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Gender Neutrality of Criminal Law in India-A Myth or Reality with Special Reference to Criminal Law (Amendment) Bill, 2019

NIHARIKA¹

ABSTRACT

The purpose of criminal law is to protect the society against every crime and to ensure this it prescribes punishment. This protection is available to everyone irrespective of their sex or gender. But the same is not true in case of sexual offences such as rape or outraging the modesty for example. The law relating to sexual offences in India is gender biased in the sense that it proceeds on the presumption that only women can be victim of sexual offences. The legislature, despite many recommendations, has failed to amend the law and thereby acknowledge the sexual victimization of men and transgenders. There are very few incidents when a rape against men/transgender is reported and even if it is brought into light, no appropriate action is taken because of absence of law on the subject. After Nirbhaya case, the Criminal law (amendment) Act, 2013 brought major changes in the rape law but still the relevant definitions were not made gender neutral. Last year in December, the Transgender Persons (Protection of Rights) Act, 2019 was passed which contains provision prescribing punishment for rape committed against a transgender. But this Act is heavily criticized and one of the points of criticism is that the quantum of punishment prescribed for rape is very less. Recently, Criminal law (Amendment) Bill, 2019 was introduced in the Rajya Sabha with an intention to amend existing rape law and make it gender neutral. In this article, the author has explored the concept of gender neutrality and its relevance in Indian rape law, along with an analysis of Criminal Law (Amendment) Bill, 2019.

Keywords: gender neutral, criminal law, transgender, rape, rape of men.

I. 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.”

The above statement is of Alain (name changed) who recalled the incident of his rape by the

¹ Author is an Assistant Professor at Faculty of Law, University of Lucknow, India.

government forces who accused him and his family of being rebel sympathizers. He underwent a surgery after the incident and was forced to leave his residence in Democratic of Congo because the pastor there told him that now he would never be considered a real man again.² “*I didn’t think a man could be raped*” are the words of another male rape survivor whose story was shared in a documentary made by Channel 5. Sam Thompson narrated the entire incident and recounted how he was raped by two men in a hotel room back in 2016 and how they took turns and raped him for hours.³ He mentions that he was not even aware that straight men can also be victims of offences like rape. It traumatized him so much that he just wanted to end his life.⁴

In India also, similar cases of men and transgender rapes have been reported. In a horrifying incident, a man in Mumbai was raped by four people in a moving car for three hours and was dumped on road later. These people traced the location of the victim through his Instagram post and then abducted him. The FIR was lodged under Section 377 of Indian Penal Code which criminalizes unnatural sex.⁵ Deepak Kumar, who works for rehabilitation of HIV infected people, shared one incident where a transgender was raped by 17 policemen at a police station and passed away two days later.⁶ In a shocking news report, several men shared their stories of being sexually assaulted by women and how they suffered in their personal lives because no one believed them.⁷ The necessity for gender-neutral rape law became more evident after the recent Shakutalam case where two men in Tamil Nadu died due to alleged police brutality. But activists have been vocal that sexual assault in this case was not categorized as rape because they were ‘men’ by their anatomy. In an open letter by ‘No Rape India Activists’, it was further alleged that what happened to these two men was as grave as Nirbhaya case.⁸

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> (accessed Aug. 6, 2020).

³ https://www.youtube.com/watch?v=gx6_kl_Dpng (accessed Aug. 6, 2020).

⁴ *Male rape survivor: ‘I just wanted to die’*, BBC news, (Jan. 7, 2020) ,<https://www.bbc.com/news/av/uk-51016041/male-rape-survivor-i-just-wanted-to-die> (accessed Aug. 7, 2020).

⁵ Saurabh Vaktania, *Mumbai: Four stalkers use 22-year-old man’s Instagram selfie to trace his location, rape him*, India Today, (Dec. 11, 2019), <https://www.indiatoday.in/crime/story/mumbai-man-raped-moving-car-instagram-location-1627346-2019-12-11> (accessed Aug. 8, 2020).

⁶ Vishu Gopinath, *On Transgender Day of Remembrance, the Screams that India Ignored*, The Quint, (Nov. 20, 2018), <https://www.thequint.com/neon/gender/transgender-day-of-remembrance-tracking-violence-against-lgbt-community-in-india> (accessed Aug. 8, 2020).

⁷ Nicole Oakley, *Men who were sexually assaulted by women share their stories-and how their friends reacted*, Mirror, (Feb. 10, 2018), <https://www.mirror.co.uk/lifestyle/health/men-who-were-sexually-assaulted-10271205> (accessed Aug. 9, 2020).

⁸ *After Shakuntalam Case, Appeal for Gender-Neutral Rape Laws*, The Quint, (July 7, 2020), <https://www.thequint.com/neon/gender/gender-neutral-rape-laws-shanthakulam-incident-open-letter> (accessed Aug. 8, 2020).

The traditional notion of rape is associated with penile-vaginal penetration which automatically defines the sex of the victim and the perpetrator. This notion is the result of the characteristics assigned to men and women in the society, where men are considered strong, aggressive and can never be the victim of offences like rape. On the other hand, women are considered fragile, weak, and submissive and therefore could be the only victims of such cruel act. The structure of society has changed in recent times and so has the nature of crime specifically sexual offences. In a time when gender equality has become critical, it becomes important to move beyond the established and predetermined characterization of the victim-perpetrator framework. There is an urgent need to change the perception that women can never be the perpetrators of sexual offences. If a man/transgender has been raped/sexually harassed, then it needs to be taken seriously rather than ridiculing or mocking it.

In this light, the question arises as to what is gender equality in the present context and whether this approach is justified in the Indian criminal law? This question becomes even more important given the rise in rape cases against women. The current legal regime of gender-specific rape law was also defended by the Ministry of Home Affairs in a petition filed before the Delhi High Court.⁹ The petition highlighted that even though such offences were less prevalent against men, absence of gender-neutral laws is affecting larger number of men than is commonly thought.

