

Section 375 of the Pakistan Penal Code and the Exclusion of Male Rape Survivors*

Rashid Ahmad^φ

* Disclaimer: The author is aware that the rape provisions in the PPC lack clarity in definition and are gender biased in various ways which affect male, female and transgender; however, due to editorial requirements and space constraints, this article only focuses on the fact that Section 375 of the PPC is not applicable to male rape victims. For the same reasons, any deeper analysis of the definition of rape and any reference to the gender of the perpetrator have been excluded from the scope of this article.

^φ Rashid Ahmad holds an LL.B. from the University of Punjab and is an alumni of Pakistan College of Law. He is currently a junior associate at Minto and Mirza. This article was written as part of his coursework for the Pakistan Center of Legal Research and Publication's Summer Internship 2019. He can be reached at mrarsenalrashid@gmail.com.

Abstract

This article discusses Section 375 of the Pakistan Penal Code, which deals with the offence of rape. It will be argued that the definition of rape in Section 375 should be amended to make it applicable to instances where the victim of rape is a man. Such a reform would make the rape norms more consonant with the principle of equality before the law under Article 25 of the Constitution of Pakistan. This paper also presents the results of the author's survey on the issue of male rape. Although the pool of respondents was never meant to be a representative sample of Pakistani society, the results seem to suggest that young people belonging to the upper middle class, who have access to education, are less inclined to deny that male rape exists. They also agree that the provisions of Section 375 of the PPC should be made gender inclusive. The formulation of rape contained in Section 1 of the Sexual Offence Act 2003 in the United Kingdom may serve as a guideline for future changes in rape laws, although its slavish replication in Pakistan is not recommended by the author. Male rape exists and the reform of rape law is an issue that needs to be urgently addressed by the legislature, irrespective of all denial and shame.

Introduction

This article discusses Section 375 of the Pakistan Penal Code¹ (PPC) which deals with the offence of rape. It will be argued that the definition of rape in Section 375² should be amended to make it applicable to instances where the victim of rape is a man. Such a reform would make the rape laws more consonant with the principle of equality before the law and more attuned to social reality. Male rape exists and although attitudes of denial due to the feelings of shame that are attached to it are still prevalent, reform of rape laws is an issue that needs to be urgently addressed by the legislature.

The paper is articulated in three parts: first, the definition of rape in Section 375 will be shown to be at variance with the fundamental principle of equality before the law provided by Article 25 of the Constitution of Pakistan.³ It will also be maintained that Section 377 of PPC dealing with ‘unnatural offences’ is not sufficient to ensure adequate protection to male rape victims. Second, the existence of rape of men in Pakistani society will be highlighted. It will be shown that male victims of rape are numerous in Pakistan but, due to societal taboos and stigmatisation it is very difficult for them to make their voices heard. Therefore, the case for the amendment of Section 375 is all the more urgent, so that their cases may be taken seriously by society. This stance will be supported by expert opinions collected from legal professionals through interviews and the two online surveys, which will further corroborate the fact that the provisions on rape in the PPC do not adequately protect male victims. Part three will show how, in England and Wales, the Sexual Offences

¹ The Pakistan Penal Code, Act XLV of 1860.

² Whenever in the Paper the words ‘Section 375’ are used, they are meant to refer to ‘Section 375 of the Pakistan Penal Code, 1860’ unless otherwise specified.

³ The Constitution of the Islamic Republic of Pakistan 1973 (hereinafter referred to as ‘the Constitution’).

Act 2003 provides an example of a gender inclusive approach to rape.⁴ While the author does not recommend that those provisions be transplanted into Pakistan as they are, they may offer useful guidance on how more inclusiveness may be attained.

A. Penal Provisions on Rape in Pakistan and Equality of Treatment between Men and Women

'If the misery of our poor be caused not by the laws of nature, but by our institutions, great is our sin.' – Charles Darwin

Section 375 defines rape as follows:

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) against her will;
- (ii) 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 Sexual Offence Act 2003 (UK), Chapter 42, Section 1, discussed later in Part C.

