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# Gender Neutrality of Rape Laws

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## ABSTRACT

*Gender neutrality in Indian rape laws was first time dealt in the case of Sudesh Jhaku v KC Jhaku. In this case the case observed that the sexually assaulted men should be given the same protection of the laws as given to the female victims. The 172<sup>nd</sup> Law Commission's Report recommended making rape laws unbiased. The latest development regarding gender neutrality of rape laws is the bill presented by Mr. KTS Tulsi which seeks to make rape laws gender neutral which has not been passed yet. Around seventy-seven countries have established and accepted the gender-neutral laws including USA, UK, Australia and Denmark. The state has a fundamental obligation "to provide a safe environment, at all times, for all citizens". The statutes of the state should be such that it reflects the obligation towards its citizens. In India according to Section 375 of the Indian Penal Code rape is defined as "a man is said to commit 'rape' if he.....". India does not recognise gender neutrality in rape laws and follows the traditional notion of male being the perpetrator. Gender neutrality in rape laws seeks to increase the ambit of the victims of rape and sexual assault. It aims to recognise and normalise rape and sexual assault of male and other genders and to provide equal protection of laws irrespective of their gender. The further developments in rape laws in India were seen in the 172<sup>nd</sup> Law Commission Report and the 2013 Criminal Law Amendment.*

**Keywords:** Gender Neutrality, Rape Laws

## I. MEANING OF GENDER NEUTRALITY

The Indian law is based on the notion that a victim of rape is always a female and the perpetrator is always a male. Gender neutrality is a concept that aims at eliminating the difference between different genders in the codification and execution of laws. This concept postulates to ensure equal protection of laws without any discrimination on the basis gender. It implies uniformity in certain laws which are gender-specific. Rape laws is one such law. Under section 375 and section 376 of the Indian penal code, 1860 it is provided that only a male can be convicted of committing rape while the victim can only be a female. This is a gender-specific law which lacks the concept of gender neutrality.

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Gender neutrality is a concept that aims at making the gender specific laws gender neutral. Gender neutrality means to remove the difference between female and male perpetrators of rape and sexual offences. The Indian Penal Code, 1860 provides under Section 375 and Section 376 that only a male can be convicted of rape. It is widely affirmed that human rights should become an essential practice and doctrine to regulate state laws, especially sexual assault rules in its criminal justice system.<sup>2</sup> Gender neutrality in rape laws has been identified in various countries over the time. The rape laws in India follow the traditional notion that the female is always the victim and the male is always the perpetrator. Constant developments have been seen in the Criminal Justice System but still the definition of rape recognises only female as the victim. After all these years a progressive argument has come up advocating the fact that even the male gender, transgender and other non-confirmative fluid genders can become a victim of Rape in India.<sup>3</sup>

The Indian law recognises only female as the victim of rape. This is because of the mere fact that rape with genders other than females go unreported, reason being unacceptance of such a crime with the society. Gender neutrality in Indian rape laws was first time dealt in *Sudesh Jhaku v KC Jhaku* wherein the court said that sexually assaulted men should be given the same protection of the law as given to female victims. In 1983, the criminal procedure code was amended to provide for in camera rape trials.<sup>4</sup> It also became an offence to disclose the identity of a rape victim<sup>5</sup>. 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<sup>6</sup>. The punishment for a crime should be based on how heinous that crime was. It should not be limited to a specific class of the society irrespective of the gender. This is the main aim of making rape laws gender neutral. The perpetrator should be punished and this punishment should be equal for all the genders. The Indian legislation still lacks provisions relating to male rapes which are very much present in today's world.

## II. RECENT DEVELOPMENTS

The Law Commission of India in its 172<sup>nd</sup> report has recommended that the rape law must be gender neutral.<sup>7</sup> It is argued that the principles of equality before law and equal protection of

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<sup>2</sup> The Criminal Law Blog. 2021. *Gender Neutral Rape Laws: Need of the Hour*. [online] Available at: <<https://criminallawstudiesnluj.wordpress.com/2020/05/01/gender-neutral-rape-laws-need-of-the-hour/>> [Accessed 27 July 2021].

<sup>3</sup> Verma, A., 2021. *All you need to know about gender inequality in rape laws - iPleaders*. [online] iPleaders. Available at: <<https://blog.ipleaders.in/need-know-gender-inequality-rape-laws/>> [Accessed 27 July 2021].

<sup>4</sup> The Criminal Law (Amendment) Act, Section 327 (1983)

<sup>5</sup> Indian Penal Code, Section 228-A (1860)

<sup>6</sup> Satish, M. (2013). *Virginity and rape sentencing*, Times of India, the crest ed.,

<sup>7</sup> Agnes, F. (2002). *Law, Ideology and Female Sexuality*. Economic and Political Weekly, 844-847.

rights enshrined as fundamental rights in our constitution must be applied here as well.<sup>8</sup> Thus, it can be said that a gender-neutral rape law would ensure equal protection of all persons. However, this must not be forgotten that women are still most vulnerable section and they require certain special protection. There have been concerns that a gender-neutral rape law, both for the perpetrator and the victim, may open up avenues for inflicting greater trauma and humiliation on women, and thereby would defeat the very purpose of law<sup>9</sup>. Gender neutrality in rape laws seeks to broaden the ambit of the perpetrators and victims of rape and sexual assault. It focuses on normalising rape and sexual assault of victims other than female and to provide them equal protection in the eyes of law.

