

NEED FOR GENDER NEUTRAL RAPE LAWS IN INDIA AND ISSUES ARISING IN ITS ABSENCE-A STUDY OF THE RESTRICTIVE DEFINITION OF RAPE AND THE SOCIO – LEGAL FRAMEWORK IN INDIA

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INTRODUCTION

Rape is most often than not addressed as a gender- specific crime. It is a human rights issue which needs to be dealt accordingly, accepting the fact that a man, woman or a transgender could be the victims or the perpetrators. Non-acceptance of such possibilities leads to not only rape myths but also exacerbating the experience of the victims. In the present society, men are considered to be dominant, aggressive and masculine whereas, women are weak, non- aggressive, emotional and dependent on men¹ in many developing countries including India. The lack of societal recognition of rape and the institutional neglect of the problem² is one of the consequences of the myths prevalent regarding sexual assault. The Indian Penal Code, 1860 defines rape as a crime committed by a ‘man’ on a ‘woman’ against her will³, therefore making the term restrictive. The assumption that there is no need for gender neutral laws in the society has given rise to the continuous encouragement of the same and leaves no room for justice. This paper seeks to explore the scope of widening the definition of rape in Indian laws which would be more just, specific and gender neutral.

ANALYSIS OF RAPE LAWS IN INDIA

Going beyond the premise that "rape is a conscious process of intimidation by which all men keep all women in a state of fear"⁴, it gives power to the society to maintain the gender bias enrooted from time immemorial. Among several legislations that address rape or any act of sexual assault, Indian Penal Code, 1860 is the most direct criminal code which specifies the

¹ Judith Worell, & Pamela Remer, *Feminist Perspectives in Therapy: An Empowerment Model for Women*. (John Wiley & Sons : New York 2003).

² Rumney, Philip N.S. *In Defence of Gender Neutrality Within Rape*, Seattle Journal for Social Justice: Vol. 6: Iss. 1, Article 40 (2007).

³ Section 375, Indian Penal Code, 1860.

⁴ Susan Brownmiller, *Against Our Will - Men, Women and Rape* (Penguin Books 1975).

crime to be specifically committed by a man on a woman. It limits the scope of rape and states that-

A man is said to commit "rape" if he -

- penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any ~ of body of such woman or makes her to do so with him or any other person; or
- applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person under few circumstances further stated in the Code⁵

Presence of casualties like exclusion of the fluid definitions of sexuality and social stereotypes gives rise to the conservative and often unequal implementation of justice through the public policies. All other forms of rape are termed under Section 377 of the Indian Penal Code, 1860 as 'carnal intercourse against order of nature' and the act of a female raping a man is not even addressed due to social stigma and gender stereotyping. The narrow definition of rape has also been vastly criticised as it merely included penal-vaginal penetration and other forms of acts were considered to be 'unnatural' in nature under Section 377 of the Indian Penal Code. The first case to indicate the need for inclusion of a more broad definition of rape than merely penal-vaginal penetration was *Sudesh Jhaku v. K.C Jhaku*⁶ which led to the opinion of the court that gender neutral laws should be established to protect men from sexual assaults.

In a public interest litigation – *Sakshi v. Union of India*⁷, before the Supreme Court, the court did not expand the definition of the term 'rape' to include forms of sexual assault other than the above. Due to a group of activists which had a negative effect on the recommended gender- neutral and unbiased laws by the Justice Verma Committee, the Criminal Law (Amendment) Act, 2013 did not include the impartial execution of the laws. Despite the

⁵ Section 375, Indian Penal Code (IPC), 1860.

⁶ *Sudesh Jhaku v K C Jhaku* (1998) Cri LJ 2428 (India).

⁷ *Sakshi v. Union of India* AIR 2004 SC 3566 (India).

inclusion of others types of rape like penetration of the vagina, mouth, urethra anus or any part of the woman's body by a man with any object or part of his body, it remains gender-specific. The failure of the legislature is evident since it fails to uphold the principles the country claims to follow by being members to various international conventions such as the Universal Declaration of Human Rights 1948 and the International Covenant on Economic, Social and Cultural Rights 1966 among few others. Gender inequality is therefore a socially manufactured inequality⁸ and the execution of laws parallel to such notions by the Indian legislature makes the citizens more vulnerable to the crimes that clearly occur but are rarely addressed. The laws are biased not only against men but also against trans-genders who were believed to be equal under Article 14 of the Constitution of India as laid down in National Legal Services Authority v. Union of India & Ors⁹.

