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# Issues with Rape Law in India

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## ABSTRACT

*In this paper, I have discussed three existing problems with the Rape law of India. While talking about the first problem which is the law not being gender neutral, I have discussed how the law is still based on the patriarchal mindset that only a man can rape a woman, whereas the reality is that the current statistics showcase that even men and transgender people are subjected to the crime of rape. Through this discussion, I have argued that even women can be perpetrators of rape, and the definition of 'victim' must be amended to include transgender people and men. The second problem that I have discussed is the incestuous rape law not defining who a 'relative' is. POCSO elaborates on the definition of who is a relative, but it only safeguards children. The law on incestuous is also incomplete in the aspect that it does not treat sexual assault by a relative as an aggravated offence. I have also argued why incestuous rape should be treated as an aggravated offence, considering how the involvement of a relative that is a relationship of trust and dependency psychologically traumatises both the family and the victim, and at times the victim is silenced because someone from the family is involved. Thirdly, I have argued how the law on rape is obsessed with penetration, whereas, in my opinion, the law on rape should not be based on whether there was any penetration instead, the question which should be asked is if a woman's sexual autonomy was violated.*

**Keywords:** Incest, Gender-neutral, rape, penetration, India.

## I. INTRODUCTION

Even though the provisions of The Criminal Law (Amendment) Act, 2013 are highly progressive, I believe there are still some issues with India's rape law, some of which I will address in this essay.

Three major problems that I'll be discussing relating to rape law in India are –

1. The law is not gender-neutral
2. Incomplete provision on incest
3. Obsession with penetration

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## **II. GENDER-NEUTRAL**

As per the current law on rape, only a woman can be raped by a man. This may be because initially laws on rape and adultery were framed keeping in mind the patriarchal mindset of the society that rape is an act done by a man against a woman's family (especially her husband and father), their pride, and honor. A woman was treated like an object who could be lured into doing something as if she does not have an understanding of what she desires. The female gender was always looked down upon as a submissive one and women were assumed to be sensitive and fragile. Keeping all this in mind it was presumed that rape or sexual assault is something that can only be inflicted by a man on a woman.

The word 'victim' has customarily been perceived to incorporate only a woman. Unfortunately, the Indian law on rape is of the view that only a woman can be a victim of rape. This belief emerges from the presumption that rape is an act of sex alone to fulfill the sexual longing 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, or community over the other and is an act 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. (Kabra) When we look at patriarchy, we determine how the socio-cultural fabric of India, while placing men as the head of the family, hinders the recognition of male rape. There exists a stereotypical notion of men that they are too strong to be subdued, whereas the likelihood of being raped centers around the idea that the victim is weak. (Kulshreshtha, 2019) The stereotypical rape or sexual violence is usually inflicted by a man who is a stranger, usually belonging to the uneducated or lower strata of society, in an extremely hostile environment and also requires rape to be violent, brutal even, and it most likely involves penetration. The standards that have been set for what is understood as rape are so unreasonable that anything that does not fall within this framework, is dismissed as “not rape,” and is also not taken seriously. (Chaudhari, 2018)

Recent data shows that In the US in 2003 one in every ten rape victims was male, and 2.78 million men in the U.S. have been victims of sexual assault or rape. (Kabra) There even have been cases when men were raped by women. I here agree with the fact that there have more incidences of women getting raped but that does not mean that men aren't. There have been various surveys with sufficient empirical data to prove that women rape men. In 2014, a study of 284 men and boys in college and high school found that 43 percent reported being sexually coerced, with the majority of coercive incidents resulting in unwanted sexual intercourse. Of them, 95 percent reported female perpetrators. (Friedersdorf, 2021) Moreover, our estimations

of the number of male victims are likely to be severely understated because the act is not considered a serious crime, meaning that there have been no efforts to record its incidence. (Chaudhary, 2017)

Law has also been ignorant of the rights of transsexual individuals. There is sufficient evidence to support that India has consistently been home to the transsexual community. Indeed, the Hijra community's presence traces back to the Ramayana and the Mahabharata. In India, many studies have written about the sexual and physical brutality faced by transsexual people. The Peoples' Union for Civil Liberties Karnataka (PUCL-K) studied human rights violations against the transgender community in Bangalore. Its conclusions were shocking-

"Sexual violence is a constant, pervasive theme in all the narratives that we have 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, feeling up their breasts, stripping them, and in some cases raping 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." (Kabra)

Incidents of nonconsensual sexual activity among 930 homosexually active men living in England and Wales were analyzed. Of these men, 27.6% said they had been sexually assaulted or had sex against their will at some point in their lives; one-third had been forced into sexual activity (usually anal intercourse) by men with whom they had previously had, or were currently having consensual sexual activity. (Hickson et al., 1994) It is quite clear that even men and transgender people are victims of non-consensual sex and even women or transgender people can be the perpetrator.

