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Rape Laws in India: Limited, Conservative and Devoid of Gender-Neutrality

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ABSTRACT

The paper is a comparison and a critical analysis of the rape laws in India before and after the Criminal Law Amendment Act of 2013 which not only introduced many new sexual offences but also made punishments and penalties more stringent in an effort to curb the increasing instances of sexual offences against women in the cities of India. However on a personal note, that some provisions are not very conducive in providing the fullest extent of justice that should be dispensed to the victims of this heinous crime.”

“Rape, the most heinous crime is still occurring in our society. Even after the Delhi gang Rape case so many protests took place; a new law has been passed but still the situation has not changed a bit. Recently a Mumbai based photo journalist was raped. When some journalists from a well-known paper house went to take interview in her locality; they got to know that nobody from the survivor apartment aware that the girl is from their locality. So the question arises why still now the survivor of the rape feels ashamed and prefers to be silent. This is one of the main reasons that most of the rape victim does not file an FIR. They think if society got to know about this her reputation will be ruined and rest of her life will be hell. That is the reasons why the crime like rape is still happening in our so-called modern society. In this project I will try to analysis development of rape laws from the social transformation perspective.”

Keywords: Rape, Criminal Law, Analysis.

I. INTRODUCTION

(A) Overview

The cases of gender-based violence have seen a horrifying rise. The cases categorized are rapes, acid attacks, dowry deaths, domestic violence, eve-teasing and murder. Although, crimes based on gender are not specific to any country, India has a distinct place in regards to endemic forms of Gender-based violence. Despite constant efforts by commissions, activists and even the law-

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making authorities the crimes have not seen a decline. On the contrary the increase in the same has been unprecedented.

India has a history of gender-based violence. From JC Bose rape case² to Priyanka Reddy's brutal rape, Laxmi Agarwal vs. Union of India³ and many other which are 'forgotten', or haven't been brutal enough to make a space in our memory, India has seen an ascend in such heinous crimes. But what is worse than the increase in these crimes is the reality that many victims do not even have legal remedy. With the course of time not the laws but the crimes have become gender neutral. We, not only have women facing such atrocities, but we also have men being subjected to sexual harassment or 'rape' which is not even recognized in IPC. Another crime that lacks adequate legal recognition is marital rape.

There is an urgent need to address the issues that have been overlooked. Rape statistics in India have been horrific enough to make the commentators name Delhi as the 'Rape Capital'. And the numbers that have given this tag to the city don't even include the statistics of male rape. Moreover, while we indulge in praising the low divorce rates in India, we overlook the rate of domestic violence and the need to address marital rape as a crime. In order to fight these endemically horrific crimes, we need to address the flaws in the socio-political system we live in and the loopholes in the Indian criminal justice system.

(B) Research Problem

This research paper tries to analyze the effectiveness of a gender neutral rape law specifically in the Indian context. The researcher has tried to answer the questions regarding

- What constitutes gender neutral?
- What are the various dimensions of a gender neutral law?
- What are the views for and against gender neutral law?
- What are the effect and consequences of a gender neutral law?
- Is there a need for gender neutral law in situations of caste, communal conflicts, custodial and war crimes?
- Whether it must be completely gender neutral or as suggested by many a midway approach of only making the victim gender neutral must be adopted?

(C) Objectives of the study

² Bhanu Pratap Singh, "JC Bose Gang Rape case: 8 sent to jail for 10 years", The Times of India, October 27 2012

³ (2014) 4 SCC 427

- To study about Marital rapes.
- To study about gender inequality in rape laws.
- To study that how we reform our rape laws.
- To study the causes or reasons of rapes in India.
- To study the most affect area of society in India from rapes.

(D) Research Questions

- What constitutes gender neutral?
- Whether a gender neutral law would be detrimental to the most vulnerable section of the population, i.e. women.
- Power differentials arising in custodial, communal, and war situations.
- Whether the solution is to make it gender inclusive for the perpetrator only.
- Whether the Marital rape is a heinous crime or not.

(E) Hypothesis

1. There is an urgent need of addressing sexual violence against males and the transgender community.
2. Making the law completely gender neutral would harm the interests of the female rape victims. Therefore, a solution would be to make the law gender specific for the perpetrator and gender inclusive for the victim.
3. There must be a separate law for aggravated situations of caste, communal conflicts and war crimes

II. REVIEW OF LITERATURE

Novotny (2003) in her article in the Seattle Journal of Social Justice expresses concern that gender neutral rape laws would lead to negative consequences for female victims of rape and call it a “backlash against feminism” .

Winn (2011) stresses on the role of media in spreading the false myth that rapes are committed more frequently by the strangers than the acquaintances. Therefore, “society as a whole gains a misconception about the reality of rape and what constitutes the “typical” rape from this skewed media portrayal. In view of this, to educate women about the actualities of rape become of utmost importance. Media literacy is one such platform which can contribute in

fulfilling such an initiative. Media literacy refers to the “analytical tools required to critically evaluate and communicate messages in various mediums.

Projansky (2001) has mentioned different reasons and logistics as to why rapes are committed and their consequences with reference to various American films. If a woman comes out as strong, individualistic, she is raped to turn her into a submissive and vulnerable human being. Some other film narratives depict that the fact that the girl elopes with her lover betraying her parents leads her to face such a horrifying episode.