The words ‘A man is said to commit rape who has sexual intercourse with a woman’ imply that rape can only be committed against women. This means that due to the wordings of the provision, which expressly construe rape as the act of a man who coerces a woman into having sexual intercourse, instances of rape against a man fall outside the scope of the criminal provision dealing with it.

In light of the above, Section 375 seems to be a *prima facie* case of violation of the principle that all are equal before the law. This principle is enshrined as one of the fundamental rights in Article 25(1) of the Constitution which states that ‘all citizens are equal before law and are entitled to equal protection of the law.’⁵ Section 375, by excluding men from among the possible victims of rape, appears to be in violation of this right to equal treatment.

The Supreme Court of Pakistan, in *Pakcom v Federation of Pakistan*,⁶ has clarified that equality ‘must be among the equals. The equality has to be between persons who are placed in the same set of circumstances.’⁷ In *Ms. Shazia Batool v. Govt. of Balochistan*,⁸ the Supreme Court further elaborated on the concept of equal protection of law, saying that ‘it envisages that a person or a class of persons should not be denied the rights, which are enjoyed by the other persons in the same situation.’⁹ This means that two persons who find themselves in the same situation must have equal protection of the law. Distinctions can be made only on the ground of a ‘reasonable classification’.¹⁰ There is nothing reasonable in excluding men from the list of potential victims of rape, since violence is violence

⁵ Constitution of Pakistan, Article 25(1): All citizens are equal before law and are entitled to equal protection of law.

⁶ PLD 2011 SC 44.

⁷ *Ibid.*, at 110, paragraph 56.

⁸ 2007 SCMR 410

⁹ *Ibid.*, at 429-430, paragraph 7.

¹⁰ *Ibid.*, at 431, paragraph 8.

whatever the gender of the victim. A research by Gorth and Birnbaum,¹¹ shows that the rape of a man does not differ from the rape of a woman in terms of the dynamics of the act: ‘Although it is commonly believed that a male is powerful enough to defend himself from a sexual assault, he is in fact susceptible to the same techniques by which assailants gain control over female victims.’¹² Moreover, the horror that the victim faces during the commission of the crime and the psychological consequences of the incident are the same.¹³ Finally, the plight rape victims face due to the social stigma attached to the act of rape is also similar: a psychologist interviewed by the author during his research said that it is even more difficult for male victims to come forward and tell anyone about the violation they have suffered because of the taboos attached to it in Pakistani society.¹⁴ Therefore, Section 375, by extending its protection only to women, fails to provide equal treatment to men who suffer an identical crime. It treats persons who are in the same situation differently, without providing reasonable grounds for this distinction. It is therefore in conflict with Article 25(2) of the Constitution, as interpreted in the jurisprudence of the Supreme Court.

¹¹ A Nichols Gorth and H. Jean Birnbaum, *Men Who Rape: The Psychology of the Offender* (Springer, 2013).

¹² *Ibid.*, at 122.

¹³ Patrizia Riccardi, ‘Male Rape: The Silent Victim and the Gender of the Listener’ (2010) 12(6) *The Primary Care Companion to the Journal of Clinical Psychiatry*, <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3067991/>> accessed 11 Dec 2019 (Similar to female rape victims, adult male rape victims rarely turn to the legal, medical, or mental health systems for assistance. Personal stories of male rape mirror female rape in terms of a sense of shame, humiliation, and self-blame, but males are even less likely than females to report an assault).

¹⁴ Interview with a doctor, on file with the author.

Article 25(2) further states that ‘there shall be no discrimination on the basis of sex.’¹⁵ In *NWFP Public Service Commission v Muhammad Arif*,¹⁶ the apex Court further clarified that what violates equality is discrimination against a group or an individual which implies ‘making an adverse distinction with regard to some benefit, advantage or facility.’¹⁷ Discrimination thus comprises of ‘an element of unfavourable bias.’¹⁸ It is maintained here that Section 375 discriminates against male victims of rape, since it makes an adverse distinction with regard to the benefit of having the rapist punished.

