
RAPE: A THOUGHT OUTSIDE THE MALE-ON-FEMALE PARADIGM

Siddharth Gokhale, B.B.A.LL.B. (Hons.), Jindal Global Law School, O.P. Jindal Global
University

ABSTRACT

The Indian legal framework regarding sexual violence remains entrenched in a rigid gender-specific paradigm, exclusively recognizing men as perpetrators and women as victims under Section 375 of the Indian Penal Code and its successor, the Bharatiya Nyaya Sanhita. This paper critiques this exclusionary framework, highlighting the absence of legal recourse for male victims of rape and the statutory immunity enjoyed by female perpetrators. Through a historical analysis of judicial precedents and legislative reform, or attempts thereof, the paper demonstrates the legislature's reluctance and the judiciary's ambivalence to expand the statutory definition of rape via interpretation, contrasting this with the consistent recommendations of Law Commissions for gender neutrality.

To contextualize India's stagnation, the paper provides a comparative analysis of gender-neutral rape statutes in jurisdictions such as Minnesota, New Zealand, and the United Kingdom. It attempts to deconstruct radical feminist opposition to gender neutrality. It refutes arguments based on physiological stereotypes and the potential for false counter-complaints, contending that these rationales violate the guarantee of equality under Article 14 of the Constitution of India. Ultimately, the paper advocates for a legislative overhaul that redefines rape not as a tool of patriarchal oppression against women exclusively, but as a violation of bodily integrity and sexual autonomy of an individual, invocable irrespective of the gender of the perpetrator or the victim.

When news of the Nirbhaya gangrape broke, ghosts from Vinodhan's past were brought back to life – at the age of eighteen he had become a victim of gangrape by six men, as were those of Krishna, who was a victim of sexual assault.¹ Male-rape is not a matter of isolated incidents; it is extremely prevalent amongst men in uniforms,² dismissed off in jokes, or worse yet, as an unwritten component of deterrence when it occurs in prisons,³ and is often a manifestation of wartime aggression⁴. However, victims of male-rape fail, at least in India, to receive legal recognition as victims of rape and to receive the justice they deserve. A similar state of matters is noticed with respect to female perpetrators of rape, who, unfit for being charged under §375 (rape) and §376 (punishment for rape) of the Indian Penal Code due to the gender-specificity of the statutes, are charged under lesser offences like §342 (punishment for wrongful confinement) and §354 (outraging a woman's modesty) and corresponding provisions of the Bharatiya Nyaya Sanhita.⁵ In light of these cases, and criticising the exclusionary radical feminist endeavour that tends to stave off gender-neutrality in rape laws, this paper comparatively analyses the scope of gender-inclusivity in rape laws in India against rape law amendments in other jurisdictions across the world, to create a case for legislative reform in India.

1. Gender neutrality in rape laws in India:

1.1. History:

There have been several legal endeavours throughout history to expand the definition of "rape". One of the first such initiatives to broaden the definition of rape was the judgement of *Sudesh Jhaku v. KCJ*,⁶ where the petition was filed by a sexually assaulted minor's mother who was dissatisfied with the charges vide §354, §377 and §506 of the Indian Penal Code. Mr. Arun

¹ Priya M Menon, 'Lacking support, male rape victims stay silent' (*The Times of India*, 16 February 2013) <<https://timesofindia.indiatimes.com/city/chennai/lacking-support-male-rape-victims-stay-silent/articleshow/18524668.cms>> accessed 31 October 2022.

² Dave Philipps, 'Six Men Tell Their Stories of Sexual Assault in the Military' (*New York Times*, 10 September 2019) <<https://www.nytimes.com/interactive/2019/09/10/us/men-military-sexual-assault.html>> accessed 31 October 2022.

³ Bennett Capers, 'Real Rape Too' (2011) 99 (5) *California Law Review* 1259 <<https://www.jstor.org/stable/41345384>> accessed 31 October 2022.

⁴ Will Storr, 'The rape of men: the darkest secret of war' (*The Guardian*, 17 July 2011) <<https://www.theguardian.com/society/2011/jul/17/the-rape-of-men>> accessed 31 October 2022.

