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GENDER NEUTRAL RAPE LAWS IN INDIA: A STEP TOWARDS EGALITARIANISM¹

AUTHORED BY - VINAYAN SINGH

INTRODUCTION

"They shot me in the back. They put a cable around my neck and began choking me. The soldiers grabbed and held me down. They said, 'we are going to rape you. 'And they each took turns.'"²

"My name is John Kelly, and I'm a survivor of rape and intimate partner violence. I was raped twice while in college, but one of my experiences doesn't fit into traditional definitions of rape."³

India has been engaged in the battle to safeguard its female population for a considerable period of time. Given the continually increasing rate of criminal activities, it is crucial to ensure that the rise in such incidents is attributable solely to their occurrence and not due to the misuse of laws. Although women are frequently the primary victims, it is important to acknowledge the negative consequences for men resulting from the imprudent implementation of laws designed to protect women. Historically, the justification for enacting laws and regulations to benefit women has been based on their subordinate status in society during previous eras.

The Justice Verma Committee report first appeared in 2013, providing a beacon of hope for a society that had been engulfed by the chains of violence and power. In addition to its findings and recommendations, the panel stressed the need of being aware of the possibilities of sexual attack on males, as well as gay, transgender, and transsexual rape, in its report. But the organisations that had argued against the committee reports and recommendations came forward with unfounded objections to prevent the introduction of such a law in the country, and so The Criminal Law (Amendment) Act 2013 was passed without incorporating the suggestions that had been made.

¹ Author, Vinayan Singh is an Assistant Professor of Law at Chanderprabhu Jain College of Higher Studies & School of Law.

² Sarah Thrust & Josh Estey, DRC's male and female rape survivors share their stories, Aljazeera, (Apr. 15, 2020), <https://www.aljazeera.com/indepth/features/drc-male-female-rape-survivors-share-stories-200412123610314.html>

³ KELLY, John, "I'm a Survivor of Rape and Intimate Partner Violence—And I'm a Man" *TIME* (2 July 2014),

STATEMENT OF PROBLEM

The Criminal jurisprudence in India does not recognize rape of men. At most it is covered under section 377 of the IPC as an “unnatural offence”. We must, however, recognise that India's constitution has evolved to recognise the inherent dignity of every individual irrespective of gender. Being one of the bedrock values of constitutional democracies like India's, constitutional integrity is given significant weight by the country's judicial system. Recently, in December 2022, a man from Jalandhar alleged that he was raped by 4 women.⁴ Legal recognition of male sexual abuse is a crying need of hour.

RESEARCH QUESTIONS

1. What are the key factors driving the need for gender-neutral rape laws in India?
2. What are the different arguments favouring non-criminalisation of rape on men?
3. What are the proposed changes brought by the Criminal Law Amendment Bill, 2019?

RESEARCH OBJECTIVE

The objective of this research is to analyse the existing rape laws in India, the need for gender neutral laws and the legality of gender-neutral laws.

RESEARCH METHODOLOGY

This is a doctrinal research based on primary and secondary sources to understand different aspects of gender neutrality of rape laws in India.

SCOPE AND LIMITATION

The research only focuses on the rape laws. It does not include other gender specific laws like Stalking, Voyeurism etc.

CHAPTERIZATION

Chapter 1: Gender specific Rape Laws in India

Chapter 2: Arguments Against Gender Neutral Rape laws

⁴ “Four Women 'Rape' a Man in Jalandhar: Gender-Neutral Laws Are Crying Need of Hour” (*Firstpost* December 4, 2022) <<https://www.firstpost.com/opinion-news-expert-views-news-analysis-firstpost-viewpoint/four-women-rape-a-man-in-jalandhar-gender-neutral-laws-are-crying-need-of-hour-11747931.html>> accessed March 15, 2023

Chapter3: Criminal Law (Amendment) Bill, 2019; An Analysis

Chapter 4: Position of Rape Laws in Other Countries (USA, Canada and UK)

GENDER SPECIFIC RAPE LAWS IN INDIA

In recent years, equality between the sexes and the promotion of women's empowerment have gained widespread recognition as essential principles and concerns that span across all disciplines. Abuse of any type, including sexual abuse, must be categorically and unequivocally condemned in the strongest possible terms. If this kind of conduct were allowed to continue, it would be a violation of people's freedom and dignity, which are two things to which every person is inalienably entitled.

