
GENDER NEUTRALITY IN RAPE LAWS: NEED OF THE HOUR

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ABSTRACT

The following article discusses the need for gender neutrality in rape laws. Since the inception of Criminal laws in India, the term 'rape' has been associated with women as victims and men have always been deemed to be the offenders. However, the reality is that there has been plethora of instances where men have been the victims of sexual offences like rape. Section 375 of the Indian Penal Code which describes about the offence of rape also stands with the biasness of declaring a man as the only being who commits rape and Section 376 on the other hand lays down punishment to which the male would be subjected to.

There is no doubt that the scope of laws dealing with sexual offences has been broadened after the 2013 Nirbhaya rape case, and that too for good but what remained neglected is rape laws for the protection of men and transgender. The 172nd Law Commission also emphasized on the need of gender-neutral rape laws. Similarly, the J.S. Verma Committee setup in 2013 also suggested including men and transgender in rape laws. However, such recommendations were not able to fetch fruitful results.

The gender- neutrality of rape laws in no manner derogates the rights of women. Rather, it is a step towards inclusivity. It clearly means that if this essential step of making rape laws gender neutral is taken then this will only give words to those males and transgender who have been subject of such heinous offences but could not get legal justice merely because of their physical identity.

This article deals with the problem of lack of gender neutrality in rape laws, its background study, its status at international arena, problem in rape laws as far as India is concerned, what is the need of making the rape laws gender neutral and finally some suggestions for improving the situation.

Keywords: gender neutral, rape laws, sexual offences, transgender, inclusivity.

INTRODUCTION

In India, men have always been recognized as perpetrator in case of sexual offences. When a PIL on the issue of gender neutrality of sexual offences was filed in Delhi High Court in 2017, the central government responded against the issue on the ground that in sexual offences perpetrators are mostly men and victims are mostly women¹. If we apply this logic then it implies that constitutional and statutory rights are not meant for minorities and this may be one of the reasons for not considering LGBTQ as victims of sexual offences.

There is a belief that the victim of any sexual offence can only be a woman and this is based on presumption that rape is the act of sex only² for the gratification of sexual needs. However, the act of rape is not only restricted to the act of sex, rather it is a display of dominance and a manifestation of aggression and the victim of aggression can be anyone irrespective of their gender. While Indian law gives protection to women in this regard but it exempts men and transgender from including them in the ambit of protection. There are instances when men and transgender are raped but unfortunately, they do not have any legal remedy for that. Even the reporting of the sexual assaults on men and transgender is omitted from the rules of our normative society. It should be understood that even a man can fall prey to such an abhorrent act. The need is apparent, gender neutrality in rape laws with respect to the victim.

BACKGROUND

Gender neutral rape law in India is not a new concept. It was firstly recognized in *Sakshi v. Union of India*; the Supreme Court of India gave directions to review the existing rape laws. The Law Commission in its 172nd Report also recommended broadening the scope of definition of rape. The Law Commission recognized the increased sexual assaults on men and understood the psychological damage caused to male. Therefore, it recommended inclusion of male as a victim also and not merely as a perpetrator.

Another effort was made after the heinous 2013 rape case. The Justice J.S. Verma Committee was formed after the incident, to suggest the changes required in the present legal system.

¹ Pallavi Pundir, "Indian Rape Laws Cannot Be Gender-Neutral," *VICE*, July 4, 2019, available at https://www.vice.com/en_in/article/mb8dey/rape-laws-in-india-cannot-be-gender-neutral-says-ministryof-home, (Visited on April 14, 2023).

² Arvind Narrain, "Violation of Bodily Integrity, The Delhi Rape Case among Ohters," 48 *EPW*, (2013). Available at <http://www.epw.in/commentary/violation-bodily-integrity.html> (Last Modified April 14, 2019).

The Committee, apart from other recommendations, also recognized that there is possibility of sexual assault on men, as well as transgender. Therefore, provisions must be made for that also. The Committee recommended gender neutrality of the victim. However, the amendment made by the legislature did not include these suggestions made by the Committee.

INTERNATIONAL ASPECT

The phenomena of lack of labeling of sexual assault against men as rape and the neglect of such problem is not merely limited to a particular country. Some countries have included it under its legal ambit. However, some countries have still turned a blind eye towards such problem. In case of men, it is said that “the general belief persists that either men cannot be raped, or if they are, so few men are raped that it becomes a freak occurrence.”³

In English law, the notion of male rape was first recognized in 1994. The revised definition of rape also included penile-anal intercourse irrespective of a male or a female.⁴

There are certain countries which have included gender neutral laws in their legal system. Such countries are Canada, Australian states, the Republic of Ireland⁵, Finland⁶, England and Wales⁷ and some states of the United States⁸. Reports from various researches have also shown that men have been victims to sexual assault, which can also be labeled as rape.

In South Africa, in research it was found out that 9.6% of men were victims of male-on-male sexual assault. Out of these, 3% reported penetration; 3.3% men reported that they were raped by another man⁹. Punishment for sexual offence and rape has been provided by the Criminal law (Sexual Offences and Related Matters) Amendment Act, 2007. It categorizes such acts in two categories. Firstly, rape and second, sexual assault. The

³ Michael Scarce, *Male on Male Rape: The hidden toll of stigma and shame* 8–9 (Basic Books, New York, 1997).