⁵ Mohua Das 'Goa police book Delhi woman for sexual assault on French woman' (*The Times of India*, 3 March 2021) <http://timesofindia.indiatimes.com/articleshow/81300736.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 31 October 2022. See also 'Activist booked in rare case of assault on French woman' (*Mid-day*, 2 June 2022) <<https://www.mid-day.com/mumbai/mumbai-news/article/activist-booked-in-rare-case-of-assault-on-french-woman-23162025>> accessed 31 October 2022.

⁶ CriLJ 1998 22.

Jaitley, counsel for the appellant, advocated for an ‘expanded understanding of rape in the law’⁷ which found its roots in ‘the changing scenario in various other jurisdiction[s] showing contemporary understanding of the problem’⁸ – ‘penetration’ of the female’s vagina by the male by any part of his body or any object, without her consent conforming to the conditions listed in the section, should amount to rape.⁹ The court dismissed the petition by opining that penal statutes must be strictly construed and the question of expanding the definition of rape is best left to the legislature to decide upon. However, the court did suggest, *obiter*, that if the Law Commission or the legislature does take up the task of revision of rape laws, they should look at defining the offence of rape in gender-neutral terms.¹⁰ While calling for the same, Justice Jaspal Singh, who delivered the judgement, said,

‘Men who are sexually assaulted should have the same protection as female victims, and women who sexually assault men or other women should be as liable for conviction as conventional rapists.’¹¹

A year later, in 1997, Sakshi, a non-governmental organization that aims at working towards the reform of women and children who have been victims of sexual abuse, filed a petition in the Supreme Court. It claimed relief, asking the Court to recognize the increasing cases of sexual violence against women and children by issuing required writs declaring *inter alia* that all forms of penetration, including penile/vaginal, penile/oral, penile/anal, finger/vaginal, and finger/anal, shall be sufficient penetration to define ‘sexual intercourse’ necessary to the offence of rape, as defined in the explanation of §375 of the IPC.¹² The apex court dismissed the petition, noting, ‘Accepting the contention of the writ petitioner and giving a wider meaning to Section 375 IPC will lead to serious confusion in the minds of prosecuting agency... We are, therefore, of the opinion that it will not be in the larger interest of the State or the people to alter the definition of “rape” as contained in Section 375 IPC by a process of judicial interpretation’.¹³

The Law Commission of India, however, that was tasked by the Court in this case with examining the issues raised by the petitioner and the viability of amendments to the current

⁷ Ibid [15].

⁸ Ibid [8].

⁹ Ibid.

¹⁰ Ibid 34.

¹¹ Camille E. LeGrand, ‘Rape and Rape Laws: Sexism in Society and Law’ (1973) 61 (3) California Law Review 919, 941 (as cited in *Sudesh Jhaku v. K.C.J.* CriLJ 1998 22, 35).

¹² SCC (2004) 5 518.

¹³ Ibid [22].

statute, took a different view, and recommended several reforms, including a broader understanding of penetration as demanded by the organization, and the substitution of the offence of rape with that of sexual assault that was gender-neutral with regards to the 'offender' and the victim.¹⁴ This report remained shelved in the Ministry of Law and Justice for a significant period of time; no amendments or law reforms were initiated by the legislature amidst growing disappointment over the fact that the commission's recommendations had not been accepted and implemented.¹⁵

The Report of the Justice Verma Committee, which was constituted in the aftermath of the Nirbhaya gangrape case, to suggest amendments to criminal law, acknowledged that previous reports of the Law Commission continued to 'gather dust...due to the apathy of all the political dispensations.'¹⁶ While hoping that the government would show as much concern and urgency in implementing the recommendations of the committee as it did in constituting it, the committee examined the Criminal Law (Amendment) Bill, 2012 introduced in the Lok Sabha. This bill contained provisions to substitute rape with the broader, completely gender-neutral offence of 'sexual assault'.¹⁷ Having examined the bill, the J.S. Verma Committee was of the opinion that the offence of rape must be committed by a man; the same was reflected in its recommendation that §375 read, 'A man is said to commit rape...'.¹⁸ However, the recommended provision was gender-neutral with regards to the victims of rape; effectively rendering rape an offence that can be committed only by a man but can be committed against 'another person'.¹⁹ In short succession, the government pushed for the promulgation of a presidential ordinance – the Criminal Law (Amendment) Ordinance, 2013, which had virtually the same provision regarding rape as the Criminal Law (Amendment) Bill, 2012,²⁰ even though the bill was passed only in the Lok Sabha and stood for consideration by the Parliamentary Standing Committee on Home Affairs. The report of this standing committee also recommended the substitution of 'rape' with 'sexual assault', and widening its definition so as

