Exploring the Impacts of Defining Rape as Non-consensual Sexual Intercourse: The Need to Redefine the Offence

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Abstract: This article explores the negative impacts of defining rape as non-consensual sexual intercourse as articulated in the relevant laws of Bangladesh. It demonstrates that such a definition of rape encounters a number of difficulties in proving the offence and becomes a stumbling block to ensure justice for the victims of rape in Bangladesh and prosecute the actual rapists. Hence, many victims of rape are deprived of justice and the offenders go unpunished. Moreover, the existing non-consensual definition of rape often persuades the trial courts to pay attention to the conduct and attitude of the victim rather than that of the perpetrators and allows the defence lawyer to raise question as to the character of the victims. In order to overcome the shortcomings of the present definition, this paper argues for redefining the offence of rape as a forced sexual intercourse to put the rapist on trial, not the victim.

Keywords: Conviction, impacts, non-consensual sexual intercourse, perpetrators, rape, and victims.

1. Introduction

The legal system of Bangladesh places great importance on justice. Indeed, it does not only seek to ensure redress for the victims but also emphasize more on ensuring justice for both the victims and the perpetrators of any crime. Therefore, the primary objective of each statutory law of the country is to secure justice for both parties. However, due to the shortcomings in the existing laws and practices,[1] it has become impossible to ensure justice for the parties in majority of the cases.[2]

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[1] The researchers have demonstrated many shortcomings in the existing laws and practices in their papers. For example, Taslima Yasmin has found various gaps in the legal framework that addresses sexual violence. Taslima Yasmin, 'Sexual Violence in Bangladesh: Addressing Gaps in the Legal Framework' (2017) 28 Dhaka University Law Journal (The Dhaka University Studies Part-F) 105, 109-117. See also S. M. Atia Naznin and Tanjina Sharmin, Reasons for the Low Rate of Conviction in the VAW Cases and Inconsistencies in the Legislative Frameworks (The Research Report of the VAW Project, BRAC University, 2015) 43-71.

[2] It may be mentioned here that due to the gaps and shortcomings in the relevant laws and practices; the conviction rate in sexual violence cases is very low. A study demonstrates that out of the 22,073 rape cases disposed by the Nari-O-Shisu Nirjatan Daman (Women and Children Repression Prevention) Tribunals of Dhaka, Comilla and Pabna between 2009 and 2014, only 186 rape cases resulted in convictions, making the conviction rate as surprisingly low as 0.86%. S. M. Atia Naznin and Tanjina Sharmin (n 1) 42. However, a report published in the Daily Star on 30 March 2018 shows

Rape law is one of them, which covers some drawbacks generating a great impasse on achieving the expected objective and making it impossible to meet the goals of the relevant laws. Particularly, the relevant laws fail to provide an effective definition of rape that is very important to prove the case beyond reasonable doubt. The existing definition of rape, as provided in the Penal Code, 1860 and the Suppression of Oppression against Women and Children Act 2000[3] is old-fashioned and often alleged to be not well matched with the socio-legal milieu of the country. Therefore, the law academicians, legal researchers, lawyers and judges often raise a very significant question as to its appropriateness in the contemporary legal arena.[4]

Rape is traditionally understood as sexual intercourse committed by a man (the perpetrator) with a woman by force and against her will.[5] In Bangladesh, both the Code of 1860 and the Act of 2000 deal with the offence of rape, providing the definition of the offence and various degrees of punishments based on the

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that there is no conviction in 97 percent rape cases in Dhaka alone and most of the accused persons have been acquitted. See Bishakha Devnath, 'Many rapists escape thru' loopholes' The Daily Star (Dhaka, 30 March 2018) <https://www.thedailystar.net /frontpage/many-rapists-escape-thru-loopholes-1555585> accessed 21 February 2019. This situation of very low rate of conviction demonstrates the failure of the criminal justice system to ensure justice for most of the rape victims.

[3] The official version of the Act is in Bengali titled as the Nari O Shishu Nirjatan Daman Ain 2000 and the Suppression of Oppression against Women and Children Act is an unofficial translation of the Bengali title. This title has also been used for the purpose of this work. It is mentionable here that before enactment of the Act, there were two laws relating to protection of women and children against different heinous crimes including rape. The first one was titled as 'the Cruelty to Women (Deterrent Punishment) Ordinance, 1983'. Replacing the 1983 Ordinance, the second one was made in the form of (Prevention of Women and Children Repression (Special Provision) Act in 1995. Later, the government enacted the Suppression of Oppression against Women and Children Act 2000 repealing the Act of 1995. Taqbir Huda, 'The colonial legacy of rape laws' The Daily Star (Dhaka, 28 November 2019) <https://www.thedailystar.net/opinion/law/news/the-colonial-legacy-rape-laws1832800> accessed 23 March 2020.

[4] For example, in a conference on 'Rape Law Reform in Bangladesh', Justice A.F.M. Abdur Rahman, Former Justice, High Court Division, Supreme Court of Bangladesh, opined, "The definition of rape is yet to be updated, despite the enactment or amendment of special laws in 1995, 2000 and 2003". In addition, Dr. Shahnaz Huda, Professor, Dept. of Law, University of Dhaka, urged to update the definition of rape arguing, "The definition of rape needs to be updated since the Penal Code is now almost a 160-year-old law". See Taqbir Huda and Abdullah Anbar Titir, 'Rape Law Reform in Bangladesh' (Conference Report, Bangladesh Legal Aid and Services Trust (BLAST), Dhaka-1000, Bangladesh, April 2019) <https://www.blast.org.bd/content/publications...-RLR-ConferenceReport.pdf> accessed 23 March 2020.

[5] Victor Tadros, 'Rape without Consent' (2006) 26 (3) Oxford Journal of Legal Studies 515, 515, stating- "Traditionally, the law of rape prohibited penetration of the vagina of the complainant by the penis of the accused by force and against the will of the complainant". According to David Archard, rape may be defined as sex without the consent of its victim. David Archard, 'The Wrong of Rape' (2007) 57 (228) The Philosophical Quarterly 374, 374. However, some authors are in favour of a 'conjunctive definition' of rape describing it as sex that is non-consensual and forced. See J. McGregor, 'Why when she says no, she doesn't mean may be and doesn't mean yes: A critical reconstruction of consent, sex, and the law' (1996) 2(3), Legal Theory, 175.

gravity of the offence. Both these two laws have defined rape as sexual intercourse committed by a man with a woman against her will or without her consent. This definition of rape does not include both the requirements of non-consent and non-willingness of the victim concurrently. Accordingly, having sexual intercourse by a man with a woman without her consent is sufficient to be an offence of rape. Thus, rape may be defined as 'committing non-consensual sexual intercourse by a man with a woman'.