Asaah (2007) analyses the frequent occurrences of rape to draw our attention to the acute seriousness of the issue. No matter the circumstances, rape is still a widespread phenomenon which is unavoidable. The study attempts to portray the recurrent manifestation of images of rape in literature with special reference to the African novels.

Arvind Narain(2013) while commenting upon the Criminal Law Amendment Bill, 2013 in an article in the Economic and Political Weekly quotes ‘There are no known instances in India where women have committed sexual assault upon men and the proposal to make sexual assault gender neutral in noncustodial situations is not based on any empirical evidence’.

Durosaro, & Omotosho (2009) try to investigate various reasons and repercussions of Intimate Partner Rape on women of Nigeria by adopting the qualitative approach. Domestic violence is a pervasive practice which is prevalent in the community of Nigeria. Women are easily raped, assaulted and beaten by their husbands thus causing serious damage to their bodies as well as personality. But, surprisingly, the husbands accused of such assaults are not punished because the laws of Nigeria do not consider them guilty.

Tsun-Yin Luo (2000) discusses the interview of 35 rape survivors to observe and analyze the painful experiences which these women were forced to undergo. The study also takes into account the way these disturbing encounters have managed to perpetuate in the mainstream culture of China.

III. MARITAL RAPE: AN EXEMPTION ROBING WOMEN OF THEIR RIGHTS

Section 375, IPC,1860 defines rape as follows:

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 six following descriptions: —

(First) — Against her will.

(Secondly) — Without her consent.

(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested 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 her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) — With or without her consent, when she is under sixteen years of age. Explanation. — Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.”⁴

Thus, Section 375 describes the conditions that make an act rape. However, this act has an exception, which reads, “Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.” And thus, marital rape is not considered as a crime. Shockingly, phrases like “against her will” and “without her consent” seem to lose their value in regards to compelled sexual intercourse with the wife.

Laws regarding marital rape in India have a limited and inadequate ambit. IPC keeps marital rape as an exception and considers it as an offense only if the wife is below the age of 15 years.⁵ Thus, there is no lawful security provided, against forced sexual intercourse, to a wife after the age of 15 years which is against the human rights directions.

The Patriarchal system in society has always treated women as an unimportant property of her significant other or maybe guardian. And therefore, rape was just considered a theft of ladies from their ‘owners’ and this belief has affected our law-making authorities in not considering offense of spousal rape. Sexual intercourse has thus been seen as a husband’s wedding right or privilege.⁶ Such approach has reduced women as mere protest of her husband’s sexual satisfaction, disregarding her entitlement to uniformity and equity.

This ideology can be traced back to Sir Matthew Hale’s explanation of as to why marital rape is not an offence. He gave various justifications for the same. In this article we would critically analyze the justifications given by him. The justifications entailed the following; The contract

⁴ Section 375, Indian Penal Code, 1860

⁵ *Id*

⁶ F. Pollock & F. Maitland, “*The History Of English Law*”, II ed, 1968

theory which treats marriage as an agreement between a man and a woman, wherein intercourse is a clause a woman agrees to as soon as she marries, the consent theory which postulates that consent to marry is also a consent to indulge in sexual intercourse, proof problems in showing lack of consent and fear of false accusations.

Hale has stated that the institution of marriage indicated an irrevocable consent on the part of the wife for the physical relations. This argument forms the fulcrum for the legislation existing even today.⁷ As sexual intercourse forms an integral part of marriage, the consent for marriage also acts as a consent for sexual intercourse. And thus, a husband is not required to obtain a fresh consent for sexual intercourse every time and the demand for sexual intercourse has been called a husband's marital right.⁸ Although these justifications were given when marriage was considered as an irrevocable contract, which is not the truth today. However, the justifications still seem to hold water for the legislature.

Marriage is an institution way beyond mere sexual intercourse. It is a bond created out of love and trust that form the base of human relationships. Rape, within marriage, not only violates a woman's body and her right over it but also violates the trust she invests in the marriage. Marital rape not only has a physical impact on the woman but also leaves mental scars, which have been overlooked by legislations. In a marriage, a woman consents for companionship, trust, cohabitation and above all seeks protection by the spouse. However, listing marital rape as an exception, not only misinterprets the idea of consent but also ignores the violation of trust and sanctity in marriage. This issue was well addressed by Delhi High court in *RIT foundation v. Union of India*.⁹ The bench constituting Acting Chief Justice Gita Mittal and C Hari Shankar observed that, "Marriage does not mean that the woman is all time ready, willing and consenting (for establishing physical relations). The man will have to prove that she was a consenting party," Thus, a consent for marriage cannot be considered as a consent for all sexual intercourses to follow. A man should be held responsible for not considering the partner's consent.

Moreover, presuming consent of marriage as consent to all sexual intercourse, brings into picture the concept of prolonging and implied consent. Through various judgments, the judiciary has made it clear that a sexual intercourse is considered consensual only if there is an 'unequivocal' communication from the woman. Explanation 2 of Section 375 defines consent as "*an unequivocal voluntary agreement when the , by words, gestures or any form of verbal*

⁷ M. Hale, *Pleas Of The Crown*, (1847), P.629

⁸ State v. Smith, 148 N.J., 372 A.2d 386 (1977), 82 DICK. L. REv. 608, 610 (1978).

