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# Shifting Perspectives: The Exigency of Gender-Neutrality in Indian Rape Laws

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## ABSTRACT

*It has been over 160 years since the inception of the Indian Penal Code in the legal substructure of India but astoundingly, a few persistent lacunae still haunt the efficacy of the archaic punitive legislation. Over the past few decades, India has witnessed a sweeping upsurge in demands for amending our longstanding laws and regulations to comply with the present-day perspective of the citizens as well as to cope up with the contemporary needs of the society. Resultantly, the government took due cognizance of the voice of the citizenry and implemented some remarkable changes in our socio-legal administration viz. decriminalization of adultery, validating live-in relationships, recognizing homosexuality, incorporating the Right to Privacy as a fundamental right, and so forth.*

*However, the canons of 'Equality' treasured in the Basic Structure of the Constitution of India are not stringently adhered to if we were to ascertain the pragmatic realities of identifying the concept of 'Gender Neutrality' in India's rape laws, as laid down under sections 375-376 of the Indian Penal Code, 1860. Although the notion of incorporating Gender Neutrality in rape law has been discussed in various suggestive reports and judicial precedents, no significant developments concerning the same have been practically instigated. Identifying the dreadful crime of 'Rape' as a gender-neutral crime is of paramount importance since India is devoid of any comprehensive legislation to tackle male on male, female on male, or transgender rapes. This is vital for the nation to truly progress as an established democracy with legal standards of equity, uprightness, and impartiality.*

**Keywords:** Gender-Neutrality, rape, crime, equity, uprightness, impartiality

## I. INTRODUCTION

Gender-neutrality is a perception that postulates the abolition of discrimination between different sexes in legislation as well as the implementation of laws. It aims to provide for equal rights for every citizen, irrespective of their sex viz. equal protection before the law,

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equal pay for equal work, *etc.* From the perspective of Indian rape law, it aims to eradicate the gender-oriented archetype attached to rape in the Indian legal context. Albeit the definition of “*Rape*” under Section 375 of the Indian Penal Code (1860) has been amended multiple times, the definition still peers with the traditional conception associated with rape wherein it is presupposed that the victims and perpetrators are always women and men respectively. To view such an atrocious crime to be exclusively committed by men is discrediting the genuineness of the statement that “*Men can be subjected to rape too.*” Gender-neutrality could only be truly envisioned when all its sub-dimensions are judiciously enumerated and complied with<sup>2</sup>, *i.e.*:

- (1) Neutrality with respect to the victim
- (2) Neutrality with respect to the perpetrator
- (3) Neutrality in custodial, communal, war, and conflict situations

## II. HISTORY OF RAPE LAW IN INDIA:

Women in India have proactively engaged in innumerable movements and protests concerning the agenda of reforms in rape law since the 1980s.<sup>3</sup> Women groups, for a significant period of time, have struggled to widen the scope as well as the definition of rape<sup>4</sup>. The ***Mathura rape case***<sup>5</sup> is one of the landmark judgments in Indian women’s rights and in this case, the Apex Court held that *Mathura*, the victim who had been raped by three policemen, had submitted and given her consent to the sexual intercourse as there were no injuries of resistance found on her body during the medical examination. *Inter alia*, it was held that the absence of injuries implies consent. This verdict by the Supreme Court was tremendously criticized and four eminent law professors wrote an open letter<sup>6</sup> to the Chief Justice of India scrutinizing the judgment. The *Mathura* case invoked a sudden demand of shifting the ‘*burden of proof*’ regarding consent to the accused once the prosecution discharges its onus of confirming sexual intercourse.<sup>7</sup>

Recent developments in rape cases include a petition which was filed by several social activists to conduct *in-camera* proceedings for rape trials and not to publish the rape victim's

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<sup>2</sup> Arvind Narrain, *Violation of Bodily Integrity*, 48 Economic and Political Weekly No. 11 (2013).

<sup>3</sup> Flavia Agnes, *Law, Ideology and Female Sexuality*, 37 Economic and Political Weekly No. 09, 844 (2002).

<sup>4</sup> *Sakshi v. Union of India*, AIR 2004 SC 3566.

<sup>5</sup> *Tuka Ram & Anr. v. State of Maharashtra*, (1979) 1 SCR 810.

<sup>6</sup> Upendra Baxi et al., *An Open Letter to the Chief Justice of India (1979)*, <https://pldindia.org/wp-content/uploads/2013/03/Open-Letter-to-CJI-in-the-Mathura-Rape-Case.pdf>.