II. HISTORICAL PERSPECTIVE

Gender equality in the present context implies that criminal law should recognize that both men and women can be the perpetrator as well as victim of the sexual offences. The progressive thought of making criminal law gender neutral can be found in an old case of *Smt. Sudesh Jhaku v. K.C.J. and others*¹⁰. While hearing this case on rape, the Delhi High Court observed that crime is a dynamic concept and keeps on changing with economic, political, and social set-up of the country. This observation was made while pondering over expansion of definition of rape to include penetration by any part of man's body and foreign objects as well. At the same time, the court also said that if law commission and the legislature decide to look into it then why not also define the offence of rape in gender neutral terms? Further, a paragraph was quoted from an article¹¹ which said that sexually assaulted

⁹ Soibam Rocky Singh, *Do not alter existing definition of rape, Centre tells High Court*, The Hindu, (July 4, 2019), <https://www.thehindu.com/news/cities/Delhi/do-not-alter-existing-definition-of-rape-centre-tells-high-court/article28277009.ece> (accessed Aug. 10, 2020).

¹⁰ *Smt. Sudesh Jhaku v. K.C.J. and others*, 1998 CriLJ 2428.

¹¹ Camille E Legrand, *Rape and Rape Laws: Sexism in Society and the Law*, 61(3) California Law Review 919, 941(1973). Paragraph quoted in the judgement: "Men who are sexually assaulted shall have the same protection as female victims, and women who sexually assault men or other women should be liable for conviction as

men should be provided same protection as women and that women who rape men or other women should also be made liable for punishment. Moreover, if rape is considered as sexual assault as opposed to a special crime against women, then a healthier perspective will emerge, and definition will be more justified.

Later in the case of *Sakshi v. Union of India*¹², the hon'ble Supreme Court's attention was drawn to various sections of the Indian Penal Code, 1860 (IPC) specifically to Sections 375 and 376 which deal with rape. It was pointed out that the provisions were not interpreted in a manner compatible with current situation of the society, specifically in relation to sexual abuse of children. The matter relating to amendment of IPC in this context was directed to the Law Commission of India and it was requested to examine the issues raised in the petition and file its report. The Law Commission in its 172nd Report on Review of Rape Laws recommended certain changes for widening the ambit of the offence of rape defined under Section 375, IPC and to make it gender neutral.¹³ The report suggested substitution of definition of 'rape' by definition of 'sexual assault' considering that many young boys were also being increasingly subjected to sexual assault. Social activists pointed out that the victim of sexual acts and perversion were not only females but males also. The definition of 'sexual assault' recommended in the report did not use the word 'man' or 'woman' rather it used the word 'person' and it was very wide as compared to the current definition of 'rape'.¹⁴ Later, these recommendations took the shape of Criminal Law (Amendment) Bill, 2012 which was introduced to amend certain provisions relating to sexual offence under Indian Penal Code along with other provisions of Criminal procedure code and Indian Evidence Act.¹⁵ This bill could not take the form of an Act because of an intervening horrific incident of Nirbhaya where a woman was brutally gang-raped in Delhi on 16th December 2012.¹⁶ It shook the entire nation and the focus on women security and enhanced punishment for rape against

conventional rapists. Considering rape as a sexual assault rather than as a special crime against women might do much to place rape law in a healthier perspective and to reduce the mythical elements that have tended to make rape laws a means of reinforcing the status of women as sexual possessions.”

¹²*Sakshi v. Union of India*, (1999) 6 SCC 591.

¹³ <https://www.legal-tools.org/doc/1c639d/pdf/> (accessed Aug. 10, 2020).

¹⁴“Sexual assault means : (a) penetrating the vagina (which term shall include the labia majora), the anus or urethra of any person with - i) any part of the body of another person or ii) an object manipulated by another person except where such penetration is carried out for proper hygienic or medical purposes; (b) manipulating any part of the body of another person so as to cause penetration of the vagina (which term shall include the labia majora), the anus or the urethra of the offender by any part of the other person's body; (c) introducing any part of the penis of a person into the mouth of another person; (d) engaging in cunnilingus or fellatio; or (e) continuing sexual assault as defined in clauses (a) to (d) above in circumstances falling under- any of the six following descriptions...”

¹⁵https://www.prsindia.org/sites/default/files/bill_files/Criminal_Law_%28A%29_bill%2C_2012.pdf (accessed Aug. 10, 2020).

¹⁶ *Nirbhaya case: Four Indian men executed for 2012 Delhi bus rape and murder*, BBC News, (Mar. 20, 2020), <https://www.bbc.com/news/world-asia-india-51969961> (accessed Aug. 10, 2020).

women became stronger than ever.

The above incident led to the constitution of Justice J.S. Verma Committee on December 23, 2012. This Committee was entrusted with the task of suggesting amendments to the criminal law for providing speedy trial and enhanced punishment for convicts of sexual assault committed against women. The report which was submitted on January 23, 2013 mainly contained suggestions on rape and sexual assault among other things.¹⁷ In its conclusion and recommendation, the Committee also talked about making gender-neutral rape provisions by mentioning that sexual assault on men, homosexuals and transgenders is a reality and that law must take cognizance of it. Subsequently, when the Criminal Law (Amendment) Ordinance, 2013 which contained gender-neutral definition of rape was set for debate in Parliament, it received a lot of criticism, agitation, and backlash from women groups and human rights bodies.¹⁸ The prevalent environment at that time influenced the Government to stick to gender-specific nature of the rape law and it was passed like that in the Criminal Law (Amendment) Act, 2013. Last year, Rajya Sabha member KTS Tulsi introduced a private member bill with the objective of bringing changes in the current provisions of Indian Penal Code. It proposes inclusion of penal provisions for sexual offence committed against men and transgenders but is not limited to these two categories only. It aims to provide punishment for offenders of any sex or gender. Further, it highlights that limited scope of such laws have a grave impact on victims of other sex and orientation as it prevents them from recognizing their own victimization.¹⁹

