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GENDER NEUTRALITY OF RAPE LAWS: A LEGAL STUDY OF INDIA

AUTHORED BY: ROHAN GOWDA H V

1. INTRODUCTION

1.1 ABSTRACT

Rape and sexual assault is a crime which is highly prevalent in India, especially against women. However, instances of men and people who identify as non-binary gender being victims of this crime have been coming to light. To promote the interests and welfare of its people, the right against discrimination on the basis of religion, race, caste, sex or place of birth is provided to the citizens of India under article 15 of the Indian Constitution. This right plays a very important role to maintain justice and equality in the country and to protect its citizens. In spite of this, instances of gender discrimination against people belonging to the LGBTQ+ community and men can be seen as there is no law in place which provides protection to these people against rape and sexual assault. Section 375 of the Indian Penal code clearly specifies that a victim of rape can only be a woman and the perpetrator is always a man. Due to lack of safeguards for men and the LGBTQ+ community, they continue to be harassed and sexually violated. This study aims to bring to light the instances of male rape and sexual assault against LGBTQ+ community prevalent in India and the role played by existing provisions in safeguarding people from Sexual assault and rape. The study also examines and assess whether the existing provisions are sufficient and reasonable to protect people regardless of gender from instances of rape. The paper brings to light the harsh reality of how there is no gender neutrality of rape provisions in India and how gender roles are deeply rooted to the Indian society. It also highlights the need for a comprehensive gender neutral rape laws to be introduced in India to safeguard all from rape regardless of gender. The argument here is that rape against men and non-binary gender is continuing to increase due to insufficient laws and legal framework and that there is a need to reform and introduce new laws to curb rape in India.

1.2 KEYWORDS:

women perpetrators, homosexual rape, Section 375, Rape, gender neutral rape laws, India, gender roles

1.3. RESEARCH PROBLEM

Rape is widely acknowledged as one of the most serious crimes in India. The reality of men and other non-binary genders, such as members of the LGBTQ+ community experiencing similar circumstances is ignored by society as well as the laws. Rape is though to be exclusively committed by a man against a woman. The laws that are currently in place In India regarding rape also very clearly reflect this societies mindset. Section 375 of the Indian Penal Code is one such law that defines rape as having sexual relations with a woman. This provision makes it clear that a woman is the victim of rape, disregarding the fact that anyone can fall victim to such a horrible crime.

Although there have been many instances of women being the victims of rape, there are also more and more instances of men and non-binary genders falling victim of the same crimes. There is a gap in the current laws because the provisions do not acknowledge this. This paper emphasises on the need for gender neutral rape laws while focusing on how anyone can be a victim of rape, irrespective of gender. The Indian Constitution guarantees social security and equality and it forbids discrimination based on the person's gender. The laws that are in place now violate the constitution and infringe the rights of men and non-binary genders.

1.4. RESEARCH QUESTIONS

1. What is the historical evolution of rape laws in India and what amendments were brought to make the rape laws more inclusive?
2. How does gender roles contribute to gender specific provisions in India?
3. Whether the current rape laws provide sufficient safety and protection to all the genders?
4. Whether there is a need for gender neutral rape laws in India?
5. What is the step forward to implement gender neutral rape laws in India?

1.5. RESEARCH OBJECTIVES

1. To examine the historical context of rape laws in India
2. To analyse the existing rape laws in India and the impact of these laws on men and Non-Binary genders
3. To explore the stereotypes and stigmas that influence the reporting and prosecution of rape cases among men and Non-Binary genders
4. To examine the arguments for and against gender neutral rape laws

5. To propose suggestions and recommendations that could make rape laws In India more gender inclusive and neutral.

1.6. RESEARCH METHODOLOGY

The research methodology used for this paper is Doctrinal in nature. Doctrinal research is a method of legal research which focuses on analysing and interpreting existing legal sources and materials to understand and analyse the law. This type of research includes a study of statutes, case laws, doctrines, regulations and other legal texts to understand legal frameworks.

2. BACKGROUND

Rape is considered to be one of the most heinous crimes however the Indian law provisions related to rape are currently gender specific, which means that the laws are biased towards women. Due to the societal norms, it is considered that rape is something which is committed against women by men and this notion is also supported by the existing rape provisions such as section 375 of the IPC.¹ The provision clearly defines that rape is a crime which is carried out by a man against a woman. Hence it clearly identifies that the perpetrator is always a man and that the victim is always a woman. This ignores the prevalence of rape against men as well as non-binary genders. Due to this, men and the non-binary genders continue to suffer in society. Due to the absence of an adequate law which protects and serves justice for rape against them, many of the crimes remain unreported and they continue to be sexually harassed and assaulted. There can be seen an increase in the number of such cases coming to light however many still go unreported. Hence it can be clearly seen that rape is a crime which is not just committed against women but also against men and non-binary genders and due to the failure of the Indian laws to recognise this, people are continuing to suffer.²

