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# Gender Biased Rape Laws in India

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## ABSTRACT

*Despite certain reforms over the last few decades, India's rape laws are still oppressive and perpetuate discriminatory gender roles. At a time when several nations around the globe are progressing towards gender-neutral rape laws that recognise someone of either gender as a possible victim, survivor, or suspect, India maintains a statute focused on the concept of male vaginal penetration. This is a toxic assumption that can deprive a segment of society of justice, citizenship, the right to life, and freedom.*

*The notion that males are the only offenders of such a horrible offence stems from the traditional belief that men are biologically better than women, and that sexual harassment is the exercise of dominance by men over women. The patriarchal belief that men are too strong and powerful to be victims stems from the same patriarchal belief that men are too strong and wealthy to be victims. Section 375 of the Indian Penal Code unfairly categorises only women as claimants, thereby providing them with defence, thus utterly disregarding the other sexes in our community.*

*Despite the fact that societal disapproval towards non-consensual sexual acts is on the increase, the law reinforces unfair, regressive gendered assumptions regarding male and female sexuality, which are troublesome for virtually all.*

## I. INTRODUCTION

In Rape and sexual harassment have been routinely used by men to exploit women, especially by upper-caste men against women from lower castes. The promotion of oppressive agendas by regressive legislation, on the other hand, considers sexual abuse and harassment to be a tool for gaining power, authority, and dominance. What makes the situation much more complicated is that while only men and women are included, another similarly significant group of people – transgender people and non-binary people – are omitted from the scope of the rape statute.<sup>2</sup>

The Supreme Court's decision in *Navtej Singh Johar v. Union of India*<sup>3</sup>, Ministry of Law and

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<sup>2</sup> Laxman SreeKanth, Gender Biased Rape Laws Must Change, 27<sup>th</sup> January 2021, <https://www.deccanherald.com/opinion/in-perspective/gender-biased-rape-laws-must-change-943721.html>

<sup>3</sup> W. P. (CrI.) No. 76 of 2016

Justice Secretary abolished consensual carnal intercourse, but did not associate non-consensual carnal intercourse with sexual misconduct, instead declaring it an immoral crime.

## **II. HISTORICAL OVERVIEW**

Rape is a crime that has existed in the evolution of human society. This offence is punishable under Section 376 of the Indian Penal Code, 1860. Despite various changes since 1860, it may be argued that the meaning under Section 375 has been radically modified because it no longer reflects current social attitudes.

Since the 1980s, there has been a call for rape legislation overhaul. Prior to 2013, the term "rape" was only used to refer to penetration in the penile-vaginal area. Much of that changed after the historic judgement in *Tuka Ram and Anr v. the State of Maharashtra*<sup>4</sup> in the Mathura Rape case (Custodial rape). Since there were no bruises found on the victim's body, the Apex Court erred in its rationale when it concluded that the victim consented to it. The charged (3 police officers) claimed that the victim's sexual past shows she is a "loose" child. Surprisingly, the Apex Court agreed with this claim and overturned the Sessions Court's judgement. This resulted in a great deal of controversy and agitation around the world. However, a large number of changes occurred as a result of this lawsuit.

### **The Criminal Law (Amendment) Act of 1983**

In 1983, Parliament revised the Criminal Procedure Code. The most significant change was that under Section 327 of the Criminal Procedure Code, rape hearings could be performed in video. The disclosing of a rape victim's name, on the other hand, becomes a crime under Section 228A of the Code of Criminal Procedure, 1973<sup>5</sup>. Section 376(2) of the IPC<sup>6</sup> imposes a higher level of imprisonment on those who are incarcerated. Another significant change was the addition of Section 114A to the Indian Evidence Act of 1872<sup>7</sup>, which established a presumption of lack/absence of consent in particular circumstances.

The independent acceptance of custodial rape as a crime was a hallmark of the 1983 amendments. Since the accused is in a state of confidence, incarcerated rape is considered a heinous crime. They have the power and are responsible for preventing such crimes. Another significant change was the transfer in the burden of proof in such cases from the prosecutor to the victim.

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<sup>4</sup> 1979 AIR 185

<sup>5</sup> The Code Of Criminal Procedure, 1973 Act No. 2 OF 1974, s. 228A

<sup>6</sup> Supra note 1, s. 376(2)

<sup>7</sup> The Indian Evidence Act, 1872, Act, No. 1 of 1872, s. 114A.

### **III. WHAT IS GENDER NEUTRALITY?**

The word "gender-neutrality" has been ridiculed as a term that hides more than it reveals of its context. It essentially entails gender equality with certain laws that are gender-specific, notwithstanding the fact that all genders are capable of committing the same types of crimes. For example, men or even transgender people may be compelled to engage in sexual activity or may be subjected to sexual harassment or rape.

Gender Neutrality in Rape Policies can be seen from two different viewpoints: Victim and perpetrator.

