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Gender-Neutral Laws in India

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ABSTRACT

Brownmiller (1975) opines that only men can coerce women into having sex. Sreekumar (1992), in his research paper highlighting the issues of under-trial prisoners in India, points out that homosexual gang rape was common in Indian prisons. Agens (2002), in her article within the Seattle Journal of Social Justice, expresses concern that gender-neutral rape law would open up avenues for inflicting even greater trauma and humiliation to an already marginalized section of women and hence defeat the very purpose of reform. Novotny (2003), in her article within the Seattle Journal of Social Justice, Expresses concern that gender-neutral rape laws would cause negative consequences for female victims of rape and calls it a backlash against feminism. People Union for Civil Liberties (2003), in its study of Kothi and hijra sex workers in Bangalore, has concluded that human rights violations against the transgender community are widespread, and laws protecting them are urgently required. Assuming that only women and no other identities are often dominated by persons in powerful positions is incorrect. We all know that coercive sexual activity with men by men is roofed under Section 377 of the IPC, as carnal intercourse goes against the order of nature. one among the questions I seek to deal with during this paper is- why coercive men on men intercourse can't be covered by the rape law? There must be a distinction between coercive and consensual homosexual sexual activity. The Law Commission of India, in its 172nd report, has recommended that the rape law must be gender-neutral. It's argued that the principles of equality before the law and equal protection of rights enshrined as fundamental rights in our Constitution must be applied to the present situation also. Clear, it is often said that only a gender-neutral rape law would end in equal protection of all identities. However, we must not forget the realities of the society we sleep in. It can't be denied that the foremost vulnerable section of the population is women. There have been concerns that a gender-neutral rape law, both for the perpetrator and therefore the victim, may open up avenues for inflicting greater trauma and humiliation on women already marginalized and thereby would defeat the very purpose of the law.

Keyword: Women, Law, Society, Rape, Gender neutral

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I. INTRODUCTION

Sections 375 and 376 of the Indian Penal Code, 1860, specify the conviction on the offence of assault of a lady by a man. Other than the assault laws, there have been numerous different demonstrations, for example, the Domestic Violence Act, 2005, that are sexually explicit and related uniquely to ladies, for example, lewd behaviour or voyeurism where a culprit is consistently a man”. Expanded mindfulness about these offences in the general public shows us that the fundamental justification submitting a rape of any type of viciousness numerous not simply be to satisfy the longings that are explicitly arranged, yet in addition to attesting the culprits’ strength”. However, assuming that is the situation, the statement of strength ought not to be sexually explicit as it very well may be an attestation of predominance upon a particular standing, doctrine, direction, religion, or any friendly foundation. Subsequently, any type of rape could happen to guys and females, just as different sexual orientations of society². 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, 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, i.e.:

- (1) Neutrality concerning the victim
- (2) Neutrality concerning the perpetrator
- (3) Neutrality in custodial, communal, war, and conflict situations.

Before going into the core of the topic concerned, the first and foremost task is to understand the meaning and essence of the subject matter, which is Gender Neutrality. From various sources, I have gathered to know that gender neutrality describes the idea that policies, language, and other social institutions should avoid distinguishing roles according to people as

² Nadda, A, Malik, JS, Rohilla, R, Chahal, S, Chayal, V, Arora, V. Study of domestic violence among currently married females of Haryana, India. *Indian J Psychol Med.* 2018; 40:534-539.

sex or gender, toxic discrimination arising from the impression that there are social roles for which one gender is more suited than another. Gender neutrality emphasizes the equal treatment of men and women socially, economically, and legally with no discrimination. From the pre-historic era to the late 60s, the condition and status of women were quite bad. In ancient India, epics and Puranas equated women with property. Manu dictated that a woman would be dependent on her father in childhood, on her husband in youth and when her lord is dead, to her sons³. Mahatma Gandhi, the father of this free nation in which we are living today, stood for women's rights in the dark misty period when women were confined to their houses and children. He was having absolute faith in the inherent power of women; he emphasized it by saying emancipation of women and her equality with man is the final goal of our social development, whose realization no power on earth can prevent .