Article 25(3) of the Constitution provides that ‘[n]othing in this Article shall prevent the State from making any special provision for the protection of women and children.’ This clause is meant to allow for special laws for the protection of women, but cannot be used to justify the exclusion of men from the possible victims of rape. Incriminatory norms are surely meant to protect victims but are also created to preserve society from crime. As proven by the quoted research from Groth and Birnbaum, rape is such a crime that can be committed against women and men alike. Therefore, the provisions of the PPC criminalising rape cannot be construed as a special norm for the protection of women, and therefore Article 25(3) of the Constitution does not apply here.

Since the Penal Code contains no specific provisions on male rape, the courts in Pakistan have resorted to Section 377 of the PPC, a section that criminalises ‘unnatural offences’, whenever they had to

¹⁵ Constitution of Pakistan, Article 25(2): There shall be no discrimination on the basis of sex.

¹⁶ 2011 SCMR 848

¹⁷ *Ibid.*, at 855, paragraph 8.

¹⁸ *Ibid.*

deal with instances of male rape. The text of the provision reads as follows:

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 shall not be less than two years nor more than ten years, and shall also be liable to fine.

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

A quick perusal of the provision makes it clear that it is completely ill-suited to cater to the offence of rape. First of all, it contains the words ‘voluntarily’, which cannot be found in any definition of rape. The courts have applied the provision of ‘unnatural offences’ to both consensual and non-consensual acts of sodomy. In *Niaz Ahmad v The State*,¹⁹ the Federal Shariat Court found that the act of sodomy was committed with a consenting young boy,²⁰ whereas in *Muhammad Mastan v The State*,²¹ the Lahore High Court applied the same provision to a minor who was abducted and forcibly sodomised.²² This ambivalence is clearly at variance with the requirements of rape, which exists only when consent to sexual intercourse is lacking. Moreover, the crime of ‘unnatural offences’ carry a much milder minimum punishment, two-year imprisonment, than the one for rape which is ten years.²³ This results in a huge

¹⁹ MLD 1998 Federal Shariat Court 1924.

²⁰ Ibid., paragraph 10.

²¹ PCrLJ 1996 Lahore High Court 1011.

²² Ibid., paragraph 2.

²³ PPC, Section 376(1): ‘Whoever commits rape shall be punished with death or imprisonment of either description for a term which shall not be

difference in the treatment of the rapist, based on the gender of the victim, which is very difficult to justify rationally.

It can be concluded that the law on rape has failed to provide equal treatment to equal situations, violating a basic requirement of natural justice and the fundamental right of equal treatment before the law under the Constitution. It is therefore, an unconstitutional provision that should be amended by the Parliament, to ensure that the fundamental rights of the citizens of Pakistan are duly protected. The next part will examine societal perceptions and data on male rape in Pakistan to make a case that the time is ripe to amend Section 375.

B. Perceptions and Data on Male Rape in Pakistan

*'There are so many men who have been affected by sexual abuse. But the language is always about women and girls, so they feel completely ignored. They feel like they can't speak out.'*²⁴ – Duncan Craig

The law on rape in Pakistan seems to assume that men cannot be raped. If Lawrence Friedman is correct in maintaining that the law is shaped by social forces while at the same time shaping them,²⁵ one may pin down the present formulation of rape provisions in Pakistan to a societal denial of the fact that men can be raped too. This concern was addressed by Rukhsana Siddiqi, a support officer for rape

less than ten years or more than twenty-five years and shall also be liable to fine.'

²⁴ 'Men and boys get raped too', Theo Merz, 24 Feb 2014 < <https://www.telegraph.co.uk/men/thinkingman/10657485/Men-and-boys-get-raped-too.html> > last accessed on 07/09/19.