<sup>7</sup> *Supra*, note 2.

name to the media<sup>8</sup>. Another significant demand was to hold the victim's sexual antecedents irrelevant for determining whether the accused is guilty of rape.<sup>9</sup> All of these women-centric amendments brought a vital shift to the conventional mechanism and the functioning of rape law. Unfortunately, none of these amendments opined that men could be subjected to be the victims of rape, or the fact that their rights against sexual offences must be fulminated too.

### III. THE ADVENT OF THE CONCEPT OF GENDER-NEUTRALITY:

Gender-neutrality in rape law surfaced for the first time in the case of *Sudesh Jhaku v. K.C. Jhaku*<sup>10</sup>, wherein the court adjudicated that sexually assaulted men shall be under the purview of the same protection of the law as provided to the female victims. In *Sakshi v. Union of India*<sup>11</sup>, the Supreme Court redirected the entire issue to be dealt with by the Law Commission of India. Consequentially, the 172<sup>nd</sup> Law Commission Report<sup>12</sup> recommended that rape laws must be gender-neutral in nature as well as in substance, both in light of the victim as well as the offender. The Justice J.S. Verma Committee Report<sup>13</sup> suggested a gender-neutral rape legislation for the victim and a gender-specific legislation for the offender. Regrettably, none of the two were incorporated into the legislative *modus operandi* of the nation.

#### The Criminal Law Amendment Act of 2013:

The Delhi gang-rape case of 2012 (*Nirbhaya case*) shocked the entire nation with its abhorrence and brutality. The widespread upheaval led to substantial rectifications in the Indian Penal Code concerning rape laws. The Criminal Law Amendment Act, 2013 introduced exclusive provisions for *acid attacks*, *sexual harassment*, *disrobing a woman*, *voyeurism*, *stalking*, and *trafficking*. The laws regarding *stalking*, *voyeurism*, and *sexual harassment*<sup>14</sup> are all gender-specific in nature whereas the law regarding acid-attacks has been classified gender-neutral<sup>15</sup>.

Furthermore, the definition of 'rape' was widened to include and criminalize the offence of

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<sup>8</sup> Nandita Haksar, *Human Rights Lawyering – A Feminist Perspective: Writing the Women's Movement: A Reader* 135 (Mala Khullar ed., Zubaan Books Ltd. 2005).

<sup>9</sup> *Supra*, note 2.

<sup>10</sup> (1996) 62 DLT 563.

<sup>11</sup> (1999) 6 SCC 591.

<sup>12</sup> Law Commission of India, *Review of Rape Laws*, Report No. 172 (Mar. 25, 2000), <http://www.lawcommissionofindia.nic.in/rapelaws.htm>.

<sup>13</sup> Justice J.S. Verma (Retd.) et al., *Report of the Committee on Amendments to Criminal Law* (2013), <https://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committee%20report.pdf>.

<sup>14</sup> The Criminal Law Amendment Act 2013, Act. No. 13 of 2013, § 7.

<sup>15</sup> The Criminal Law Amendment Act, 2013, Act. No. 13 of 2013, § 5.

penetration with any object<sup>16</sup>. The punishment for the offence of rape in both aggravated and non-aggravated circumstances was correspondingly enhanced<sup>17</sup>. Disappointingly, the offence was not classified to be gender-neutral under the Act as it was proposed in the ordinance. Therefore, no provision concerning male-rape was derived from the act.

#### IV. CHARACTERIZING RAPE: THE MALE PERPETRATOR PARADIGM

To rationally analyze gender neutrality in rape law, there exists a pre-requisite to characterize the scope of the offence and its impact inflicted upon the victim. Section 375 of the Indian Penal Code (IPC), 1860 clearly states:

*Rape – 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: -*

The definition is followed by sub-clauses enumerating the conditions under which the offence of rape can be applicable. The judicial opinions concerning Indian rape laws reflect a rather conventional comprehension wherein rape is not only regarded as an assault on the body of a woman, but also her modesty, chastity, and honor.<sup>18</sup> However, this perspective tactlessly stands on a patriarchal bedrock and undermines the adequacy of arguments oriented towards neutrality with respect to the victim’s gender, autonomy, and, bodily integrity<sup>19</sup>.

Unfortunately, the provision of rape under the Indian Penal Code predetermines the gender of the perpetrator as well as the victim and leaves no avenue for any form of liberal interpretation. Such a legal provision is not only arbitrary and equivocal, but it is also irrational and discriminatory on the ground of sexual stigmatization. To consider the fact that only a man is capable of committing the offence of rape and only a woman can be victimized of the crime provides an unfair immunity to women as well as other male perpetrators who target masculine victims. Section 375 of IPC considers rape to be an explicit patriarchal crime unswervingly stemming from the grotesque abuse of male power and privilege. However, as a steadily progressing nation and being the world’s largest democracy, we need to transform our laws as per the needs of the ever-evolving society so as to cater to the dynamicity of law.