3. HISTORY OF RAPE LAWS IN INDIA

The Latin word that gave rise to the English word rape means to seize. Rape literally means "forcible seizure." Usually, when a woman is violated without her consent through the use of force, fear, or fraud, it is referred to as rape. The definition of rape and the associated penalties are both outlined in Indian legal codes. The definition of rape is found in Section 375 of the Indian

¹ section 375 of Indian Penal Code

² Flavia Agnes, *Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law*, 9, *Economic and Political Weekly* 37,844–47, (2002)

Penal Code. Both in 1983 and 2013, this provision was changed to make India's rape laws more inclusive and comprehensive.³

However in spite of the provision being amended multiple times to make it more inclusive, the law still omits to recognise that any person regardless of their gender can be a victim or perpetrator. It continues to follow the old, traditional gender roles and considers only women as victims and men as perpetrators.

The meaning of rape was initially confined only to penile-vaginal intercourse however, the Mathura rape case⁴ brought significant changes in the understanding as well as the meaning of rape and led to significant changes in the rape provisions. The court in this case, gave the judgement that there the victim was not raped based assumption that the absence of injuries amounted to consent and based on the record of sexual activity of the victim. However, women activists condemned the judgement and demanded significant changes in the rape provisions. Firstly, they demanded that the absence of injuries cannot be considered to be proof of consent and that the burden of proof should be shifted on the accused. Secondly, they demanded in camera proceedings of the case and non-revelation of the name of the victim to protect their identity. Lastly, they demanded that the history of sexual activity of a person should be irrelevant while deciding a case of rape. These were accepted by the Chief Justice and led to revolutionary changes in the rape provisions. This led to the Criminal Law (Amendment) Act, 1983 where the demands of the activists were accepted and their rape provisions were amended to include the demands.

The Nirbhaya rape case⁵ further led to significant changes in the rape provisions. After this case, The Criminal Law (Amendment) Act, 2013 was passed which introduced various provisions for stalking, trafficking, acid attacks as well as sexual harassment. This case also led to the inclusion of non penetrative rape, oral, anal as well as usage of objects. The court made acid attacks gender neutral however, rape was not made gender neutral.

There have been numerous instances where people as well as law makers have tried to make the rape provisions gender neutral but have failed. The recognition of the fact that such a crime is gender neutral is very important and is the need of the hour.

³ SEN, RUKMINI, *Law Commission Reports on Rape, Economic and Political Weekly* 45, 44, 81–87, (2010)

⁴ Tuka Ram and Anr v. State of Maharashtra, AIR 1979 SC 185

⁵ Mukesh and Anr v. State of NCT of Delhi and Ors (2017) 6 SCC 1

In the case of *Sakshi v Union of India*,⁶ the supreme court of India directed the law commission to make the rape provisions gender neutral and make it more inclusive. The law commission following the orders, suggested changes in the provisions to be gender neutral. However this failed due to the perspective of the society that women are not capable of committing such a crime against a man.

In another case of *Priya Patel v. State of Madhya Pradesh*, a group of women were accused of rape but the court dismissed the case on the grounds that women cannot commit rape.⁷ This shows that even though there are cases registered which bring to light the harsh reality of rape, it continues to be ignored on the basis of the gender roles played by different genders in the society. When cases of women being raped can lead to significant changes in the rape provisions, it is difficult to understand why the state continues to ignore the reality of men being raped even when such cases are being brought to light.

4. GENDER ROLES AND THEIR CONTRIBUTION TO GENDER SPECIFIC RAPE PROVISIONS

The gender roles prevalent in the society is one of the main causes for the gender specific rape laws in India. The society, due to history, has fixed certain roles for men and women in the society. Women are often associated with being emotional, weak and confined to the household while men are considered to be strong, physically as well as emotionally, to be the breadwinners of the household and the head of the house. Due to these established gender roles, the fact and reality of men being victims of sexual assault is ignored and unbelievable.

One of the main arguments is that women cannot rape men and women do not rape men. It is based on the notion that it is physically impossible for a woman to rape a man. It is assumed that even if a man is in that position, he has the ability to defend himself. This is due to the gender roles rooted in the society which portrays a man as being physically stronger than a woman. It ignores the fact that each individual is different from that of another and that men cannot be associated with strength.

⁶ *Sakshi v Union of India*, AIR 2000 SC 3479

⁷ Harsh singh & Prachie singh, *Gender neutral rape laws in India need a stricter and inclusive regime*, 2, International journal of legal science and innovation, 23-52, (2020)

Further, various statistics and data show that woman do commit rape and have the capacity to commit rape and that male rape does take place in the society. The reality and the experiences of men cannot be ignored only on the belief in gender roles.