⁹ Writ petition (Civil) No. 382 of 2013

or non-verbal communication, communicates willingness to participate in the specific sexual act".¹⁰ Those who argue the consent to marry to be the consent for all sexual intercourse tend to ignore the word 'specific' given in the explanation. In case of rape, a woman's consent for any past flirtations or sexual activity cannot be considered as a consent for all sexual activities ever to follow. Thus, the judiciary has, time and again, emphasized on the need of a fresh consent for every 'specific' sexual act. Why does this principle fail to make any place in the institution of marriage? Therefore, marital rape exemption seeks to violate the very basic concept of consent and thus very much constitutes to be rape as described by Section 375 according to the first and second condition.

Among other justifications given by Hale, is the 'proof problem in showing lack of consent'. He argues that the biggest obstacle in marital rape is proving lack of consent on the part of the wife. This argument is based on two assumptions; first, as discussed, the consent of marriage as consent to sexual intercourse and second that resistance on the part of the wife is difficult to prove. But while this 'lack of consent' dilemma acts as a major issue, what is more challenging is to overcome the judiciary's predisposition to doubt a marital rape charge and not in the unavailability of evidence.¹¹ For this predisposition to be disproved, the judiciary demands signs of physical injury, resistance as corroborative evidence. This restricted outlook on how lack of evidence can be proved, ignores various other situations under which rape can be committed in a marriage. The Delhi High Court, while hearing petitions on making marital rape an offence, has observed that physical force is not necessary for rape as a man could bring her wife under financial pressure to force her for sex. "Force is not a pre-condition of rape. If a man puts his wife under financial constraint and says he will not give her money for household and kids expenses, unless she indulges in sex with him and she has to do it under this threat. Later, she filed a rape case against the husband, what will happen," the court said.¹² It cannot be strictly presumed that force will always precede rape. In relations concerning emotions, or institution of marriage to be precise, force is not the only way in which a woman can be made to indulge in a sexual intercourse against her will. And thus, courts should consider other dimensions of marital rape.

The issue of proving lack of consent can also be seen as a result of posing the entire burden of proof on the victim. This is one main factor that has prevented rape victims from having court

¹⁰ *Supra* note 2

¹¹ One commentator suggests that the predisposition of juries to doubt a woman charging her husband with rape is a more difficult obstacle than proving no consent. Griffin, In Forty-Four States, It's Legal To Rape Your Wife, *Student Law*, Sept., 1980, at 57.

¹² *Supra* note 7

rule in their favor, or sometimes even worse, prevented them from even reaching the court. The entire burden was on the woman to show that she did not consent for the sexual intercourse in question. However, in the case of *Karnel v. State of MP*¹³, the court held that in a rape case a woman should not be treated like an accomplice in the crime but as a victim. Her testimony, as a victim should not be treated with the same suspicion as that of the offender.¹⁴ Rape, is now, one of those few offences, where the burden of proof lies on the defendant to prove that the consent of the woman existed. As this burden has been shifted to the defendant for unmarried rape victims, it will be just to shift the same in case of marital rape as well. Instead of treating a married woman with suspicion, she should be treated as any other rape victim who has suffered physical and mental violation.

Even if the burden of proof is shifted in marital rape cases, there will be another problem to be addressed i.e. believing the woman's testimony over her husband's. In an unmarried woman's rape, court has, several times, questioned lack of consent owing to the woman's sexual history with the man. In cases of marital rape, the issue aggravates as the woman, in most cases, has had sexual history with the husband and thus the court inclines towards presuming consent. This presumption has been discussed in detail in the case of *Haryana v. Prem Chand*.¹⁵ In this case, the Supreme court heard the appeal filed by the appellants and held that a woman's sexual history, character or any conduct of past cannot be used to determine the veracity of her testimony. This principle also found its place in the books of law after the infamous Delhi gang-rape case of 2012. The 2013 Criminal law (amendment) bill, passed after *Mukesh & Anr vs. State for NCT of Delhi & Ors.*¹⁶, de-recognized the victim's sexual history and presumed a lack of consent in rape cases, thus establishing an objective standard for determining consent.¹⁷

Therefore, there is a need for the legislature and the judiciary to treat a marital Rape victim similarly and stop hitching the perpetrator with the victim to neglect the severity of the offence.

In 2005, Protection of women from Domestic violence act was passed which considered marital rape to be a part of local violence. The act pushes out marital rape from the very ambit of Section 375. According to the act, in case of marital rape a woman can resort to court to demand partition from the husband. For a crime that not only hurts the body but also damages the trust in the holy relation of marriage, is being reduced to an act of physical violence. The severity

¹³ 1995 SCC (5) 518

¹⁴ 1995 AIR 2472, 1995 SCC (5) 518

¹⁵ 1990 AIR 538

¹⁶ (2017) 6 SCC 1 : (2017) 2 SCC (Cri) 673]

¹⁷ Criminal Law Amendment Act, Section 375 (2013)

of the offense being overlooked by the legislature and the court is unacceptable. The fundamental premise of these laws is that when a woman agrees to be a part of a marriage, she also consents for all sexual intercourse to follow. So, does that mean consent to have sexual intercourse once, with a person, counts as a consent forever? Is marriage a permit to rape?

