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Reconstructing Gender in Indian Rape Laws

PABITRA MOHAN PANDA¹

ABSTRACT

Despite minor advances over the past few decades, India's rape laws remain regressive and reinforce patriarchal gender norms. India continues to adhere to a law that is based on the idea of vaginal penetration by a man at a time when many nations across the world are moving toward gender-neutral rape laws to observe a person of any gender as a potential victim/survivor or perpetrator. This is a harmful stereotype that could rob a segment of society of justice, liberty, and rights. Utilizing auxiliary examination of hypothetical texts this research paper aims to explore the current gender disparity in existing Indian rape laws and the need to situate gender more appropriately in them, by pointing out defects in existing legal provisions and policies which are divided into five halves. This research will also put forward some theories which may be employed to enhance gender neutrality and minimize gender biases.

Keywords – Rape Laws, Gender-Neutrality, Transgender, Sexual Assault

I. INTRODUCTION

Our progressive society is shifting from patriarchal gender protectionism to gender equality. The same sentiment is reflected in all the organs of the Government as well as in the general public at large. Hence, the demand for gender-neutral legislation are coming from the judiciary, the press and all those welfare enthusiasts. To illustrate this, one can quote the recent filing of a writ petition by Lawyer Mr Sanjiv Kumar in Delhi High Court under Article - 226 of the Constitution of India to direct the Legislature to come up with gender-neutral rape laws. Following this, the Delhi High Court asked the Delhi Government to submit its reply. Hence, analysis of gender neutrality of laws is a recent trend and is of utmost importance. In a June 2022 case, Kerala High Court called for gender-neutral rape laws.²

Literature Review

After the 9-judge Puttaswamy judgment, the apex court recognized the right to privacy of

¹ Author is a LL.M. Student at National Law University Odisha, India.

² “Gender Neutral Rape Law? Legal Experts Disagree, Call It Flawed Understanding of Law” (*The Indian Express* June 12, 2022) <<https://indianexpress.com/article/india/gender-neutral-rape-law-legal-experts-flawed-understanding-kerala-high-court-7965675/>> accessed July 29, 2022

individuals. This right to privacy includes the right to consent and the right to bodily integrity in itself. Both of those constituent rights are extended to both genders. However, our existing rape laws doesn't depict equality while ensuring both the rights of male and female.³ In its 2012 report, the Justice Verma Committee emphasised the necessity for India to recognise all sexual orientations and suggested including the third gender in addition to men and women when crafting gender-neutral laws.⁴

Recently, Mr K.T.S. Tulsi, Senior Advocate, filed a Bill in the Rajya Sabha seeking changes to the Penal Code of 1860, the Code of Criminal Procedure of 1974, and the Indian Evidence Act, 1872, all while underlining the need for "Gender Neutral laws" in our nation. According to him, males and transgender people should also be recognised as vulnerable and given the appropriate legal protection because they are also a vulnerable class that requires protection. The proposed law would treat all sexual offences equally regardless of gender. Sexual offences ought to be punished regardless of the gender of the victim since they violate social decency.⁵

The arguments for gender neutrality are based on the writings of McKinnon and Novotny, who debate whether neutrality is a reaction against feminism and a threat to the sole acknowledgement of violence against women. Rumney has touched on a couple of these issues in his writing, but he only discusses the discrimination male sexual assault victims experience in the trial and participates in theoretical discussions on gender neutrality in the western context.⁶ Gender neutrality has its detractors, including Novotny, Caffeine, and MacKinnon, who have argued that it is not a wise decision. It promotes a growing awareness of male victimisation, acts as a vehicle for anti-feminist sentiment, assumes a gender-neutral appearance, and represents an effort to address all victimizations equally. Rumney addresses the issues brought up, such as the fact that gender neutrality has undermined the legal response to rape and also treats men and women's experiences with sexual assault equally.⁷

Siobhan Weare has written about how gendered rape laws reinforce the idea that men initiate

³ Desk IN, "Delhi High Court Issues Notice to Centre on Pil Seeking 'Gender-Neutral' Rape Laws" (*Latest News, Breaking News, LIVE News, Top News Headlines, Viral Video, Cricket LIVE, Sports, Entertainment, Business, Health, Lifestyle and Utility News | India.Com* September 27, 2017) <<https://www.india.com/news/india/delhi-high-court-issues-notice-to-centre-on-pil-seeking-gender-neutral-rape-laws-2502155/>> accessed July 29, 2022