Not only do the acts of rape, sexual assault, harassment, and cruelty cause harm to the victim's physical, emotional, and psychological well-being, but these acts also reflect a growing acceptance of such behaviour in a society that claims to uphold the rule of law. As a result, these acts are considered to be serious issues.

The basic right to live with human dignity and the right to equality naturally involve protection from any kind of abuse or harassment. It should come as no surprise that the Constitution of India aims to grant basic liberties to each and every person, notwithstanding differences in gender.

SECTION 375 OF IPC

Section 375 of the Indian Penal Code, which was enacted in 1860, specifies that rape is a crime that is committed by a man against a woman. This section identifies only males as capable of committing violent acts and women as potential victims of such acts. On the other hand, it only considers the perspectives of the victim and the offender, and it doesn't take into account other possible scenarios, such as a man being sexually assaulted by another man, a man being sexually assaulted by a woman, or the rape of individuals who identify as being of a third gender.⁵

If we look at the crime of rape, there can be several forms of rape, according to the genders

⁵ SECTION 375, IPC

recognized in India (male, female, transgender⁶):

- Rape of woman by man
- Rape of woman by transgender
- Rape of woman by woman
- Rape of man by man
- Rape of man by woman
- Rape of man by transgender
- Rape of transgender by man
- Rape of transgender by woman
- Rape of transgender by transgender.

In India only one form of rape has been recognized by the Indian Penal Code i.e., Rape of woman by men.

Section 377 of the Indian Penal Code, 1860 addresses any kind of non-consensual sexual activity or intercourse between males and is classified as carnal intercourse against the order of nature.⁷ However, it does not define male on male sexual assault as rape, which is a concerning issue. It is disturbing that in India, non-consensual male on male sexual assault is treated the same as voluntary homosexual activity. Section 377 disregards the clear difference between coerced male on male rape and consensual sexual intercourse between individuals of the same sex.

ARGUMENTS AGAINST GENDER-NEUTRAL RAPE LAWS

Arousal implies consent

“I have doubts whether a woman can commit rape; the reason is that a man has to be aroused sexually to be able to have sex with a woman. If a woman tells a man that he must have sex with her, it won't work because the man will be so frightened and disorientated that he won't really be able to do it. Under that circumstance, the man won't be able to be in the proper physical mood to be able to have sex with the woman.”⁸

"To presume that women can rape men is rather outrageous. While women can sexually harass

⁶ NALSA V. UNION OF INDIA, Writ Petition (civil) No. 604 of 2013

⁷ SECTION 377, IPC

⁸ Vanguard, a Nigerian newspaper

men, they can't sexually assault them. There have been no such cases anywhere."⁹

The whole argument that men cannot be raped is based on the trite and archaic definition of rape which only recognizes penile-vaginal penetration as rape. The interpretation that arousal implies consent is flawed and is not in consonance with the modern-day society.

Case studies were conducted by Sarrel and Masters on a total of 11 male subjects who had been the victims of sexual assault at the hands of females. Even though the males felt humiliated, anxious, fearful, angry, and terrified, they reported experiencing physical sexual desire despite these negative emotions. In point of fact, a few of the males said that they had erections and ejaculated while the attack was taking on. In other instances, the fear of castration was sufficient to evoke a physical or sexual reaction from the subjects.¹⁰

According to the findings of the study that was conducted by Levin and van Berlo (2003), various different sources imply that just because a person feels arousal or an orgasm does not always mean that they have provided permission to the sexual stimulation that was experienced. The argument that the presence of evidence of genital arousal or orgasm indicates consent is unconvincing and should not be deemed a legitimate defence by the offender.¹¹

Also, after the Criminal law amendment of 2013, the definition of rape in India under section 375 of the IPC has been widened to include other forms of penetration including penile-vaginal penetration. Now, the criminal law in India also includes oral sex as rape. With such existing legal position there seems to be no rational reason as to why men should not be included as victims of rape.