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<sup>16</sup> The Criminal Law Amendment Act, 2013, Act. No. 13 of 2013, § 9.

<sup>17</sup> *Id.*

<sup>18</sup> Harshad Pathak, *Beyond the Binary: Rethinking Gender Neutrality in Indian Rape Law*, 11 Asian Journal of Comparative Law (Special Issue 2) 367-397 (2016).

<sup>19</sup> *Id.*; Rafiq v. State of Uttar Pradesh, (1980) 4 SCC 262.

### **Male-on-Male Rape:**

After the decriminalization of Section 377 of the Indian Penal Code (*unnatural offences – ‘homosexuality’*) in the momentous judgment of *Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice*<sup>20</sup> (2018), there remains no readily available legal remedy to deal with adult male to male rapes in India. While male child rape victims are protected under the horizon of the Protection of Children from Sexual Offences (POSCO) Act of 2012, adult male rape victims lack any form of legal services or assistance since the judicial apparatus of the Indian Penal Code is ill-equipped to deal with offences of such nature.

Several research studies contend that male-male rapes, as well as female-female rapes in prisons, are ordinary instances and a vast majority of such cases remain unreported. According to American psychologist *Sarah Crome*, barely 1 in 10 male-male rapes is ever reported.<sup>21</sup>

### **Female-on-Male Rape:**

Female-on-male rapes are drastically under-researched as compared to any other forms of sexual violence.<sup>22</sup> In one study, it was found that 23.4% of women and 10.5% of men reported that they were victims of rape whereas 6.6% of women and 10.5% of men reported that they were victims of attempted rape.<sup>23</sup>

In India, there has been no credible backdrop or governmental research data to help us construe the statistical frequency of such crimes.<sup>24</sup> Unsurprisingly, it is highly likely that even if a male rape victim attempts to lodge a genuine FIR against a woman for rape, he might be laughed at by police officials and he might even have to face immense social shunning and mental trauma. A victim of a crime is a victim, irrespective of his/her caste, color, creed, race, or sex. But on the contrary, it is evident that the hues and cries of male rape victims are nothing more than unvoiced opinions which are never administered to justice. Such impervious indifference between different genders ultimately leads to the creation of a society where pseudo-feminism is at its pinnacle.

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<sup>20</sup> (2018) 10 SCALE 386.

<sup>21</sup> Nicole Johnston, *Male Rape Victims Left to Suffer in Silence*, The World Today – ABC (Feb. 09, 2001), <http://www.abc.net.au/worldtoday/stories/s244535.htm>.

<sup>22</sup> Nicola L. Fisher & Afroditi Pina, *An Overview of the Literature on Female-Perpetrated Adult Male Sexual Victimization*, Aggression and Violent Behavior, University of Kent, 18 Kent Academic Repository (KAR) 1, 54-61 (2013).

<sup>23</sup> Martin S. Fiebert, *References Examining Men as Victims of Women’s Sexual Coercion*, 4 Sexuality and Culture 81-88 (2000).

<sup>24</sup> *Supra*, note 17.

### **Transgender Rape Laws in India:**

The tenets of Gender-Neutrality in rape laws encompass justness beyond the two commonly known genders to the world, it advocates the inclusion of people of the transgender community too. Presently, India does not have any dedicated rape laws concerning rapes of trans persons and such a flagrant indifference is a surprising contravention of the Supreme Court's 2014 landmark judgment in the *NALSA*<sup>25</sup> case in which the SC took due cognizance of the rights and remedies of the transgender community.

The **Transgender Persons (Protection of Rights) Act, 2019** was enforced on December 05, 2019, with the purpose of obliterating ostracism and the predispositions against transgenders and placing them on an equal pedestal in the eyes of law. The act, however, was shorn of some crucial legislative provisions apropos sexual offences against transgenders and those obstinate lacunae have still not been rectified. Moreover, the 2019 Act possesses provisions which paradoxically tend to promote a discriminatory bias rather than eliminating such biases. Section 18(d) of the Act reads as:

#### ***18. Offences and penalties.***

*Whoever, -*

*(d) harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse, and economic abuse, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.*

The crux of this provision is indeed ironic because while a similar offence on a woman might lead to drastic penal consequences, the same offence on the body and dignity of a trans person is treated as a 'petty offence'.<sup>26</sup> This insensitivity promotes a 'gender-specific dictum' and is also a vibrant specimen of how the criminal legislation of our country transgresses the epitomes of *Equality* instilled in the doctrine of the 'Basic Structure'<sup>27</sup> of our Constitution. Hence it becomes indispensable to recognize the gravity of sexual offences against transgenders and to treat offences against them *pari materia* with the provisions of the Indian Penal Code, 1860.