A lingering question in regard to the matter of Marital rape is that how it is expected from a woman to ensure her right to life and freedom while the law does not allow her to ensure her right to her body in marriage. Marital rape is a clear infringement of a woman's Right to live with human dignity.¹⁸ It was in the case of *Francis Coraille Muin v. Union territory of Delhi*¹⁹ that idea of Right to life under Article 21 was highlighted. It was held in this case that article 21 also incorporates the right to live with human dignity and all that accompanies it. The Supreme Court has held in plethora of cases that rape abuses and violates the right to live with human dignity of the victim. However, court seems to unequivocally disregard the Human dignity of woman if she is married and the rape is committed by the spouse. In cases like *Bodhisattwa Gautam v. Subhra Chakraborty*²⁰ the court held that rape is not only a sexual offense but also a demonstration of hostility. Therefore, the marital rape exception violated the right to live with human dignity of a spouse and empowers a husband to indulge in a sexual intercourse against her will, as a matter of right.

(A) Non- Recognition of Marital Rape: Violation of the Constitution

In addition to violation of Right to live with Human dignity, marital rape also blatantly abuses the Right to Bodily self-determination. Although the constitution does not explicitly talk about this right, this exists in the bigger ambit of Article 21. The idea of this right rests on the belief that an individual is the chief in matters mainly related to his/her body or prosperity. This right pertains to the most private of matters as one's control on one's body. The Supreme court in case of *State of Maharashtra v. Madhukar Narayan Mandikar*²¹ has accepted the fact that one has security over his/her body. But it is unfortunate, how the court has still kept spouses out of this ambit. A woman has right over her body but only if subjected to rape by a stranger while it is perfectly fine for a husband to violate the same in name of marriage. There is a need for the courts to understand that a rape does not reduce to nothing if the victim is hitched to the attacker.

¹⁸ Article 21, The Constitution of India

¹⁹ 1981 AIR 746, 1981 SCR (2) 516

²⁰ 1996 AIR 922, 1996 SCC (1) 490

²¹ AIR 1991 SC 207

JS Verma Committee report also stood in congruence to this idea and recommended that Marital Rape as an exception should be removed and marriage should not be considered as a prolonging act of irrevocable consent.²² Therefore, in a case of whether a sexual activity happened with or without consent, should not consider the relationship between people as an excuse. However, the recommendations on Marital rape were not accepted or worked upon.

This issue was further raised in a petition filed by RIT foundation and All India Democratic Women's Association. An argument was raised by NGO men welfare trust that to constitute an offence of rape, force has to be proved. Delhi High court heard this matter in-depth, taking in consideration all aspects. The court observed that force is not a compulsory pre-condition for rape.²³ The court also held that a marriage does not act as a permit for sexual activity and cannot amount to consent for all physical activity.

More so, Article 14 of the Constitution guarantees the fundamental right that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".²⁴ Article 14 therefore protects a person from State discrimination. But the exception under Section 375 of the Indian Penal Code, 1860 discriminates with a wife when it comes to protection from rape. Thus, it can be deduced, that to this effect, exception provided under Section 375 of the Indian Penal Code, 1860 is not a reasonable classification, and thus, violates the protection guaranteed under Article 14 of the Constitution. Protection of the dignity of women is a fundamental duty under the Constitution, casting a duty upon every citizen "to renounce practices derogatory to the dignity of a woman"²⁵; it seems that domestic violence and marital rape do not come under the definition of dignity.

While hearing a case against a man, accused of forcing his wife for an unnatural sex, additional sessions judge Kamini Lau opined that, "non recognition of marital rape in India, a nation set upon the bedrock of equality, is gross double standard and hypocrisy in law which is central to the subordination and subjugation of women."²⁶

It is high time that India, the nation known for its values and morals, stood against the unethical and illegal treatment given to women. The laws based on ideas that no longer hold relation to today's society and thus need to be done away with.

²² Justice J.S Verma, Justice Leila Seth, *Report of the Committee on Amendments to Criminal Law* (2013)

²³ *Supra* note 7

²⁴ Article 14, Constitution of India

²⁵ Article 51-A(e) of the Constitution of India.

²⁶ Rukmini S, *The Many Shades of Rape Cases in Delhi*, *The Hindu*, July 19, 2014 (<https://www.thehindu.com/news/cities/Delhi/nonrecognition-of-marital-rape-is-hypocrisy-court/article6473013.ece>)

IV. GENDER NEUTRALITY IN RAPE LAWS: AN URGENT NEED

Another limitation that makes Indian criminal justice system ineffective, in rape laws, is the lack of gender neutrality. According to Black's Law Dictionary, the word 'Neutral' means 'indifferent; impartial; not engaged on either side'.²⁷ Thus Gender-neutrality refers to impartial and unbiased treatment of men and women. This article emphasizes on the concept of Gender-neutrality as an idea that the legislature and the judiciary should avoid distinguishing roles according to a person's gender or sex. In the article we will talk about the need to make rape laws gender-neutral and avoid the fix definitions of victim and perpetrators based on sex.

In India, rape is considered as an offence which can only be committed by a man against a woman i.e. a perpetrator is always a man and a victim, a woman. Though it is agreed that this definition of rape has been built based on the experience of the society over a period of time, but there is a need for change in the particular law owing to the change in dynamics of the society today. The definition given in Section 375 of the Indian Penal Code, fails to recognize the act of male/transgender rape. Moreover, the fixed requirement of penetration, for an offence to constitute rape, also negates the possibility of a woman being a perpetrator. The Law concerning rape, earlier, required the act of penile-vaginal penetration to call an offence rape. This criteria/requirement was questioned in *Sakshi v. Union of India*,²⁸ after which the court asked for recommendations by the Law commission.