MALE VICTIMIZATION

The most commonly believed notion that males can't be on the receiving end of crimes leads to the kind of laws a country adopts. The pressure of societal beliefs results in overlooked male victimization through sexual assault and rape. Sexual assault in men is a significant problem which has been neglected in legal research except abuse of minors. This act can take place in a variety of settings such as prisons, being the most common one along with schools, hospitals, military and during war and on the streets¹⁰ Along with show of dominance over the other person, the intention to emasculate men, demand respect and discipline, there are several motives for male victimization. Studies suggest that males are even less likely to report the sexual assault in comparison to females because of the fear of the label of homosexuality, societal taboo, fear of being out-casted and being punished.

Susan Brownmiller in her study '*Against Our Will: Men, Women and Rape*' acknowledges the prevalence of male victimization –

“And as men may invade women through their orifices, so, too, do they invade other men. Who is to say that the sexual humiliation suffered through forced oral sex or rectal penetration is a lesser violation of the personal, private inner space, a lesser injury to mind, spirit and sense of self?”¹¹

⁸ Tila Kumar & Hemanta Kumar Bhattu, *Caste, Class, Gender and Ethnicity as Distinct categories and their inter connections*, Human Rights, Gender and Environment, 03-19 (2007).

⁹ Legal Services Authority v. Union of India & Others, Writ Petition (Civil) No.400 NALSA (2012).

¹⁰ Chapter 6, Sexual Violence, World Health Organization.

¹¹ Susan Brownmiller, *Against Our Will: Men, Women and Rape* 257– 68, 378 (1975).

There are a number of myths which has received societal recognition with regard to the male victimization which include the myth that males cannot be raped, especially by women. It is commonly believed that the males which rape another or/and are victims are homosexuals. It is also believed that the males, who are the victims of sexual assault, were the ones who were 'inviting' such crimes and being physically responsive to the sexual acts, even if it is involuntary, means accepting the act and wanting it. Surprisingly enough, it is also believed that the men who experience sexual abuse in their childhood grow up to be a sexual assault perpetrator themselves.

A wide variety of consequences of rape are faced by males which include denial, depression, physical injuries, post-traumatic disorder, anxiety, anger and sexual dysfunction.

TAINT OF HOMOSEXUALITY

One of the major reasons for the non- implementation of the right to equality in regard to rape laws is the stigma of homosexuality that still prevails in the society. Legal recognition has been given to the trans-genders but it does nothing to protect them under Section 375 of the Indian Penal Code. The members of the LGBT community suffer the social backwardness in the society which roots from unequal protection under the laws. Who's to say that the use of fingers, hand or other objects on a person of the same sex doesn't inflict the same amount of physical and mental trauma as it does when a man sexually assaults a woman?

Article 377 of the Indian Penal Code criminalises the voluntary act of carnal intercourse with a person or an animal but doesn't address the involuntary act of assault. Even though rape of a man or a woman by another person could be filed under this section, the assumption remains that the act was voluntary or that both, the victim and the perpetrator are homosexuals which is socially unacceptable and most often untrue. The law has been understood to criminalise "oral sex, anal sex and penetration of other orifices" as held in *The Naz Foundation v. Government of NCT of Delhi*¹². The label or merely the false accusation adds to the excruciating experience of the victim and his/her mental health. In cases of male-male rape, the two theories of rape are read together, which are, penetration and consent. The lack of physical brutality and force are implicitly equated with consent¹³.

¹² *Naz Foundation v. Government of NCT of Delhi* (2009) 160 Delhi Law Times 277 (India)

¹³ Sneha Annavarapu, *Hetero-normativity and Rape: Mapping the Construction of Gender and Sexuality in the Rape Legislations in India*, International Journal of Criminal Justice Sciences Vol. 8 (2): 248–264. (Dec. 2013)

One would assume that the queer movement would have a lot to gain from subject of male/male rape gaining recognition worldwide but it would be assumed that the male victim of rape who was a homosexual had given consent and the entire issue would be overlooked.