However, the existing definition of rape as non-consensual sexual intercourse gives rise to a number of problems in proving a rape-case beyond a reasonable doubt. This definition persuades the trial courts to focus problematically on the conduct and sexual history of the complainant rather than the conduct of the accused.[6] This definition may also open the door of confusion in determining whether sexual intercourse was rape and misguide the judges to not convicting many actual rapists. Relying on a mistaken understanding of consent, they may arrive at an unjust decision based on the wrongful belief that the complainant might have consented to sexual intercourse before committing it. Therefore, it is very difficult to prove the offence of rape resulting in non-conviction of many actual rapists. As a result, a culture of non-conviction in most of the rape cases has become a common scenario. Thus, this definition of rape brings a number of negative impacts causing injustice to the victims and their family members. Therefore, this situation usually gives rise to a question as to the appropriateness of the existing definition of rape based on non-consensual sex.

This article aims at revisiting the definition of rape as a non-consensual sexual intercourse by a man with a woman or girl as provided in the existing legal provisions. With this objective in mind, this paper first explains rape defined as non-consensual sexual intercourse along with the essential elements of the offence. Then it tries to clarify the concept of consensual sexual intercourse to understand the proper application of this definition. After that, it explains how the existing definition of rape may generate problems in the trial of rape cases and deprive the victims and their family-members of justice. Finally, the article substantiates that in order to overcome the drawbacks of the existing definition, it should be replaced by a definition based on forced sexual intercourse.

2. Defining rape as non-consensual sex

Simply rape may be defined as having sexual intercourse by a man with a woman or girl without her consent[7] or against her will[8]. According to section 2 (e) of the Suppression of Oppression against Women and Children Act 2000, 'rape' means,

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[6] Victor Tadros (n 5) 516.

[7] *Shibu Pada Acharjee v The State* (2003) 8 MLR (HC) 275.

[8] Penal Code 1860, s 375.

subject to section 9 of this Act, rape as defined in section 375 of the Penal Code 1860. Therefore, in order to comprehend the definition of rape, we need to read section 375 of the Penal Code along with section 9 of the Act of 2000. Thus, we find the basic definition in section 375 of the Code, which provides-

> A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions: -Firstly: Against her will; Secondly: Without her consent; Thirdly: With her consent, when her consent has been obtained by putting her in fear of death, or of hurt; Fourthly: With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married; Fifthly: With or without her consent, when she is under fourteen years of age.[9]

However, this definition is subject to section 9 of the Act of 2000, which provides-

> If any man, without lawful marriage, has sexual intercourse with a woman above sixteen years of age without her consent or with her consent obtained, by putting her in fear or by fraud, or commits sexual intercourse with a woman under sixteen years of age with or without her consent, he shall be deemed to have committed rape.[10]

Therefore, if we read both these two sections, it will be clear to us that a man will be guilty of rape, if he commits, without lawful marriage, sexual intercourse with a woman above sixteen years of age against her will or without her consent. Therefore, the basic definitional element of rape is non-consent or non – willingness of the victim to sex that renders sexual intercourse criminal; otherwise, it would not be rape. Thus, for sex to be rape, it must be committed against the will of the victim or without her consent to sexual intercourse or with consent not deemed in the eye of law as valid consent as prescribed in the above-mentioned provisions.[11] Accordingly, rape may be defined as 'committing non-consensual sexual intercourse by a man with a woman without lawful marriage'.

3. The legal requirements of rape defined as non-consensual sex

A criminal act or omission to be an offence must have certain essential requirements, which the prosecution is required to prove in order to hold the accused guilty of the offence and ensure his conviction. If we illustrate the definition of rape based on non-consensual sex, we will find the following

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[9] ibid.

[10] The Suppression of Oppression against Women and Children Act 2000, s 9 (Explanation).

[11] Consent to sex obtained by putting the victim in fear of death, or of hurt, or given by her under circumstances when she believes that the perpetrator is her lawful husband, but the perpetrator knows that he is not her husband, or given by a woman under sixteen years of age, is not consent. See Penal Code 1860, s 375 and Suppression of Oppression against Women and Children Act 2000, s 9 (Explanation).

essential requirements of rape, which the prosecution must prove beyond a reasonable doubt in a rape case-

3.1. Sexual intercourse by a man with a woman

In order to be an offence of rape, there must be sexual intercourse, without lawful marriage, by a man with a woman. Thus, the accomplishment of sexual instinct by a man with another man or by a woman with a woman or by a woman with a man is not rape according to the criminal law of Bangladesh; rather this type of sexual activity has been termed as 'unnatural offence'.[12] The term 'sexual intercourse' refers to the penetration of the sexual organ of the perpetrator (man) into that of the victim (woman). According to the Penal Code, 1860, penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.[13] Therefore, to constitute sexual intercourse in a rape case, there must have been an actual penetration of the virile member of the accused within the labia of the pudendum of the victim, no matter how little.[14]

3.2. Non-consensual sexual intercourse

Sexual intercourse by a man with a woman will turn into rape if it has been committed without her consent. In contrast, having sexual intercourse with the consent of a woman, who is not less than sixteen years of age, is not rape and as such, no person will be guilty of rape for sex with consent. Therefore, in order to hold an accused person guilty of rape, the prosecution must prove that the accused had sexual intercourse without the consent of the complainant. Consent in rape cases covers states of mind ranging widely from an actual desire to reluctant acquiesce.[15] The complete willingness of the woman (complainant) is not necessary to constitute consent to sex. If a woman consciously permits sexual intercourse, there is consent to sex, though it may be hesitant, reluctant, or grudging.[16]

3.3. Resistance by the victim

Although the statutory provision does not explicitly require physical resistance by the victim, it nevertheless remains an unacknowledged practice of the courts to require the prosecution to prove this element in order to determine whether the

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[12] Penal Code 1860, s 377. In addition, Section 10 of the Suppression of Oppression against Women and Children Act 2000 has criminalized the accomplishment of sexual desire by touching the sexual organ or any other organ of a woman or of a child by any of organ of a perpetrator or by any other objects and defined this offence as sexual oppression.