The further developments in rape laws in India were seen in the 172<sup>nd</sup> Law Commission Report and the 2013 Criminal Law Amendment. These developments have been further discussed in the continuing chapters.

In 2013 Arvind Narrain gave three dimensions of gender neutrality. These are as follows:

1. Neutrality with respect to the victim.
2. Neutrality with respect to the perpetrator.
3. Neutrality in custodial, communal, war and conflict situations.

The traditional notion attached to the word 'victim' is that a victim is a woman as she is the most vulnerable in the society. The Indian rape laws is based on the same notion and thus does not provide any protection to the other victims of rape. This arises from the assumption that rape is an act of sex alone for the satisfaction of the perpetrator's sexual desire. But today with growing awareness it is evident that sexual assault is not just an act of lust but it is an act of dominance over one's caste, religion, gender, community and to execute power over another to cause humiliation. If the above phrases are to be believed then the victim should not be just 'female'. We assume that human bodies are clearly either male or female and turn a blind eye to violence suffered by those who violate the normative understanding of what it means to be a man or woman<sup>10</sup>. We overlook the plight of the transgender community, which includes hijras and kothis in the Indian context and the intersex, a condition in which one's sexual organs are ambiguous<sup>11</sup>.

### III. PROTECTION OF THE TRANSGENDER COMMUNITY

The Hijra community in India trace their origins to myths in the Ramayana and Mahabharata<sup>12</sup>.

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<sup>8</sup> Ibid.

<sup>9</sup> ibid

<sup>10</sup> Menon, N. (2013). *Seeing like a Feminist*. Zubaan and Penguin Books India Pvt. Ltd.

<sup>11</sup> Ibid.

<sup>12</sup> Narrain, S. (2003). Being a Eunuch. *The Frontline*, <http://www.countercurrents.org/gennarrain141003>

'Transgender' is a term to describe 'people who do not conform to traditional notions of gender identity, appearance and expression'<sup>13</sup>. It includes hijras, kothis, and trans-sexual<sup>14</sup>. While some undergo surgical operations to transform into the opposite sex, others perform the role of the opposite sex<sup>15</sup>. Brutal stories portraying the reality of everyday violence suffered by transgenders, is the core of the report of the Peoples' Union for Civil Liberties in collaboration with other NGOs<sup>16</sup>. It describes the harassment, abuse and sexual violence that form a part of the life of hijras and kothis and the ways in which the process of organizing by hijra and kothi sex workers is taking place<sup>17</sup>.

The classification of state and societal violence against hijra and kothi sex workers can be done under the following heads:

- a) Harassment by the police in public places
- b) Harassment at home
- c) Police entrapment
- d) Abuse/harassment in police stations
- e) Rape in jails <sup>18</sup>.

It is a traditional notion that the perpetrator of rape is always a male. The topic of female being the perpetrator has been debated a lot. There have been for and against views on female being the perpetrator of rape. In this sub-section the focus is on female being the perpetrator of rape. In the 172<sup>nd</sup> report of the Law Commission, the recommendation was that the rape laws in India must be gender-neutral. The definitions of rape change from one area to another, however rape is a crime often perpetrated by a person who forces another to intercourse by force against their consent. Women are exposed to discrimination, exploitation, oppression and violence in significant sections of the world. Despite many improvements to the legislation on offenses under the Indian Penal Code, the word "rape" is defined in Section 376 of the Indian Penal Code of 1860 as "whenever a man penetrates or does sexual intercourse with a woman without

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(Visited on May 10<sup>th</sup>, 2021)

<sup>13</sup> Appaji, PR. The Hijra and Kothi Movement; a struggle for respect. *Centre for Public Policy Research Initiative*. [http://www.mindtext.org/view/118/The\\_Hijra\\_and\\_Kothi\\_Movement;\\_a\\_struggle\\_for\\_respect/](http://www.mindtext.org/view/118/The_Hijra_and_Kothi_Movement;_a_struggle_for_respect/) (Visited on 10<sup>th</sup> May, 2021.)

<sup>14</sup> Narrain, A. (2012). The Criminal Law (Amendment) Bill 2012: Sexual Assault as a Gender-Neutral Offence. *Economic and Political Weekly*, 47, (No. 35).

<sup>15</sup> Ibid

<sup>16</sup> Pucl.org. 2021. *Human Rights Violations against the Transgender Community | PUCL*. [online] Available at: <<http://www.pucl.org/reports/human-rights-violations-against-transgender-community>> [Accessed 27 July 2021].