The law commission in its 172nd report recommended to amend the law to widen the definition of rape. In its report, the Commission had recommended that rape be substituted by sexual assault as an offence. Such assault included the use of any object for penetration. It further recognised that there was an increase in the incidence of sexual assaults against boys.²⁹

The recommended changes aimed at widening the definition in order to include sexual assaults not involving penile-vaginal penetration.

The 2010 draft *Criminal Laws Amendment Bill*, released by the Ministry of Home Affairs, attempted to redefine rape. The draft provisions substitute the offence of rape with "sexual assault". Sexual assault is defined as penetration of the vagina, the anus or urethra or mouth of any woman, by a man, with (i) any part of his body; or (ii) any object manipulated by such man under the following circumstances: (a) against the will of the woman; (b) without her

²⁷ Henry Campbell Black, *Black's Law Dictionary*, St. Paul Minn. West Publishing Co., 1968, IV Edition

²⁸ AIR 2004 SC 3566

²⁹ Law Commission of India, 172nd Report on Review of Rape Laws, (March 2000)

consent; (c) under duress; (d) consent obtained by fraud; (e) consent obtained by reason of unsoundness of mind or intoxication; and (f) when the woman is below the age of 18.³⁰

This landmark change ended up being a blessing for women as it widened the definition, incorporating various other ways of violating a woman's body. In addition to that, the very idea that sexual violation is way more than penile-vaginal penetration brings us to question another dimension i.e. male rape.

Rape of males or transgenders is any kind of sexual assault that involves forced penetration of the anus or mouth by penis, fingers or any other object or coerced/compelled penetration. This definition itself does not take into consideration the aspect of women being a perpetrator of rape.

This article will study the aspect of gender neutrality from two dimensions i.e. Gender neutrality in terms of victim as well as perpetrator.

In India Male rape is not recognized and finds no place in the laws. There have been endless justifications for the same. Some of them are:

(A) Rape Requires Forced Intercourse and It is Difficult to Physically Force a Man.

This justification stems from Gender stereotyping where a man is assumed to be capable of defending himself of any force, whatsoever, rendering the possibility of rape negligible. This argument was seen to be made by the victim's father in *Commonwealth v. Gonsalves*.³¹ This case came up in Massachusetts Appellate Court, wherein the father argued that why wasn't the son able to defend himself. These arguments are a reason to create an image of invincible masculinity. Due to such stereotypes, a stigma it attached with the victim which event leads to under reporting of the cases.

The fallacy in this justification is not only restricted to Gender stereotyping but also includes presumption of force as a pre-requisite of rape. It needs to be understood that a consent need not be obtained only through physical force and thus there is a possibility of other manipulations. In many cases, the victim succumbs to the power of the perpetrator in order to escape and get rid of the brutality. The Delhi High court had negated the belief that rape is always preceded by force.³²

Apart from that, in cases where force has preceded rape, have included gang rapes. A presumption of invincible masculinity fails to understand a basic idea of outnumbering. How

³⁰ Simran, "Cabinet Approves bill to amend law on rape", PRS Legislative Research, February 8 2012

³¹ Ed. 2d 41 (1997)

³² *Supra* note 7

can a man be expected to defend himself against an entire group of people, using any force whatsoever?

These prejudices and absence of legal recognition force the victims to live in silence. Many victims in past have taken recourse to social media to bring in light their experience. One of the most glaring example is the incident of Vinodhan, a boy from Chennai who shared in Gang rape incident at an age of 18 years.³³ Another such incident was in September 2014, where a Mumbai based transgender was raped and video graphed by three police officials at Ajmer Darghah Police station.³⁴ Despite of these Victims attempt of bringing their stories out in public, law has not addressed the issue of Male/Transgender Rape.

(B) Erection and Implied Consent

Due to lack of required information among people, there is belief that a man cannot have erection while being sexually assaulted by someone. This belief has led to a myth in people's mind that if a man has a physiological response to a sexual intercourse, that is a sign of his consent, and it is mistaken to mean that he was enjoying it.³⁵ In *R v. R.J.S.*,³⁶ a Canadian court held that when a male victim maintains an erection during a sexual encounter and this 'arousal' can be taken by the assaulter as consent.³⁷

This judgment was highly criticized for interpreting erection as a prima facie proof of consent. This very idea of considering an erection as a sole response of arousal is completely flawed. Such ideology upholds the stereotype that 'men always want sex'. In response to this misinterpretation, it has been argued that many times victims ejaculate out of anxiety or in order to put an end to the assault by making the offender believe that it is over. This is even used by the offenders as a technique to bewilder the victim and make him believe that he enjoyed the sexual act, which leads to the victim's self -blaming.³⁸ Researcher John Bancroft in his work titles 'Psychophysiology of sexual dysfunction (1980)' has given three explanations for a male's physiological response i.e. erection/ejaculation during sexual assault:³⁹

- i. Such a response may be a part of "generalized body reaction to an emotional turmoil".