[13] Penal Code 1860, s 375 (explanation)

[14] *R. v Joseph Lines* (1844) 1 C&K 393 cited in Muhammad Mahbubur Rahman, Nari –O- Shishu Nirjatan Daman Ain 2000 (1st edition, New Warsi Book Corporation, 2005) 68.

[15] *R. v Olugboja* (1981) 3 W.L.R. 585. cited in Muhammad Mahbubur Rahman, (n 14) 76.

[16] Holman vs. The Queen, 1970, W.A.R. 2. cited in Muhammad Mahbubur Rahman (n 14) 76.

complainant consented to sex.[17] Therefore, a victim's lack of resistance is often considered a crucial factor in a rape case where the accused raises "the defense of reasonable belief of consent"[18]. Consequently, physical resistance by the victim of rape is considered an essential element required to be proved to convict an accused of rape.[19] The proof of vigorous resistance of the victim indicates the absence of consent to sex and requires the use of force by the accused to overcome her resistance. On the other hand, submission or lack of resistance indicates that the complainant consented to sex, and not using force by the accused denotes the absence of his criminal intent to rape.[20] Hence, if there is no evidence of struggle between the perpetrator and the complainant or no mark of injury is found on the body of any of them, rape will not be proved, even though the defense party raises no defense of consent by the complainant.[21] Demonstrating this traditional attitude, the High Court Division of the Supreme Court of Bangladesh held in a rape case:

> Absence of marks of violence on the body of the victim itself proves that the prosecution case is false. In case of rape, it is the duty of the prosecution to produce wearing apparels of the victim to show marks of stain in order to establish claim of rape. If the statement of victim does not tally with the sketch-map, it creates doubt about the place of occurrence.[22]

In contrast to the argument that absence of struggle between the perpetrator and the complainant or mark of injury on the body of any of them implies consent to intercourse on the part of the complainant, it may be rightly asserted that 'failure to resist' or 'absence of mark of violence' is not necessarily equivalent to consent. Naima Huq has strongly argued that though consent implies submission, mere act of submission does not mean that the complainant has consented to intercourse, as surrender of body does not amount to her desire or will to intercourse. The court

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[17] However, some researchers are against the application of physical resistance requirement arguing that it places "stringent demands" on the victim. Matthew R. Lyon, 'No Means No: Withdrawal of Consent during Intercourse and the Continuing Evolution of the Definition of Rape', (2004-2005) 95 (1) Journal of Criminal Law & Criminology 277, 286. In contrast to this argument, some writers support to apply this requirement arguing that exclusion of the physical resistance requirement may cause conviction of an innocent accused solely because of a woman's subjective feelings of violation, even when her behavior amounts to consent to sex. Moreover, physical resistance requirement may solve another problem arising from dichotomous subjective understanding of sexual encounters between female and male. Thus, this requirement can serve as an objective measure to determine whether a rape took place. See Dana Berliner, 'Rethinking the Reasonable Belief Defense to Rape' (1991) 100 (8) Yale Law Journal 2687, 2692-2696.

[18] The defense of "reasonable belief of consent" refers to the defense raised by an accused in a rape case claiming that he truly and reasonably believed that the victim consented to sexual activity. See Dana Berliner (n 17) 2688.

[19] ibid, 2691-2692.

[20] ibid, 2692.

[21] 1985 P. Cr. L. J. 2396 Cited in Muhammad Mahbubur Rahman (n 14) 77.

[22] *Abdul (Md) Hakim v The State* BCR 2004 HCD 98.

ought to consider certain factors associated with the circumstances to ascertain the reason behind the failure of the victim to resist. She may fail to show her vigorous resistance due to her extreme youth, threat of use of force by the perpetrator to overpower her resistance, want of strength or attack by number of men indicating uselessness of resistance, unconsciousness or deep sleep. Therefore, 'failure to resist' or 'the absence of marks of violence' on part of the victim should not be treated as necessary ingredients of the crime.[23]

4. Conceptualizing 'consensual sexual intercourse'

The concept 'consensual sexual intercourse' is combined of two terms, consensual and sexual intercourse. The word 'consensual' is derived from 'consent' that refers to anything or any act 'done with the agreement of all the people or groups involved'.[24] Consent implies "the exercise of a free and untrammeled right to forbid or withhold what is being consented to".[25] It may consist of facts about a person's mental state or expressive conduct.[26] On the other hand, the term 'sexual intercourse' indicates the penetration of the sexual organ of a man into that of a woman in order to satisfy sexual desire. Therefore, the concept 'consensual sexual intercourse' denotes committing sexual intercourse by a man with a woman with her consent. Its synonymous term is 'consent to sex' which means expressing actual words or showing conduct indicating freely given agreement to have sexual intercourse or sexual contact just before or at the time of sexual intercourse.[27] Thus, consensual sex implies sexual intercourse in which the parties to intercourse have indicated consent based on the complete understanding of the circumstances and their interests or desires, and none of them is unduly constrained by extraneous factors. It requires that the parties must know that what they are doing is sexual

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[23] Dr. Naima Huq, 'Reflections on the Perception of 'Consent' in Rape Cases' (2005) XVI (2) Dhaka University Law Journal (The Dhaka University Studies, Part-F) 71, 74. The High Court Division of the Supreme Court also supports this view in the case of Abdus Sobhan Biswas v State. The court prudently takes the testimony of the victim into consideration when she does not resist the alleged intercourse or does not scream and shout in fear of the accused while being raped behind locked door of a residential hotel on the night of the occurrence. See Abdus Sobhan Biswas v State 54 DLR (2002) 556, 560.

[24] See Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/consensual> accessed 01 February 2020

[25] *Rao Harnarain Singh v State*, AIR 1958 Punj 123; 1958 CrLJ 563 Cited in Muhammad Mahbubur Rahman, (n 14) 75.

[26] Peter Westen, 'Some Common Confusions About Consent in Rape Cases' (2004) 2 Ohio State Journal of Criminal Law 333, 333.

