law operate as just an

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<sup>13</sup> AIR 1997 3011 SC

<sup>14</sup> 5 SCC 125 1996

<sup>15</sup> 228 SCC 1999

<sup>16</sup> AIR 1973 SC 1461

unspoken statute alongside the official Indian constitution. He alludes to such common law procedures as a history of colonialism that India has acquired. In my opinion our legal system has always taken guidance and consideration from these common law regulations.

- 22) Any application of judicial review and intervention is well inside the boundaries and responsibilities of the court. Sakshi correctly puts forth that the rape laws consist of vagueness and has confusion, which asserts that judicial intervention is required. I strongly agree that our courts in India have the supreme power to correctly interpret and intervene in any terminology which is against any group of citizens, in this case the women.
- 23) It has been feared by the respondents that extension of the rape laws by the court would amount to the violation of the concept of stare decisis. For maintaining the legal uniformity and easement, stare decisis asserts and mandates following past decisions of courts of equivalent or greater authority inside the similar jurisdiction. In *A.R. Antulay Case AIR 1984 SC 718*<sup>17</sup> it was held that the doctrine of stare decisis is not supreme but, the rule of judicial activism and the maintenance of unjust laws them is supreme. As stated herein, rape is a tragic breach against a women's body thereby the greatest character of the court turns is to the maintenance of stated narrow laws. The duty of this judiciary is to provide the survivors with their respective rights as provided by the law.
- 24) The above stated judgement is condensed as -
  - a) The definition of rape is violative of fundamental rights provided by the Indian Constitution. The definition under s.375 should include vagina-penile penetration and other types of penetrative assaults. Rape shall not be restricted to violation of a women's virginity or chastity but a violation of her sexual autonomy.
  - b) The court has the full power to use its judicial activism and intervene even if it seems opposing to the doctrine of stare decisis.
  - c) Being a signatory to international conventions, the state should comply with them when the domestic laws are against the international provisions. International law, common law and

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<sup>17</sup> AIR 1984 SC 718



other tribunals are not binding on the state per say but are to be followed as a higher guideline.

## **Conclusion**

If the Supreme Court would have expanded the definition and the interpretation of sexual assaults in the year 2004 itself, the victims in the coming years would have an adequate redressal system. Further the judicial decision would have fostered a shift from a traditional mindset of the violation of a women's virginity and chastity towards the infringement of their personal freedom and fundamental rights. This shift would have encouraged dismantling of the patriarchal mindset in our Indian culture.