⁴ Philip N. S. Rumney, “Gender Neutrality, Rape and Trial Talk,” *IJSL* (2008)

⁵ Criminal Law (Rape) (Amendment) Act 1990

⁶ Päivi Honkatukia, “Rough Sex? Understandings of Rape in Finnish Police Reports,” *2 JSSCCP* 15 (2001).

⁷ The Sexual Offences Act (1956), Section 1

⁸ Philip N.S. Rumney, “In Defence of Gender Neutrality Within Rape,” *6 SJSJ* (2007), available at: http://www.spr.org/en/doc_01_rapelaws.html (Visited April 18, 2023).

⁹ KL Dunkle, R Jewkes, “Consensual male-male sexual activity and male-male sexual violence: prevalence and associations with HIV infection from a population-based household survey in South Africa,” *PMED*, (2013), available at: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3708702/> (Visited on April 15, 2023).

definition of rape¹⁰ uses gender neutral terms such as person, complainant etc.

In United Kingdom, the Ministry of Justice in England and Wales reported that 0.4% of males have been subjected to an attempted sexual offence.¹¹ Such reporting included in its ambit all kinds of sexual offences such as rape, indecent exposure, unwanted touching and other forms. This report also provides that during the years 2005- 2011, approximately 1141 cases were recorded by the Police.¹² Efforts were made by the legislation to expand the ambit of such laws and make them gender neutral. After the Criminal Justice and Public Order Act, 1994 the scope of such law was made broad. Its section 142 provides that “It is an offence for a man to rape a woman or another man”. For this purpose, rape included vaginal or anal penetration.

In the United States of America also, similar stance prevails. Approximately 25,000 males were victims of sexual abuse and its aggravated form.¹³ Certain States in America have made rape laws as gender neutral.

Scotland’s Sexual Offences (Scotland) Act, 2009 also recognizes rape or sexual assault as genderneutral. In Northern Ireland, Sexual Offences (Northern Ireland) Order 2008 also follows a gender-neutral approach.¹⁴

In Bhutan, Chapter 14 of the Penal Code of Bhutan, 2004 provides for such offences. The definition of rape as provided under section 177 of the Penal Code technically implies that amale can also by subject to rape or other such sexual assault. It starts with, “*A defendant shall be guilty of the offence of rape, if the defendant has sexual intercourse with another person...*”¹⁵

In Ukraine, the Criminal Code of Ukraine, 2001 also makes rape and sexual assault as gender neutral. The legislations providing the definition of rape includes gender neutral words such

¹⁰Section 3, Criminal law (Sexual Offences and Related Matters) Amendment Act, 2007, (Act 32 of 2007)

¹¹ Ministry of Justice, Home Office and the Office for National Statistics, An Overview of Sexual Offending in England and Wales, 11 *available at*: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214970/sexual-offending-overview-jan-2013.pdf (Visited on April 17, 2023).

¹²Joshita Jothi, Keshavdev JS, “Rethinking Rape: Should the Law still confine to the paradigm?,” *NLUJLR* (2014).

¹³ *ibid*

¹⁴ Abhishek Gupta, “Law, Sexual Assault and Gender Neutrality - An Exploration of Legal Perspectives and Remedies for Transgender and Male Victims,” 2 *IJLPP* (2015) *available at*:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249225 (Visited on April 17, 2023).

¹⁵ Penal Code of Bhutan, 2004 *available at*: <http://www.asianlii.org/bt/legis/laws/pcob2004145/>

as person/victim. The code also provides punishment for compelled sexual intercourse including males and females.

In New Zealand, the Crimes Act, 1961 deals with crimes of sexual offences and rape. It defines rape as a gender-neutral offence. Article 128 of the Act defines as an act which involves rape and unlawful sexual connection with another person. The definition uses the term “person” which effectively implies male, female or even transgender.

In Brazil, prior to 2009, the Brazilian Penal Code of 1940 provided rape as gender specific, only a woman could be a victim. However, after the amendment in 2009, rape and other sexual offences have been made gender-neutral.

RAPE LAWS IN INDIA

In India, section 375 of the Indian Penal Code, 1860 provides for offences such as rape. It is a gender specific definition and provides that rape can be committed only against a woman. This is a narrowly construed definition and excludes the possibility of rape or sexual offences against men or transgender.

The problem in India with respect to recognition of rape against genders other than women is for the following reasons-

- (a) Existence of notion of masculinity that society typecasts man as a strong individual who cannot be subjected to offences such as rape.
- (b) If a male is raped by a male, then fear of being recognized as homosexuals.
- (c) Many a time, a male ejaculates while he is being subjected to such sexual acts which makes it embarrassing for him to share it with others.

It is often argued that sometimes the man who is subjected to sexual assault ejaculates in the process and this shows that he actually enjoyed it. This has been used as a tool by the aggressor as quoting the ejaculation as an ‘implied consent’ on the part of the aggrieved. But the thing to be noted here is that ejaculation is the physical response of the body and not the sexual response. Therefore, by no stretch of imagination can it be seen as consent.