Some other arguments that I want to put forward in support of the gender-neutrality of rape laws are-

#### **1. Women can rape men.**

There exists an assumption that rape incorporates just penile-vaginal penetration. But the meaning of assault isn't, as up until recently, restricted to penile-vaginal penetration any longer in India. It incorporates oral as well as penal penetration and also includes the insertion of objects.

## 2. Right to equality

Part III of the Constitution ensures fundamental rights to each resident of India. Article 14 gives every citizen the right to equality before the law and Article 15 forbids discrimination on the grounds of sex. Men and transsexual individuals consequently should have similar rights as women as they are as much citizens of the country. Despite the fact rape of men and transsexual individuals is not as common as the rape of women; they can't be denied the right to equality.

Thus, in my opinion, the law on rape should be gender-neutral and include all men, women, and transsexual people under the definition of both victim and perpetrator.

## III. INCEST

Rape, incest, and incestuous rape are all distinct offences that must be understood differently. Any forced act of sexual intercourse upon a person is defined as rape. Incest is defined as any sexual activity between close relatives, regardless of the consent and age of the accomplice. Having forcible intercourse within a banned degree of relationship is referred to as incestuous rape.

Victims of incestuous rape are subjected to both physical and psychological abuse. Incestuous rape is an irreversible betrayal of trust. Its effect is frightening and sickening; some people are drastically disturbed both psychologically and emotionally, while others become delinquent and rebellious. In the name of honour, some victims are even murdered by family members. Finally, this weakens society's moral fiber, which has a long-term detrimental impact that is impossible to fathom at this time. People often believe that "rape or sexual assault by a family member" and "rape or sexual assault by a stranger" are equally traumatic, but I'll try to highlight how rape or sexual assault by a relative is more horrific and needs to be classified as an aggravated offence.

The Indian law on incest rape that is Section 376 (2)(f) of the Indian Penal Code (1860) states that:

“being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman”

This section is the one in particular that talks about the rape of women by a relative or family member. No doubt that the section mentions that rape by a relative under IPC is an aggravated offence and the offender shall be punished with rigorous imprisonment for no less than ten years, which may be extended to imprisonment for life, and shall also be liable for a fine. But the section is incomplete as it does not define who a 'relative' is in the eyes of the law, leaving

the section vague and incompetent. On the other hand, POCSO (India, Protection of Children from Sexual Offences 2012) lays down a clear definition as to who is a 'relative'.

The Section 5(n) of POCSO Aggravated penetrative sexual assault mentions that:

“whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child”

It says that somebody related to the victim through marriage, adoption, or blood is a family member but POCSO only protects a 'child' that is any person under the age of 18. Individuals above the age of 18 are not protected under POCSO and section 376 does not define who a relative is making the law on incest vague, incomplete, and inapplicable in some cases as perpetrators will be able to weasel out of the aggravated punishment considering the section does not define who a relative is.

Now coming to the law on sexual assault – IPC does not make any distinction between an incestuous relative or a stranger sexually assaulting a woman or child whereas POCSO treats sexual assault by a relative as an aggravated offence under Section 9(n). The question now arises why is there a need to treat rape or sexual assault by a relative any different than rape or sexual assault by a stranger? I'll try to answer this question below.

India is reported to be gaining the dubious reputation of being one of the highest-risk countries for the sexual assault of women and children. In India, the sexual exploitation of children is one of the most common and under-reported crimes. According to a poll undertaken by the Sakshi Non-Governmental Organization, every second child has been sexually abused at least once before the age of 18, with 90% of these sexual abuses occurring at the hands of family members or someone they know. The COVID-19 lockdown period showed that women and children are not protected in their own homes and from their own families, as multiple newspapers reported incestuous rape almost every other day. There were 24,672 cases of sexual penetrative assault and sexual assault involving children in 2019 (NCRB 2019). Of those, 2153 (8.72 percent) were perpetrated by a member of the victim's family, an increase of 78.95 percent over 2018 (NCRB 2018) and a startling increase of 747.56 percent since 2010. According to the National Bureau of Criminal Records, the number of cases of sexual violence and exploitation perpetrated against children by their own families is on the rise (See Figure 1).