Under Section 375 and 376 of the Indian Penal Code, only a man can be convicted of committing rape, and the victim can only be a woman. Further, the laws relating to stalking, voyeurism, and sexual harassment⁴ are gender-specific, i.e. the perpetrator can only be a man while the victim can only be a woman. The Indian law is based on the belief that a victim of rape can only be a woman. This arises from the assumption that rape is an act of sex alone to satisfy the sexual desire of the perpetrator. However, there is a growing 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 . If this is so, then there is no reason the male gender is excluded from being a rape victim in India. The researcher questions the present law as to why gender is the only identity that is taken care of while determining the perpetrator and the victim of a sexual assault. There are other identities on the basis of which division exists in a society like a caste, class, religion. Another concern while determining what constitutes gender-neutral is whether it constitutes bodies is clearly either male or female⁵ who violate the normative understanding of what it means to be. We overlook the plight of the transgender community, which includes hijras and kothis. A few years ago, the #MeToo movement took the world by storm. The movement was instrumental in breaking the time-old taboo of victimhood and motivating women around the world to raise voices against unwanted sexual advances.

³ hulia, VR. Domestic violence against men: High time government addressed the problem; 2015. Retrieved from <https://www.news18.com/news/india/domestic-violence-against-men-high-time-government-addressed-the-problem-1004785.html>

⁴ The Criminal Amendment Act 2013, Sec. 354

⁵ The Criminal Amendment Act 2013

II. MEANING OF GENDER NEUTRALITY

To comprehend the inquiry expressed above, we need to comprehend the expression “sexual orientation” first. In like manner sense, the expression “sexual orientation” has been characterized as somebody who has a place with the class of one or the other male or female”.

“Notwithstanding, this definition neglects to consider the third sex that is “transsexual” which incorporates the “hijras” or the “kothis”, or the networks where they are brought into the world as “intersex” where an individual has both female and male organs or even networks that neglect to distinguish themselves having a place with any sexual orientation”.

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 with the contemporary needs of 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 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.

III. HISTORY OF RAPE LAWS IN INDIA

Women in India have proactively engaged in numerous movements and protests concerning the agenda of reforms in rape law since the 1980s. ⁶Women groups, for a significant period of time, have struggled to widen the scope as well as the definition of rape.

The Mathura rape case⁷ 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,

⁶ Tuka Ram & Anr. v. State of Maharashtra, (1979) 1 SCR 810.

⁷ Sakshi v. Union of India, AIR 2004 SC 3566.

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 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 intercourse⁸.

(A) 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 harassment⁹ are all gender-specific in nature, whereas the law regarding acid-attacks has been classified as gender-neutral¹⁰. Furthermore, the definition of 'rape' was widened to include and criminalize the offence of penetration with any object¹⁶. The punishment for the offence of rape in both aggravated and non-aggravated circumstances was correspondingly enhanced. 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.

(B) Male-on-Male Rape:

After the decriminalization of Section 377 of the Indian Penal Code (unnatural offences – 'homosexuality') in the momentous judgment of *Navtej Johar & Ors. v. Union of India*. The Secretary Ministry of Law and Justice²⁰ (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

⁸ 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>.

⁹ (1999) 6 SCC 591

¹⁰ Justice J.S. Verma (Retd.) et al., Report of the Committee on Amendments to Criminal Law (2013), <https://www.prindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>

ordinary instances, and a vast majority of such cases remain unreported. According to American psychologist Sarah Crime, barely 1 in 10 male-male rapes are ever reported.

(C) Female-on-Male Rape:

Female-on-male rapes are drastically under-researched as compared to any other forms of sexual violence. 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. In India, there has been no credible backdrop or governmental research data to help us construe the statistical frequency of such crimes.¹¹ 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, colour, creed, race, or sex. But on the contrary, 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.

(D) 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 NALSA²⁵ 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, to obliterate ostracism and the predispositions against transgender and placing them on an equal pedestal in the eyes of the law. The Act, however, was shorn of some crucial legislative provisions apropos sexual offences against transgender, and those obstinate lacunae have still not been rectified. Moreover, the 2019 Act possesses provisions that paradoxically tend to promote a discriminatory bias rather than eliminate such biases.