Gillian Mezey and Michael King explained the mechanism of male reaction to rape as “although it is often assumed that men are able to defend themselves, our findings demonstrate that, like women, men react to extreme personal threat with frozen helplessness.”¹⁴

FEMALE PERPETRATOR

The notion of a female being the perpetrator of a crime like rape has never been brought into consideration because of the lack of penetration in the assault by women. Not only the society but the law too recognises rape to be the crime of ‘penetration’ by a ‘male’ in a ‘woman’ without her consent. Since penile penetration is a necessary consideration, the women cannot be punished under Section 377. The only punishment which could be given is that under the crime of gang rape as defined under Section 376D.

To bring in reforms in the gender biased laws, a committee under the chairmanship of Ex Chief Justice of India Justice J.S. Verma, was constituted. The report by the aforesaid committee was submitted on which the 172nd Law Commission presented its recommendations stating, “*Since the possibility of sexual assault on men, as well as homosexual, transgender and transsexual rape, is a reality, the provisions have to be cognizant of the same*”¹⁵. For the first time, gender neutral laws were considered to be passed recognizing males as victims of rape too. Due to the unfortunate events of a few feminist groups who opposed the recommendations on unreasonable grounds, the Criminal Law (Amendment) Act, 2013 passed without the change from gender-specific laws to gender neutral ones.

In the case of *State Govt. v. Sheodayal* (1956) it was opined by the Madhya Pradesh High Court that a woman can outrage the modesty of another but this order was overruled in the case of *Priya Patel v. State of Madhya Pradesh*¹⁶ where the notion that a woman can rape another was held unconceivable. It was held by the Supreme Court that only a man could

¹⁴ Gillian Mezey & Michael King, *The Effects of Sexual Assault on Men: A Survey of 22 Victims*, 19 PSYCHOL. MED. 205, 208 (1989).

¹⁵ Justice J.S. Verma, Justice Leila Seth & Gopal Subramaniam, *Report of the committee on amendmnets to criminal law*, 416 (2013).

¹⁶ *Priya Patel v. State of Madhya Pradesh* (2006) JT (6) SC 303 (India).

commit the crime of rape on the basis of the common law principle under Section 34 of the Indian Penal Code, 1860.

Just like male-male rape is assumed to be related to homosexuality, female- female rape is considered to be invisible because of their lack of capability to inflict physical injury. The rape laws in India are not fluid and do not recognize homosexuality or concept of rape without ‘penetration’.

DIFFERENCE IN AFTERMATH

The crime of rape affects each gender differently. It affects women disproportionately but that does not mean that it doesn’t affect the male population at all. It is very difficult to quantify the aftermath of rape and its consequences, both physically and mentally, in men and women, effectively, as said by the Professor of public health at Stony Brook University Tia Palermo. Lara Stemple, who is a professor at UCLA and a leader on the issue of male rape says that ignoring or overlooking male victimization is bad for women and girls because of several reasons including the reinforcement of some victims as more sympathetic than others which perpetuates the myth that essentializes only women as victims¹⁷

Mental and physical injuries and experiences after the crime, differentiates the behaviour of males from females. Both experience a wide series of psychological events, in the shorter run and in the longer term. The males, in comparison to females, experience anger, sleep withdrawals, fear of denouncement or being unheard, sexual dysfunction and branching out into other crimes like stealing and assaults. They suffer from lack of power, dominance and helplessness whereas, women experience degradation, weakness, post -traumatic stress, unwanted pregnancies and suicidal tendencies.