³³ Priya M Menon, "Lacking Support, Male Rape Victims stay Silent", The Times Of India, February 16, 2013

³⁴ Maria Akram, "Transgender Raped by Cops Fight For Justice", The Times of India, September 14, 2014

³⁵ Sarah LeTrent, 'Against his Will: Female-On-Male Rape', CNN, April 6, 2015

³⁶ [1995] 1 SCR 451

³⁷ 1995 1 SCR 451

³⁸ Nicholas A. Groth and Ann Wolbert Burgees, "Male Rape: Offenders and Victims", American Journal of psychiatry, 1980

³⁹ Siegmund Fred Fuchs, "Male Sexual Assault: Issues of Arousal and Consent", 51 Cleveland State Law Review, 2004, P.101-102; Noreen Abdullah-Khan, "Survivors of Male Rape: The Emergence of Social Legal Issue", 2002

- ii. Such responses may have biological roots, that is to say that while sexual responses are influenced by the brain; they are mediated through the spinal cord and function independently. A sexual response determined by spinal cord discharge without control is therefore possible when one is ‘paralyzed with fear’.
- iii. Response may be a natural reaction to anxiety or some other previous role reflected in the victim’s subconscious.

This proposition demonstrates that a physiological response of the victim is not a proof of consent or enjoyment against the sexual act. This proposition explains how the stereotype that ‘men always want sex’ is flawed and disrespects the plight of a victim, and overlooks a victim’s agony on the basis of sex.

Another dimension to study, in case of rape, is gender neutrality in context of the perpetrator. This has been the most contended in the domain of rape law. Reasons like physical force and stereotypical outlook towards men have made people believe that a woman can never commit rape against a man. However, in a survey conducted by Centre for civil society, they interviewed 222 men, out of which 16.1% reported that they had been coerced or forced into sex as an adult by a woman.⁴⁰ These numbers show the reality in response to the belief among people that a female rapist is against “social reality”. The issue of woman as a perpetrator of rape needs to be seen under the following dimensions:

1. “It is physically impossible for women to rape men.”

The argument made by people against gender-neutrality is based on the interpretation of rape as mere penile-vaginal penetration. However, India no more recognizes rape with the same definition. Now it also includes insertion of foreign objects, oral and anal penetration as well.⁴¹ Thus, a woman can be said to rape a man. Secondly, even if penile-vaginal penetration is kept as a requisite, erection cannot be considered as arousal or consent. This argument is based on various studies that show that erection/ejaculation can be a result of anxiety, fear and humiliation.⁴²

2. “There have been no cases of female rape on men.”

Kavita Krishnan believes that women raping men is not a problem in society.⁴³ This is an argument full of fallacies. There have been incidences of male rape perpetrated by women.

⁴⁰ Jai Vipra (Centre for Civil Society), “A Case for Gender-Neutral Rape Laws in India”.

⁴¹ *Supra* note 15

⁴² Sarrel, P. M., & Masters, W.H. (1982). Sexual molestation of men by women. *Archives of Sexual Behavior*, 11, no. 2, 117-131.

⁴³ Perera A, “Why a gender-neutral anti-rape law isn’t anti-women”, *The Firstpost*, 2013

There have been surveys that have substantiated the same.⁴⁴ Although I agree that in male rape, majority offenders are men, however there are instances of women perpetrators which cannot be ignored. In 2015, Lara Stemple, Director of UCLA's Health and Human Rights Law Project, came upon a statistic that surprised her: In incidents of sexual violence reported to the National Crime Victimization Survey, 38 percent of victims were men—a figure much higher than in prior surveys.⁴⁵ Several surveys have been conducted that have shown that there are men who have suffered sexual molestation and have had no law to address the problem. Thus, saying that a female rapist is a non-existent character, is highly misleading⁴⁶

(C) “Gender-Neutrality in Rape Law is Anti-Women”

The idea behind gender-neutrality is not to retaliate against women victims or disregard the magnitude of the same. It is well noted that male rape is way less in occurrence as compared to female rape, however it is not non-existent. For example, while rate of rape in women is 1 in every 5 women, the rate in men is 1 in 71 men.⁴⁷ It is understood that rape has been a crime against women at an unacceptable rate and due to that women have faced stigma, fear and have lived a life with curbed freedom. But it has to be understood that crime or criminal does not restrict itself to a sex. A crime can be perpetrated against anyone regardless of their sex.

Bringing in gender neutrality is not based on the motive of pulling the feminist movement down. In fact, it is aimed at upholding the fundamental rights of men as well. Article 14 enshrines Right to equality and article 15 prohibits discrimination on the grounds of sex, Therefore, men should be entitled to the same rights as women and should be provided recourse in law against rape.