It is also further assumed that men always give consent to sexual activities. This is not true. The gender roles and the concept of masculinity force people to indulge In sexual activities and this should be taken as a serious violation of a person. It is perceived that male arousal is an indication of consent but arousal is not an indication of consent.⁸ It is ignored that fear or threat can also cause such physical responses and it should not be misunderstood to be consent.

Another important assumption made about men due to the fixed gender roles in the society, is that there is a presumption that men do not go through the same things that a woman goes through when they are sexually assaulted.⁹ It is always presumed that women go through more as compared to a man. However in reality, rape is something which traumatises a person regardless of the gender not just physically but also mentally and emotionally. The coping mechanism of each person is very different and this cannot be generalised to a particular gender.

These assumptions made about men cannot be generalised for all men and this fails to portray the true realities. This characterisation forces men to not report crimes committed against them and forces them to remain silent even when they want to take any action. The absence of adequate regulations and laws to provide protection to men deters them from reporting rape as there is not solution for the same. It is the need of the hour for the state to recognise this issue and pass adequate laws to help provide safety and justice to the victims.

5. LGBTQ+ COMMUNITY AND RAPE

The LGBTQ+ community has been facing discrimination as well as marginalisation for a very long period of time. This is due to social, cultural as well as legal biases.¹⁰ They are seen as different people and are excluded from society. Sexual assault and rape are two crimes which the people belonging to the community face a lot because of the absence of proper legal safeguards.

⁸ Md. Ali Ibrahim, Step Towards Gender Neutral Sexual Offences in India, 8, International Journal of Creative Research Thoughts, 3234, 3240,

⁹ Anshul Rana, Gender Neutral Laws- A Critical Study in India, 2, International Journal For Research and Analysis(2022)

¹⁰ Shubhi Verma & Alok Anand, Gender Neutral Laws - Is India Ready?, Jus Corpus Law Journal, 718, 733 (2022)

The fear of being labeled as outcasts or the fear of experiencing more discrimination leads the LGBTQ+ community to remain silent against the crimes they face on a regular basis. The absence of laws against this further creates an environment where the perpetrators take advantage as they are not held accountable for their acts.

Gender specific rape laws have a negative affect on the LGBTQ+ community because in a case where both the victim as well as the perpetrator is of the same gender, the law does not provide any protection to the victim. This clearly is discrimination and exclusion on the grounds of gender which violates Article 15 of the constitution. Some jurisdictions, recognise the cases of sexual assault committed against a transgender and provide the necessary relief, however the remaining people of the LGBTQ+ community continue to be ignored and exploited due to gender specific rape laws.

This further facilitates the lack of recognition of the LGBTQ+ community among the society. Section 377 was declared to be unconstitutional and consensual sexual intercourse among people of the same gender is not considered to be unlawful. The state has recognised that sexual intercourse is not unlawful, but fails to recognise that the same can be misused and the same can be used to violate someone sexually.

The challenges that are faced by the LGBTQ+ community and the ignorance of their experiences, clearly reflect that there is discrimination on the grounds of gender and that adequate safeguards should be given to all genders.

6. ARGUMENTS FOR AND AGAINST GENDER

NEUTRAL RAPE LAWS

ARGUMENTS FOR GENDER NEUTRAL RAPE LAWS

Protection against rape and sexual assault is a human right and it is the states obligation to provide safety and protect this right. the right to life is a basic human right and rape is in direct violation of this right and its the states duty to protect the human rights of its citizens. Article 15 of the constitution prohibits discrimination on the grounds of gender. However, these gender specific rape laws are in clear violation of the right as it discriminates men and LGBTQ+ community on

the grounds of gender and excludes them from the provision.¹¹

Further the Universal declaration of Human Rights clearly aims to protect the dignity of all the people regardless of any discrimination on any grounds. Everyone should be equal before the law and everyone should be protected equally by the law. Article 14 provides this but the existing rape provisions are directly violating this and should be reformed.¹² It is important to give equal protection to all regardless of gender and prevent discrimination.

Gender neutral rape laws can also encourage the victims to come forward and report the crimes and can be an attempt to change the mindset of the society and can lead to a change in the understanding as well as implementation of gender roles in the society.

ARGUMENTS AGAINST GENDER NEUTRAL RAPE LAWS

Firstly, India being a patriarchal society, making the rape provisions gender neutral will attract widespread contention as the society is of the view that such acts happen only to women. Further the gender roles which are deeply rooted to the society will deter the people from understanding the true realities of the crime. The rationale behind passing such a law will be highly misunderstood by the people.