III. RAPE AGAINST MEN AND TRANSGENDERS: EMPIRICAL EVIDENCE

In the present context of Gender neutrality two components can be taken into account, i.e., victim and perpetrator. It has already been discussed at length that how current legal regime erroneously recognizes only female as the victim of sexual offences. There is no official data available to reflect the number of rape cases against men and transgenders. The reason is twofold: firstly, it was not until recently that in 2019 transgenders were recognized as “third gender” by the Apex Court and, secondly, there is no law which recognizes non-consensual/forced sexual acts against men as crime. In September 2003, a report was published titled

¹⁷ Report of the Committee on Amendments to Criminal Law, (Jan. 23, 2013), <https://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf> (accessed Aug. 11, 2020).

¹⁸ *Activists join chorus against gender neutral rape laws*, The Times of India, (May 7, 2013), <https://timesofindia.indiatimes.com/india/Activists-join-chorus-against-gender-neutral-rape-laws/articleshow/18840879.cms> (accessed Aug. 11, 2020).

¹⁹ Ambika Pandit, *KTS Tulsi floats Rajya Sabha bill to make rape laws gender-neutral*, Times of India, (July 14, 2019), <https://timesofindia.indiatimes.com/india/kts-tulsi-floats-rajya-sabha-bill-to-make-rape-laws-gender-neutral/articleshow/70210664.cms> (accessed Aug. 11, 2020).

“Human Rights violations against the transgender community” by the People’s Union for Civil Liberties, Karnataka (PUCL-K)²⁰ which was basically a study of kothi and hijra sex workers in Bangalore. The report categorically mentions that rape and sexual assault is quite prevalent against the transgender community. The report supports this by including multiple testimonies of transgenders who were shunned by their families and had to join sex work to support themselves but were sexually abused in the course. As far as male rape is concerned, Marti S. Fiebert²¹ published a list of forty empirical studies and two reviews which reveal that men also face sexual coercion. In 2013, National Center for Injury Prevention and Control, Atlanta, Georgia, published “The National Intimate Partner and Sexual Violence Survey” that talked about Victimization by Sexual Orientation²². The survey says that 28.6% of heterosexual men who experienced sexual violence other than rape in their lifetime reported having only male perpetrators, while 54.8% reported only female perpetrators, and 16.6% reported both male and female perpetrators. Further, the data for rape and other forms of physical violence committed against lesbians was 43.8% out of which 67.4% lesbians reported having only female perpetrators of such violence.

This data signifies two things: *Firstly*, women are also capable of committing sexual offence of any nature against men and therefore the argument that women are physically incapable of committing rape falls to the ground. This argument was never sustainable in the Indian scenario because of the wide definition of rape which does not restrict it to penile-vaginal penetration. *Secondly*, women can commit sexual offence against women also. This argument is addressed in the light of an old yet significant judgement of *Priya Patel v. State of M.P. & Anr.*²³ in which the question was whether a female can be prosecuted for gang rape? The Court answered this in negative and held that a woman cannot rape. The judgement appears right for the time when it was passed because of the limited scope of Section 375, IPC at that time but after Criminal Law (Amendment) Act, 2013, the face of rape law has changed drastically. Nonetheless, in the absence of any recent judgement on the point, it was crucial to discuss it. Now, the above data coupled with changed law, makes it conceivable that women can also be the perpetrators of rape both against men and women.

Additionally, some news reports in India also support this argument. In an incident, Kaneez

²⁰http://pucl.org/sites/default/files/reports/Human_Rights_Violations_against_the_Transgender_Community.pdf (accessed Aug. 17, 2020).

²¹ Martin D. Fiebert, *References examining men as victims of women’s sexual coercion*, 4(3) *Sexuality and Culture* 81-88 (2000), https://www.researchgate.net/publication/226140559_References_examining_men_as_victims_of_women’s_sexual_coercion#read (accessed Aug. 17, 2020).

²² https://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf (accessed Aug. 17, 2020).

²³ *Priya Patel v. State of M.P. & Anr*, Appeal (crl.) 754 of 2006.

Surka, a comedienne levelled sexual misconduct allegation on a fellow comedienne Aditi Mittal. It was bizarre because Aditi Mittal was a strong advocate of the #MeToo Movement and called out sexual predators on social media. Kaneez alleged on her Twitter post that she was forcibly kissed by Aditi Mittal during a comedy show without her consent. The incident took place in front of an audience of hundred people and many comedians.²⁴ In another shocking incident, a 38-yearold man committed suicide because he was continuously being harassed and blackmailed by a woman's demand for sex. The man worked in a hospital in Mumbai's Parbhani district and was found hanging at his house and left behind a suicide note. The note mentioned that a woman was continuously pestering him for having sexual relationship with her despite knowing the fact that he was a married man. She also threatened him to file a criminal case against him if he refused to fulfil her demand. The police registered an abetment to suicide case only.²⁵ This incident show nothing but a failure on part of our legal system and a dormant judiciary (strictly on this issue) who didn't take any step to provide appropriate justice in such cases.