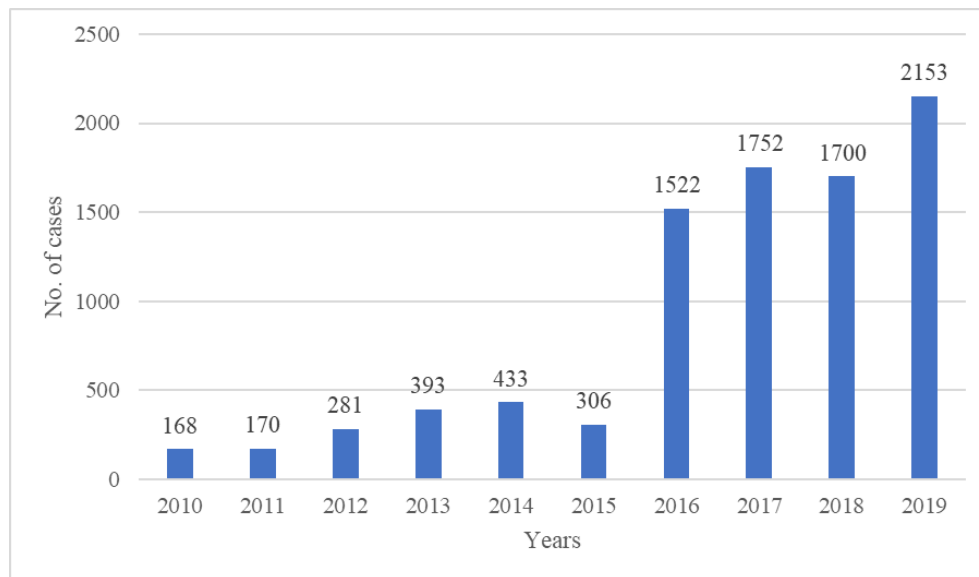


Figure 1(Reported cases of incest in India against children)

(Choate & Sharan, 2021)

Further, the data reported by NCRB in its annual report shows that in the four years (2016-2019), a woman was more likely than a child to be the victim of rape or sexual assault by a family member. (Figure 2). (Choate & Sharan, 2021)

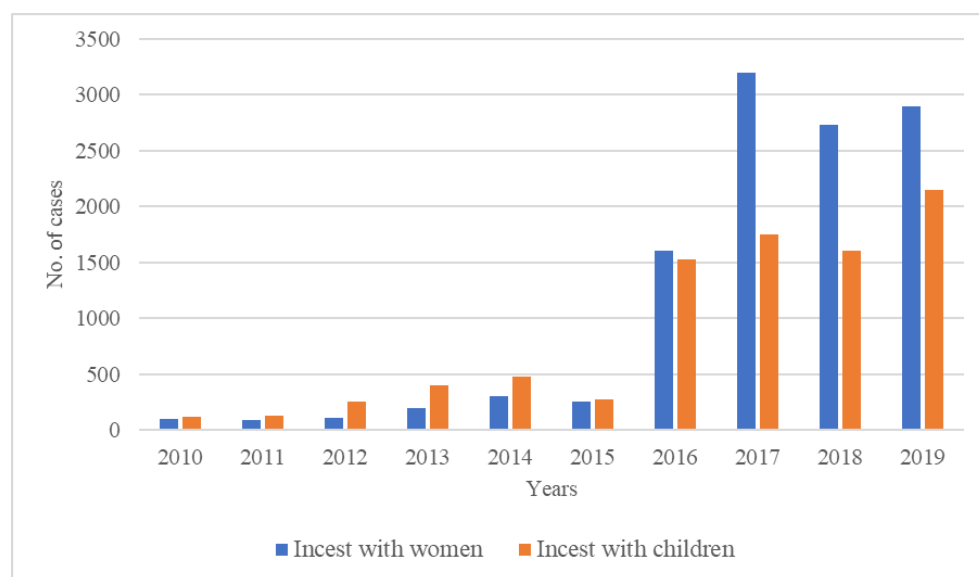


Figure 2 (Statistics comparing no. of cases of rape with children and women)

(Choate & Sharan, 2021)