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<sup>25</sup> National Legal Services Authority v. Union of India, AIR 2014 SC 1863.

<sup>26</sup> Rishabh Chhabaria & Abhigyan Tripathi, *Transgenders and Rape Law: Is equal protection of law still a pipe dream?*, The Leaflet (May 23, 2020), <https://theleaflet.in/transgenders-and-rape-law-is-equal-protection-of-law-still-a-pipe-dream/>.

<sup>27</sup> Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

## V. GENDER NEUTRALITY IN RAPE LAW VIS-À-VIS HUMAN RIGHTS:

The right to equal protection of the law is a key tenet of basic human rights guaranteed to every individual irrespective of any discriminatory bias. Therefore, it becomes imperative to assert the contention of transforming the existing rape laws in favor of gender-neutrality with a human rights standpoint.<sup>28</sup>

On account of *Bodhisattwa v. Shubhra Chakraborty*<sup>29</sup> and *Narendra Kumar v. State (NCT of Delhi)*<sup>30</sup>, the Supreme Court duly acknowledged the disputation that the criminal offence of rape infringes the basic human rights of an individual enshrined under the Constitution of India – the *Right to Life* and *Personal Liberty*. Nonetheless, such an odious crime also encroaches the human rights entitled to men or any human being *per se*, regardless of whether they can be victimized of rape as per the law.

The Universal Declaration of Human Rights (UDHR), 1948 acts as a cornerstone for modern international human rights law.<sup>31</sup> Article 2 of the UDHR *per se* enunciates that every individual is entitled to rights envisioned in the declaration without any discrimination on any ground (including gender). Article 7 of the declaration also articulates that every human being is equal before the law and is entitled to equal protection before the law. The gender-neutral pronouncement of the declaration corroborates the contention that every repugnant offence shall be treated with equity in the eyes of law.

### Custodial Reflections:

In a 1992 report<sup>32</sup>, the usual practice of homosexual rapes/gang-rapes in prisons was brought to light to the public. Such incidents depict a failure of the prison administrations and the insensitivity of the authorities to treat a prisoner with empathy or even minimal human integrity. While these sexual encounters can certainly spread infections as well as serious sexually transmitted diseases among prisoners, the mental ordeals and the ruthless physical trauma attached to such incidents haunt the helpless prisoners for a long period. A study published in 2018<sup>33</sup> reveals that the suicide rate in Indian prisons is one and a half times more than the general population.

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<sup>28</sup> Arjit Mishra, *Gender Neutral Rape Laws: Need of the Hour*, The Criminal Law Blog – NLUJ (last visited on Jul. 07, 2020, 11:11 AM), <https://criminallawstudiesnluj.wordpress.com/2020/05/01/gender-neutral-rape-laws-need-of-the-hour/>.

<sup>29</sup> (1996) 1 SCC 490.

<sup>30</sup> (2012) Appeal (Criminal) No. 2066-67/2009.

<sup>31</sup> *The Universal Declaration of Human Rights* (UDHR) – 1948, HumanRights.ch (last visited on Jul. 07, 2020, 04:20 PM), <http://www.humanrights.ch/en/standards/udhr/>.

<sup>32</sup> R. Sreekumar, *Access to Justice for Under Trial Prisoners: Problems and Solutions*, Human Rights Initiative (1992).

<sup>33</sup> Neena S. Sawant, *Suicide in Indian Prisoners*, 2 *Annals of Indian Psychiatry* 1-3 (2018).

On March 11, 2013, Ram Singh, one of the chiefs accused of the brutal Delhi gang-rape case of 2012, was found hanging in the Tihar jail in New Delhi because of alleged pitiless sexual victimization at the hands of other inmates.<sup>34</sup> Ram Singh's death is a sheer reflection of the unraveled truth which rests behind the bars that highlights the incapacity of the prisoners to stand up for their rights despite being subjugated to such barefaced offences on a frequent basis. The People's Union for Civil Liberties (PUCL) expressed their views about the state of affairs inside Tihar in 1981 and revealed:<sup>35</sup>

*“When a young boy enters, the prisoners have been known to have a bid a price for the boy. The price offered is in terms of ‘bidis’, soap, or charas. Often prisoners have been divided into camps and the groups have fought each other on the issue of who shall have the new entrant.”*