[27] Almost similar definition of consent is found in Section 9A.44.010(7) of Wash. Rev. Code § 9A.44.010, which provides-"Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact. See D. N. Husak and G. C. Thomas, 'Date Rape, Social Convention, and Reasonable Mistakes' (1992) 11(1-2) Law and Philosophy 95, 110. According to Peter Westen, "consent" to sexual intercourse in law is to acquiesce to it in one or more ways. Peter Westen, (n 26) 333, 335.

and they must desire to commit it with the knowledge of the risks associated with the conduct they engage in.[28]

This consent to sexual intercourse involving permission or authorization to engage in sexual acts, either by the complainant's express words or by her behavior, is very important in the existing law of rape because it transforms sexual intercourse from being one of the most heinous crimes into sex that is not so blameworthy. However, the issue of consent is to be judged on careful consideration and scrutiny of the relevant evidence, and the attendant circumstances preceding, accompanying, or following the acts of sexual intercourse.[29]

Consent may be either attitudinal or per-formative.[30] From an attitudinal point of view, consent is considered as a mental state of affirmation or willingness to do or to abstain from doing something, while per-formative accounts regard it as a certain kind of action or utterance (for instance, saying "yes" or nodding). However, the feminists favour the per-formative accounts rejecting the attitudinal consent. Their view is in contrast to the traditional patriarchal view, which holds that unless a woman physically resists a man's attempt to have sexual intercourse; she will be presumed to have consented to such intercourse.[31] However, a purely performative account of consent is not free from limitation. It is not always admissible, as it does not take into consideration the circumstances surrounding the relevant behavior or utterance. For example, if a woman says "yes" or even feigns sexual enthusiasm to save her from hurting or killing by a knife-wielding attacker, interpreting her behavior or utterance as meaningful consent will be unreasonable and ridiculous.[32] Since none of these two types of consent is free from criticism, the judges should decide whether consent existed considering the circumstances and facts of the cases as well as both these two types of consent.

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[28] J.H. Bogart, 'Reconsidering Rape: Rethinking the Conceptual Foundations of Rape Law' (1995) 8(1) The Canadian Journal of Law and Jurisprudence 159, 163-164.

[29] 1986 Mad LW (Cri) 129 cited in Muhammad Mahbubur Rahman (n 14) 75-76.

[30] P. Kazan, 'Sexual Assault and the Problem of Consent' in S. French, W. Teays and L. Purdy (eds.), Violence Against Women: Philosophical Perspectives (Cornell University Press 1998) 27–42. In order to distinguish rape from sex, Peter Westen, however, puts emphasis on different types of consents, which are factual consent, legal consent, attitudinal consent, expressive consent, actual consent and imputed consent. See Peter Westen (n 26) 333-337. According to Robin West, there may be three types of consents i.e. fictional consent, acquiescent consent and erotic consent. Robin West, 'A Comment on Consent, Sex, and Rape' (1996) 2 (03) Legal Theory 233, 237-238.

[31] Rebecca Whisnant, "Feminist Perspectives on Rape", *The Stanford Encyclopedia of Philosophy* (Fall 2021 Edition), Edward N. Zalta (ed.) <https://plato.stanford.edu/archives/fall2021/entries/feminism-rape/> accessed 25 January 2022.

[32] ibid.

However, it is worth mentionable here that neither the Code of 1860 nor the Act of 2000 defines consent to sex or consensual sexual intercourse,[33] though the Penal Code provides a negative definition of the term 'consent' by listing certain circumstances under which giving consent cannot be taken as signifying consent.[34] However, this definition of consent is inconsistent with the definition of rape as provided in section 9 of the Act of 2000 and section 375 of the Code of 1860 in respect of age when consent is immaterial.[35]

Consent to sexual intercourse given by the complainant (victim) of rape (rape) is a good defence to a charge of rape unless she is unable to consent because of extreme youth, unconsciousness, idiocy, or imbecility.[36] Since non-consent to sexual intercourse is an element of the offence of rape and giving consent to sex converts an offence of rape to non-offensive sexual conduct, consent to sexual intercourse must be treated as a defense in rape cases.[37] However, in order to use it as a defense in a rape case, the accused must prove that the complainant gave consent to sex with her free choice. Supporting this requirement, some commentators argue that the seriousness and overwhelming consequences of rape justify requiring the accused to ensure consent.[38]

The consent defense is similar to, and sometimes indistinguishable from, the reasonable belief of consent defense, which asserts that the victim's behavior would have looked like consent to a reasonable man.[39] To establish the reasonable

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[33] "Taslima Yasmin rightly viewed "The colonial definition of rape in the Penal Code, does not define penetration, fails to elaborate the meaning of consent, or how consent can be proved. See Taqbir Huda and Abdullah Anbar Titir (n 4).

[34] See, Penal Code 1860 s 90, which provides – "A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or If the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."

[35] This inconsistency will be clear if we read section 9 of the Suppression of Oppression against Women and Children Act 2000 and sections 90 and 375 of the Penal Code 1860. According to 90 of the Penal Code, consent given by a person who is under twelve years of age is not consent. Again, as per section 375 of the Code, consent to sexual intercourse given by a woman who is under fourteen years of age is immaterial. On the other hand, under section 9 of the Act of 2000, consent to sexual intercourse given by a woman who is under sixteen years of age will not be treated as such consent. However, this inconsistency may be removed by holding the sixteen years as the minimum age of giving consent to sex according to section 9 of the Act, as it is the latest relevant law.

[36] ILR (1952) 2 Raj 817 cited in Muhammad Mahbubur Rahman (n 14) 77

[37] Markus Dirk Dubber, 'Toward a Constitutional Law of Crime and Punishment, (2004) 55 (3) Hastings Law Journal 509, 569 (arguing –"Consent is a defense if non-consent is an element of the offense charged, or if it "precludes the infliction of the harm or evil sought to be prevented by the law defining the offense).

[38] Dana Berliner (n 17) 2695-2696.

[39] ibid, 2693.

belief defense, the accused must claim and prove that he did not have the requisite *mens rea* for the crime of rape because he honestly believed that the victim was consenting and he merely intended to have consensual sexual intercourse and had no criminal intent to have sex with her without her consent.[40]

5. Impacts of defining rape as non-consensual sexual intercourse

The criminal law of any country is expected to define any offence in a clear and intelligible way making it very easy for the prosecution to prove the offence against the accused so that no actual offender can escape punishment due to any shortcoming in the definition of the offence. In contrast, if the law defines any offence in a way that is very difficult to be proved, many actual offenders may be acquitted and thus may go unpunished due to failure of the prosecution to prove the offence. In Bangladesh, both the Code of 1860 and the Act of 2000 have defined rape as sexual intercourse committed by a man with a woman without her consent bringing the following negative impacts:

