

10. Need of Gender-Neutral Rape Laws in India

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Pg. No: 134-145

i. Abstract

Indian law is based on the belief that a victim of rape can only be a woman. There is a belief in the society that rape is a crime committed by men against women. India has a patriarchal mindset which negates the male victimisation. There are many incidents of rape of females as well as transgender, but there is less reporting of these cases. This has resulted in no specific data of male rape in India. There have been many efforts to make gender-neutral rape laws, but still, India does not have gender-neutral rape laws. There is a pressing need to recognize that women can and do rape men. The constitution of India envisages the fundamental principle of equality and we must strive to give effect on the principle of equality in sexual offences, to ensure justice to all.

In this research paper, the author has tried to critique the idea of gender specificity in Indian rape laws. We should have a human rights approach towards the gender-neutrality of rape laws. We must strive to negate the role of gender in identifying the perpetrators and victims in rape. Under Section 375 and 376 of the Indian penal Code, 1860, only the man is the perpetrator of committing rape and only women can be the victim. The researcher has tried to analyse the situation of gender-neutral rape laws in other countries and have also traced the rape law reforms that have taken place in India. The author has tried to provide a solution to the problem of gender-neutral laws against sexual offences in India.

Table of Contents

| S. No. | Title | Pg. No. |
|-------------------|---|--------------------|
| i. | Abstract | 135 |
| 1. | Introduction | 137 |
| 2. | History of Rape Laws in India | 137 |
| 3. | Reforms in Indian Rape Laws | 138 |
| 4. | Position Regarding Rape of Males in Different Countries | 140 |
| 5. | India's Response to Gender Neutrality of Rape Laws | 140 |
| 6. | Arguments Against Gender Neutrality of Rape Laws | 143 |
| 7. | Conclusion | 145 |

1. Introduction

In India, the rape laws are based on the belief that only women can be the victims. This arises from the assumption that rape is an act of sex alone¹⁷⁶ to satisfy the sexual desire of the perpetrator. But, there is a need of awareness that sexual assault is not only an act of lust and desire but also a manner of showing dominance or superiority of one caste, class, religion, community over the other and are acts of power and humiliation.¹⁷⁷

The Law Commission in its 172nd Report submitted in 2000 has recommended that the rape law must be gender-neutral.¹⁷⁸ The principle of equality before the law and equal protection rights as enshrined in fundamental rights of our constitution must be applied here as well.¹⁷⁹

We cannot deny the fact that there is no rape of males. The gender-neutral laws of sexual assault would result in protection of all identities.

2. History of Rape Laws in India

We can trace back the history of rape laws in India from 1980 where reformation of rape laws in India was started by Indian women's movement. Women's group have for a long time struggled to broaden the definition of rape.¹⁸⁰ Before the 2013 amendments¹⁸¹, rape has been restricted to only penile-vaginal form of penetration.¹⁸²

The Mathura rape case¹⁸³ is a landmark case which reformed the rape laws in India. In this case, a young girl named Mathura was raped by a policeman in Maharashtra. The sessions court

¹⁷⁶Narrain, A. (2013). Violation of Bodily Integrity. *Economic and Political Weekly*, 48, (No. 11). Retrieved from <http://www.epw.in/commentary/violation-bodily-integrity.html> on January 5, 2014.

¹⁷⁷ *Id.*

¹⁷⁸ Agnes, F. (2002). Law, Ideology and Female Sexuality. *Economic and Political Weekly*, 844-847.

¹⁷⁹ *Id.*

¹⁸⁰ *Sakshi vs. Union of India*, AIR 2004 SC 3566.

¹⁸¹ The Criminal Law (Amendment) Act, New Delhi: The Gazette of India (2013).

¹⁸² Shweta Kabra, *Gender Neutral Laws- How Needful in India?*, Published in Articles section of www.manupatra.com.

¹⁸³ *Tuka Ram and Anr vs State of Maharashtra*, 1979 AIR 185.

held that she had sexual intercourse while at the police station but rape had not been proved and that she was habituated to intercourse.¹⁸⁴ The sessions court acquitted both the policemen.

The High Court reversed the order of acquittal. When the case reached the Supreme Court, it overturned the High Court verdict saying that “the intercourse in question is not proved to amount rape”.

The apex court said no marks of injury were found on the girl after the incident and “their absence goes a long way to indicate that the alleged intercourse was a peaceful affair”.¹⁸⁵ Court held that the absence of injuries implies consent.

This case led to a movement shifting the burden of proof regarding consent to the accused. Also, this case led to the reformation that rape trials should be held in-camera proceedings and the victim’s name should not be published. The victim sexual history should not be seen while deciding the case. This case has brought various reformation and amendments in the Indian rape laws.