IV. THE CRIMINAL LAW (AMENDMENT) BILL, 2019: ANALYSIS

The Criminal Law (Amendment) Bill, 2019²⁶ is a private member bill which was introduced in the Rajya Sabha on 12th July 2019 by then member of Parliament KTS Tulsi. The bill proposes to make rape laws gender neutral, a proposition which was offered in the past as well. The bill bases its proposal on fundamental right to life and right to equality guaranteed under the Constitution of India. It mentions the past Law Commission report and amendment bill which talked about gender neutrality as well. Further, to strengthen its argument for justifying the proposal, it mentions the landmark case of *National Legal Services Authority v Union of India*²⁷ where the hon'ble Supreme Court gave formal recognition to transgenders as 'third gender'. Moreover, the case of *Criminal Justice Society v. Union of India & Ors.*²⁸ was cited where the Apex Court in its order mentioned that there was merit in the petitioner's prayer asking for gender neutral rape laws and it expressed its view that Parliament may consider doing the same. Lastly, since India is a signatory to the Universal Declaration of

²⁴ #MeToo: Popular comedienne Kaneez Surka accuses Aditi Mittal of sexual misconduct, Zee News, (Oct. 10, 2018), <https://zeenews.india.com/people/comedienne-aditi-mittal-accused-of-sexual-misconduct-2147434.html> (accessed Aug. 20, 2020).

²⁵ *Man kills himself, note says woman pestered him for sex: Police*, Press Trust of India, (Oct. 16, 2018), <https://www.ndtv.com/cities/parbhani-maharashtra-man-kills-himself-note-says-woman-pestered-him-for-sex-say-police-1932545?pfrom=home-topstories> (accessed Aug. 20, 2020).

²⁶ <http://164.100.47.4/BillsTexts/RSBillTexts/asintroduced/crimnal-E-12719.pdf> (accessed Aug. 11, 2020).

²⁷ *National Legal Services Authority v Union of India*, (2014) 5 SCC 438.

²⁸ *Criminal Justice Society v. Union of India & Ors.*, W.P.(C) No. 1262/2018 vide its Order dated Nov. 12, 2018.

Human Rights, 1948 which protects human rights of equality and gives protection against discrimination, it becomes essential that in order to give effect to all of the above, Parliament amends the present criminal law and makes it gender neutral. The bill emphasizes on making changes in the law in such a manner so as to protect people of both the sexes, all the genders and people of different sexual orientation, and to enable them to get proper redressal and justice.

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

- i. Inclusion of word 'transgender' in Section 8 and 10 which defines 'gender', 'man', and 'woman' respectively,
- ii. Insertion of Section 8A which defines modesty in a manner applicable to all the genders,
- iii. Substituting Section 354 with a new Section which makes assault or use of criminal force with intent to outrage modesty gender neutral,
- iv. The offence of sexual harassment under Section 354A is made gender neutral by replacing gender-specific words with words like "whoever" and "any person",
- v. The offence of assault or use of criminal force with the intention to disrobe under Section 354 B has been substituted with another section which uses the word "any person" instead of "woman",
- vi. Similarly, gender neutral versions have been inserted for voyeurism and stalking given under Sections 354 C and 354 D,
- vii. Another important change which is proposed in the bill is substitution of words "man" and "woman" with the word "any person" in the definition of rape provided under Section 375. This will widen the ambit of the definition and protection will be extended to men and transgenders as well.
- viii. The bill has proposed insertion of a new provision that will deal with sexual assault. Section 375A of the bill defines the offence of sexual assault as any non-consensual act of touching other person's genitalia or use of words or gestures which create the fear of unwelcome sexual threat. The punishment prescribed is rigorous imprisonment which may extend to three years or fine or both.
- ix. Similar changes have been suggested with reference to rape by person in authority and gang rape as provided under Section 376 C and 376 D.

- x. Other than this, certain changes have been made in the relevant Sections of Code of Criminal Procedure, 1873 and Indian Evidence Act, 1872.

The bill is relevant in the light of certain legal developments such as the landmark judgement of *Navtej Singh Johar v. Union of India*²⁹, where the Apex Court made it clear that Section 377, IPC³⁰ has no application when the sexual intercourse between same-sex individuals is consensual and is done privately. And if Section 375, IPC³¹ is read along with this, it becomes clear that law criminalizes non-consensual sex and treats it as rape. Then an obvious question arises as to why a differential approach is being followed in case of non-consensual sex involving men and transgenders by putting them under Section 377 and labelling it as unnatural sex offence and not rape? As far as sexual offence against transgenders is concerned, it was addressed by the legislature by passing of The Transgender Persons (Protection of Rights) Act, 2019. Section 18 of the Act³² provides punishment of up to two years for sexual abuse against transgenders. It can be criticized on two points: a) sexual abuse has not been defined in the Act, so it becomes unclear as to what all categories of sexual offences will be covered within its ambit and whether rape is one of the categories covered? and, b) even if it extends protection against rape then the quantum of punishment is not satisfactory as compared to what has been given under Section 376, IPC for rape against a woman, that is mandatory minimum punishment of rigorous imprisonment for seven years which may extend to life imprisonment.

The Transgender Persons (Protection of Rights) Act, 2019 itself negates the equal treatment which transgenders deserve especially in the light of *National Legal Services Authority v.*

²⁹ *Navtej Singh Johar v. Union of India*, Writ Petition (Criminal) No. 76 of 2016.

³⁰ Indian Penal Code, 1860, S. 377: "Unnatural offences- Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

³¹ Indian Penal Code, 1860, S. 375: "Rape- A man is said to commit "rape" if he-

(a) 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

(b) 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

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person,

or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

without her consent or when is influenced or is not free."

³²The Transgender Persons (Protection of Rights) Act, 2019, S. 18(d): "Whoever harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine."

*Union of India and Others*³³ where the hon'ble Supreme Court recognized them as "third gender" for the purposes of protecting their fundamental rights guaranteed under the Constitution of India. Another concern that this Act raises is absence of any provision specifically dealing with rape committed by police officers against transgenders in custody. There have been numerous incidents where transgenders have been picked up and raped in lock ups.³⁴ They face problem in filing of FIR because policemen often ask them to prove their gender³⁵, they are beaten up by cops and don't receive proper treatment³⁶ and their complaints go unheard with no justice to show³⁷. This unfair and unequal treatment is for many reasons, such as lack of awareness and acceptability, anger because of their non-conforming appearance and behavior which often is the justification for sexually abusing them. In this light, the bill which moots the idea of gender neutrality of rape law and purports to extend protection to transgenders along with men is a welcoming step.