²⁵ Lawrence M. Friedman *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975).

survivors at War Against Rape (WAR).²⁶ She maintains that: ‘In Pakistan, it is unacceptable that someone can rape men. Men believe they are the strongest and they can hurt others but no one can hurt them.’²⁷ The notion that men are strong and invulnerable means that there are very few men who dare come forward and narrate the ordeal they suffered, since it attacks the very basic sense of a common understanding of the role of men in society. Male victims of rape are ridiculed by the use of various offensive labels. Due to this, they do not report the violence suffered. According to Fisher & Afroditi, ‘...much of the literature [on male rape] postulates that negative attitudes towards male victims cause the significant underreporting of male sexual victimization.’²⁸ A statement in the documentary ‘Pakistan’s Hidden Shame’ uses the right words to describe the situation: ‘[Pakistan] is one of the most important Muslim nations. A nuclear power, ally to the West in the war against terror, and a democracy. But Pakistan is also a country in denial...’²⁹

This part will try to ‘deny the denial’: in its first section, it will show that men are also victims of rape in Pakistan, as they are all over the world.³⁰ Data will be given to corroborate this stance. The second section of this part will share the results of two online surveys

²⁶ Ferya Ilyas, ‘Pakistan Shameful Denial of Male Rape’ *Express Tribune* (29 July 2016) <<https://tribune.com.pk/story/1149618/pakistans-shameful-denial-male-rape/>> accessed 11 December 2019.

²⁷ *Ibid.*

²⁸ Fisher, Nicola L. and Afroditi P., ‘An overview of the literature on female-perpetrated adult male sexual victimization’ (2013) 18(1) *Aggression and Violent Behavior* 54, 61.

²⁹ Pakistan’s Hidden Shame, Real Stories, 10 Jan 2017 <<https://www.youtube.com/watch?v=NMp2wm0VMUs>> last accessed on 07/09/19.

³⁰ According to the reports of FBI from 2012 to 2017, 69,494 were reported male victims of sexual offences and 394,032 were female victims, in the U.S.

conducted by the author to gather first hand data on societal perceptions on male rape.

1. Data on the Incidence of Male Rape in Pakistan

A survey conducted by the Express Tribune on a sample of 927 men, revealed that 57.2% of them had been either sexually assaulted, or harassed, or both. The incidents mostly happened when the interviewees were minors.³¹ However, 12% of those who had been sexually attacked, had attained majority when the incident took place. This means that sixty-three of the participants in the survey had been sexually assaulted, harassed, or both when they were no longer minors. This figure is disturbingly high, as it represents more than 6% of all the men interviewed.

Data seems to show that male rape is not a myth but a sad reality. This is confirmed by the case of Javed Iqbal, a serial killer who killed around one hundred boys after sexually abusing and raping them.³² Another case is that of the Kasur child pornography's racketeer, who sexually exploited more than two hundred children, mostly boys.³³ A more recent example of male rape is the suicide of a boy who was raped in Battagram, where an initial investigation by police revealed that the victim took his own life after being blackmailed by two men, who had sexually assaulted him and filmed the act.³⁴

³¹ Ilyas (n 26).

³² 'Lahore: The Story of a Pampered Boy' *Dawn* (11 Oct 2011) <<https://www.dawn.com/news/896>> accessed on 11 Dec 2019.

³³ 'Kasur Child Pornography Ring: Lawyer Accuses Police of Protecting Culprits' *The Express Tribune* (10 Aug 2015) <<https://tribune.com.pk/story/935471/kasur-child-pornography-ring-lawyer-accuses-police-of-protecting-culprits/>> accessed 11 Dec 2019.

³⁴ 'Battagram youth commits suicide after being sexually assaulted, blackmailed', *The Express Tribune* (26 Mar 2019) <<https://tribune.com.pk/>>

2. Changing Perspectives on Male Rape: The Author's Survey

To check whether the denial of male rape referred to by Rukhsana Siddiqui and the documentary on 'Pakistan's Hidden Shame' still persists, the author tried to explore the opinions of the public, by conducting an online survey, in which eighty-two people participated. Sixty participants (73.2% of the total) were male and twenty-two of the participants (26.8% of the total) were female.

2.1 Limitations of the Survey

The survey conducted by the author suffers from several limitations. The first is that most of the respondents were students and faculty of Pakistan College of Law. This means that they belonged to the upper middle class of society and were receiving or had already received legal education. They were therefore more aware than the general public on human rights issues and more familiar than the general public with the language of the law and its technicalities. The rest of the respondents also belonged to the same class but in different fields of education.