⁴ "Justice Verma Committee Report" (*PRS Legislative Research* July 29, 2022) <<https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary>> accessed July 29, 2022

⁵ Network LN, "SR ADV KTS Tulsi Introduces Bill in Rs to Make Sexual Crimes Gender Neutral [Read Bill]" (*Live Law* July 12, 2019) <<https://www.livelaw.in/news-updates/kts-tulsi-introduces-bill-to-make-rape-gender-neutral-offence-146304>> accessed July 29, 2022

⁶ Sharma A, "Addressing the Roadblocks to Gender Neutrality in Sexual and Domestic Violence Laws : A South Asian Perspective" (2020) 11 *The Journal of Indian Law and Society* 79

⁷ *Ibid.*

sex while women are passive sexual subjects.⁸ Gender neutrality has been the focus of much discussion since the Masiya case, in which the South African Constitutional Court expanded the definition of rape to include the penetration of a woman's anals but chose not to give the same protection to men.⁹

Dr Ankita Gupta in her article titled 'The Soul Has No Gender Then Why Should The Law!' clearly depicted the gender-specific sexual harassment of women at workplaces but forgot to bring the harassment of men to table and effectively suggest ways to achieve the same.¹⁰ G. Priyadarshini, in her article titled 'Offence of Rape Should be Gender Neutral in India', largely analyzed the recommendation made by the 172nd Law Commission report.¹¹ In 'Gender Neutral Laws - How Needful in India?' writer Shweta Kabra started with the meaning and history of gender neutrality and subsequently went on to discuss its need in Indian society.¹²

After the NALSA judgement, now we have to balance the third gender with two of its counterparts to make rape laws gender-neutral in India.¹³

Research Questions

After going through the existing literature on the same and reviewing them, the problem or the research gap that the researcher could find is that all those studies are not exhaustive when it comes to the issue of gender neutrality, the role of courts and Legislature, suggestions for better implementation of gender-neutral rape laws, need and ways for legal recognition of gender-neutral rape laws and domestic violence laws.

Hence after analyzing the research gap and the statement of the problem, the researcher has formulated the following research questions to streamline his research.

1. How gender is placed in sections - 375 and section - 376 of the Indian Penal Code, 1860?
2. Do men to have the right to consent?
3. Do men have the right to bodily integrity as well?
4. What should the role of law-making bodies in bringing gender neutrality to rape laws?

⁸ Sharma, Supra Note at 5

⁹ "Masiya v. Director of Public Prosecutions (Pretoria)" (*Legal Information Institute*) <[https://www.law.cornell.edu/women-and-justice/resource/masiya_v_director_of_public_prosecutions_\(pretoria\)](https://www.law.cornell.edu/women-and-justice/resource/masiya_v_director_of_public_prosecutions_(pretoria))> accessed July 29, 2022

¹⁰ Gupta A, "The Soul Has No Gender Then Why Should the Law!" (2019) 8 CNLU Law Journal 307

¹¹ "172nd LCR Law Commission of India" <https://lawcommissionofindia.nic.in/old_reports/rpt172.pdf> accessed July 29, 2022

¹² Narayanan A and Kabra S, "Gender Neutral Laws" (*Indian Law Portal July 3, 2020*) <<https://indianlawportal.co.in/gender-neutral-laws/>> accessed July 29, 2022

¹³ (2014) 5 SCC 438

5. How can gender be better placed in rape laws to make those provisions gender neutral?
6. What are the roadblocks infringing gender neutrality in rape laws?
7. How the third gender should be placed in rape laws?

II. STATUS QUO OF INDIAN RAPE LAWS IN LIGHT OF GENDER NEUTRALITY

The notion that men are the only ones responsible for committing such a horrible crime stems from the patriarchal belief that men are physically stronger than women and that sexual assault is an exercise of male dominance over women. The patriarchal idea that men are strong and should not be exposed to such acts underlies the notion that only women can be victims. The Indian Penal Code's Section 375 blatantly disregards the roles that genders play in our society by unfairly designating exclusively women as victims and providing them with protection.¹⁴

According to section 375 of the IPC¹⁵, rape is defined. After the Delhi gang rape in December 2012, it was most recently changed in 2013. Following discussions with the Justice Verma Commission (JVC¹⁶), Parliament broadened the definition of rape to encompass offences committed against a person using digital, anal, or physical objects. The JVC did discuss the potential for a gender-neutral rape statute. There are two angles from which to view gender neutrality. The first is: Are male victims of sexual assault possible? The second question is more controversial: Are female offenders of sexual assault possible?¹⁷

(A) Section - 375 IPC

Rape is defined under section - 375 of the Indian Penal Code. After going through the texts. We can find the following observations.