¹⁴ Law Commission, *Review of Rape Laws* (Law Com No 172, 2000) para 3.1.2
<<https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022082487.pdf>> accessed 31 October 2022.

¹⁵ *Tara Dutt v. State*, Criminal Revision Petition No. 321/2008 (Decided by S. Muralidhar, J. of the Delhi High Court on 29 April 2009) [1]; [23].

¹⁶ Justice Verma Committee, *Report on Amendments to Criminal Law*, 23 January 2013, page iii [7]
<https://adrindia.org/sites/default/files/Justice_Verma_Amendmenttocriminallaw_Jan2013.pdf> accessed 31 October 2022.

¹⁷ Criminal Law (Amendment) Bill 2012, s 5.

¹⁸ n (15) 439 [7].

¹⁹ Ibid.

²⁰ Criminal Law (Amendment) Ordinance 2013, s 8.

to be completely gender-neutral and include other forms of ‘penetration’.²¹ However, these recommendations were not paid much heed, as the Criminal Law (Amendment) Act, 2013, rewrote the offence of rape as being an offence that solely a man may commit against a woman, though rather thankfully, the Act made progress in that it widened the scope of the definition of rape from mere penile/vaginal penetration to other forms of penetration as well.²² And this is where the law stands now; the above amendment was one of the last changes made in the IPC with regards to the offence of rape. §375 of the IPC, now §63 of the Bharatiya Nyaya Sanhita 2023, still emphatically declares that an offence of rape can only be committed by a man against a woman.

1.2. Legal recourse in cases of rape non-conforming to the male-on-female paradigm:

Today, victims of rape not conforming to the statutory definition find no direct legal recourse; law-enforcement officers often find themselves in a dilemma while choosing the sections under which a person may be charged for committing rape not conforming to the male-on-female paradigm prescribed in the relevant section.²³ For example, in cases of forced sexual intercourse between two men, the use of §377 of the erstwhile IPC was often resorted to, whereby acts of such nature are labelled as being ‘against the order of nature’,²⁴ and are punished with either imprisonment for life or imprisonment of either description which may extend to ten years, and a fine, as against the punishment for rape committed by a man against a woman, according to §376 of the IPC, which prescribes rigorous imprisonment for not less than ten years, but which may extend to life imprisonment, and a fine.

Even where there has been an attempt to criminalise forced sexual intercourse between persons of non-heteronormative sexual orientation, the attempt has remained half-hearted. Observe the punishment for rape according to the §376 of the IPC mentioned above. However, according to §18 of the Transgender Persons (Protection of Rights) Act, 2019, which is said to provide for the protection of rights of transgender persons and their welfare, anyone who tends to cause sexual abuse of a transgender person shall be punishable with imprisonment for not less than six months, but which may extend to two years, and with a fine. The Act, then, seems ill-

²¹ Department-related Parliamentary Standing Committee on Home Affairs, *167th Report on the Criminal Law (Amendment) Bill, 2012*, March 2013, 58 [5.17.2]
<<http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Home%20Affairs/167.pdf>> accessed 31 October 2022.

²² Criminal Law (Amendment) Act, 2013, s 9.

²³ n (4).

²⁴ Indian Penal Code 1860, s 377.

equipped as not only does it create ambiguity about the exact meaning of ‘sexual abuse’ and whether rape may come under its ambit, but also showcases a disparity of punishment between offences of a similar nature committed against victims of differing sexual orientation.