¹¹ Rjit 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/>

IV. POSITION IN INDIA

In India, neither sexual assault nor rapes are identified as offences that can be committed against men. The definition is so narrow that only a man can commit these offences against a woman. From a plain reading of the Report of the Committee on Amendments to Criminal law, a few observations can be inferred. The fundamental right of every person to live with human dignity, and equality,¹² are to be made available to every citizen, including men. However, as pointed out earlier, this has not been implemented, as the Government has chosen to ignore the suggestions of the Justice Verma Committee in this regard. The Committee, in its report, had categorically stated that if the human right of freedom means anything, then India cannot deny its citizens the right to be different. Thus, the right to sexual orientation is a human right guaranteed by the fundamental principles of equality. The Committee endorsed the rights of homosexuals and transgender, to not be excluded from the purview of protection against offences such as sexual harassment and sexual assault. 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, all of which reaffirm the inalienable right of every person to equality and human dignity. However, India has willfully chosen to disregard its obligations under these. “The Criminal Law (Amendment) Act, 2013 was passed by the Lok Sabha on March 19, 2013, and by the Rajya Sabha on March 21 2013. It got the consent of the President on April 02 2013 and was considered to have come into power on February 03, 2013.² The Act coming into power has run the expectations of millions of Indians who had intensely wanted reformist and extensive laws on sexual offences. Although the Act has executed a few truly necessary measures, it has disregarded a few more.” The fierce assault of a 23-year-old Physiotherapy understudy was the impetus that brought about the death of the Criminal Law (Amendment) Act, 2013. There was public clamour after the episode as thousands rampaged, challenging the aloofness of the state structures towards sexual violations, and requesting that changes be achieved in the current laws”.

“In light of this assault, *a Committee was set up on December 24, 2012, under the chairmanship of Justice (Retired) J.S.Verma*, former Chief Justice of India. The motivation behind this Committee was to audit the laws managing rape against ladies. The other two

¹² Priya M. Menon, Lacking support, male rape victims remain silent, THE TIMES OF INDIA, (February 6, 2013).

individuals from the Committee were Justice (Retired) Leila Seth and previous Solicitor General Gopal Subramaniam”.

“It got more than 70,000 reactions from the overall population inside a fortnight and concocted its report in a month. The Committee concocted a few suggestions. Nonetheless, just those that are pertinent to the current theme have been investigated”. In the Chapter managing Conclusions and Recommendations, the Committee has completely expressed that, “Since the chance of rape on men, just as gay, transsexual and transgender assault, is a reality, the arrangements must be conscious of the equivalent.” “Moreover, it was additionally expressed that except if the proposals given by them were carried out earnestly, it would bring about the whole exercise being worthless. The Committee has unmistakably recognized the presence and predominance of male, gay, transsexual, and transgender assault and the requirement for changes in this space. In any case, the Parliament decided to overlook this idea and didn’t accommodate something similar in the Criminal Law (Amendment) Act, 2013”.

In the light of the above realities, it turns out to be certain that this issue is one of inescapable significance and that it should be completely examined. To completely appreciate the different perspectives included, it gets appropriate to dive into the worldwide situation.

V. CONCLUSION

The existing pervasive gender-role stereotypes suggest a notion that males, and the idea of masculinity that they embody, cannot fall victim to an offence of rape or sexual assault. The veracity of this statement has now had reason to be doubted. The instances of male rape, as enunciated above, give a clear idea regarding its prevalence—however, questions regarding societal recognition and awareness of the same need to be advanced. As already noted, correct labelling of a crime gives the victim a sense of vindication, which might encourage him to seek legal or psychological redress. Gender neutrality has vastly been regarded as a coercive mechanism whereby scholars shift the attention from female victims of rape. However, it must be noted that the object of gender neutrality in sexual assault and rape law is very different and has a reasonable, independent standing. A change towards gender-neutral laws brings forth the notion that the laws are not analyzed in gender-specific terms but rather emphasize the Act, irrespective of the gender of the perpetrator or the victim. The increasing presence of women in the workforce and trade unions has sharpened the demand for gender equality and non-discrimination at work. The challenge to policymakers is to provide a level workplace\environment for women and to create enabling mechanisms within which women’s voices can be articulated and heard. Accounting for household work and its vital contribution

to the labour market would be the first step in gendering law and policy in this direction. Improving the access of women to skill training, capital, and other resources through law and policy efforts would enable a better working environment for women workers. Aside from this, there is a widespread gender bias in the recruitment and promotion of women workers. Better representation of women in decision-making bodies, including trade unions and employer organizations, can strengthen their ability to bargain for better working conditions. The proposed Equal Employment Opportunities Commission will be pivotal in dealing with discrimination in both the public and private spheres. The proposed Equal Opportunity Commission will provide a proactive forum to deal with gender discrimination. Instead of a simple complaints-based system, this will encourage proactive research and studies to be conducted and place the onus on employers to adopt policies to deal with gender discrimination. There is a need for inspectors to be sensitized to gender equality issues and to give these matters due recognition and importance in their work schedules.

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