This section starts with “A Man” and puts the male gender on the preparator side. It subsequently uses the expression “sexual intercourse with a woman” inferring that only women can be a victim of the heinous act of rape. This section extensively uses the feminine pronoun “she”, “her”, “wife”, “herself” etc throughout its texts which implies the intention of the Legislature to make rape laws gender specific towards the female gender.

It is a rule of interpretation that criminal laws need literal interpretation. Hence carefully choosing of aforementioned words clearly defines the gender of the victim and offender in the

¹⁴ “Patriarchy & Power” (*Asian Pacific Institute on Gender Based Violence Website* January 4, 2018) <<https://www.api-gbv.org/about-gbv/our-analysis/patriarchy-power/>> accessed July 29, 2022

¹⁵ “Section 375 in the Indian Penal Code - Indian Kanoon” <<https://indiankanoon.org/doc/623254/>> accessed July 29, 2022

¹⁶ Supra Note at 3

¹⁷ Mehta A, “Why It Is Time for India to Consider Gender-Neutral Rape Laws” (*Article 14* September 7, 2021) <<https://article-14.com/post/why-it-is-time-for-india-to-consider-gender-neutral-rape-laws-6136d766effef>> accessed July 29, 2022

crime of rape. The selective specification of rape laws implies that the male gender can never be subjected to the offence of rape. But this social stereotype is very dangerous in the twenty-first century and it deprives the protection of the right to life and bodily integrity of men.

With the advent of NALSA judgment, the third gender was recognized legally. The rape provisions are silent on the incorporation of the third gender and how to place it in rape laws. No further amendments were made subsequently to the 2013 judgment to accommodate the third gender in rape laws.

(B) Section 376 IPC & Section -376 r/w Section - 511 IPC

While section - 375 of IPC defines rape i.e. the culpability clause. Its liability clause is section - 376¹⁸ where punishment for rape is provided. After going through the provision, the following inferences can be drawn.

This section also takes the legacy of Section - 375 and extensive uses the feminine words throughout the text. Being the liability clause for rape, it has to be read in tandem with section - 511 of IPC when it is needed to deal with cases of Attempts to Rape. As there is no specific provision in the Indian Penal Code that deals with the attempt to rape, hence this is the only way left to deal with those cases. This indirectly makes the laws dealing with ‘attempt to rape’ gender specific.¹⁹

III. BRIDGING THE GENDER GAP IN INDIAN RAPE LAWS

(A) Establishing the Need

In a progressive society, law grows with the need of the society to protect all the rights of the individuals. Law is not static and certainty of law is a legal myth as correctly stated by Jurist Frank. While society is moving forward from the archaic victorian era patriarchy and the stereotypes that only a particular gender can be subjected to the offence of rape seem obsolete. There are numerous instances where a woman is alleged to commit sexual aggression. Various leading News daily is reporting the instances of sexual aggression by a women and the need to bring gender-neutral rape laws in India.

This question was specifically an issue in the case of Priya Patel v. State of Madhya Pradesh. This case involved the gang rape of a woman by a group of persons which included some females as well. Hence the question before the court was whether a woman can be convicted of

¹⁸ “Section 376 in the Indian Penal Code” <<https://indiankanoon.org/doc/1279834/>> accessed July 29, 2022

¹⁹ Bhardwaj P, “What Amounts to Attempt to Rape? Supreme Court Explains in a ... - SCC Blog” (*SCC Online* October 26, 2021) <<https://www.scconline.com/blog/post/2021/10/26/what-amounts-to-attempt-to-rape-supreme-court-explains-in-a-2005-attempted-rape-of-minor-girls/>> accessed July 29, 2022

the offense of rape. To answer this question, the apex court held that a woman can not be convicted for the offence of rape. However, a woman can very well be prosecuted and convicted for abatement to rape by instigating, engaging in a conspiracy to commit rape or by intentionally aiding in the rape of a woman. This case further makes the intention of law-making and law interpreting bodies' stance clear on gender neutrality of rape laws.

Apart from the urges from various news outlets, netizens and all those aware activists, there are some genuine reasons for the legislature or the Courts to take the call to make the rape laws gender neutral. These reasons include the legal recognition of the third gender, increasing incidents of men as a victims of rape etc.