#### **(A) Neutrality with respect to the victim**

Unfortunately, Indian law and culture also agree that a rape survivor should only be a woman (female gender). Rather than the common belief that rapists commit rape solely to fulfil their sexual urges, rape may be driven for a variety of purposes.<sup>8</sup> Other factors could include the perception of sexual supremacy as a sign of superiority among castes, cultures, sects, and so on. Rather than being motivated by lust, sexual harassment may often be motivated by a desire to humiliate the witness. As a result, not just women, but also men and the transgender community, could be victims of sexual harassment.

Gender in today's world is more complex than it has been in the past. The belief that a person's body should have either feminine or masculine characteristics. As a result, society automatically turns a blind eye to sexual harassment perpetrated against those that do not adhere to social norms and the constrained definitions of male and female characteristics.<sup>9</sup> As a result, the legislature ignores the transgender community's plight as well (includes hijras and kothis).

The transgender community has always existed in India, according to historical and mythological facts. Instead of having their rights recognised, they have been denying citizenship for a long time.

#### **1. Male on male rape**

Male rape has been recorded by a few groups in the United States. In 2003, one out of every ten rape victims were man, according to statistics. In the United States, 42.78 million men have been sexually assaulted or raped.<sup>10</sup>

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<sup>8</sup> Narrain, A. (2013). Violation of Bodily Integrity. *Economic and Political Weekly*, 48, (No. 11), <http://www.epw.in/commentary/violation-bodily-integrity.html> on January 5, 2014.

<sup>9</sup> Menon, N. (2013). *Seeing like a Feminist*. Zubaan and Penguin Books India Pvt. Ltd.

<sup>10</sup> 1 Catalano, S.M. (2003). National Crime Victimization Survey. U.S. Department of Justice. Retrieved from

Forceful man-on-man sexual contact is illegal in India under Section 377 of the Indian Penal Code, which defines it as carnal intercourse that goes against nature's order. It is surprising that in India, male on male rape is lumped in with homosexuals' consensual sexual intercourse. A distinction needs to be made between coerced and reciprocal sexual relations.

Following the Criminal Amendment Act of 2013, the minimum sentence for rape is now seven years in jail, with a statutory sentence of life imprisonment. Section 377, on the other hand, which punishes forced sexual activity between genders, has no minimum penalty. When a minimum penalty is specified, it is presumed that the offence is horrific, and hence rape is punished by a minimum sentence of seven years.<sup>11</sup> For male on male rape, there is no such inference. It is not only not deemed disgusting, but it is also not regarded as rape in India.

The three-member Verma Committee proposed that the survivor be gender neutral, meaning that sexual harassment on gays, lesbians, transgendered, and transsexual people should all be protected by the rape statute. Ratna Kapur (2013) argues that section 377 should be repealed in order to create a statute that is truly gender neutral. She claims that criminalising non-consensual sex, irrespective of sex, would only succeed if sexual minorities are first given the freedom to have consensual sex. It is believed that enacting such a bill would only serve to further intimidate members of the LGBT community. Flavia Agnes (2013) examines Section 377's usefulness in protecting homosexuals from abusive assaults by either homosexual or heterosexual men, concluding that the legislation does not currently offer any safeguards to these vulnerable groups.

“Who is to claim that the sexual abuse endured by transgender people and men, as well as those intersex people and sexual minorities who are not born women, is a lesser invasion of the intimate, inner space, a lesser damage to mind, soul, and sense of identity?” asked Siddharth Narrain (2013) in response to the suffering of rape victims who are not women. This is absolutely right. Millions of transgenders, transsexuals, and sexual minorities now have their rights taken away by the government.

### **(B) Neutrality with respect to the perpetrator**

Although there is generally agreement on keeping the victim gender inclusive, the question of whether or not a person should be a rapist is hotly discussed. There are both pro and con arguments for making women the perpetrators. Two types of rape are discussed in this section:

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<http://www.bjs.gov/content/pub/pdf/cv03.pdf> on January 10, 2014.

<sup>11</sup> Gupta, T. S. Child Abuse. Retrieved from <http://www.sos-sexisme.org/english/IndiaChildAbuse.htm> on January 1, 2014.

- i) Harassment by a woman against a man.
- ii) Harassment of a female by another female.

In its 172nd article, the Law Commission of India proposed that rape legislation be gender neutral.<sup>12</sup> Rape became a gender-neutral crime with the Criminal Law Amendment Ordinance of 2013. Sex differentiation, on the other hand, was preserved in the 2013 Amendment Act.

### **1. Female on male rape**

First and foremost, it has been suggested that raping men is psychologically and scientifically difficult for women. Professionals and a few scholars have concluded that women cannot rape men because men must be stimulated before they are ready for sexual interaction. As a result, if a woman pushes herself on a male, he would be sufficiently disoriented to be unable to engage in non-consensual sexual activity.

Second, social reality does not seem to be mirrored. Even if physical improbabilities are mentioned, it is acknowledged that it is not unlikely for a woman to rape a man. No, there have never been any such cases brought to the attention of the media. Since there isn't enough scientific proof, gender-neutral legislation can't be applied before real events arise.

The above points are astounding and demonstrate society's cynicism and resistance to reform to this day.