2. Gender neutrality in rape laws in other jurisdictions:

Several jurisdictions around the world have adopted complete gender-neutrality with respect to rape laws. For example, consider §609.342 of the Minnesota Statutes,²⁵ which defines the offence of ‘criminal sexual conduct’ instead of rape. The language of the statute is such that it renders the offence completely gender-neutral; it is an offence that any person can commit against any other person and not necessarily a man against a woman. Other jurisdictions have amended rape laws to bring under their ambit instances of rape where females may not be the victims. Under §128 of the Crimes Act of New Zealand, rape is equated with non-consensual sexual contact under the singular offence of ‘sexual violation’. Rape, under this section, is still limited to penile penetration of another’s genitalia and can thus be only committed by a man, however, it is at par with other unlawful non-consensual sexual connections between persons of any gender. The Sexual Offences Act of England and Wales considers victims of rape gender neutral, as do the Sexual Offences Act of Scotland and the Sexual Offences Order of Northern Ireland.²⁶ While these provisions require penile penetration of the vagina, anus or mouth of another person, thus recognizing only men as principal offenders, while women can be tried only as accessories,²⁷ they are also supplanted by the provisions for ‘sexual assault’ under which any person, regardless of gender, committing non-consensual sexual contact can be punished to similar extents.²⁸ Though digressing from the main aim of the paper, this difference in labelling of penile penetration of the vagina, anus or mouth of another, as rape when caused by a man, and as sexual assault when caused by anyone other than a man, also raises questions of the rationale behind such discrimination.²⁹

²⁵ MINN. STAT. 609.342 (2022) (US).

²⁶ Sexual Offences Act 2003, s 1; Sexual Offences Act 2009 (asp 9), s 1; Sexual Offences Order (Northern Ireland) 2008, s 5.

²⁷ R v. Ram and Ram [1893] 17 Cox CC 609.

²⁸ Sexual Offences Act 2003, s 3; Sexual Offences Act 2009 (asp 9), s 3; Sexual Offences Order (Northern Ireland) 2008, s 7.

²⁹ Philip N.S. Rumney, ‘In Defence of Gender Neutrality Within Rape’ (2007) 6 (1) Seattle Journal for Social Justice 481, 484 <<https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1546&context=sjsj>> accessed 31 October 2022.

3. The case for and against gender neutrality in rape laws:

It is noticed, as the history of the argument in favour of the expansion of the definition of “rape” is traced, that though the legal fraternity has been modernist in approach and accepting of the fact that a lacuna exists in criminal law regarding the offence of rape being committed by a woman, and also against a man, the legislation has resisted any change in current law. Their silence on gender-neutrality reforms is appended by criticism of such a model offered by feminist legal scholars.

The most common argument put forth by proponents of biased rape laws is that women cannot commit rape. Secondly, the number of rape cases with female perpetrators is so miniscule that it does not warrant for such a drastic change in rape laws; statistically, it is often heterosexual men who are perpetrators of sexual violence. Lastly, it is contended that in such an environment, if gender-neutral rape laws are enacted, female survivors of rape are likely to be in a situation where their offender files an illegitimate counter-complaint, compelling them to withdraw their complaint; that gender-neutral rape laws can be used against women, who, more often than not, are victims of rape. There are several extremely apparent fallacies in these arguments.

The first argument not only perpetuates the age-old stereotype that women are a weaker gender and thus, it is physically impossible for them to commit rape but also implies that all men necessarily have the physical capability to resist attempts by women to rape. Moreover, this argument is based off of a limited understanding of physiology – if a man does not consent to sexual advances, he will not be aroused and thus penetration, amounting to rape, will not be achieved and if he is aroused, then he consents to the act anyway. It discounts the fact that male sexual arousal is not equivalent to consent just as a woman being aroused during rape is not consent.³⁰

Next, the argument that cases of rape involving a male perpetrator inflicting sexual violence on a woman outweigh those with a female perpetrator and thus, victims of the former offence need protection, is equally flawed. A necessary implication of this is that the plight of victims of female-perpetrated rape is irrelevant and that because such incidences are less common and are vastly imbalanced, they warrant no legal remedy – this is in violation of the fundamental

³⁰ Natasha McKeever, ‘Can a Woman Rape a Man and Why Does It Matter?’ (2019) 13 Criminal Law and Philosophy 599 <<https://link.springer.com/article/10.1007/s11572-018-9485-6>> accessed 31 October 2022.

principle in criminal law that ‘all persons should be protected equally from harm of like degree’³¹ and of the right to equality before law enshrined in Article 14 of the Constitution of India. Women may be responsible for a far lower number of robberies committed than men, however this disparity does not allow the state to punish only men who commit robbery. A similar analogy must be applied in the above case too.