5.1. Difficulty to prove lack of consent beyond reasonable doubt

Since neither the Penal Code 1860 nor the Suppression of Oppression against Women and Children Act 2000 has defined consent to sexual intercourse, it is very difficult for the prosecution to prove lack of consent demonstrated by the complainant and accordingly, to prove the offence of rape beyond a reasonable doubt. As it is not clear what consent to sex is, it is also unclear what will constitute substantial evidence of it. This situation makes it very difficult for the trial court to decide what kind of evidence will be relevant in determining whether the complainant consented to sex[41] and often convinces it to believe that the complainant may have consented to sex.[42] Furthermore, the defence lawyer usually tries to create doubt into the minds of the judges about lack of consent by claiming that the complainant had consented to sex and subsequently she repudiated her previous position. Particularly, it is very easy for him to create doubt if there is any previous relationship between the complainant and the perpetrator. Therefore, it is more difficult for the prosecution to prove a lack of consent to sexual intercourse in the case of such a relationship.[43] Consequently, the court does not frequently hold the accused guilty of rape believing that the complainant consented to sexual intercourse and convict him. Hence, difficulty to

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[40] *People v Mayberry*, 15 Cal. 3d 143, 155,542 P.2d 1337, 1345, 125 Cal. Rptr. 745,753 (1975). Cited in Dana Berliner (n 17) 2693.

[41] Victor Tadros (n 5) 530.

[42] ibid, 531, arguing… "as it is unclear what consent is, it is also unclear what will constitute substantial evidence of it. So, there may be cases where the jury would have been inclined to decide that the complainant may have been consenting…"

[43] David P. Bryden and Sonja Lengnick, 'Rape in the Criminal Justice System' (1997) 87(4) Journal of Criminal Law and Criminology 1194, 1216.

prove lack of consent has become one of the substantial reasons behind the non-conviction of many actual rapists resulting in a very low rate of conviction in rape cases.[44]

5.2. Diverting the attention of the courts

Since the definition of rape based on non-consensual sex requires the trial court to determine whether the victim (the complainant) gave consent to sex, that may be implied from the victim's behaviour[45] and her other actions[46], this definition diverts the attention of the Court from the conduct and behaviour of the accused to that of the victim.[47] Thus, the definition persuades the courts to emphasize the behaviour and attitudes of the rape-victims as if they were worthy to be blamed because of being victims of this heinous crime. Though the courts, in deciding the cases other than rape, focus almost on the conducts and mental conditions of the accused and the circumstances of the case, the courts, in rape cases, focus mainly on the conduct and attitude of the victims to determine the existence of consent to sex.[48] Therefore, this non-consensual sex-based definition of rape opens the door of stigmatizing the non-offensive behavior and attitudes of the victims and makes the nature of the offence different from that of other offences.

5.3. Converting the offence of rape into non-punishable sex

There is a common presumption that one has no access to, and cannot use, another's body, property, personal information, or other elements of his or her personal domain except the other consents to such access or use. "Consent thus alters the structure of rights and obligations between two or more parties."[49] In the same way, by consenting to have sex with a man, a woman temporarily waives her right to physical inviolability. She relieves the man of his obligation not to cross the boundaries of her sexual autonomy, and in most instances, simultaneously relieves the state of its obligation to protect her from his boundary-crossing conduct. Moreover, by consenting to have sex with him, she not only relieves the state of its obligation to protect her but also demands that the state not intervene in this consensual transaction because such intervention would violate their sexual

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[44] However, there are many other reasons for low rate of conviction in rape cases, which include technicalities of the relevant legislations relating to the offence of rape, filing of false cases, insufficient police investigation, lack of proper and adequate evidence, settlement of disputes out of court, weak presentation of case by the prosecution, harshness of punishment and case backlog. S.M. Atia Naznin and Tanjina Sharmin (n 1) 43-71.

[45] Rachael Burgin and Asher Flynn, 'Women's behavior as implied consent: Male "reasonableness" in Australian rape law' (2021) 21(3) Criminology & Criminal Justice 334, 338.

[46] Rachael Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59(2) The British Journal of Criminology 296, 302.

[47] Victor Tadros (n 5) 516.

[48] Susan Estrich, 'Rape' (1986) 95 (6) Yale Law Journal 1087, 1094.

[49] Rebecca Whisnant (n 31).

autonomy.[50] Heidi Hurd, therefore, commented, "Consent turns a rape into lovemaking."[51] Thus, giving consent to sex by a woman converts the offence of rape into non-punishable sex.

5.4. Ignoring criminal intent as a necessary element of crime

The traditional way of defining a crime is to describe the prohibited act (*actus reus*) committed by the accused and the prohibited mental state (*mens rea*) with which he commits the said prohibited act. It is a general principle of criminal law that an act or omission to be a crime must be committed with the criminal intent of the perpetrator. Hence, an accused of an offence cannot be held guilty, unless he commits it with requisite criminal intent[52] or *mens rea*. However, due to the definition of rape based on non-consensual sex, the courts mainly focus on the conduct of the victims to determine whether the complainant consented to sex rather than the criminal intent or *mens rea* of the accused. Therefore, the *mens rea* doctrine bears very little theoretical importance in rape cases.[53] Thus, this definition ignores criminal intent as an essential requirement of the offence.

5.5. Complexity in existence of relationship between the victim and the perpetrator

The relationship between the perpetrator and victim of rape makes proof of the offence more complex, because in case of such relationship, the victim usually does not cooperate with the prosecution once ill feelings have gone out.[54] If the victim and the accused know each other and there exists any previous relationship between them, the prosecutors are less likely to prosecute and the judges are less likely to convict the accused. Therefore, when the relationship between the accused and the victim becomes closer, there is a greater tendency of the Courts to

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[50] Vera Bergelson, 'The Meaning of Consent' (2014) 12, Ohio State Journal of Criminal Law 171, 172. See also Markus Dirk Dubber (n 37) 509, 569.

[51] Heidi M. Hurd, 'Blaming the Victim: A Response to the Proposal That Criminal Law Recognize a General Defense of Contributory Responsibility' (2005) 8(2) Buffalo Criminal Law Review 503, 504.

[52] Criminal intent may be one of four levels of mental culpability: intention, knowledge, recklessness, or negligence.' See Dana Berliner (n 17) 2691.

[53] Dana Berliner (n 17) 2691. However, there are two views which claim that non-consensual sex based definition of rape does not deny the *mens rea* requirement. According to the most conservative point of view, a man is deemed to have *mens rea* while committing rape only if he believes that the victim has not consented to sexual intercourse. According to this view, a man who sincerely believes that the woman has consented is not guilty of rape, no matter how unreasonable his belief may be under the circumstances. A more moderate view is that a man has *mens rea* if he believes while committing intercourse that the woman has not consented or unreasonably believes that she has consented. Rebecca Whisnant (n 31).