The analysis of the bill has been summarized below:

i. The definition of 'modesty'³⁸ in the bill is subjective because modesty has been labeled as a characteristic that applies to the personality of every man, woman, or transgender with regard to the widely held belief of morality, dignity, and honesty of speech and behavior. The words 'commonly held belief' used in the section appears to be problematic and maybe a clearer definition may be proposed. Like, while deciding the case of *Tarkeshwar Sahu v. State of Bihar*³⁹, the Apex Court observed that "the essence of a woman's modesty is her sex. The modesty of an adult female is writ large on her body." This clarity is also needed considering the first-time inclusion of transgenders and men within the definition and lack of judgements on the point for obvious reasons.

ii. The definition of rape underwent a drastic change after Criminal Law (Amendment) Act, 2013. Section 375, IPC covers every possible aspect of the offence and is already wide in

³³ *National Legal Services Authority v. Union of India and Others*, Writ Petition (CIVIL) No.604 of. 2013

³⁴ 'I was raped by cops multiple times and then left writhing in pain', Hindustan Times, (Dec. 2, 2013), <https://www.hindustantimes.com/india/i-was-raped-by-cops-multiple-times-and-then-left-writhing-in-pain/story-iy0D1QpjjBaxyd7N42cr2K.html> (accessed Aug. 15, 2020).

³⁵ *Prove your gender, police tells molested Mumbai transwoman before filing FIR*, India Today, (Oct. 13, 2019), <https://www.indiatoday.in/crime/story/prove-your-gender-police-tells-molested-mumbai-transwoman-before-filing-fir-1608805-2019-10-13> (accessed Aug. 15, 2020).

³⁶ <https://newsable.asianetnews.com/south/police-attack-transgenders-victims-denied-treatment> (accessed Aug. 15, 2020).

³⁷ *Transgender rape victim still waiting for justice*, The Hindu, (Sept. 12, 2014), <https://www.thehindu.com/news/national/other-states/transgender-rape-victim-still-waiting-for-justice/article6401994.ece> (accessed Aug. 15, 2020).

³⁸ The Criminal Law (Amendment) Bill, 2019, S. 8A: "Modesty is an attribute which attaches to the personality with regard to commonly held belief of morality, decency and integrity of speech and behavior, in any man, woman or a transgender".

³⁹ *Tarkeshwar Sahu v. State of Bihar*, Appeal (Cr.) 1036 of 2005.

its ambit as compared to definitions of rape in other countries.⁴⁰ The only change required is to make it applicable to everyone irrespective of their sex/gender. This has been proposed under the current bill but still there is room for a slight change. In the clause *fourthly* of Section 375 which talks about fabricated consent, rather than using the words ‘her husband’, the word ‘partner’ can be used. This way the scope of its application will be increased.

iii. The bill proposes insertion of a new section which will deal with sexual assault⁴¹ which is again a welcoming step as it will cover cases which are short of essentials of rape. But again, it uses certain words which need clarification such as “unwelcome actionable threat.” What comprises an “actionable threat of sexual nature” might vary from person to person who is in threat of sexual assault and therefore needs elucidation. Further, Explanation 3 of the section uses the word “reasonable belief” which is again a vague terminology and it will create problem when interpreting the consent of victim for sexual touching.

The bill is appreciated given the reluctant attitude of the hon’ble Supreme Court in addressing this gender neutrality issue. Recently, it declined hearing of a petition which sought to strike down Section 375 of IPC on the ground of it not being gender neutral. The Apex Court stated that it is the domain of Parliament to look into this matter. Before this, Delhi High Court also pondered over this issue while hearing a plea against gender specific nature of law on sexual assault.⁴² This approach is shocking because Supreme Court of India has always been an active participant in furthering the cause of the citizens.

V. INTERNATIONAL PERSPECTIVE

- **United States of America**

In 2013, the federal Bureau of Investigation (FBI), USA changed the definition of rape for the purposes of Uniform Crime Reporting (UCR) Program.⁴³ The new definition is “Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral

⁴⁰ McKeever, N., *Can a Woman Rape a Man and Why Does It Matter?*, 13 Criminal Law, Philosophy 599,619 (2019), <https://link.springer.com/article/10.1007/s11572-018-9485-6#citeas> (accessed Aug. 16, 2020).

⁴¹ Criminal Law (Amendment) Bill, 2019, S. 375A: “The following acts shall constitute the offence of sexual assault, if any person:

(a) intentionally touches the genital, anus or breast of the person or makes the person touch the vagina, penis, anus or breast of that person or any other person, without the other person's consent except where such touching is carried out for proper hygienic or medical purposes; or

(b) uses words, acts or gestures towards another person which creates an unwelcome actionable threat of sexual nature or result in any unwelcome advance,

and shall be punished with rigorous imprisonment that may extend to three years, or with fine, or both.”

⁴² *Supreme Court refuses to hear plea seeking gender-neutral rape law*, India Express, (Nov. 12, 2018), <https://indianexpress.com/article/india/supreme-court-refuses-to-hear-plea-seeking-gender-neutrality-in-rape-laws-5442059/> (accessed Aug. 16, 2020).