Further there is always a threat of counter complaints as an act of revenge for the crime being reported. Making rape provisions gender neutral can attract a lot of fake and false complaints which will lead to a lot of money, manpower, time destruction. However at the same time, due to the fear of counter complaints, the justice which should be given to a person cannot be denied.

Further the main important reason for gender specific rape laws is due to insufficient evidence and reports of rape against men and non-binary genders. There is insufficient information as well as evidence to prove that women can rape other people or that people who are not women also get raped. However at the same time it is important to analyse the reasons for the lack of evidence and reports. There is a prevalence of such instances however they do not report it due to societal pressures and lack of laws to protect and give remedies for such acts.

¹¹ Aditya Raj, Gender Neutral Rape Laws: Not As Simple As You Might Think, First India, Aug 28, 2022, at 11

¹² Satya Muley, GENDER NEUTRAL LAWS, India Legal, Apr 6, 2023

7. SUGGESTIONS

Even though there exists drawbacks of making the rape provisions in India gender neutral, it is the need of the hour. Every law, every act, every regulation has drawbacks but this should hinder a person from getting justice for any crime committed against him.

The first step towards this is to make all the sexual offences gender neutral. Currently, all the laws in place relating to sexual offences especially rape identify only woman as victims and men as perpetrators.¹³ This should be changed to identify that anyone, regardless of gender can be considered a victim or perpetrator.

For instance there should be a substitution of the word women or men in all the provisions and make it gender neutral by mentioning any person or anyone. For example, substituting the term any man (while referring to the perpetrator) to any person and substituting any woman (while referring to the victim) to anyone in section 375 of the Indian Penal Code.

Such substitution of words in an attempt to make the laws gender neutral is just one facet of the aim. To achieve gender neutral rape laws in India, it is important :

1. For the government to conduct regular surveys, statistics in order to collect the actual data related to sexual assault to gather information about how many people are coming forward to report and will also help the state to know the true gravity of the crimes
2. It is important to conduct awareness programs for all genders to provide information about the rights, laws and remedies available to them and to conduct gender sensitisation programs to move away from the stringent gender roles in the society.
3. Establishment and encouragement of correctional as well as rehabilitation facilities for providing help to the victims, regardless of gender and to ensure counselling facilities are available to all.
4. Educating children as well as adults about abuses, good touch and bad touch by all genders.
5. Encourage victims to come forward and report the crimes by providing them with the right kind of support and guidance to receive justice.

¹³ Nikunj Kulshreshtha, Ought The Rape/ Sexual Assault Law in India be Gender Neutral?, SSRN Electronic Journal, 2019

6. To educate and spread awareness and provide additional training to the police officers to be gender sensitive and not dismiss or discriminate against anyone on the grounds of gender.

8.CONCLUSION

The paper aims to highlight the necessity of gender neutral rape legislation in India. In order to highlight the fact that, despite revisions, the rape provisions still exclude men and LGBTQ+ community, the paper discusses the history of the laws and the changes made to them over time. The paper attempts to shed light on the realities of rape cases involving men and the LGBTQ+ community and how the state still disregards them using a variety of case studies. These individuals are not currently protected from rape and sexual assault by any means.

The *Priya Patel v. State of Madhya Pradesh* demonstrates the perception of male rape cases held by both the state and the general public. The article continues by outlining how one of the primary obstacles to gender neutral rape laws in India is the societal norms surrounding gender roles.

It is challenging for people to see reality and acknowledge that men are also victims of sexual assault because of the way that people think about and towards men. Men are becoming more and more separated from the reality due to the notions that they cannot be raped and that women cannot rape them, the lack of concept of consent for men and the assumption that men react differently to sexual assault than women.

The exclusion of the LGBTQ+ community from the rape provisions has left them in situations akin to those faced by men. The refusal to acknowledge same-sex sexual assault is an infringement on people's rights and contributes to their non-recognition. Since there is no law that forbids crimes against them, it also makes it easier for crimes against them to be committed. It is important to acknowledge the difficulties that men and the LGBTQ+ community face and to take proactive measures to address this problem in order to protect all people regardless of gender.

The paper then goes on to talk about the arguments for and against gender neutral rape laws and highlights the fact that in spite of there being threats of misuse and counter complaints, one's right to justice cannot be denied on these grounds. The rights given to a citizen of India clearly state that law provides protection to all and the same must be upheld.

Finally, recommendations are made to guarantee the introduction of gender neutral rape laws. To effect this change, a change in the language of the laws and provisions alone will not be enough. For the goal of protecting everyone, regardless of gender, to be fully realised, there must be a radical shift in the mindset of the entire society.