In 2019, every day, 88 rape cases were reported to the police, out of which 98% of the rapes were committed by family members or close acquaintances. The rape of children or women by acquaintances is more common than the rape of children and women by strangers. Rape by acquaintance is more problematic not only because of the position of authority the perpetrator

is in but also because of the relationship of trust they share. Such a relationship makes it easier for the perpetrator to impose himself on the victim using pressurizing and exploitative tactics. Abuse in such cases continues even after the victim crosses the age of statutory consent as the victim feels that she does not have any other option other than to suffer in silence. Such abuse of the relationship of trust and dependency deserves to be treated as an 'aggravating factor' while quantifying punitive measures against the perpetrators. (Vibhute, 2002)

Incest can, and frequently does, cause psychological trauma not just to the victim but also to the family members whether at the time of the incident or later. Incest not only disrupts the family system but also causes 'harm' to it in the long run. While making a credible argument for incest as a specific crime, a scholar correctly observed: Incest continues to be anathema to those who are committed to the family's institutional structure and the preservation of family life. Both individuals who engage in incest and those immediately affected by it suffer negative effects. The preservation and maintenance of a unit concerning boundaries and a sense of security for all members is crucial. The most foundational of these boundaries is the sexual one. Women and men who live with or interact with their fathers or mothers and brothers or sisters need to be aware that having sex with either of them is not and will never be on the table. Therefore, it is essential for criminal law to firmly support that boundary and strive to safeguard the person's safety in the family environment. Legislation against incest must aim to safeguard both the family and the individual from the family. (Vibhute, 2002)

Research demonstrates that most rapes are committed by someone the victim knows. It comes as no surprise that 'child/woman-rape,' or 'sexual abuse outside the family,' is completely distinct from 'incest-child/woman-rape,' or 'sexual abuse within the family.' The latter is not only associated with the exploitation of the victim by a person in a position of power and trust but also with the abuse of the trust and dependency relationship. The 2010 National Intimate Partner and Sexual Violence Survey (NISVS), which was conducted by the Centers for Disease Control and published in November 2011, found that the majority of both female and male victims knew their perpetrators. Only 13.8 percent of female rape victims reported being raped by a stranger; most female victims reported being raped by a current or former intimate partner (51.1 percent), acquaintance (40.8 percent), or family member (12.5 percent). Male victims similarly reported a low number of stranger victimizations (15.1 percent) and a high number of acquaintance perpetrators (52.4 percent). (Black et al., 2011)

For the sake of the family's reputation, Indian society instills a belief in the mind of females that they are only quiet sufferers, even if they are victims of sexual exploitation within the family. Moreover, even if the victim has the 'courage' to reveal the sexual liaison, the 'exploiter' and his



entire family try to ensure that she is kept silent. The victim remains silent until someone else discovers it because of reasons such as fear of society's opinion and in some cases dependency on the perpetrator. Many times in such cases victims who lack the guts or attempted but failed to stop the 'exploiter' feel that they have no choice but to commit suicide in order to be free of the horrific sexual exploitation. When it comes to sexual exploitation (of a minor girl or woman) by someone from 'outside the family,' this unseen, in-built, or contrived familial or social pressure becomes less significant.

Existing IPC provisions appear to be less effective in combating the vice. In my view, it is critical to clarify who is a "relative" under section 376(f) so that there is more clarity and perpetrators of incestuous rape are subjected to stricter penalties. There should also be a separate section recognizing sexual assault by a relative as an aggravated offence and ensuring that the perpetrator receives harsher punishment. The punishment should be proportional to the 'harm' of incest. The prevalent societal and moral feelings towards the crime of incest, as well as the calculated public gravity of resentment, indignation, and reprobation voiced through their legislators, should undoubtedly be guiding variables in determining the sentence for incest. The crime of incest is based on the abuse of "trust or power," and the legislature should pay close attention to it in order to combat interfamilial sexual attacks on women by those in positions of trust and authority.