⁴³ https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/rape-addendum/rape_addendum_final (accessed Aug. 18, 2020).

penetration by a sex organ of another person, without the consent of the victim.” This new definition is wide and includes both men and women and recognizes rape by penetration by either a body part or any object also. This has broadened the ambit for statistical purposes because now data can be collected irrespective of the gender, penetration by objects will also fall under rape and, sexual offences where no force was used but the victim was drugged and then raped will also be counted. The FBI was of the view that the number of victims will rise when data is collected by applying this changed definition. The State of Washington amended the definition of “sexual intercourse”⁴⁴ in 2020⁴⁵ to include penetration of the vagina or anus by one person on another, either belonging to the opposite sex or of the same sex.⁴⁶

- **United Kingdom**

Section 142 of the Criminal Justice and Public Order Act, 1994⁴⁷ recognizes rape of man but then the perpetrator under this section remains man only. The definition says that “it is an offence for a man to rape a woman or another man”. So technically, although it does recognize male rape but does not recognize gender neutrality in entirety. Before this, the English Common Law did not recognize male rapes and it was rather treated and punished as non-consensual buggery. The Sexual offences Act, 2003 defines rape as penetration of vagina, anus, or mouth by another person’s penis.⁴⁸ It clearly does not treat only women as victims of rape, but it surely treats men as perpetrators of the sexual offences against men and women both. Definitions of similar intent can be found under Sexual Offences (Scotland) Act 2009⁴⁹ and Sexual Offences (Northern Ireland) Order 2008.⁵⁰

- **Canada**

The Criminal Code of Canada⁵¹ does not use the term “rape”, but it rather provides for “sexual assault” under Section 271 of the Code. The offence is gender neutral as it uses the word “everyone” and not “man” or “woman”. It is punishable with a maximum imprisonment of ten years and to a mandatory minimum punishment of one year. The definition nowhere

⁴⁴ Revised Code of Washington, Section 9A.44.010.

⁴⁵ Engrossed Substitute Senate Bill 6287, Chapter 312, Laws of 2020, 66th Legislature, 2020 Regular Session, pg. 159, <http://lawfilesexst.leg.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/Senate/6287-S.SL.pdf> (accessed Aug. 18, 2020).

⁴⁶ Sakshi Jain, *Need for Gender Neutral Rape Laws*, 7 Pen Acclaims (2019), ISSN 2581-5504.

⁴⁷ <https://www.legislation.gov.uk/ukpga/2003/42/section/3> (accessed Aug. 18, 2020).

⁴⁸ Sexual Offences Act, S. 1 (2003), <https://www.legislation.gov.uk/ukpga/2003/42/part/1/crossheading/rape> (accessed Aug. 19, 2020).

⁴⁹ Sexual Offences (Scotland) Act, S.1 (2009), <https://www.legislation.gov.uk/asp/2009/9/section/1> (accessed Aug. 18, 2020).

⁵⁰ Sexual Offences (Northern Ireland) Order, S. 5 (2008), <https://www.legislation.gov.uk/nisi/2008/1769/article/5>, (accessed Aug. 19, 2020).

⁵¹ <https://laws-lois.justice.gc.ca/eng/acts/c-46/> (accessed Aug. 19, 2020).

mentions “penetration” either by a body part or by an object. Further, it criminalizes sexual assault with a weapon or by putting the complainant in fear of hurting some third person⁵² and prescribes punishment for aggravated sexual assault also.⁵³ Section 265(1) of the Code defines assault and extends its application to sexual assault (and other aggravated forms of it) also.⁵⁴ The law on rape, indecent assault and attempted rape was deleted from the Criminal Code on August 4, 1982 by Bill C-127 titled “An Act to Amend the Criminal Code in Relation to Sexual Offences and Other Offences Against the Person.” The Bill that became law on 4th January 1983 introduced sexual assault, sexual assault with a weapon and aggravated sexual assault.⁵⁵

The Code also provides for an offence of “Sexual interference” under Section 151. It is also gender neutral because it says that “every person” who makes contact with the other person for sexual purpose either by touching with a body part or by an object is guilty under the provision. Such an act has been made punishable with an imprisonment of up to fourteen years and a mandatory minimum punishment of one year.

- **Philippines**

The Anti-Rape Law of 1997 amended the Penal Code of Philippines to expand the definition of rape and made it gender neutral. Under the Revised Penal Code (Act No.3815),⁵⁶ rape was classified as crime against persons and a new chapter on rape was introduced. Article 226-A (2) says that an offence of rape by sexual assault will said to have been committed by any person who inserts either his penis or any instrument or object into the mouth or genital of other person. The new law recognizes male as victims of rape, but it does not label sexual offence against men as “rape” rather it is considered under “rape by sexual assault” and has a lesser punishment.

VI. INDIA’S POSITION ON ADOPTION OF GENDER-NEUTRAL LAW

The readiness of India to adopt a gender-neutral rape law can be understood in the light of the following three-heads:

1. Protest by women rights groups and activists against gender-neutrality of rape law

In an old article,⁵⁷ Flavia Agnes vehemently opposed the reforms suggested by the 172nd Law

⁵²Criminal Code of Canada, S. 272 (1).

⁵³ Section 273, *Ibid.*

⁵⁴ Section 276(2), *Ibid.* See Section 265 (3) also.

⁵⁵ <https://www.ncjrs.gov/pdffiles1/Digitization/140416NCJRS.pdf> (accessed Aug. 19, 2020).

⁵⁶ <https://pro1.pnp.gov.ph/Downloads/RA%208353%20Anti-Rape%20Law.pdf> (accessed Aug. 19, 2020).

⁵⁷ Flavia Agnes, *Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law*, 37 Economic and Political Weekly 844-847 (March 2-8, 2002).