[54] However, in case of rape by stranger, there is less uncertainty in proving the case. The victims are more likely to cooperate with the prosecution. C. A. Albonetti, 'Prosecutorial Discretion: The Effects of Uncertainty' (1987) 21(2) Law & Society Review 291, 301

presume that the complainant consented to sex.[55] The accused can argue that he was in such an ongoing sexual relationship of mutual trust with the complainant that sexual intercourse in such circumstances was not blameworthy as an offence of rape.[56] Consequently, the court does not convict the perpetrators in cases of such relationship. Robin West rightly commented that:

> the closer the relationship between the victim and her assailant to the traditional one of man and wife, the less likely a rape conviction, or prosecution, will be forthcoming. The more a "girlfriend" resembles a "wife," the more likely her "consent" to sex with her boyfriend will prevent her from successfully charging him with rape.[57]

5.6. Complication in determining the reasonableness of belief about consent to sex

In most countries, the rape law permits the accused of rape to raise defence asserting that he believed that the concerned victim had consented to sexual intercourse. The issue of whether such belief is reasonable or unreasonable is to be decided by the trial courts. However, a relevant question arises how the court will determine the reasonableness of such belief. There is no undisputed method of ascertaining the issue. According to Husak and Thomas, social conventions[58] are important factor in distinguishing between reasonable and unreasonable belief about consent to sex and the law should not determine the criteria of reasonableness about such a belief.[59] They argue that there are social and behavioral conventions by which women manifest their willingness to have sex and that where a woman has engaged in such conventions, it is reasonable for a man to believe that she is consenting. They have also emphasized understanding the social conventions for making any judgment about the reasonableness of a mistake about consent by arguing, "Until we more fully understand the social

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[55] Dana Berliner (n 17) 2687. Catharine MacKinnon also argues that the relationship of the complainant with the accused and presumption of consent are inversely related. Thus, there is often a presumption of non-consent in stranger rapes, but in marital rapes, the courts, in most of the cases, hold that there exists an irrefutable presumption of consent. Catharine A. MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8 (4) Signs: Journal of Women in Culture and Society 635, 648-649.

[56] Victor Tadros (n 5), 541-542.

[57] Robin West (n 30) 237. Dana Berliner also views almost in the same words stating, "Empirical studies indicate that when the victim and defendant are not strangers, prosecutors are less likely to prosecute and juries less likely to convict than in stranger rapes. As the relationship between defendant and victim becomes closer, there is a greater tendency to presume consent". Dana Berliner (n 17) 2687.

[58] A social convention is a societal norm to which a person, as a member of society, ought to conform. See David Lewis, Convention (Cambridge: Harvard University Press 1969) 99 cited in D. N. Husak and G. C. Thomas, (n 27) 103. Conventions are comprised of facts which can help to establish the reasonableness of a belief seems plausible. They are always changing and are used to help establish that a belief is reasonable in a wide range of controversial legal disputes. D. N. Husak and G. C. Thomas (n 27)103-104.

[59] D. N. Husak and G. C. Thomas (n 27) 95.

convention about consent to having sex, any judgment about the reasonableness of a mistake about consent is fragile."[60] Archard, however, is against this view pointing out that any such conventions may be ambiguous and not understood to all, because many men usually interpret women's behavior in more sexual terms than women mean or intend, and someone may have sexual intercourse causing serious harm relying on his beliefs about such conventions.[61] Therefore, it is very difficult to ascertain whether the accused had reasonable belief that the complainant consented to sex, as there is no unanimous standard for determining the reasonableness of such belief.

5.7. Possibility of making the powerless women subject to sexual exploitation

Many women may give consent to sex due to economic, psychological, and social hierarchical threats shown by the perpetrators and sexual intercourse with such consent is not rape within the purview of the relevant provisions. Thus, for example, sex committed by an employer with a female employee by threats of firing her job is consensual sex and therefore, not rape, because submission under threat to economic survival does not satisfy the essential requirements of rape defined as non-consensual sexual intercourse.[62] In addition, the victims may give their consent when they find that resistance is overcome or the consequences of refusal may be worse than the consequences of acquiescence and it appears to them that fighting is futile, dangerous, or otherwise more expensive.[63] Therefore, since the victim of rape is comparatively less powerful and when she finds that her resistance against sexual intercourse is fruitless; she surrenders herself to the intention of the perpetrator and thus becomes a tool of sexual exploitation. In this respect, Judith Herman rightly describes, "When a person is completely powerless, and any form of resistance is futile, she may go into a state of surrender."[64] However, the relevant law cannot ensure any redress for the powerless victims who have become subject to sexual exploitation, and hence, the courts cannot convict many rapists who hold a powerful position.

5.8. Probability of humiliating the victims

Since due to the definition of rape based on non-consensual sex, the trial courts emphasize more on the conducts of the victim rather than that of the perpetrator to ascertain whether she consented to sex, this definition apparently supports the

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[60] ibid, 123.

[61] David. Archard, 'A Nod's as Good as a Wink": Consent, Convention, and Reasonable Belief' (1997) 3(03), Legal Theory 273, 285.

[62] Catharine A. MacKinnon, 'Rape Redefined' (2016) 10 Harvard Law & Policy Review 431, 443.

[63] ibid.

[64] Judith Herman, Trauma and Recovery: The Aftermath of Violence - From Domestic Violence to Political Terror (1992) 42 cited in Catharine A. MacKinnon (n 62) 447.

tendency to 'put the victim on trial' in rape trials.[65] Since the government of Bangladesh has not yet adopted any 'rape shield statute'[66] to protect the rape victims from being humiliated by disclosing their prior sexual activities with the accused, the definition generates the possibility of such humiliation. As no law prohibits such disclosure, the defence lawyer may bring the issue with a view to proving consent to sexual intercourse alleged to have been committed without her consent. However, the prosecution may argue that previous history of sexual activity with the consent of the victim does not substantially indicate that the alleged subsequent sexual intercourse had been committed with her consent and therefore, disclosure of the previous history is quite irrelevant.[67] Though this disclosure is irrelevant and does not substantially prove the presence of consent to sex, it humiliates the victims, their family members and other nearest relatives.