Effect of rape is different on men and women

“The consequences of rape for a woman are far-reaching. She has to battle social stigma, social mindset. While fixing marriages, nobody asks a man if he is a virgin.”¹²

Another argument against gender neutral laws is that the effect of rape is different on men and women. It is based on the belief that the social trauma of rape is only towards women and not

⁹ Flavia Agnes in The Times of India

¹⁰ Sarrel PM, Masters WH. Sexual molestation of men by women. Arch Sex Behav. 1982 Apr;11(2):117-31. doi: 10.1007/BF01541979. PMID: 7125884.

¹¹ Levin RJ. Sexual arousal--its physiological roles in human reproduction. Annu Rev Sex Res. 2005; 16:154-89. PMID: 16913291

¹² <https://timesofindia.indiatimes.com/india/cabinet-nod-to-make-rape-gender-neutral-riles-womens-groups/articleshow/15049606.cms>

men. It is argued that the social stigma of rape operates only towards women and not men. It is also said that the mental torture of rape victim is more for women than men. Some arguments have gone to the extent of saying that men don't mind non-consensual sexual intercourse.¹³

In a study conducted by Walker, Archer, and Davies (2005)¹⁴, a group of 40 men who had experienced rape were interviewed, and the results showed that the effects of rape on men included several long-term consequences such as heightened anxiety, depression, increased feelings of anger and vulnerability, loss of self-image, emotional detachment, self-blame, and self-destructive behaviours.

Some studies have also concluded that the effect of rape on male victims is more than that of female victims. According to the findings of research conducted by Frazier (1993), which entailed the examination of 74 male and 1,380 female rape victims, male victims exhibited greater degrees of sadness and anger immediately after rape than did female victims.¹⁵

CRIMINAL LAW AMENDMENT BILL, 2019: AN ANALYSIS

On July 12, 2019, former member of parliament KTS Tulsi presented the Criminal Law (Amendment) Bill, 2019, as a private member bill in the Rajya Sabha. The measure seeks a change to India's rape laws that would make them equally applicable to both sexes, an idea that has been proposed before. The bill claims that the right to equal protection under the law is a basic right protected by the Indian Constitution. It also references earlier studies and legislation that dealt with the topic of gender equality. The Supreme Court's 2015 decision in *National Legal Services Authority v. Union of India*¹⁶, which established transgender people as a "third gender," is cited in the bill. The case of *Criminal Justice Society v. Union of India & Ors.*¹⁷ is also mentioned, in which the Supreme Court recommended that Parliament consider making rape legislation gender-neutral.

¹³ Author links open overlay panel Pamela A Ratner a and others, "Non-Consensual Sex Experienced by Men Who Have Sex with Men: Prevalence and Association with Mental Health" (*Patient Education and Counselling* April 30, 2002) <<https://www.sciencedirect.com/science/article/abs/pii/S0738399102000551>> accessed March 15, 2023

¹⁴ Walker J, Archer J, Davies M. Effects of rape on men: a descriptive analysis. *Arch Sex Behav.* 2005 Feb;34(1):69-80. doi: 10.1007/s10508-005-1001-0. PMID: 15772770.

¹⁵ "Apa PsycNet" (*American Psychological Association*) <<https://psycnet.apa.org/record/2001-05666-018>> accessed March 15, 2023

¹⁶ *National Legal Services Authority v Union of India*, (2014) 5 SCC 438.

¹⁷ *Criminal Justice Society v. Union of India & Ors.*, W.P.(C) No. 1262/2018 vide its Order dated Nov. 12, 2018.

The major changes proposed in the Indian Penal Code, 1860 are as follows:

- The inclusion of the phrase "transgender" in Sections 8 and 10, which, respectively, define the terms "gender," "man," and "woman,"
- The incorporation of Section 8A, which would provide a definition of modesty that is relevant to all genders,
- Changing the definition of "assault" in Section 354 to include "the use of unlawful force with the aim to offend modesty" in a new section that would replace Section 354,
- The offence of sexual harassment, as defined by Section 354A, has been rendered gender-neutral by the substitution of gender-specific phrases with gender-neutral ones such as "anyone" and "any person," among others.
- The crime of assault or the use of unlawful force with the aim to disrobe, which was formerly defined in Section 354 B, has been replaced by a new section, that refers to "any person" rather than "woman" in its subject matter. Moreover, gender-neutral versions of the definitions of voyeurism and stalking that are specified in Sections 354 C and 354 D, respectively, have been included.
- Under the definition of rape that is given in Section 375 of the bill, the terms "man" and "woman" are suggested to be replaced with the phrase "any person." This is an additional significant modification that is proposed in the bill. The scope of the term will therefore expand as a result of this, and protection will also be given to males and transgender people.
- The act of non-consensual handling of another person's genitalia or the use of words or gestures that generate the fear of unwanted sexual danger is defined as the crime of sexual assault in the bill's Section 375A, which describes the offence of sexual assault. The specified penalty is harsh incarceration that may last for up to three years, a fine, or all of these options together.
- Similar amendments have been proposed with regard to gang rape and rape committed by a person in a position of authority, which are covered under Sections 376 C and 376 D respectively.