The argument concerning the misuse of a gender-neutral statute to file false counter-complaints, though serious, fails to understand that false accusations are not a phenomenon exclusive to this offence and are dealt with under the other relevant provisions of the statute. Even with the existence of the current gender-specific rape laws, false rape allegations can be filed to the detriment of the accused male. What is imperative then, is not using the guise of gender-specificity to prevent illegitimate complaints against a specific gender but to strengthen the law-enforcement machinery to identify and dismiss all such complaints at the very outset. It is important to note that while these arguments play out in the foreground of the feminist discourse on gender-neutrality in rape laws in India, what remains in the background is their demand for ‘gender just, gender sensitive and not gender neutral rape laws’.³² Martha Fineman attempts to explain this by saying that lawmakers, while attempting to construct an egalitarian society, often create new and more complex difficulties through the ill-considered strategies they employ. The rhetoric of equality underlies these reforms, but she suggests that in order to do equity, legislators must move away from equality as the grand principle of reform.³³ Such a demand is better contextualized in the Indian scenario, where prevalent patriarchy characterizes womanhood as weakness,³⁴ and violence against women is dismissed as a rampant, yet everyday fact.³⁵ Feminist critics thus argue that gender-neutral rape laws will ultimately strengthen those already wielding much power.³⁶ However, such a proposition only generalises that all persons who are not females benefit from this societal power-inequality; their demand either conveniently obviates cases of male-rape, and extreme sexual violence inflicted on members of the LGBTQ+ community, who are a socially ostracized group apart

³¹ Jocelyne A. Scutt, ‘Reforming the Law of Rape: The Michigan Example’ (1976) 50 (12) Australian Law Journal 615 (as cited in Philip N.S. Rumney, ‘In Defence of Gender Neutrality Within Rape’ (2007) 6 (1) Seattle Journal for Social Justice 481, 484).

³² ‘Activists join chorus against gender neutral rape laws’ (*The Times of India*, 7 March 2013) <<https://timesofindia.indiatimes.com/india/activists-join-chorus-against-gender-neutral-rape-laws/articleshow/18840879.cms>> accessed 31 October 2022.

³³ Martha Albertson Fineman, *The Illusion of Equality* (The University of Chicago Press 1999).

³⁴ n (31).

³⁵ Flavia Agnes, ‘Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law’ (2002) 37 (9) 844, 847 <<https://www.jstor.org/stable/4411809>> accessed 31 October 2022.

³⁶ n (31).

from being historically oppressed, or implies that cases of sexual violence against men and members of the LGBTQ+ community are not of a similar nature and gravity as those against women.

4. Conclusion:

The radical feminist arguments and the position of gender-neutral rape statutes in other jurisdictions create the impression that formulation of separate rape laws depending on whether it is committed by a man against a woman, or by or against a person of any gender will showcase a disparity in the punishment imposed upon offenders – rape of a woman is of a completely different nature than the rape of any other person as it is the manifestation of systemic injustice towards women, and thus deserves being severely punished. Thus, victims of rape who are not women will be alienized as they will identify under separate offences which are not rape, and the sense of belonging shared among victims of rape will cease to exist. And the effects of enacting such a statute will be restricted to these on the assumption that the laws regarding non-female victims of rape do not trivialize the offence, prescribing a lower punishment.

This paper attempts to establish that all victims of rape, irrespective of their gender and that of the perpetrators, deserve to have their right to bodily integrity and sexual autonomy protected equally and to have legal recourse against any violation of these rights. This is best done by bringing the offence of rape outside its restrictive understanding as a crime against women, interpreting it instead as a crime against a human and a violation of his rights. It is yet to be seen whether such an egalitarian situation can actually be achieved.