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GENDER NEUTRALITY WITHIN THE DIMENSIONS OF RAPE IN THE INDIAN LEGAL SYSTEM

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I. ABSTRACT

Rape is the fourth most common crime committed by people in India. It is often considered that rape is committed by male towards the female and therefore it is unlikely to be vice-versa. Not only the people but also the Indian Law is based on the conception that woman is the victim of the rape and man is the perpetrator of crime. The rape scenario in the transgender community is also very disturbing. Sexual assault in the sub-population of the transgender community which includes the youth, individuals with disability, homeless people and those involved in sex trade has been found to be high. Although the concept of gender-neutrality has been recommended by experts and reports, no notable steps have been taken to curb this situation. It is desirable to consider rape with the human rights and negate the role of gender biasness in the identification of the victim and perpetrators of rape. Regardless of gender of an individual, there should be equal protection of law under Article 14 of Indian Constitution. In order to have better understanding and inclusivity in the paper, the author has focused on the secondary data, statistical tests and experiments. The research conducted in this paper finds that even after the amendments in criminal law, the position has remained the same i.e. gender specific. This paper aims to shift the minds of the readers to the neglected nature of the legal system towards the transgender community and the need for gender-neutral laws in the Indian legal system.

II. KEYWORD

Rape, Gender-specific, Gender-neutral, Transgender, Human rights

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III. INTRODUCTION

Law Commission in its 172nd Report recommended that the rape laws should be gender-neutral in nature.² Central to this statement is the speculation that the offence of rape should be desexualized, and the stigma related to this would disappear eventually. By rephrasing, the offence of rape, the attitude of the society will eventually change. The agitation against the rape started as early as 1980s. It not only covers the sexual violence against the women but also addressed the domination and superiority which they have been subjected to from time to time.³ Rape is a weapon of fear which men controls in order to regulate this hierarchal society. It is not only inflicted because of the bodily lust of a person but also with the view to subjugate a particular community, caste, class etc.⁴ Sexual offences committed against the transgender community also go unreported or ignored. They are treated as 'second class citizen' because of the different conceptions related to their identity. They are often discriminated a lot by both males and females in various fields of life. The myth related to a woman 'no' means her 'yes' should also be changed by using appropriate legal methods.

Rape can be done to anyone irrespective of gender, caste, class, age etc. Many of the times it goes unreported as the victim fear that he or she might be a laughing stock for the people and it will harm their potency.⁵ Our constitution incorporates Article 14 which states 'the state shall not deny to any person equality before the law or equal protection

²Flavia Agnes, *Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law*, Economic and Political Weekly, 844, 844-847 (2002), available at <http://www.jstor.org/stable/4411809>, last seen on 18 August 2021.

³ WTD News, *The Evolution of Anti-Rape Laws in India Since 1860*, (August 10 2021), [The Evolution Of Anti-Rape Laws In India Since 1860 | Youth Ki Awaaz](#)

⁴ Shweta Kabra, *Gender-Neutral Laws-How Helpful in India*, (August 10 2021), [ALRRJ Vol 1 eBook \(2\).pdf \(manupatra.in\)](#)

⁵ Nikhil Mishra, *Gender Neutrality Rape Laws in India-A Necessity*, (August 10 2021), [Gender Neutral Rape Laws in India: A Necessity \(latestlaws.com\)](#)

before the laws within the territory of India', and Article 15 provides the provision for the protection from discrimination on the basis of religion, caste, sex or place of birth.⁶

In the post globalization period, the world changes for the males, females and transgenders. Males, who were once regarded as guilty in the crimes of sexual offences, are now becoming the chief victim for the same e.g., rape, sexual assault cruelty etc. Females are now running the economy of the country. They are competing with men in the fields of education, employment, social status etc., which largely happened due to post independence women legislations. The absence of law which defend males is considered disastrous to them and reflects that the entire legal system is biased against them.⁷ The need of an hour is to understand that rape can be done to anyone other than female and it can occur anywhere and anytime. Only by leaving this stereotypical approach towards rape, we can understand the urgency of the matter and its seriousness. Therefore, this paper discusses the evolution and trends of rape laws, different legal reforms over time, gender neutrality culture in Indian legal system and the arguments in favor and against it, relationship with human rights, hurdles in achieving the required goals of gender neutrality and the way forward.