3. Reforms in Indian Rape Laws

3.1. The Criminal Law (Amendment) Act, 1983

The Criminal Procedure Code was amended to provide for in-camera rape trials.¹⁸⁶ There was an amendment in Section 228 of Indian Penal Code, 1860 and it became an offence to disclose the identity of a rape victim.¹⁸⁷ Under Section 376(2), enhanced punishment was made for custodial situations. There was an amendment in the evidence act also that made a presumption of the absence of consent in certain situations.¹⁸⁸

¹⁸⁴ Soibam Rocky Singh, *Explained: The laws on rape and sexual crimes, December 17, 2019*, The Hindu, https://www.thehindu.com/news/national/what-are-the-laws-on-rape-and-sexual-crimes/article30233033.ece_

¹⁸⁶ The Criminal Law (Amendment) Act, Section 327 (1983).

¹⁸⁷ Indian Penal Code, 1860 , Section 228-A

¹⁸⁸ India Evidence Act, 1871, Section 114-A.

3.2. The Indian Evidence (Amendment) Act, 2012

The Indian Evidence (Amendment) Act of 2002 prohibited the defence from putting questions in cross-examination of the prosecutrix about her general moral character and sexual history.¹⁸⁹

3.3. Reports

The 172nd Law Commission Report, 2000 recommended to make rape laws in India gender-neutral to protect the male victims also. The Justice Verma Committee Report recommended a gender-neutral law for the victim but a gender-specific law for the offender.¹⁹⁰

3.4. The Criminal Law Amendment Act 2013

The Delhi Gang Rape led to many reformations in the rape laws in the Indian Penal Code. There was amendment under Section 375 of the Indian Penal Code, that made the definition of rape more broadened. It not only included penile-vaginal penetration but oral, anal, and insertion of any object into vagina, urethra or anus of a women as well.¹⁹¹ The punishment for rape was enhanced in aggravated and non- aggravated situations.¹⁹²

¹⁸⁹ Satish, M. (2013). Virginitv and rape sentencing, Times of India, the crest ed., retrieved from <http://www.timescrest.com/society/virginitv-and-rape-sentencing-9566> on January 8, 2014.

¹⁹⁰ Supra Note 7.

¹⁹¹ The Criminal Amendment Act, 2013, Section 375.

¹⁹² The Criminal Amendment Act, 2013, Section 376.

4. Position Regarding Rape of Males in Different Countries

In the UK, under the **Criminal Justice and Public Order Act, 1994**, for the first time rape of males were recognized. Later **Sexual Offences Act, 2003 (England and Wales)**, includes even non-consensual penetration through the mouth.¹⁹³

In Scotland, the “**Sexual Offences (Scotland) Act, 2009** brought changes into the rape laws. It redefined the rape as “*The intentional or reckless penetration of the penis (to any extent) into the vagina, anus or mouth of another person, without that person consenting and without any reasonable belief that consent was obtained*”.¹⁹⁴

In South Africa, a study found out that 9.6% of men reported male-on-male sexual violence victimization and 3.0% of them reported rape perpetration; 3.3% had been raped by another man, and 1.2% of them were perpetrators of male-on-male rape. Also, homosexual men were over nine times more likely to have been raped and are four times more likely to report the crime as opposed to heterosexual males.¹⁹⁵

In the USA, through a study, it was found out that approximately 25,000 males in the United States were subjected to an aggravated form of sexual abuse or rape in the year 2009.¹⁹⁶

5. India’s Response to Gender Neutrality of Rape Laws

In India, it is considered that the offences of sexual assault or rape cannot be committed against men. The definition of rape is very narrow and it is considered that only a man can commit these offences against women. The gender neutrality of rape laws in India is not considered.

¹⁹³ The scope of male rape: A selective review of research, policy and practice, ResearchGate, https://www.researchgate.net/publication/317729028_The_scope_of_male_rape_A_selective_

¹⁹⁴ *Id.*

¹⁹⁵ KL Dunkle, R Jewkes, *Consensual male-male sexual activity and male-male sexual violence: prevalence and associations with HIV infection from a population-based household survey in South Africa*, 10(6) *PLOS MED*, (2013), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3708702>.

¹⁹⁶ National Institute of Justice & Centers for Disease Control & Prevention, *Prevalence, Incidence and Consequences of Violence Against Women Survey* (1998), available at <http://rainn.org/get-information/statistics/sexual-assault-victims>.

In the case of *Sudhesh Jhaku vs KC Jhaku*¹⁹⁷, the issue of gender neutrality of rape laws was first raised. The Delhi High Court has to determine whether the pre-2013 definition of rape includes non-penetrative sexual acts. The court went beyond and also considered the issue of gender neutrality of rape laws in India. Justice Jaspal Singh opined that there is a need for gender-neutral terms in the offence of rape.