Commission report which also recommended making rape laws gender neutral. One of the reasons for her views against gender neutrality of rape law was that there were no cases of woman being the perpetrator in a sexual offence in the Indian context and that no one till that time ever made a plea of sexual violence by a woman. The major concern at that time was sexual offences by men against women, children, and other men. Further, she was of the view that such a change could even lead to increased cases of violence against women at a time when situation was already bad. There was similar opposition by women rights groups and human rights activists when the report of the Parliamentary Standing Committee on the Criminal law (Amendment) Bill, 2012 and Criminal Law (Amendment) Ordinance, 2013 was all set for debate in Parliament. Many activists from voluntary organizations like Saheli, State Repression Forum against oppression of women opposed the report and the bill as according to them it would further deteriorate the position of women and make them even more vulnerable. It was justified as the timing for the proposal was wrong because of the Nirbhaya incident.⁵⁸ There have been numerous such protests by the women activists on different occasions.⁵⁹ This trend highlights that whenever a move has been made for introduction of ‘gender-neutrality’ in rape laws, it has always been met with protest and in one instance such protest even influenced the Government to change its stance to conform to the demand of the protestors.⁶⁰

Opposition against gender-neutral rape law finds its basis on the historically oppressed position of women in the society and assertion of masculinity by men upon women. But it is a known fact that the aforesaid set-up has changed in the recent past to a considerable extent and that women have become more powerful now. At the same time when people are exploring their sexual identity and orientation, the earlier established idea of “physical strength” or “physical capacity” to commit sexual offence which was attributed to men, has seemingly changed. Now, there are various reported cases which highlight the vulnerability of men and LGBT community to sexual abuse. The Centre for Civil Society published an extraordinary article titled “India’s law should recognize that men can be raped too”⁶¹ which essentially talks about the injustice caused due to gender specific rape laws. It raises few good points like why a man can only be “sodomized” and not “raped”? Further, it mentions that the current legal regime does not have any remedy for adult male rape victims, and it

⁵⁸ *Ibid.*

⁵⁹ *Cabinet nod to make rape gender-neutral riles women’s groups*, Times of India, (July 20, 2012), <https://timesofindia.indiatimes.com/india/Activists-oppose-making-rape-gender-neutral/articleshow/15049606.cms> (accessed Aug. 19, 2020).

⁶⁰ Statement is in reference to Criminal Law (Amendment) Act, 2013.

⁶¹ <https://ccs.in/indias-law-should-recognise-men-can-be-raped-too> (accessed Aug. 23, 2020).

does not recognize female perpetrators for the same. The author formerly worked as director of an LGBT counselling and sexual health centre in New Delhi. The article further mentions that there are many male and transgender rape survivors living in Delhi alone and this fact has been documented in cases like *Naz Foundation v. Government of National Capital Territory of Delhi*⁶² and other reporting of human rights organizations.

Finally, it can be concluded under this point that making sexual offences gender-neutral in India is a challenging task and it will not be easy and fast. It will be opposed time and again by different sections of the society, but this should not become a discouraging factor. It has been reiterated many times that law is not constant but keeps on evolving and changing as per the developments in the society. It took a lot of time and debate to decriminalize consensual sex done privately under Section 377, IPC and thereby grant protection to same-sex people; also, it was not in a day that transgenders were given “third gender” status by the hon’ble Supreme Court of India. It was the Apex Court only which decriminalized adultery, recognized live-in relationships, and therefore illustrated the courage for decisions which were not in consonance to the “traditional Indian values”. But it was nevertheless done to conform to the changing time and circumstances and grant relief in such changed societal environment. The severity and trauma caused to a woman due to rape cannot be denied and nowhere is the author putting the pain of men and women caused due to such horrific crime on the same footing. But to completely reject acknowledgment of a crime which is very much happening as pointed out earlier in the article is not justified on any ground.

2. Article 15 of the Constitution of India

Article 15(3)⁶³ of the Constitution of India enables the State to make special provision for women and children. This is an exception to the general rule against discrimination given under Article 15 (1) and (2) and was incorporated to strengthen and improve the status of women. Further, this clause implies that State can discriminate in favor of women against men but not vice-versa.⁶⁴ In *Government of A.P. v. P.B. Vijayakumar*⁶⁵, the hon’ble Supreme Court while explaining the objective of Article 15(3), observed that this clause is a recognition of the fact that women have historically been socially backward. It is an endeavor to eliminate this backwardness and bring equality between men and women. This provision is there to ensure upliftment of women and strengthen their position in the society. This

⁶²*Naz Foundation v. Government of National Capital Territory of Delhi*, WP(C) No.7455/2001.

⁶³ Constitution of India, Article 15 (3): “Nothing in this article shall prevent the State from making any special provision for women and children.”

⁶⁴ *V. Revathi v. Union of India*, AIR 1998 SC 835.

⁶⁵ *Government of A.P. v. P.B. Vijayakumar*, AIR 1995 SC 1648.

Constitutional framework justifies the current legal framework which provides for gender specific laws and recognize only women as victims. Example of such provisions include a variety of crimes such as rape, outraging the modesty, sexual intercourse on promise of marriage (Cheating), incidents of domestic violence etc.

This further supports the view of some people who believe that if a law is a little discriminatory against men then there is nothing to worry about because the Constitution itself justifies positive discrimination in favor of women against men. In the light of certain incidents where if a woman is raped by a higher caste man or an influential man⁶⁶ and the chances of her getting justice are very slim, the present legal position appears justified. There are other arguments as well which assert that gender-neutrality might bring mischief in the form of counter-rape allegations by the perpetrator. It might be true because of many factors like low education level, deeply embedded caste-system, disadvantaged position of women in many parts of India, lack of awareness about one's rights and so on. The requirement to change law has to be evaluated on the above-mentioned factors but the basic rule of law being dynamic must also be kept in mind. The plight of one section should not be an excuse to address the pain and suffering of other sections of the society, no matter how small.