5.9. Requiring careful investigation

The definition of rape based on non-consensual sexual intercourse requires the courts to focus on the moment before intercourse when the perpetrator and the complainant (victim) may or may not agree to sex. Committing sexual intercourse with the consent of the complainant, who is not less than sixteen years of age, is not punishable under the relevant laws.[68] However, in order to determine whether sexual intercourse amounts to rape or not, careful investigation of the relationship between the accused and the victim is required.[69] Since this investigation humiliates the victims and their family members, many of the victims do not show their interest to file rape cases against rapists and do not cooperate with the investigating officer in fear of losing their social dignity. This situation makes it more difficult for the prosecution to prove the case.

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[65] Victor Tadros (n 5) 517.

[66] Rape shield laws protect rape victims from being humiliated by disclosure of the details of their prior sexual activities. These laws are enacted with a view to restricting a criminal defendant's ability to present to the jury or judges' evidence of past sexual history.' The main objective of these laws is to eliminate a common defense strategy of trying the complaining witness rather than the accused. The result of this strategy was harassment and further humiliation of the victim as well as discouraging victims of rape from reporting the crimes to law enforcement authorities." State v. Williams, 224 Kan. 468, 470, 580 P.2d 1341, 1343 (1978). Cited in J. Alexander Tanford and Anthony J. Bocchino, 'Rape Victim Shield Laws and The Sixth Amendment' (1980) 128 University of Pennsylvania Law Review 544, 544.

[67] Husak and Thomas hold the same view arguing- "a person can consent to intercourse with the same person 99 times and refuse consent on the 100th occasion. D. N. Husak and G. C. Thomas (n 27) 124.

[68] However, as per section 497 of the Penal Code 1860, if any man has sexual intercourse with a woman who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

[69] Victor Tadros (n 5) 530.

5.10. Other negative impacts of the definition

Apart from the above-mentioned drawbacks of the definition, it has some other negative aspects. This definition does not trace the offence as a crime of violence, though in most of the rape cases, the perpetrators use violence for obtaining consent of the victims to sexual intercourse. Victor Tadros rightly commented-

> Defining rape around consent does not mark the offence out as a crime of violence even where there has been violence. Violence, it appears, is merely evidence of something else in such cases: a lack of consent.[70]

Furthermore, it supports the manipulation of the case by the defence lawyers. Since the concept of consent is flexible, it creates an undue advantage in favour of the accused and opens the door of acquittal for the accused as his counsel can very easily convince the courts to be doubtful about lack of consent, particularly in the case of the prior relationship between the accused and the victim. Thus, the defence counsel may manipulate the trial.[71]

6. Re-thinking rape as non-consensual sexual intercourse

Defining rape as non-consensual intercourse has several drawbacks as evident from the aforementioned words. More particularly, this definition often persuades the Courts to concentrate attention on the conduct and attitude of the victims instead of the criminal conduct of the accused. It also gives rise to complexity in proving the offence of rape beyond a reasonable doubt. Besides, due to this type of definition, the defence party may humiliate the victims by disclosing the previous sex history of the accused with the victim. Furthermore, since the prosecution is required to prove physical resistance by the victim, this definition ultimately necessitates not only proof of non-consent of the victim but also that of force used by the perpetrator to overcome her resistance. Moreover, it does not criminalize sexual intercourse where force is used but consent exists and thus allows the perpetrator who committed sexual intercourse by using force against the victim to argue in a more or less unrestricted style that the complainant (victim) consented to sexual intercourse.[72] Therefore, this type of definition is largely accused-friendly as it strengthens his argument to justify sexual conduct though it is forced and it causes serious harms including both the psychological[73] and physical injuries to the complainant.

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[70] ibid, 516-517.

[71] ibid, stating, "...the concept of consent is particularly malleable, and is commonly subject to manipulation by defence counsel".

[72] ibid, 527.

[73] For better understanding the psychological impact of rape victims, see Rebecca Campbell, 'The Psychological Impact of Rape Victims' Experiences With the Legal, Medical, and Mental Health Systems' (2008) 63(8) American Psychologist 702.

The most reasonable solution to these drawbacks would be simply to redefine the offence abandoning the concept of consent as the central element in the definition of rape.[74] The relevant law, therefore, should redefine the offence by introducing an intelligible definition so that the prosecution can easily prove the offence and play an important role in ensuring justice for the victims and convicting the actual rapists. It should define the offence in comprehensible and unambiguous words so that common people have notice as to what kind of conduct or act amounts to rape and can easily distinguish between criminal and innocent conduct.[75]

7. The necessity to redefine the offence of rape

The role of any criminal law is not only to describe who is guilty of any offence but also to portray appropriately the criminal act and conduct of the accused that constitutes an offence. Therefore, the law should define any offence in a way that reflects what makes the conduct of the perpetrator crime and publicly wrongful.[76] However, deviating from this common fashion of criminal law, the relevant laws of Bangladesh dealing with the offence of rape have persuaded the courts to emphasize the conduct of the victims by defining rape as non-consensual sexual intercourse. Hence, an accused will not be guilty of rape, if the complainant consents to sex. Thus, consent plays a very important role in the trial of rape cases, but it should not be treated as the central element of the offence. Victor Tadros has rightly argued, "If consent is to play a role in the law of rape, it ought not to be central to the definition of the offence".[77] Therefore, the relevant law should define rape in such a way that emphasizes the conduct of the perpetrators instead of that of the victims.

In order to avoid the difficulties in proving the offence and overcome other drawbacks in the existing definition, the relevant criminal law of Bangladesh should be amended by redefining the offence of rape as forced sexual intercourse reflecting the criminal conducts of the accused.[78] The offence may be defined as committing sexual acts with use of force [79] or threat of using force compelling the

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[74] Victor Tadros (n 5) 515.

[75] See, *Connally v. General Constr.* Co., 269 U.S. 385, 393 (1926) (in which the US Court observed, "…criminal statute must not be so vague that ordinary persons cannot distinguish between criminal and innocent conduct".) cited in Dana Berliner (n 17) 2691-2692.

[76] Victor Tadros (n 5) 524.

[77] ibid, 519.

[78] MacKinnon also supports defining rape as forced sex and treats the element of lack of consent along with force as unnecessary as she states "Rape should be defined as sex by compulsion, of which physical force is one form. Lack of consent is redundant and should not be a separate element of the crime". Catharine A. MacKinnon, Toward a Feminist Theory of the State (First Harvard University Press paperback edition, Harvard University Press 1991) 245.