Such justifications have not only overlooked an offence that is existing in the society but also has added to the mental pain of the victims. Due to no legal recognition there has been no official or documented research on male/transgender rape. But, National Crime Record Bureau (NCRB) has tabulated some statistics related to crimes against men under various categories like kidnapping and abduction for several purposes like prostitution, illicit intercourse, slavery etc. According to NCRB 2013 report, 123 men, from different age groups, were kidnapped or abducted for the purpose of illicit intercourse; 20 men for slavery; 20 for prostitution.⁴⁸ Though cases registered with police, officially are way less, but we can gather from these numbers the

⁴⁴ *Supra* note 33

⁴⁵ Conor Friedersdorf, “*The Understudied Female Sexual Predator*”, The Atlantic, November 28 2016

⁴⁶ Rituparna Chatterjee, “*The mindset is that boys are not raped: India ends Silence on Male sex abuse*”, The Guardian, May 23 2018

⁴⁷ Statistics About Sexual Violence, National Sexual Violence Resource Centre, Info and Stats For Journalists, 2012, 2013, 2015

⁴⁸ National Crime Records Bureau, Reports on Crime in India 2013, (Ministry of home affairs 2013), P.338

extent of this problem. If the offence of Male rape is considered by our criminal justice system, it will bring to light, to some extent, the real magnitude of this problem.

Thus, it is high time we addressed the issue of male rape. There are consequences that male victims have been facing due to the lack of legal recognition. If a man is raped, especially by a woman he is not considered as a 'real man'. This not only stigmatizes a man's life but also encourages patriarchy both in a man and a woman's wife. Male rape also brings into light that Patriarchy is not only toxic for women but also for men. While women under this social system have been subjected to dominance for years together, men have also been covertly forced to adhere to a stereotypical definition of men. This system has constructed ideologies like 'men cannot cry', 'men are supposed to be the bread earners' etc. While such thinking is getting normalized day by day the need to address and eradicate these is, in turn, augmenting.

While it is essential to talk about the gender neutrality in terms of perpetrator another issue to be addressed under the same is female on female rape. the question whether a woman can be charged for a woman's rape was first raised in *Priya Patel v. State of M.P.*⁴⁹ it was a case where a woman was gang raped and the gang in question included a woman. The language of section 376(2)(g) is "whoever" commits gang-rape; thus, there is no specific perpetrator mentions, making the section gender neutral. Further, the explanation elucidates that when a woman is raped by one or more in a group of persons acting in furtherance of their common intention each such person shall be deemed to have committed gang rape. Therefore, technically the act of penetration is not required to be performed by each member of the group.⁵⁰

This means, that mere common intention is sufficient to make a person liable. Despite the explanation, the court held that a woman cannot have an intention to rape another woman and it is unconceivable that a woman can rape another woman.⁵¹ The reasoning given by court is flawed as the section completely talks about the 'common intention'. When in *State of M.P v, Sheodayal*,⁵² the High court opined that a woman's modesty can be outraged by another woman, then why cannot a woman be said to have intention to rape, regardless of the whether she is physically capable of raping a woman or not.

Moreover, the need for Gender-neutral rape laws has become an urgent affair after the section 377 verdict given by the Supreme Court, decriminalizing consensual same-sex relations. Including a male on male rape as an offense under 'unnatural sex' could have been called justified till the same-sex relations were criminalized. However, as now Supreme Court has

⁴⁹ (2006) 6 SCC 263: AIR 2006 SC 2639, 2641, 267,

⁵⁰ Section 376(2)(g), Indian Penal Code, 1860

⁵¹ *Supra* note 39

⁵² 1956 CrLJ 83 M.P

recognized these relations, it has become all the more pertinent to address these relations in the same way as we address heterosexual relationships. A forced, non-consensual sex should be considered rape, regardless of whether it is a man or a woman being raped, or it is a man or a woman raping.

V. FINDINGS

I found the various facts of sexual violence particularly rape, against women in the present scenario. Rape, a dreadful agency works in the benefit of men to sustain their hegemony as a superior gender over women. Beating, thrashing, molesting, abusing etc. become major tools in keeping women in a state of terror and submission to have an easy control over them. Being muscularly powerful generates a superiority complex in men which leads them to believe that they can rule the society according to their free will and elicit any and every kind of favors from women including sexual. Thus, there comes in a grave disparity which creates a divide between the two genders, one being the assailant and the other, the victim.

I also found that the government and other social agencies are attempting to contribute in controlling the frequent occurrence all around the world, the graph of sexual violence, rape to be specific, is still rising in India. Rapes in India have been occurring persistently against poor woman, a low caste, tribal or even an independently working woman.

It is found that with so many discrepancies in the law making, it is evident the frequency at which the rapes are occurring has continued to grow at an alarming rate. The fact that there is a lot that has to be done in this field and that there is an urgent need to find some serious solutions to help women and prevent them from the severe outcomes.

VI. SUGGESTIONS AND RECOMMENDATIONS

(A) Reconsider the Definition of Consent in Marriage

Since we have discussed how marital rape exemption is based on the belief that consent to marry is consent to engage in sexual intercourse, we require the courts to address and reconsider this definition. Just like in sexual intercourse outside marriage, a fresh consent is required for every sexual intercourse, similarly, the criterion of consent should be kept the same in marriage. This change will not only give women a right of decision in their marriage but also will give them their dignity and security in a wedlock.

(B) Alter the Outlook While Hearing a Rape Case

The courts should apply the decision held in *Karnel vs. State of Madhya Pradesh*⁵³ that a rape

⁵³ *Supra* Note 13

victim's testimony should not be treated with suspicion and she should not be treated as an accomplice in the crime, even to the victims of marital rape. As discussed, problem in proving a rape in marriage is considered as an impediment in recognizing marital rape as an offence, this change in outlook will facilitate hearing of these cases. Just like ordinary rape cases, the burden of proof in marital rape case should also rest on the perpetrator.