The second limitation is that the average age was very young. All the respondents, except two, were below the age of fifty and most of them were between sixteen and twenty-five years of age. The last limitation is that some of the respondents were aware of the article the author was writing and knew, at least in part, the content of his thesis. Their answers may have been influenced by this too. Notwithstanding all these limitations, the survey presented an interesting picture of the beliefs of a small portion of Pakistan's educated youth.

2.2. The Survey Answers³⁵

The first question was: 'Do you think that rape exists in our society?' The responses showed that 90% of men and all the women participants believed it does. The second question was whether they thought that an adult male could be raped, to which more than two thirds of the male participants and more than three quarters of the female participants answered yes. This is starkly at variance with the expected results of denial of the existence of rape in general and male rape in particular.

The next question explored the participants' attitude towards victims of rape, by asking them if they considered an adult male who suffered rape to be at fault as well. Here, slightly less than sixty percent of the men and almost eighty percent of the women responded in the negative. The propensity of women not to attribute any responsibility to the victim of rape is indicative of their greater awareness on the subject compared to their male colleagues.

The next question addressed directly the issue of whether Section 375 is gender biased. Here only 53.3% of the male respondents said yes, against 86.4% of the female respondents. Again, gender issue awareness proved to be greater in women than in men. And the last question relevant to this article's theme was whether rape should be discussed more openly in society. Half of the men and almost ninety percent of the women said yes.

The results of the survey seem to contradict the fact that society is in denial on the issue of male rape. If, as the author hopes, the survey is an indicator that the educated youth in Pakistan is more open to discussion on gender equality and sexual violence, then an

³⁵ For the purpose of this article, only the questions that dealt with male rape have been reported.

amendment of Section 375 to make it gender inclusive may be met with solid societal approval in the near future.

C. Rape Laws in the United Kingdom: An Example of a More Inclusive Rape Provision

The United Kingdom, in the beginning of the twenty-first century, amended its rape laws to make them more gender inclusive.

The Sexual Offences Act 2003,³⁶ defines rape as follows:

1 Rape

(1) A person (A) commits an offence if—

- (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
- (b) B does not consent to the penetration, and
- (c) A does not reasonably believe that B consents.

The wording of this Section recognises that men can be raped too. Its construction of the act of rape is more articulate than Section 375 of the PPC, in that it acknowledges that forcible anal penetration constitutes rape too. It is clear that both men and women can be victims of rape by anal penetration. A similar reform in Pakistan will allow the courts to sentence male rapists for what they are, without need to recur to the crime of unnatural offences, which, as shown in part one of this article, is unsuited to cater to the magnitude of the trauma male victims of rape suffer.

³⁶ Sexual Offences Act 2003, Chapter 42, Section 1.

Conclusion

'A court ought not be affected by the weather of the day, but will be by the climate of the era' – Ruth Bader Ginsburg

Several conclusions seem to be warranted by the analysis conducted in this paper. First of all, it is safe to argue that the provisions of the PPC on rape are in contravention of the fundamental right to equality before the law recognised by the Constitution. It is, therefore, an unconstitutional provision which should be amended by the legislature.

When it comes to the clash between commonly held notions on males as rape victims and the ground reality, data show that men, mostly minors, but not only, do suffer rape in Pakistan. This is in plain contrast with the attitude of denial that seem to dominate in the public. As Daniel Kahneman writes in his book 'Thinking, Fast and Slow', 'The world in our heads is not a precise replica of reality'³⁷. Moreover, the results of the author's survey, although the pool of respondents was never meant to be a representative sample of Pakistani society, at least seems to suggest that young people belonging to the upper middle class who have access to education are less inclined to deny that male rape exists. They also agree that the provisions of Section 375 should be made gender inclusive. The formulation of rape contained in Section 1 of the Sexual Offence Act 2003 in the United Kingdom – although its slavish replication in Pakistan is not recommended by the author – may serve as a guidance for future changes in rape laws.

³⁷ Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, 2011)

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