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Law as a Mechanism: A Comparative Perspective on the Perpetuation and Prevention of Violence Against Women in India, Japan, and the United States

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INTRODUCTION

December 2012, New Delhi, India

A twenty-three-year-old college student, Jyoti Singh Pandey, boarded an off duty bus with her male friend. Soon after, he was knocked unconscious and she was gang raped and brutalized by 6 men. She died as a result of her injuries. The men who assaulted and murdered her, except one who died in custody, were charged with rape, murder, kidnapping, robbery, and assault. All perpetrators were found guilty and all but one, a juvenile, were sentenced to death by hanging.

In recent years public awareness has increased about violence against women. It is estimated that over 70% of women worldwide experience a form of gendered violence (WHO, 2013). Gender-based violence includes femicide, female infanticide, female genital

mutilation, forced marriages, sex trafficking, honor crimes, sexual assault, rape, etc. (EIGE, 2015). For the purposes of my study, I focus on rape as a form of gendered violence. In the United States, it is estimated that only 16-35% of rapes are reported (Kruttschnitt, 2014, 35-47). These estimates are even lower in Japan and India. What constitutes rape may vary globally and within the United States, but often falls under the WHO's broad definition: "physically forced or otherwise coerced penetration – even if slight – of the vulva or anus, using v penis, other body parts or an object." The attempt to do so is known as attempted rape. Rape of a person by two or more perpetrators is known as gang rape. (WHO, 2013, 149).

Cultural beliefs about rape are often permeated with stigma and stereotypes known as rape myths.



Rape myths often consist of false notions such as women lying about being raped or that women 'ask for it'. Though rape myth manifestations may vary, the stigma associated with rape and the fact that the blame is most often placed on victims is not uncommon and only perpetuates violence against victims. In my research I explore the role of law, the legal system, and legal culture in the perpetuation of violence against women. To do so I utilized the culture of violence theory and three concepts: rape culture, secondary victimization, and law as a reflection of culture.

Rape culture is a feminist

lying about being raped or that women ‘ask for it’. Though rape myth manifestations may vary, the stigma associated with rape and the fact that the blame is most often placed on victims is not uncommon and only perpetuates violence against victims. In my research I explore the role of law, the legal system, and legal culture in the perpetuation of violence against women. To do so I utilized the culture of violence theory and three concepts: rape culture, secondary victimization, and law as a reflection of culture.

Rape culture is a feminist concept but is derived from the culture of violence theory, which states that beliefs that legitimize aggression validate the use of violence in relationships (Nayak, 2003, 334). Rape culture, more specifically, states that beliefs that legitimize aggression validate the use of sexual violence against women (Nayak, 2003, 334). Secondary victimization, re-victimization, or the “second rape” is a perpetuation of violence against sexually victimized women. Secondary victimization is defined as “the victim-blaming attitudes, behaviors, and practices engaged in by community service providers, which further the rape event, resulting in additional trauma for rape survivors” (Campbell, 2001, 1240). These cultural beliefs affect the application of laws that aim

to reduce violence against women through legal processes and practices. In turn, the application of law affects not only reporting rates but also the experiences of victims as well. Secondary victimization and rape culture are thought to stem from the acceptance of rape myths, which result in insensitive treatment of victims in the legal system (Campbell, 2001, 1240). In my study, I identify 3 main sites where re-victimization occurs in the legal process: reporting, evidence gathering, and prosecution. For the purposes of this paper, I focus on an evidence gathering process in India known as the “two-finger test”.

The notion of law being a reflection of culture means that law and culture are inextricably mixed (Rosen, 2006, 200). The application of a country’s laws through its legal processes and practices are a reflection of culture, but so are acts of sexual violence. Thus, while sexual violence is a reflection of a broader culture so are the laws aimed at reducing this type of violence.

METHODS

To determine the relationship between law, legal processes, and culture in the analysis of sexual violence against women I conducted a cross-national comparative analysis of rape. I chose to conduct a cross-national comparison because women suffer in each country from the effects of not only sexual violence, but gendered violence as well. What varies is the

extent to which they continue to experience violence after an assault. A country’s legal practices and processes affect the continued experience of violence within the legal system. My comparison allows me to show how these practices and processes differ in Japan, India, and the United States. I chose these three countries because they have many similarities between them regarding their laws and legal systems, but they are distinct enough culturally to show the effects of culture on the application of rape laws.