(C) Need for Cultural and Social Changes

1. Patriarchy

In order to get rid of problems like marital rape exemption and sex specific rape laws, we not only need legal reforms, but also changes have to be made in our social system. Indian Social system has been patriarchal for ages. And this patriarchy has not only reduced women as chattels and subordinates to men, but also has tied men in the shackles of toxic masculinity. As a society, getting rid of patriarchy will give women their right to be treated as equals and will also prevent crimes like rape, domestic violence and in fact let women live a life not subjected to judgments and fears. Moreover, it will allow men to live a life which does not have to fit in the definition of social prejudices.

It is a system like patriarchy that has made women a chattel of her husband leading to loopholes like marital rape exemption. In addition to that, this social system has set stereotypes like "men cannot be physically raped", or "men always want sex", shutting the male rape victims. It is high time the legal system stopped basing its laws on such societal beliefs.

2. Educational Reforms

A society does not change by legal or administrative reforms alone; it is important to change to people. It is necessary that children from a very young age should be educated about gender sensitization and should be conditioned in a way where they do not discriminate someone on the basis of sex which includes understanding the differences between the sexes but not making them a premise to exploit any.

(C) Gender Sensitization Training for the Entire Legal Machinery

Apart from making changes in the definition of rape law, we need to sensitise the entire legal machinery to make it suitable to deal with the present India. Police forms the first authority in the legal machinery whom victims' approach and it is important to ensure that they are sensitized first. However, the incidences of Police's apathy is so all-pervasive that it discourages victims from speaking up.

In the UK, the Stern Review was setup to examine certain issues within the criminal justice system.⁵⁴ The reaction of public authorities to rape complaints and the recommendations to encourage victims were amongst the top issues addressed. The report showed that the police officials have shown changes in their attitude, but the implementation of the same in legal duties was not good. It is important that system of justice is not focussed on the procedure but its motive, because in this race of sticking to the system the victim is ignored. Further researches have also corroborated the grim reality that male rape victims seeking help have been turned away from rape crisis centres considering there are no systematic provisions in place even though these centres are publicly funded by the Ministry of Justice, UK.⁵⁵

In India, a case like Bhanwari devi rape case, has brought in light the non-chalant and ruthless behaviour of police force. In Bhanwari devi case, the act of police of demanding the submission of the skirt she was wearing and not providing her with alternative clothing shows how insensitively this matter was handled. Apart from that the vaginal swab was taken after more than 48 hours while the requirement is for this act to be done within 24 hours.⁵⁶

Since Judicial officers have quite a reclusive life, it is important to sensitize them in order to prevent them from having narrow views. One such ugly incident of projection of narrow views happened during the Bhanwari Devi rape case. The Judicial Officer of the trial court while dismissing the case made such observations for acquitting the accused, which would further worsen the situation of a rape victim. Some of the reasons for acquittal given were – the head of a village cannot rape, men of different castes cannot participate together in gang rape, a higher caste male cannot rape a lower caste woman because of reasons of purity and Bhanwari Devi's husband couldn't have quietly watched his wife being gang-raped, among other such ridiculous reasons.

Such Shameful incidences tell how reclusiveness not only hampers a judicial officer's mental outlook but also subjects the people seeking justice to unreasonable actions. In order to make our legal justice system open and sensitive, it is important that our legal machinery is well aware of gender sensitization and starts practicing it.

VII. CONCLUSION

This article has analyzed the changes needed in Rape laws. From the above discussion we have tried to emphasize on the need to criminalize marital rape to address the issues faced by victims

⁵⁴ Baroness Vivien Stern CBE, Government Equalities Office UK

⁵⁵ Catherine Pitfield, 'Male Survivors of Sexual Assault: To tell or not to tell?'

⁵⁶ Namita Bhandare, "The Long march to Justice", Hindustan Times, February 22 2019

in marriage. Courts and even Law commission has time and again discussed the need to criminalize marital rape and the demerits of not doing so. It is high time the legislature acted upon the recommendations made by the Law commission in its 172nd report. The exemption given to marital rape is based on the belief that a wife is a husband's chattel and this thought strengthens the inequality established by patriarchal system. In today's view, marriage is a partnership, a companionship between two equals. Thus, both the spouses must have equal say in all decisions in a marriage. Moreover, the concept of consent should be kept as cardinal in a marital relation and the idea that consent to marry is also a consent for sexual relation needs to be questioned. The removal of marital rape exemption will provide women a recourse to address their pain and the legal recognition will further enlighten the nation about the magnitude of this problem by prevention under reporting.

Another issue discussed is the need for Gender neutrality in rape laws. While the magnitude of female rape is incomparably high, the issue of male rape requires legal recognition too, irrespective of its magnitude. The patriarchal notions of 'men cannot be physically forced' or 'men always want sex' have attached stigma to many victims who have suffered this crime. Patriarchy has not only dominated women but also forced men to adhere to social notions created by it. Many men have stayed silent because of the toxic masculinity forced on them. Rape has to be seen had an offence committed by perpetrators against innocent victims whether man or a woman, leaving a mark on their lives forever. As questioned in a few cases, the courts have to consider the truth that a woman can rape and a man can be raped. The authors believe that lack of gender neutrality denies the existence of crimes that are perpetrating and robs the victims of any legal remedy and thus there is an urgent need of the same.

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