Prisoners are human beings too and the fact that they are under incarceration cannot justify the action of confiscating their rudimentary human rights. Access to constitutionally safeguarded rights must be extended to prisoners and they shall be given ample opportunities to voice their opinions against the uprising sexual offences and other forms of violence inflicted on them. The inmates already receive sufficient retribution owing to their wrongful acts and the empowerment of this section of the society is as vital as any other regular society in the community.<sup>36</sup>

## VI. CONCLUDING REMARKS & RECOMMENDATIONS:

The offence of rape is a gender-neutral crime that is detestable and enormously detrimental to society. The mythic notions circumscribing rape such as men are invulnerable, it is always a man who commits rape, men are unable to understand the physical agony or the mental ordeals suffered in rape, *etc.* are nothing more than flawed assumptions deficient of any judicious rationale. European nations such as England<sup>37</sup>, Scotland<sup>38</sup>, and Ireland<sup>39</sup> have brought significant moderations to their respective criminal legislations in order to endorse a gender-neutral approach towards the offence of rape.

Although Article 15(3) of the Constitution of India, 1950 enables the State to make special

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<sup>34</sup> G. Pramod Kumar, *Ram Singh's death: Rape and ugly sexual violence in Indian jails*, Firstpost (Mar. 12, 2013), <https://www.firstpost.com/india/ram-singhs-death-rape-and-ugly-sexual-violence-in-indian-jails-657071.html/>.

<sup>35</sup> *Id.*

<sup>36</sup> Atishya Ghosh, *Know Your Rights - Prisoners in India*, Legal Armor (Jul. 16, 2020), <https://www.legalarmor.co.in/post/know-your-rights-prisoners-in-india>.

<sup>37</sup> Sexual Offences Act (England and Wales), UK Public General Acts, 2003.

<sup>38</sup> Sexual Offences (Scotland) Act, Acts of the Scottish Parliament, 2009.

<sup>39</sup> Schedule 1, The Criminal Justice (Northern Ireland) Order, No. 1216 (N.I. 1), 2008.

provisions for women and children, it does not restrict the State in any manner to guard the lawful interests of the male or the transgender community, nor does it confine the government to grant them equivalent socio-legal status in grave criminal offences. The contention of lack of statistical evidence against male or transgender rapes is an erroneous disputation since under-reporting of such cases does not exterminate the veracity of such cases occurring in reality.

A few suggestive recommendations promoting a gender-neutral approach towards rape law in India are enumerated below:<sup>40</sup>

- Recognizing the existence of male as well as transgender rapes in India and amending the primordial Section 375 of the Indian Penal Code, 1860 in a gender-neutral tone
- Discarding the gender-oriented stigmatization towards rape and acknowledging that both the perpetrator and the victim can pertain to any gender
- Striking a balance between the rights and obligations of men, women, as well as transgenders, so as to eliminate any conflicting interests or possible exploitation of any legal privilege
- Ensuring that prisoners are entitled to equal protection of their human rights before the law and certifying that sexual violence against them is dealt with absolute stringency and rigor
- Proposing corresponding penal policies for accomplices as well as abettors in cases of aggravated sexual offences – irrespective of the gender of the accomplice/abettor
- Lastly, we must sensitize and educate the youngsters of our nation about sexual health, mutual consent, and safe sex practices so that they may learn to respect the opposite gender and treat all human beings alike. This step will certify the formation of a civilized society with educated young minds possessing ideals of diversity, admiration, and compassion towards all fellow members of the community; which will ultimately result in reduced crime rates and negligible heinous sexual offences. Thus, education might be the most important criterion to facilitate the fabrication of a harmonious and tranquil community free from the perils of criminal annihilation.

Gender-neutrality in rape law does not advocates to instantaneously desexualize the offence of rape altogether but rather aims to gradually broaden the purview of the Indian Penal Code

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<sup>40</sup> Shweta Kabra, *Gender Neutral Laws – How Needful in India?*, Articles – Manupatra (last visited on Jul. 17, 2020, 10:36 PM), <http://docs.manupatra.in/newslines/articles/Upload/3FE150D0-E784-49BD-8328-4134C0E87955.pdf>.

to develop an unprejudiced approach towards the current underinclusive rape laws. Recognizing the fact that the culprits as well as victims of rape do not belong to any specified gender is the need of the hour in this continually progressing society in the 21<sup>st</sup> century, the sooner the better. To conclude in the fitting words of American Supreme Court's former Associate Justice Wiley Blount Rutledge, "*Equality before the law in a true democracy is a matter of right. It cannot be a matter of charity or of favor or of grace or of discretion.*"

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