In 1997, a Delhi-based group, Sakshi, filed a writ petition before the Supreme Court of India requesting it to reconsider the question that had arisen in the case of **Sudhesh Jhaku vs KC Jhaku**.¹⁹⁸

In 1997, in the case of *Sakshi v Union of India*¹⁹⁹, the court framed the “precise issues” to be considered by the Law Commission of India. Then in the **172nd Law Commission Report**, there was a recommendation that the offence of rape should be substituted by a completely gender-neutral offence of “sexual assault”.²⁰⁰

In the **Criminal Law (Amendment) Bill, 2012** the recommendations of the Law Commission Report was proposed.²⁰¹ But, in the opening statement of Ms Indira Jaising to the Justice Verma Committee (JVC), labelled this move as unacceptable since rape was to be always characterized as a crime constitutive of patriarchy, and therefore, gendered.²⁰² The government did not take into consideration the suggestions of JVC. The committee in its recommendation suggested that the right to sexual orientation is a human right guaranteed by the fundamental principles of equality.²⁰³

Article 14 of the Indian Constitution states that the State shall not deny to any person equality before law or the equal protection of the laws within the territory of India.²⁰⁴ Article 15(1)

¹⁹⁷ Sudesh Jhaku v K C Jhaku 1998 Cri LJ 2428.

¹⁹⁸ Harshad Pathak, *Beyond the Binary: Rethinking Gender Neutrality in Indian Rape Law*, Asian Journal of Comparative Law, 11 (2016), pp. 367–397.

¹⁹⁹ *Sakshi v Union of India* (1999) 6 SCC 591

²⁰⁰ Law Commission of India, 172nd Report: Review of Rape Laws (New Delhi: Ministry of Law and Justice, Government of India, 2000) at para 7.2.

²⁰¹ Section 5, Criminal Law (Amendment) Bill, 2012 (India).

²⁰² Supra note 23.

²⁰³ Justice J.S.Verma, Justice Leila Seth and Gopal Subramaniam, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW, 416, (2013)

<http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>.

²⁰⁴ Article 14, Constitution of India, 1948.

states that state shall not discriminate against any citizen on grounds only of religion, race, caste, place of birth or any of them.²⁰⁵

However, Article 15(3) states that nothing in this article shall prevent the state from making any special provision for women and children.²⁰⁶ But this provision does not restrain the government to make laws to protect the lawful interests of the male community and that's where the state fails to perform its obligations to provide equal protection of law to every citizen of the country.²⁰⁷

In the case of *Bodhisattwa vs Shubhra Chakraborty*²⁰⁸, the court opined that rape violates the basic human rights enshrined in the Indian Constitution.

India is a signatory to the International Conventions related to Human Rights, and therefore, being so, the State has an obligation to protect the human rights of all the human beings residing within its territory.

Human Rights are owned by States to all the individuals within their jurisdictions and in some situations also to groups of individuals. The principle of universal and inalienable rights of all human beings is thus solidly anchored in international human rights law.²⁰⁹

India is a party to several international covenants on the rights of individuals, such as The Universal Declaration of Human Rights, 1948, The International Covenant on Civil and Political Rights, 1966 and The International Covenant on Economic, Social and Cultural Rights, 1966. Every person is equal before the law and is entitled to equal protection of the law without any differentiation.²¹⁰

²⁰⁵ Article 15(1), Constitution of India, 1948.

²⁰⁶ Article 15(3), Constitution of India, 1948.

²⁰⁷ Arjit Mishra, *Gender Neutral Rape Laws: Need of the Hour*, The Criminal Law Blog, National Law University, Jodhpur, May 1, 2020, <https://criminallawstudiesnluj.wordpress.com/2020/05/01/gender-neutral-rape-laws-need-of-the-hour>.

²⁰⁸ *Bodhisattwa vs Shubhra Chakraborty* 1996 AIR 922.

²⁰⁹ Chapter 1, International Human Rights Law and the Role of the Legal Profession: A General Introduction.

²¹⁰ Article 7, Universal Declaration of Human Rights, 1948.

One of the main reason of not having gender-neutral rape laws in India is the argument that this would result in complaints of rape by women being met by counter-claims resulting into building pressure on them to withdraw their complaints.²¹¹

On July 2019 KTS Tulsi, a senior lawyer and Parliamentarian in the Rajya Sabha also brought a gender-neutral bill (“Criminal Law Amendment Bill, 2019”) before parliament to make the rape laws gender-neutral in India. As per him:

*“Law needs to be balanced. The balance has been disturbed. All sexual offences should be gender-neutral. Men, women, and other genders can be perpetrators and also victims of these offences. Men, women and others need to be protected.”*²¹²

The gender-specific words like “any man” and “any woman” mentioned in Section 354A, 354B, 354C, 354D, 375 and 376 of Indian Penal Code should be replaced gender-neutral words like “any person”.²¹³

There should be protection to all genders i.e. women, men, transgender. There is a pressing need to have gender-neutral laws for sexual offences.