The only redressal which male or transgender has is Section 377 of the IPC. It provides for

Unnatural offences.¹⁶ Whereas section 375 applies only for a woman and a perpetrator can only be a man, section 377 has broad interpretation. It includes all offences against nature and also includes bestiality, sodomy etc. Prior to the case of *Navtej Singh Johar v. Union of India*¹⁷, Sec 377 IPC also included homosexual relations. After the judgment, homosexual consensual relations between adults have been decriminalized. However, the offences under section 377 do not amount to rape. This section surely touches the aspects of sexual assault, but does not label it as rape.

In India, Art 21 provides that everyone has a right to live with dignity. The classification based on the basis of gender has become obsolete. Since the effect of rape is not only on females, but on males also. India is also a member of several international instruments which guarantee human rights and equality to all persons. These are, ICCPR, ICESCR, UDHR and certain other instruments. However, the sheer neglect of the legislation to include male or transgender as a victim to such sexual assault and rape disprove India's commitment to eliminate inequality and guarantee every human a dignified life.

NEED FOR GENDER-NEUTRAL RAPE LAWS

Making rape laws gender neutral does not derogate the protection granted to females. It merely implies that such laws should include all persons under its ambit irrespective of being a man, woman or a member of transgender community. Therefore, a more pragmatic approach should be applied to the problem.

As far as gender neutrality in Rape law is concerned, it can be brought about in 3 ways –

1. Gender neutrality with respect to perpetrator.
2. Gender neutrality with respect to victim.
3. Gender neutrality with respect to both perpetrator and victim.

The problem here is not that women are not seen as perpetrator rather the problem is restricted to the fact that men or transgender are not seen as victims. So, the need is to make rape laws gender neutral with respect to victims. The necessity of labeling sexual assaults with males and transgender as rape is a critical issue in determining the heinousness of the offence. It

¹⁶ The Indian Penal Code (Act 45 of 1860).

¹⁷ AIR 2018 SC 4321

considerably reduces the “feeling of isolation” amongst the victim.¹⁸ Without effective labeling of the offence, it becomes challenging to highlight such violence against men. If these laws are not made gender neutral then victims may not get aware of their own victimization. Like there was an instance in Germany in which there was a carnal penetration of a toothbrush in a boy’s body and he felt that it was an act of physical violence instead of sexual assault.¹⁹

CONCLUSION AND SUGGESTIONS

The exclusion of male as a victim of rape as per Indian legislation signifies the societal stereotype that a man cannot be a victim. These attitudes restrict the legislation to recognize rape as an issue outside the contours of female victim approach. Many countries around the world have included gender neutral rape laws in their legislation, since it has been recognized that a victim can be anyone irrespective of their gender or sexual orientation. The effect of rape on the physiology of male or female may be different, but the psychological effect or the mental trauma faced by them is no less.

The sexual assault on anyone’s body is also a violation of one’s personal autonomy and also a violation of right of life and personal liberty. Therefore, it immediately demands the attention of legislation.

The argument that gender-neutral rape law is against female and may also include fake cases is no basis to deny legal protection to male or transgender person. The mala-fide character of a complaint can always be checked and verified.

Gender neutral rape laws have also received backlash from various feminist organizations as being against female. It must be understood that such law would in no way derogate the status of females. It would merely make such an act as an offence against males also. Such law would not be gender specific, rather it would be specific upon the act, irrespective of the gender of the victim.

It is said that the initial step to the arrangement of any issue is in recognizing it. This implies in spite of the fact that the issue of rape or assault outside the male-on-female worldview

¹⁸ Liz Kelly, *Surviving sexual violence* 141 (Polity Press, U.K., 1988).

¹⁹ Available at: <https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/25-sexual-offences-3/rape-the-penetrative-sexual-offence/>

has been to a great extent ignored by lawmakers till date, it is basic that the blemishes of the current framework go to the fore and be perceived. If the act of rape outside the typical definition, gets recognized and acknowledged in the society, it will increase the reporting of such crimes substantially. But if the same law continues with the gender-specific approach with no provision for legal or psychological remedy then why would any person who is subjected to such kind of crime will report it?

The response to the question must be the lawful acknowledgment of such kind of offenses. There is no reason to doubt that rapes outside the present law are prevalent in the society and they do need recognition. The only way by which the improvement in reporting of such crimes can be done is by the implementation of gender-neutral laws. The definition of rape as enshrined in Section 375 of Indian Penal Code must be re-examined and the act of sexual assault should be categorized according to different degrees of harm caused by each, and each one of them should be defined in a detailed manner.

Gender neutrality in rape laws has been an issue which legislators have refrained from addressing. The current need of it being addressed should not be discarded and this is also reflected in the Justice Verma Committee's recommendations. Consequently, it can be summed up as a moral argument that every individual deserves protection of his rights. Any individual, irrespective of his gender, who is subjected to any kind of sexual assault, should have a legal remedy for an appropriate legal action against the perpetrator.