ARGUMENTS AGAINST GENDER-NEUTRAL LAWS

Feminists support and often demand gender sensitised and just laws but were found opposing the recommendation of the Supreme Court by the 172nd Law Commission Report of passing gender-neutral laws where both men and women could be the perpetrators and victims of rape. Due to immense opposition and vast chaos, the Criminal Law (Amendment) Act, 2013

¹⁷ Kerry K. Paterson , *A competition of suffering: Male vs. female rape* Women’s Media Centre, Women Under Siege, (Aug. 29, 2013).

passed without giving men an equal standing. Lawyer Seema Mishra had pointed out that if gender neutral laws were to be passed, then it would be possible for women to be charged with the offence which was totally unacceptable, while disagreeing with the blanket gender neutrality of the perpetrator of the sexual assault.

The possibility of a female being the perpetrator of the crime has been negated as many believe that females are weak, submissive and could only be the victims as rape is an act of dominance which can be acted by the male population because of the matching characteristics. Because of the statistics, which differ in every country, it is mostly observed that there are more female victims of rape than male ones. Due to differentiative social roles played by men and women, it is believed that gender differences do exist. Gender inequality is a socially manufactured inequality¹⁸

There are certain arguments which substantiate the reason for non-implementation of gender neutral rape laws in India including the desexualization of the crime of sexual assault and the greater risk of the misuse of the laws leading to further humiliation and harassment of women.

Despite certain arguments against the gender-neutral laws, it is a medium through which the entire population of the State can feel safe and protected under the law. It counters every argument and myth laced with gender stereotyping and orthodox beliefs. Even with the biological differences, the crime remains the same and undeniable. There is no justifiable reason as to why the laws which are gender specific should not be held unconstitutional under Article 14 of the Constitution of India.

RECOMMENDATIONS

The people who oppose the need of gender neutrality within rape bear incomplete or inaccurate information. They merely base their opinions on the beliefs what society portrays of crimes like rape and gender roles. In reality, it is impossible to believe in any discussion relating to rape being a gender specific crime. Gender neutrality is related with the labelling of the criminal behaviour¹⁹. A more efficient and idealistic system is required for law and public policy to accommodate interests of all the genders and be sensitive to their needs.

¹⁸ Tila Kumar & Hemanta Kumar Bhattu, *Caste, Class, Gender and Ethnicity as Distinct categories and their inter connections*, Human Rights, Gender and Environment, 03-19 (2007).

¹⁹ Rumney, Philip N.S. *In Defence of Gender Neutrality Within Rape*, Seattle Journal for Social Justice: Vol. 6: Iss. 1, Article 40, 509 (2007).

To protect and serve the common interests of the mass, the legislative body in India requires a push in the right direction which would help it come out of the social norms and gender biasness. Attitudes and practices are strongly connected and in order to change the face of law, a strict change in the attitudes and perceptions of the society is necessary. In India, the opposite has to be practised where the change in laws would help change and make society realise the faults in their traditional beliefs and progress together to meet the ends of justice and common interests.

The Criminal Law (Amendment) Ordinance was one draft, along with the recommendations of Justice Verma Committee Report which would have changed the face of rape laws in India but due to the pressure on the legislative and the executive body, the gender biasness gained weight over gender neutral laws, defeating the whole purpose of it in the passing of the Criminal Law (Amendment) Act, 2013. Establishing a firm, just legislation in the interests of men, women and trans-genders would not only help in safeguarding the sanctity of the citizens but also help India, as a nation develop as a whole and keep up its reputation as it is signatory to various international covenants and treaties which vouch for equality and justice across the globe. Awareness camps, peace rallies and in times of need, peaceful assemblies with the sole intent of achieving justice to all genders against a heinous crime like rape are gradual but efficient ways of taking steps towards changing the mind-sets of people.

CONCLUSION

Change is not drastic, it is gradual. Sometimes, it rocks the entire core of a social construct and belief, but that is what helps build it in a better way and a solid foundation. Rape is a subject which is sensitive to people, both to those who report it and to them whose injuries go unnoticed and unheard. There might be a risk in making the laws equal for men and women, but there is a greater risk involved in not making laws that protect the entirety of the nation and discriminating on the basis of gender which is clearly against the Constitution of India.

The Indian Penal Code needs serious reconsiderations as it cloaks behind the idea of sex and rape being correlated and rendering the pain of the other sexes invisible. The theory has its place but not at the cost of depriving others of the justice which they deserve.