(B) Roadblocks in Achieving Gender Neutrality of Rape Laws

The foremost argument advanced against the gender neutrality of rape laws is that women are biologically incapable of committing the offence of rape. As the most essential ingredient in the offence of rape is "penetration", the female gender is considered biologically incapable of doing the same.

Another argument advanced against the gender neutrality of rape laws revolves around the patriarchal notion that men are more powerful than woman and woman can not overpower a man to commit rape on him. Being a law graduate and especially practicing in criminal law, even my senses gets activated when i write "commit rape on him".

While placing the third gender in rape laws, the most common arguemnt in this regard is that there is no need to place them in rape laws. Section - 377 of the Indian Penal Code deals with the unnatural offense which impliedly covers all the sexual acts of rape like nature. Though NALSA judgment revoked the penalty for consensual unnatural intercourse, non consensual intercourse are still severely punishable. Hence there is no point in placing them in rape laws.

Some legal experts even claim that gender neutral rape law is just a flawed understanding of law and there is nothing like gender neutral rape laws.

IV. RESTRUCTURING GENDER IN INDIAN RAPE LAW

(A) Suggestions For Overcoming Roadblocks

The counter argument advanced to the first roadblock flagged earlier is that woman is not biologically incapable to commit rape even if litera interpretation is done to the provisions of section - 375 IPC. After the 2013 Criminal Amendment Act, in line with the observations of the Supreme Court in the case of Sakshi v. State, insertion of any object or applying mouth to vagina, anus or urethra of a women also constitute the offence of rape. If the same essential

extended to male gender, then women are very well biologically capable of committing rape.

To the second roadblock, the stereotype is not true in the twenty-first century. By the term "overpower" does not simply mean overpower by physical strength. It may also include financial compulsion, influence etc. Under those circumstances, there is submission and not consent. Hence this road block also does not hold any ground.

The writer however agrees with the third reason to some extent. Incorporating third gender in rape laws is neither necessary nor desirable. Non consensual unnatural intercourse are still punishable by section - 377. However, rape by a gay on a lesbian, rape by a lesbian on a male etc of like nature may be included in rape laws by increasing the scope of male to gay and transgender and scope of lesbians under female gender i.e. their natural genders.

To answer the claims of legal experts that gender neutrality of rape laws is a flawed understanding of law, the writer wishes to put forward counter argument that after the 2013 Amendment, the legislature has opened the path for gender neutrality of rape laws. Hence, gender neutrality of rape law is both necessary, desirable and legally implementable in India.

(B) Myself As the Law Making Body Amending Indian Rape Laws

Assuming that the essential law making power of the Parliament is delegated me and I am entrusted with making amendments to the existing rape laws to make them gender neutral, I will make following amendments.

1. The section will start with "whoever" instead of existing " a man".
2. Both the expression for referring victim and perpetrator of crime of rape must be addressed as "person and person of opposite gender" and not as "man or woman".
3. All the feminine words like "her, herself etc" will be replaced with their gender neutral counterparts.
4. An explanation will be added to Section - 375 which will provide an inclusive definition of 'person and person of opposite gender' This is to be done to place the third gender in rape laws.
5. Law will make provision for protection of men from sexual exploitation and forced sexual intercourse by woman.
6. Criminal Procedure Code will be amended accordingly to accommodate the changes.
7. Indian Evidence Act will be amended accordingly to accommodate the changes.

8. All the excavated form of rape as provided in section - 376A,376B,376C,376D,376E etc need to be amended accordingly in harmony with gender neutral rape laws.

V. CONCLUSION

In a progressive society like our Indian Society, gender neutral rape laws are both necessary and desirable in this twenty first century. India ,or any state (as criminal law is in Concurrent List of the Seventh Schedule), shall take the initiative to implement the gender neutral rape laws and establish an outstanding example before the world arena. There are already urges from different parts of the Government and the law making bodies need to take the call now. Till the time the Legislature does its duty, the Court may issue guidelines to bridge the gender biasness in rape laws in the same way it did to protect woman from sexual harassment at workplaces by the Vishakha Judgement.

To answer the first research question, one can clearly say that both of those provisions are gender specific and hence the rape laws in India is not gender neutral. Second and third research questions may be answered in affirmative after the observations of the apex court in the privacy judgment. In the previous paragraph, we have discussed the answer to the fourth research question. All the fifth, sixth and seventh research questions are answered in third and fourth chapter of this study.