POSITION OF RAPE LAWS IN OTHER COUNTRIES (USA, CANADA AND UK)

USA

The Federal Bureau of Investigation (FBI) revised their definition of rape for the Uniform Crime Reporting Program¹⁸ in the United States in 2013. The new definition encompasses any penetration of the vagina or anus by any part of the body or object, as well as oral penetration by a sex organ belonging to another person, regardless of how little the penetration may be. This revised definition acknowledges that rape is a crime that may be committed against either men or women and can entail the use of any penetrating instrument. Moreover, it covers incidents in which the victim was drugged and unable to put up a fight. The FBI expects that employing this new criterion for collecting data will result in an increase in the number of instances that are reported. Similarly, the definition of "sexual intercourse" in the state of Washington was changed in the year 2020 to include penetration of the vagina or anus by a person of the same sex or the opposite sex. This change went into effect.¹⁹

CANADA

Instead of the word "rape," the Canadian Criminal Code²⁰ refers to the offence of "sexual assault" under Section 271. Using the phrase "everyone" rather than "man" or "woman" makes this crime gender neutral. As per Section 151 of the Code, "Sexual interference" is also a punishable offence. In addition to being gender-neutral, the rule applies to "any individual who has sexual contact with another person, whether by touching a body part or an object."

UNITED KINGDOM

Although rape of men is recognised by Section 142 of the Criminal Justice and Public Order Act, 1994²¹, the perpetrator under this provision is limited to men. Therefore, the position in United Kingdom is that both, men and women can be victims of the crime of rape but the offender can only be a man.

¹⁸ "Crime in the U.S. 2013" (FBI May 14, 2014) <<https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/>> accessed March 15, 2023

¹⁹ Revised Code of Washington, Section 9A.44.010

²⁰ Branch LS, "Consolidated Federal Laws of Canada, Criminal Code" (*Criminal Code* March 6, 2023) <<https://laws-lois.justice.gc.ca/eng/acts/C-46/>> accessed March 15, 2023

²¹ Participation E, "Sexual Offences Act 2003" (*Legislation.gov.uk*) <<https://www.legislation.gov.uk/ukpga/2003/42/section/3>> accessed March 15, 2023

CONCLUSION

Law is not a static and dry topic; rather, it is dynamic and susceptible to continual change depending on differences in society, including new demands, altered values, and outdated concepts. As a result of these shifts, the law is always evolving to reflect these shifts. It is the role of the state to make, recognise, and enforce laws in order to have an effective legal system. This provides individuals with the ability to have trust that courts and state authorities will recognise and enforce regulations. The rule of law is an essential component of society, which is characterised by its complexity, fluidity, and emerging order. For peaceful coexistence, the observance of shared standards for behaviour is vital, and a body of laws provides the necessary framework for society. Legal philosophers like John Austin and Jeremy Bentham have divided the law into "what law is" and "what law ought to be." This distinction was made in order to analyse the law more thoroughly. In the current environment, regulations regarding rape are particularly protective of women in situations involving sexual abuse and rape. However, in reality, there are a variety of factors at play, and gender-neutral laws are required to ensure equal protection for all victims, including men, gay men, lesbian women, bisexuals, and transgender groups. This is the only way to guarantee that there will be no discrimination against any of these groups.

Equality is the signature tune of the Indian constitution and gender equality is amongst the most fundamental form of equality. Existence of rape against men and transgenders cannot be denied and it is very important to legally recognize rape of men and in furtherance make rape laws gender neutral.

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