To conduct a cross-national analysis of Japan, India, and the United States laws, legal practices, and how they affect the experience and perpetuation of violence against sexually victimized women I read over seventy sources. I used primary sources including penal codes and crime statistics from each country. I supplemented my analysis of primary sources with legal analyses, studies of specific legal cases, and studies of crime data, specifically about the inaccuracies that plague data about violence against women and the legal process that accompany these crimes. It became a necessary part of my thesis research not

	United States	India	Japan	California
2008	304.1	1.175	127.7	36.6
2009	306.8	1.19	127.6	36.96
2010	309.3	1.206	127.5	37.35
2011	311.6	1.221	127.8	37.67
2012	313.9	1.237	127.6	38
2013	316.1	1.252	127.3	38.33

Figure 1: Population in millions (billions for India).

	United States	India	Japan	California
2008	90,750	21,467	1,582	8,906
2009	89,241	21,397	1,402	8,698
2010	85,593	22,172	1,289	8,325
2011	84,175	24,206	1,185	7,678
2012	84,376	24,923	1,240	7,828
2013	79,770	33,707	N/A	7,459

Figure 2: Number of offenses known to the police (Rape).

only to find and use a wide range of primary sources for each of the three countries but also to evaluate each source, compare them, and weigh their reliability.

RESULTS

There are a few important things to note about each country's laws and incident rates. First, the laws are quite similar cross-nationally. There are a few exceptions including the existence of marital rape statutes and statutory rape statutes. Second, though the laws remain relatively similar, incident rates vary drastically cross-nationally. I argue that these variations are a result of cultural differences in legal procedures and processes that often alienate victims. Figure 1 shows the population of each country, all numbers except in the case of India are in the millions. Figure 2 shows the number of rape offenses known to the police in each country. Figure 3 shows the rape rate per 100,000 people. California and Japan are compared in these tables due to their similar geographic size; also California's penal code was used for comparison purposes

between Japan and India since the United States does not have a national rape law.

There are two significant findings regarding the incidence of rape in each country that I want to touch on. First, California's population is a third of Japan's, while Japan and California occupy a relatively similar geographic space Japan's rape rate is substantially lower than both California's and the United States. In fact, the incidence of rape in Japan is on average 24.5 times lower. And even with Japan's estimated reporting rate at 11% (Cartelle, 2008) it would still be far less than California's and the United States' if all victims in all three examples reported their assault. Second, although India's rape rates are extremely low, I argue that this is a result of violent and alienating procedures that deter women from reporting crimes committed against them. On average 95-98% of offenders are known to

	United States	India	Japan	California
2008	29.8	1.9	1.24	24.2
2009	29.1	1.8	1.09	23.5
2010	27.7	1.9	1.01	22.3
2011	27	2	0.9	20.4
2012	26.9	4.3	0.97	20.7
2013	25.2	5.7	N/A	19.5

Figure 3: Rape Rate per 100,000.

the victim and would thus deter reporting, especially if the offender was a spouse, as marital rape is not an offense in India (NCRB). Nonetheless, incidence rates are extremely low because reporting rates are also low.

SITES OF STATE SANCTIONED VIOLENCE

Rape laws are relatively similar cross-nationally, but there is still a major difference between incident rates. Although most countries intend for their laws to prevent violence against women that is not what is happening. Violence continues to be perpetuated through the state because while written laws may change, the places within the legal system that perpetuate violence against women remain the same. Sites of state sanctioned violence occur during multiple stages of the legal process, but for the purposes of this paper I will focus exclusively on India's two-finger test.

The two-finger test has its

roots in colonial India. It was created in the 1940's to establish whether or not an assault actually occurred. When it was shown that the state of the hymen was shown to be an unreliable means of determining if a woman had been raped, reliance upon the two-finger test became even stronger (Baxi, 2014, 75). Rape laws in colonial India were a result of the want to control women's chastity and rested on the beliefs that most complaints of rape are false and that women's bodies should bear marks of resistance for an assault claim to be valid (Baxi, 2014, 75).