<sup>17</sup> Pucl.org. 2021. *Human Rights Violations against the Transgender Community | PUCL*. [online] Available at: <<http://www.pucl.org/reports/human-rights-violations-against-transgender-community>> [Accessed 27 July 2021].

<sup>18</sup> People's union for civil liberties, Karnataka PUCL-K, Report on Human rights violations against the transgender community – a study of kothi and hijra sex workers in Bangalore, India (September, 2003).

her consent or will, it amounts to rape<sup>19</sup>". Moreover, the term 'act of power' in India might be characterized as rape, because in violence against women patriarchy is fundamental.

The patriarchal character of Indian culture is founded on a hierarchical power relationship structure in which males rule women. In *State government v Sheodayal*<sup>20</sup> High Court opined that a woman's modesty can be infringed upon by another woman.

#### IV. FEMALE ON FEMALE RAPE

In the subject of whether or not a female can rape was discussed in the case of *Priya Patel v State of Madhya Pradesh*<sup>21</sup>. When a woman is raped by one or more members of a group acting in pursuit of their shared objective, each member of the group is regarded to have committed gang rape. As a result, theoretically, each member of the group is not necessary to complete the act of penetration. However, the court held that a woman cannot have an intention to commit rape, it is inconceivable that a woman can rape another woman<sup>22</sup>. While the question of whether a female may rape a man has been widely addressed and contested in the public sphere, Indian intellectuals and activists have mostly stayed mute on this aspect of gender neutrality.

The Peoples' Union for Civil Liberties (PUCL-K) in Bangalore has explored abuses of human rights against the transgender community. The findings were surprising:

“Sexual violence is a constant, pervasive theme in all the narratives that we've collected in our report. Along with subjection to physical violence such as beatings and threats of disfigurement with acid bulbs, the sexuality of the hijra also becomes a target of prurient curiosity, at the least, which leads to brutal violence, at the most. As the narratives indicate, the police constantly degrade hijras by asking them sexual questions, feel up their breasts, strip them, and in some cases rape them. With or without the element of physical violence, such actions constitute a violation of the integrity and privacy of the very sexual being of the person.”

Sexual violence against men in war times and conflict situations is a global and dreadful problem. It is one of the most horrifying tools of terror used not only against women but also against men<sup>23</sup>. Various scholars have claimed that attacks are not sexual actions alone, but powerful and acts of humiliation.

The foundation of this argument is that because men and women are treated differently in our

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<sup>19</sup> The Indian Penal Code, 1860

<sup>20</sup> 1956 CrLJ 83 M.P

<sup>21</sup> (2006) 6 SCC 263.

<sup>22</sup> *Ibid.*

<sup>23</sup> the Guardian. 2021. *The rape of men: the darkest secret of war*. [online] Available at: <<https://www.theguardian.com/society/2011/jul/17/the-rape-of-men>> [Accessed 27 July 2021].

patriarchal culture, sexual assault has distinct repercussions and impacts on them. As a result, we can't have the same legislation apply to both of them. Women are subjected to societal stigma. Some are even terrified to submit a police report against the criminal. The cops take advantage of the situation to mock and abuse them. But here it doesn't stop. The doctor does the two-finger test which is quite embarrassing. The society has a chance to blame the victim. A female faces the societal pressure and harassment. A female is expected to behave in a certain manner whereas there is no such set norms or rules for a male. As a result, a sexual attack has a significant impact on a woman's psychological condition. "The consequences of rape for a woman are far reaching. She has to battle the social stigma, social mind set. While fixing marriages, nobody asks a male if he is a virgin but this is not the case with a female."

## V. CONCLUSION

The whole definition of rape in IPC is focused on rape of women, with no provision for rape of males. It demonstrates that there is no specific legislation in India whether a male rapes another male or a female rapes a male. At most, they can be sodomised under section 377 of the IPC, which is based on the Buggery Act of 1533, which defines unnatural intercourse as an "act against God."<sup>24</sup> Except for this part, all other laws and provisions apply solely to women. This disparity in the treatment of male rape vs female rape is undermining our constitution's equalitarianism. Although there is POCSO (Protection of Children from Sexual Offenses) for sexual assault on a male child, there is no similar provision for an adult male. Such cases go unreported due to many reasons that are against the social stigma. 'Man' is considered to be stronger than a female, hence, it becomes physically impossible for a male to be raped by a female. Since the definition of rape in India is limited to the penetration of the penis or an object into the vagina, the number of incidents of rape and sexual assault against men has been steadily increasing. There have been several occasions when men have been subjected to such crimes, but nothing has been done because of a lack of legal protection.

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<sup>24</sup> Parveen, G., 2021. "Ought The Rape/Sexual Assault Law In India Be Gender-Neutral?". [online] iPleaders. Available at: <<https://blog.ipleaders.in/rape-sexual-assault-law-india-gender-neutral/>> [Accessed 27 July 2021].