### **2. Female on female rape**

The Madhya Pradesh Court Observed in *State Government v. Sheodayal*<sup>13</sup> that, under Section 354 of the Indian Penal Code, 1860<sup>14</sup>, a woman will breach the dignity of another female (use of criminal force with the intent to violate modesty of a woman). The Supreme Court considered the question as to whether a group of female offenders would gang rape another woman in *Priya Patel v. State of MP*.<sup>15</sup>

The word "whoever" [gang rape] is used in section 376(2)(g) of the IPC<sup>16</sup>. If a gang rape occurs, the crime of penetration does not have to be performed by one participant; any act carried out in pursuance of the collective goal qualifies each party as a gang rape perpetrator. The Court maintained that it is unlikely for a woman to rape another woman, even though she has the intent to do so. This assessment is clearly flawed since the act of penetration is not required;

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<sup>12</sup> Agnes, F. (2002), "Law, Ideology and Female Sexuality". Economic and Political Weekly, 844-847.

<sup>13</sup> 1956 Cri LJ 83.

<sup>14</sup> Supra note 1, s. 354.

<sup>15</sup> (2006) 6 SCC 263

<sup>16</sup> Supra note 1, s.376 (2)(g)

the purpose, even though it is in the form of abetment, is sufficient.

#### **IV. WHY IT THAT MALES ARE NOT AFFORDED THE SAME LEGAL PROTECTION?**

Male-on-female assumptions have been around for a long time. This concept must be considered in its entirety. Men are not covered by statute in a few areas, despite the fact that they are eligible to it. For example, there is a constitutional presumption that the victim of harassment, indecency, sexual assault, and other gender-specific legislation may only be a male. However, since the word "Whoever" is included in its definition, the rules pertaining to acid attacks have only recently become gender-neutral.

As previously said, sexual harassment can also be used to demonstrate superiority and control. It may be motivated solely for the purpose of humiliating the survivor. As a result, anyone, irrespective of sex, can be the victim of such sexual assaults. The only mystery now is that gender is the only identity taken into account when deciding who the suspect is and who the victim of a sexual attack is.

If it can be shown that men and women have the same sexual experience, why aren't men treated fairly and subjected to the same laws as victims and perpetrators?

##### **(A) Patriarchy**

Patriarchy makes a significant contribution to this idea. Not only is it harmful to women, but it is also harmful to men. Men are supposed to be tough enough to protect oneself and each gender has specific gender roles allocated to them. As a result, men are unable to be sexually abused or manipulated by women.

Fundamental rights are guaranteed in Part III of the Indian Constitution. This rights are guaranteed to all citizens, regardless of ethnicity. Article 14 protects the universal right to equality before the law, while Article 15 forbids discrimination based on gender. As a result, in a few gender-specific rules, it is obvious that men must be treated equally to women. While it is understandable that female-on-male rape is uncommon, it is not unthinkable.

##### **(B) Gender neutrality is seen as an anti-feminist term.**

The definition of gender neutrality has been criticised by a number of feminism activists. The importance of the female view of rape is not diminished by the acceptance of male victimisation. Feminism, in practise, means putting men and women on an equal footing. Both sexes must be able to live together in harmony. As a result, expressing support for one of them does not usually imply support for the other.

Although it is clear that female rape victims face many societal taboos, male rape victims often

face a unique collection of taboos. Male dominance has been a fact of life for a long time. As a result, if a man discloses his non-consensual sexual encounter with a woman, he is seen as a vulnerable individual. If a man is assaulted by another man, the victim is ridiculed by society.

Male victims' grievances are not heard, but they continue to cover, resist, or deny their victimisation, equivalent to female victims, unless or before they have significant physical injury. Women have also been found to have filed bogus charges in a number of incidents. Many women are found to file false rape charges as a result of family coercion, vengeance, and other factors. On a regular basis, a large number of fake rape charges are filed in India. Following are a few examples of false rape cases:

- 1) *Tilak Raj v. State of Himachal Pradesh*<sup>17</sup>
- 2) *Malti Chauhan v. State (Govt. of NCT of Delhi) and Ors.*<sup>18</sup>
- 3) *Raghuvinder Harna v. State of NCT of Delhi*<sup>19</sup>

On the grounds of the aforementioned three false rape judgments, it can be inferred that often women abuse the legal system, resulting in the rapist being imprisoned even if he did not commit the offence. It causes emotional distress to the accused because the mark of abuse remains with him for the rest of his life, and society continues to view him as a perpetrator long though he is acquitted. The survivor is still haunted by memories of the case and his time in prison. And after earning compensation, his life never goes back to how it was. While numerous statutes have been enacted to protect women, no legislation has been enacted to protect men from rape and false rape charges. Only after gender-neutral policies are enforced in the world will both men and women be protected from rape and false rape convictions.<sup>20</sup>

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<sup>17</sup> AIR 2016 SC 406.

<sup>18</sup> 2016 (1) JCC 343.

<sup>19</sup> 2016 (1) JCC 99.

<sup>20</sup> Nikhil Mishra, Gender Neutral Rape Laws in India: A Necessity, 12<sup>th</sup> October 2020, <https://www.latestlaws.com/articles/gender-neutral-rape-laws-in-india-a-necessity/>