India's rape laws were reformed in the 1980's in response to public outcry over the outcome of a custodial rape case from the early 1970's. Although the laws were reformed, little changed culturally and dominant beliefs about rape victims continue to informally affect the process and outcome of rape cases.

Medical professionals perform the two-finger test to determine whether or not a woman is 'habituated to sex' (meaning that they have engaged in a sexual encounter previously). This test has had many variations including the insertion of measuring cones and glass pipettes into the vagina (Baxi, 2014, 73). The characterization of a woman as 'habituated' in medico-legal certificates enables the defense lawyer to bring up the victim's past sexual history, even when it is no

longer admissible in court. They do so to suggest that the rape was not a violent act but consensual, thus rendering a woman's assault into a story of consensual sex and turning her into a lying habitué (Baxi, 2014, 82). Currently, the extent to which an assault victim's vagina accepts two fingers or none at all is the method most commonly used to determine partial or complete penetration and whether or not the victim is habituated to sex and all victims, regardless of age, are subjected to the two-finger test (Baxi, 2014, 75).

The scientific rationality for this form of state-sanctioned violence has been disproven because not only is the two-finger test highly inaccurate because doctor's hands and fingers may vary in size thus not providing any form of uniformity for measurement, but also it does not determine whether or not the victim experienced a sexual assault. It is also subject to opinions and interpretations that support the erroneous, yet dominant narrative that women lie about being raped.

In 2010, Justice Lau deemed the two-finger test unconstitutional because it not only violated the victim's right to privacy by making her private sexual life public, but it also was irrelevant to rape trials because it proved nothing and provided the defense with another means to

perpetuate violence against victims of rape (Baxi, 2014, 102-103).

Because legal practices are embedded in culture, changes in law alone are rarely sufficient in reducing violence against women. This is exemplified by the fact that, though deemed unconstitutional, the two-finger test continues to be used. Not only does this perpetuate the initial act of violence a victim suffers, but it also can effectively be called a second rape because the insertion of two fingers into a victim's vagina, with or without her consent, is a mimicry of the act of rape itself (Baxi, 2014, 63).

CONCLUSION

Theoretically, laws make it easier to prosecute crimes against women by virtue of their existence. In reality, what good laws may do is often undone by legal practices that are influenced by dominant sexual cultural beliefs. The inability to reduce violence against women is not for a lack of trying, but because dominant cultural beliefs heavily influence the system. This is best illustrated by the gang rape and murder of twenty-three-year-old Jyoti Singh Pandey.

Jyoti's rapists have since been convicted and 4 of them are appealing the ruling (Udwin, 2015). One of her rapists feels no

remorse for what he did stating that “a decent girl won’t roam around at nine o’clock at night. A girl is far more responsible for rape than a boy” (Udwin, 2015). For over a month after the rape, men and women had filled the streets of Delhi to protest. They faced harsh temperatures, water cannons, batons, and teargas all to end violence against their daughter, mothers, sisters, wives, and themselves (Udwin, 2015).

The protests forced the federal government to set up the ‘Verma Committee’ to make recommendations for legal reforms regarding sexual violence (Kapur, 2013, 318). Many of its central recommendations threw out outdated notions of ‘Indian womanhood’ that are based on chastity, honor, and purity and instead stated that, “the issue of sexual violence needed to be addressed through a woman’s right to bodily integrity, sexual autonomy and legal recognition of adult consensual sexual relationships” (Kapur, 2013, 319). The law that was enacted by parliament left out nearly every recommendation and does nothing to prevent or reduce sexual violence against women. In this instance, law is a reflection of dominant patriarchal culture and reinforces these beliefs through not only the law, but legal processes as well.

LESSONS FROM COMPARISON

What I learned from my research is that women suffer violence everywhere, but the experience and extent of re-victimization varies. Laws are nearly indistinguishable cross-nationally, but legal practices are unique due to cultural differences and this is where the experience and extent of re-victimization varies. One example is of the variance in medical examinations between each country. In Japan, the ability to receive a medical examination after a sexual assault and the choice to report the assault are mutually exclusive; this provides victims with greater agency in their choice to receive care and, if they so choose, to pursue a legal case (Dussich, 2001; Yatagawa & Nakano, 2008). As for India, it has already been demonstrated that this experience is not one of choice. In fact, a crime must be reported for a victim to receive a sexual assault examination and it must be conducted at a government hospital, this test speaks for the victim whether the interpretation is true or not and is the determining factor in many cases (Kashyap & Gertholtz, 2010). In the United States thousands of tests go unanalyzed; eliminating justice for many women who may have had it otherwise (Ritter, 2011, 2).