3. National Crime Records Bureau (NCRB) Data

As per the latest NCRB data, an average of 91 rapes were reported in a single day across the country in 2018. A total of 3,78,277 cases were registered under the category of "crimes against women". The number has increased from 3,59,849 in 2017 and 3,38,954 in 2016. Out of this, total number of registered rape cases were 33,356 in 2018 as compared to 32,559 in 2017 and 38,947 in 2016.⁶⁷ As per the government data, on an average, one woman reported a rape every 15 minutes in India. There has also been an increase in the cases of rape coupled with murder. While the number of such cases was 223 in 2017, it increased to 291 in 2018. This is a 31 per cent rise in cases of rape with murder in 2018 as compared to 2017.⁶⁸ Out of the total number of rapes reported in 2018, only 85 per cent led to charges and 27 per cent led to convictions.⁶⁹ The gruesome rape of a medical student in Delhi (Nirbhaya), rape of a

⁶⁶ Omar Rashid, *Shahjahanpur law student, who accused Chinmayanand of rape, arrested*, The Hindu, (Sept. 25, 2019), <https://www.thehindu.com/news/national/other-states/shahjahanpur-law-student-who-accused-chinmayanand-of-rape-arrested/article29506591.ece> (accessed Aug. 21, 2020).

⁶⁷ *Average 80 murders, 91 rapes daily in 2018: NCRB data*, The Hindu, (Jan. 9, 2020), <https://www.thehindu.com/news/national/average-80-murders-91-rapes-daily-in-2018-ncrb-data/article30523916.ece> (accessed Aug. 20, 2020).

⁶⁸ Deeptiman Tiwary, *Explained: In crimes against women, rise in cases of rape with murder*, The Indian Express, (Jan. 20, 2020), <https://indianexpress.com/article/explained/in-crimes-against-women-rise-in-cases-of-rape-with-murder-6208863/> (accessed Aug. 20, 2020).

⁶⁹ Varalika Mishra, *A rape in India every 15 minutes: government data*, Asia Times, (Jan. 15, 2020), <https://asiatimes.com/2020/01/a-rape-in-india-every-15-minutes-government-data/> (accessed Aug. 25, 2020).

teenager by former BJP state legislator Kuldeep Sengar (Unnao rape case)⁷⁰, rape and murder of a young veterinary doctor in Bengaluru,⁷¹ Kathuwa rape case, are few of the many incidents that incite not only fear but anger amongst the people. There are certain other issues for the grim situation, like lack of well-equipped forensic labs and qualified doctors, inadequate number of judges in the fast-track courts to handle these cases etc. These numbers may not be right because many women do not report the crime due to the stigma attached to it. While this is a disturbing statistic and an influential argument against gender-neutrality of rape laws, it must be considered that there is no official data available on rape of men/transgenders. And therefore, a valid decision can only be made after collection of the relevant data.

VII. CONCLUSION AND SUGGESTION

The prevalence of sexual offences against men and transgenders cannot be denied in the light of various incidents quoted in this article. The fact that rape against women is a very serious issue and since there has been a spike in the number of such cases, the proposal to introduce gender-neutrality in criminal law is ambitious. But this should not be a factor to overlook the agony and pain that men/transgenders go through. Sexual offences in general and rape in particular is essentially violation of a person's body which is traumatic irrespective of the sex/gender of the victim. In the absence of a gender-neutral rape law, this trauma is further amplified because when this horrific act is done to men and transgenders, it is not treated as a crime. Men who have been victims of sexual offence often do not come forward to tell their story because of a variety of reasons such as fear of being called weak, homosexual, or feminine. There have been incidents when their stories have been dismissed by their own family and friends. This gives rise to a very unsettling situation where male victims of the crime are often laughed upon and they cannot do anything about it.

The position of transgenders on the other hand has already been deplorable and the attitude of society towards them is unimaginably bad. They are treated with ridicule and are often punished by people who find them as non-conforming elements of the society by raping and thrashing them. It must also be noted that even if the above-mentioned change is brought in the law, there will be other challenges. For example, it will be difficult to prove rape against

⁷⁰ *Unnao rape: Kuldeep Sengar gets 10 years in jail for death of victim's father*, India Today, (Mar. 13, 2020), <https://www.indiatoday.in/india/story/unnao-rape-case-kuldeep-sengar-victims-father-death-1655073-2020-03-13> (accessed Aug. 25, 2020).

⁷¹ *Veterinary doctor found charred to death on Hyderabad outskirts*, The New Indian Express, (Nov. 28, 2019), <https://www.newindianexpress.com/cities/hyderabad/2019/nov/28/veterinary-doctor-found-charred-to-death-on-hyderabad-outskirts-2068433.html> (accessed Aug. 24, 2020).

men, it might give rise to counter-allegations by male perpetrators and it might shift focus from a bigger problem that is rape against women. But these are mere apprehensions and real situation will emerge only after required changes are made in the criminal law. The Criminal law (Amendment) bill, 2019 looks promising but still certain changes are required to be made in it as pointed out earlier. The gender-neutrality in India might become a reality if the Apex Court actively participate in the process. Along with this, the following suggestions are hereby made:

- i. Appropriate changes must be made in the Indian Penal Code, Code of Criminal Procedure and Indian Evidence Act to make the rape law gender neutral.
- ii. Safeguards must be put in place to avoid counter-allegations in rape cases.
- iii. Clear provisions must be made regarding proof of rape against men and transgenders.
- iv. Rape against men/transgenders in police custody, caste and communal violence must also be considered.
- v. Government must take appropriate measures to improve the forensic labs and to train doctors for collection of forensic evidence.
- vi. Raising of awareness to remove the stigma attached to male/ transgender rape and creating compassion towards such victims is essential.
- vii. Students must be educated about this crime at school and university level so that male/transgender students can come forward and report any such incident.

Other than these, certain issues will also have to be considered, like, will there be a similar provision applicable to men/transgender victims regarding disclosure of rape victim's identity?⁷² It is already a grey area and if it is not addressed any sooner, it might be problematic. Apart from this, issues like marital rape and domestic violence against men also need serious attention. I conclude by pointing out that I am nowhere ignoring the crime rate against women and the efforts of various women rights groups for their work towards upliftment and welfare of women. But since we live in a democracy, it is mandatory that not even a single person's right is violated. There is a long road ahead in which the journey has not even started.

⁷² Indian Penal Code, 1860, S. 228A.