6. Arguments Against Gender Neutrality of Rape Laws

Many arguments are against the gender neutrality of rape laws in India. They are:

²¹¹ TNN, *Activists join chorus against gender neutral rape laws*, THE TIMES OF INDIA, (March 9, 2013), http://articles.timesofindia.indiatimes.com/2013-03-09/india/37580560_1_gender-human-rights-groups-women-activists.

²¹² Aneesha Mathur New Delhi July 13, 2019UPDATED: July 13 & 2019 23:44 Ist, *Bill to make sexual crimes gender neutral introduced in Parliament*, India Today, <https://www.indiatoday.in/india/story/bill-to-make-sexual-crimes-gender-neutralintroduced-in-parliament-1568504-2019-07-13>.

²¹³*The Criminal Law (Amendment) Bill, 2019 and Gender-Neutral Sexual Offences in India*, The Criminal law Blog (2020), <https://criminallawstudiesnluj.wordpress.com/2020/03/27/the-criminal-law-amendmentbill-2019-and-gender-neutral-sexual-offences-in-india>.

6.1. Lack of Statistical Evidence

There are no official statistics to evidence that non-females are raped in India or that women can rape another person.²¹⁴ There is less reporting of non-female rape cases. However, this does not eradicate the possibility of such incidents. There is a belief in the society that it is still men who are raping and women who are being raped.²¹⁵ In India, several attempts have been made to address the aforementioned concerns, and limit the frequent references to gender-based stereotypes.

As noted in the JVC Report, “evidence of the victim of rape is on the same footing as the evidence of an injured complainant or witness. Her testimony alone is sufficient for conviction.”²¹⁶ According to sociological studies, there is a tendency of blaming the victims for their experience of rape, notwithstanding whether the victim is male, female, or transgender.²¹⁷ It is argued that the general belief persists that either man cannot be raped, or if they are, so few men are raped that it becomes a freaked occurrence.²¹⁸

6.2. Gender-neutral rape laws would result in counter complaints

Gender-neutral rape laws will allow men to file a false case of penetrative sexual assault against women.²¹⁹ There might be counter complaints of rape by men for every complaint of rape by women. The JVC opined that “there is, naturally, a certain degree of institutional bias against women. Their complaints are not taken seriously by the police. On account of the patriarchal

²¹⁴ Supra note at 23.

²¹⁵ *Id.*

²¹⁶ Supra note at 28.

²¹⁷ Phil RUMNEY, “*In Defence of Gender Neutrality Within Rape*” (2007) 6(1) *Seattle Journal for Social Justice* 481 at 485.

²¹⁸ MICHAEL SCARCE, “*MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME*” 8–9 (1997).

²¹⁹ Submissions to Justice Verma Committee by All India Democratic Women’s Association (AIDWA) and Women’s Groups”, 4 January 2013.

structure, the male police officers do not take complaints of rape seriously.”²²⁰ This will result into increase in fake counter complaints.

7. Conclusion

There is a dire need for gender-neutral rape laws in India. There is an urgent need that we recognize sexual violence against males and transgender community. India has a patriarchal mindset which negates the consequences that men can be raped too. The researcher has concluded that there can be sexual violence against males and transgender. The presence of rape of males and transgender cannot be denied. However, we cannot ignore the increase in misuse of gender neutrality of rape laws. This might result into increase in fake counter complaints.

Justice Verma Committee in its report has suggested a midway solution to make the victim gender-inclusive while the perpetrator remains gender-specific.²²¹ This will help in protecting rape against male and transgender. There is a need to have legislation that will protect all persons against sexual offences. We must also have a strong law against false complaints and misuse of law. Inclusion of words like “any person” will ensure gender neutrality.

There is a pressing need to reform the old archaic laws and it is high time for the society to normalise the male victimisation. There should right to equality in rape laws also as envisaged under the Indian Constitution. Article 14 guarantees to every person equality before the law and equal protection under the laws. There is a need to reconsider the definition of rape. Every person deserves to have their rights protected, and that all persons are subjected to the crimes of sexual offences irrespective of their genders, must have recourse to the law to achieve their well-deserved vindication.²²²

²²⁰ Supra note 28.

²²¹ *Id.*

²²² Joshita Jothi, Keshavdev JS, *Rethinking Rape: Should the Law Still Continue to the Paradigm?*, 2(1) NLUJ Law Review 56 (2014).