#### **IV. OBSESSION WITH PENETRATION**

In previous times, women were considered the property of men, and virgin girls were deemed to be precious possessions of their fathers. This stereotypical mindset made rape a crime against the property of men. Since rape was an offense against the property of a man, husbands and fathers were the victims. Keeping their interest in mind, men framed the laws for their benefit and gave importance to penetration. A female's pleasure can be prompted by the stimulation of the clitoris and does not require penetration. Penetration then became an essential element to constitute rape, not only this but it became an essential tool to measure when a crime had gone too far to constitute rape. Rape, however, is not sex; it is a crime, and it is a crime of violence. (Langston, 1998) The crime is complete when the act is done, or the social harm has occurred. It is an invasion of a woman's body in which her "private, personal inner space" is violated. The act is done when the female's private, personal inner space is violated, and that space is violated when an uninvited individual enters the zone of protected pleasures. (Langston, 1998) The act of rape denies a woman autonomy by abridging her right to determine when, with whom, and how she will allow an individual to enter her zone of body privacy. In addition to the physical

harm, the crime of rape grants man domination over the woman's zone of body privacy. (Langston, 1998)

Even though the 2013 Amendment is a forward-looking one it is continuing the idea of property and is obsessed with penetration. Although the section covers not only penile-vaginal intercourse but also forced sexual intercourse through other objects, the essence continues to be penetration. Indeed, courts try to justify the touching of the vagina by condemning it to be penetration. Shraddha Chaudhary in her article very well submits that from a victim's point of view, penetration is not the essence of the offence of rape. It is the denial of sexual autonomy. Subjecting the victim, without her/his consent, to any overtly sexual act, whether penetrative or not, and the humiliation and degradation that accompany this physical invasion, make a travesty of the autonomy of an individual to determine who (s)he wishes to engage in sexual interactions with, at what time, and to what extent. (Chaudhary, 2017) The only thing differentiating sexual assault from rape till the definition was limited to penile-vaginal sexual intercourse, was pregnancy. Pregnancy could be a monetary, physical, and emotional burden on the victim. But now that the definition has progressed the distinction is no longer present. Still, penetration remains to be the focus; the non-consensual touching of a woman's vagina is an infringement of her sexual independence. Anything that violates the sexual autonomy of a woman is humiliating no matter if it is penetration or not. Essentially, caressing a lady's bosoms, or contacting one's penis to her bosoms, or discharging onto her face or body or into her mouth without at any point, in any event, contacting her, or making her suck on one's balls, or in any event, compelling a kiss on her, is no less intrusive, violative, and embarrassing than the act of penetration which is presently perceived as rape. There is not any need to distinguish sexual assault from rape as both violate a woman's sexual autonomy. Now, the meaning of harm to a lady because of rape is not considered to be only pregnancy but mental and emotional harm and violation of her bodily integrity. There is no other valid reason for including only the act of non-penile vaginal penetration in the section. Moreover, if the harm sought to be prevented was the conception, the perpetrator could wear a condom, or pay for the contraceptive pills of his victim, and escape liability. (Chaudhary, 2017) It is important to highlight this because the politics of sexual intercourse cannot be separated from the politics of rape. Rape is about power, it is about violence, but it is also an inherently physical act, intrinsically linked to sex. How we understand sex, therefore, is inevitably linked to how we understand rape. (Chaudhary, 2017)

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## V. REFERENCES

1. Manasi Chaudhari, Aziz Ansari, Mohammad Farooqui and the Dangerous Myth of a 'Right' Way To Resist, 53 EPW engage (2018).
2. Shraddha Chaudhary, *Reconceptualising Rape in Law Reform*, 13 Socio-Legal Review (2017).
3. Peter Choate & Radha Sharan, *The need to act: Incest as a crime given low priority—a view with India as an example*, 10 Social Sciences 142 (2021).
4. Conor Friedersdorf, The understudied female sexual predator The Atlantic (2021), <http://www.theatlantic.com/science/archive/2016/11/the-understudied-female-sexual-predator/503492/>. (last visited Dec 16, 2022).
5. Ford C. Hickson et al., *Gay men as victims of nonconsensual sex*, 23 Archives of Sexual Behavior 281–294 (1994).
6. Shweta Kabra, Gender neutral laws- how needful in India? - manupatra Manupatra, <http://docs.manupatra.in/newsline/articles/Upload/3FE150D0-E784-49BD-8328-4134C0E87955.pdf> (last visited Dec 17, 2022).
7. Nikunj Kulshreshtha, *Ought the rape/sexual assault law in India be gender neutral?*, SSRN Electronic Journal (2019).
8. Lundy Langston, *No Penetration-and It's Still Rape*, 26 PEPPERDINE LAW REVIEW (1998).
9. K. I. Vibhute, *INCEST: A BLISSFUL OR MISERABLE OMISSION IN THE INDIAN PENAL CODE OF 1860?*, 44 Journal of the Indian Law Institute 85–99 (2002).
10. Michele C. Black et al., The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report (2011).

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