[79] However, Scott A. Anderson prefers defining rape based on "coercion" arguing that the term 'coercion' denotes a broader range of activities. Scott A. Anderson, 'Conceptualizing Rape as

victims to participate in the said sexual acts.[80] The definition should criminalize any sexual intercourse, including any sexual penetration by any object, rather than only vaginal-penile penetration, committed through use of direct force, violence, threats thereof or through any behaviour or expression that intimidates the victims into committing sex with the perpetrators.[81] The law should clarify what constitutes this type of sex so that no ambiguity arises in proving the offence and require the prosecution to prove that the perpetrator had committed sexual intercourse with the victim forcefully denying her desire of not engaging in sexual activity with the accused. Besides, it should also provide less punishment for forced sex that is committed with the consent of the complainant, so that no forced sex can be deemed excusable.

However, the proposed definition is not free from limitation. In contrast to the recommendation, someone may argue that this definition will narrow down the scope of convicting many perpetrators of rape; i.e. in the case where sex is committed without the consent of the victim and without using force. In response to this argument, we can assert that narrowing the scope down does not matter. The purpose of the rape law is to ensure justice for the victims by punishing the actual rapists in order to give satisfaction to the victims and their family as it expresses the sympathy and solidarity of society for the victims and furthers their re-socialization.[82] The proposed definition can better serve this purpose, as it can be more easily proved compared to the definition based on non-consensual sexual intercourse for the following reasons. First, it persuades the Courts to emphasize

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Coerced Sex' (2016) 127 Ethics 50, 73. It may be mentioned here that the words "force" and "coercion" are synonymous (see https://www.merriam-webster.com/dictionary/coerce) and are often used interchangeably as both the terms refer to ideas of compulsion, constraint, and overtaking by means of superior power.

[80] Scott A. Anderson supports to define the offence of rape in almost the similar words. See Scott A. Anderson (n 79) 53. Moreover, the common law crime of rape also requires proof of force. Colin Colt, 'Sexual Consent as a Common Law Doctrine' (2019) 19 (2) Wyoming Law Review 453, 454. Some authors, however, favours to provide 'conjunctive definition' of rape by terming rape as sex that is non-consensual and forced. See David Archard (n 5) 374.This type of definition will pave the way of exonerating many rapists, since according to this definition, sex that is forced will not be rape if the victim consents to it, and sex that is nonconsensual will not be rape if the perpetrator does not use force while having intercourse. Robin West (30) 233. In addition, the conjunction may lead to anomalous and unfair results: since sex by using lots of force but with "consent" defeats the rape charge. See, J. McGregor (n 5) 181.

[81] This proposed definition is very much similar to that suggested by Afroza Begum. She recommends for replacing the term 'rape' by the expression of 'sexual assault' including all types of penetration by any object, rather than only vaginal-penile penetration, and other sexual contact such as sexual touching and introducing a varying degree of punishment based on the severity of the crime. Thus, she argues for making the definition wider that enhances the possibility of increasing the rate of arrest and conviction resulting in discouraging the accused of sexual touching from involving in more severe crimes like rape. See, Afroza Begum, 'Rape: A Deprivation of Women's Rights in Bangladesh' (2004) 5(1) Asia-Pacific Journal on Human Rights and the Law 1, 11.

[82] Elena Maculan and Alicia Gil Gil, 'The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts' (2020) 40 (1) Oxford Journal of Legal Studies 132, 137.

the conduct of the accused rather than that of the complainant.[83] Secondly, it requires the prosecution to prove force used by the perpetrator instead of proving lack of consent that is more difficult to be proved. Thirdly, proving forced sex is less difficult in comparison to the difficulty and complexity faced by the prosecution in proving non-consensual sexual intercourse. Fourthly, since there is no necessity of proving lack of consent, the defense lawyer cannot easily convince the courts to be doubtful about the commission of rape. Moreover, there is less possibility of humiliating the victims by the defense lawyer. Furthermore, this definition is, to some extent, victim-friendly as it exonerates the victim from facing any embarrassing questions that might affect her re-socialization. In addition, compared to defining rape as nonconsensual sex, conceptualizing rape as forced sex helps us to understand rape as typically violence pattern of crime, as well as its devastating impacts on the victims and other women. This understanding helps the police, prosecutors, judges, and the public recognize the sexual intercourse with use of force as a crime and thus, convince the judges to criminalize the forced sex and punish the perpetrators.[84]

8. Conclusion

From the legal point of view, it is very much crucial to have a clear and unambiguous definition of any crime consisting of specific elements for the prosecutors, judges and parties involved to understand, comply with and implement the relevant provisions, otherwise, they encounter many difficulties in ensuring justice for the concerned parties. This is undeniably true in the case of defining rape as demonstrated in the above-mentioned discussion. Since the existing relevant laws define rape as having sexual intercourse by a man, without lawful marriage, with a woman without her consent or against her will, a man will not be guilty of rape if he commits sex with the consent of a woman who is not under sixteen years of age. Thus, consent to sexual act usually exonerates the perpetrator from the liability even when sexual interaction is one-sided, non-mutual, unwanted, and non-voluntary. Hence, if the prosecution, in a rape case, fails to prove beyond a reasonable doubt that the accused has sexual intercourse without the consent of the complainant, the court will not hold the perpetrator guilty and as such, not convict him. The study shows that this non-consensual sex-based definition generates many complexities in proving the offence beyond a reasonable doubt, even often makes impossible for the prosecution to prove it due to such complexities. Particularly, in case of relationship between the perpetrator and the victim, it is more difficult to prove lack of consent, because a prior relationship increases the degree of doubt about whether or not the offence has been committed. Consequently, the courts cannot convict many actual rapists.

[83] Rebecca Whisnant (n 31).

[84] Scott A. Anderson (n 79) 58.

Therefore, the definition based on non-consensual sex provides an undue advantage to the perpetrators to escape punishment and causes injustice to many actual victims.

In order to overcome the shortcomings arising out of the existing definition of rape, this article recommends that the term 'non-consensual sexual intercourse' should be replaced with 'forced sexual intercourse'. This proposed definition can play a significant role in protecting the victims from being humiliated by the defence lawyer, convicting the actual rapists and ensuring justice for the victims. Therefore, it is expected that the law-making authority of Bangladesh will amend the relevant law considering the recommendation made by this paper. It will definitely help the prosecution to prove the offence of rape in a convenient manner and the courts to convict the actual rapists. Otherwise, the most expected justice for the victims of rape will remain a rhetoric as it has been for the last hundred and sixty-one years, and will not become a reality.