THE UNITED STATES: A Model for Human Rights?

The United States is often considered a model for human rights, but in reality women experience violence at exceptionally high rates. Estimates of reporting rates run anywhere from 16-36% (Kruttschnitt, 2014, 35-47). The United States reports the highest number of crimes a year internationally, while India comes in third, not accounting for underreporting (Kohn). In both countries, women face re-victimization at every stage of the reporting process from the first report to the adversarial nature of trial.

The National Crime Victimization Survey (NCVS) attempts to measure the rate of underreporting in the United States. A recent study published by the National Academy of Sciences (NAS) found that the NCVS was also underestimating rape and sexual assault (Kruttschnitt, 2014, 106). There are many factors that may affect reporting rates, including level of education, race, age, immigration status, marital status, religious affiliation, sexual orientation, socioeconomic status, and pregnancy. Of all of these factors, pregnancy in consequence of a sexual assault may have the strongest effect on whether or

not a woman reports her assault. Of the 6.5 million pregnancies each year in the United States, 3 million are unintended, and of that 32,101 are a product of rape or incest (Ventura, 2012, 1-22). For a woman facing extreme challenges in proving her assault to investigators and possibly a court, a pregnancy is definitive evidence. At the same time, it has been found that greater than 40% of the women who were pregnant or had been as a result of rape were repeatedly abused, experiencing multiple assaults (Holmes, 1996, 323). This is not surprising, given that it is estimated that 85-90% of victims know their assailants; this correlation between rape-related pregnancies and domestic and family violence can increase the challenge a woman faces to press charges against a spouse or acquaintance (www.nij.gov, 2008).

GOING FORWARD: Japan as a Model

In Japan there is a reduction in the perpetuation of violence against sexually victimized women in the criminal justice system. Japan has a system that deals with most crimes outside of the courts, so the rates of violence, even including estimated rates of underreporting are extremely low. Victims role in the process to report, prosecute, and sentence an offender is often unrecognized (Haley, 1991, 131).

The emphasis on apology and restoring harmony could be especially significant for victims of sexual assault. Since 85-90% of assaults are committed by an acquaintance, victims may not necessarily want to press charges, but rather find a solution out of court that reduces re-victimization. There is evidence that the “acknowledgement of guilt, expression of remorse including direct negotiation with the victim for restitution and pardon as precondition for lenient treatment” not only reduces the likelihood or resorting to long-term imprisonment, but that it contributes to a reduction in crime overall (Haley, 1991, 136). These formal and informal practices affect not only reporting rates, but rates are violence are thought to be far below most other nations, and produce an overall experience of reciprocity. This is not to say that there is no re-victimization, but the incidence at which it occurs is very low.

Given that anywhere from 85-98% of rape cases in all three countries are committed by an acquaintance it should be considered going forward that, as a way to reduce re-victimization and increase reporting rates, the reporting process should not necessarily lead to criminalization, but instead provide greater agency and support to the survivors brave enough to report as in the case of Japan.

IMPLICATIONS

I chose to conduct a cross-national comparison because women suffer in each country from the effects of not only sexual violence, but gendered violence as well. What varies is the extent, pattern, and experience after their assault to which they continue to experience violence. The legitimization of violence against women is ingrained in culture and is reinforced through informal and formal practices that are often in conflict with protective and progressive laws. Women who are brave enough to report their crimes face immense social stigma and further violence.

Because legal practices are embedded in culture, changes in law are rarely sufficient in reducing violence against women and are instead often counterproductive. To reduce re-victimization my research suggests that instead of just changing laws we need to change culture because a nation’s culture matters not only to how violence manifests, but also the extent. There is an important distinction between legal codes and legal practices. Laws may be quite similar cross-nationally, but cultural beliefs create patterns of violence through legal practices that prevent women from reporting.