1. Trend of Rape Laws in India

The term 'Rape' has been derived from a Latin word 'Repere' meaning to seize or to take away something by force. Rape at the early stages was never considered as a crime against the victim rather it was seen as a crime against the property. Women were regarded as a property which belonged to their husbands or fathers. The accused was required to compensate the father or husband of the women, who has been raped by him.⁸ Rape was introduced in our legal system for the first time in Indian Penal Code 1860. It defined rape as an act of sex with women against her consent and with consent

⁶ Kairali, Article 14-15 of the Indian Constitution-Eradicate Discrimination and Bring Equality, (August 10 2021), [Article 14 And 15 Of The Indian Constitution-Eradicate Discrimination And Bring Equality \(legalserviceindia.com\)](https://legalserviceindia.com)

⁷ id.

⁸ Supra.

but under the fear of death or false pretense.⁹ But this definition of rape was regarded as a narrow one and has many loopholes. With the changing times, the laws should also be broadened to cover a larger legal aspect.

Mathura Rape Case

One of the earlier landmark cases in the women's movement is 'The Mathura Rape Case'¹⁰. In this case, the Supreme Court held that the orphan tribal girl Mathura, who has been raped by the two policemen, has raised no alarm and there was no injury present on her body to identify that she resisted the men. It was also held that she submitted to the two policemen and consented to the act and therefore there was no rape. The Judge commented that "Because she was used to sex, she might have incited the cops (they were drunk on duty) to have intercourse with her. This infamous decision was welcomed with outrage from many women organizations and legal experts. Four law professors Upendra Baxi, Raghunath Kelkar, Lotika Sarkar of Delhi University and Vasudha Dhagamwar of Pune wrote an open letter to the chief Justice, criticizing the verdict of the case. This sparked off certain demands in relation to the rape laws in India. One of which was to the shift the burden of proof once the prosecution has discharged its burden of proving sexual act.¹¹ This verdict and resentment of the people brought about many significant amendments in later years.

2. Legal Reforms

The Criminal Law (Amendment) Act, 1983

The Criminal Procedure Code was amended in 1983. For the first time, 'Custodial Rape' was introduced in the Indian legal system. Until this point, no specific recognition was given in the rape cases which were committed in the custody of the public servant. But after the amendment, it became one of the heinous offences as the accused have the

⁹ Supra.

¹⁰ Tuka Ram and Anr vs State of Maharashtra 1979 AIR 185, 1979 SCR (1)

¹¹ Samapika Mahopatra, Mathura Case (August 11 2021), [MADVS2003C04_Gender_Dev.pdf \(cusb.ac.in\)](#)

The Delhi gang rape case¹⁶ or Nirbhaya gang rape case in 2012 distressed the entire nation. The brutality and barbaric nature of the accused led to widespread protests all over the country. This case gained a lot of media coverage. The public was blazing with indignation. Now they not only wanted an amended law but also a change in how the rape was looked at. The amendment includes new provisions like stalking, acid attacks, voyeurism, sexual harassment and disrobing a woman under the definition of rape.¹⁷ Now, even the threat to commit rape is a crime. The punishment in the cases was also enhanced from 10 to 20 years and the character of the victim was also regarded as an irrelevant material in the rape cases. The age of being regarded as an adult in violent crimes was amended from 18 to 16. But the crime was not gender-neutral in the Act. Therefore, only a man can commit the crime.¹⁸

The Criminal (Amendment) Act, 2018

In *Asif Bano vs Ut of J & K and others*¹⁹, an 8-year-old girl named Asif Bano was raped and brutally murdered by a group of men in the Kathua district of Jammu and Kashmir. The main accused in this case was Sanji Ram, who was a priest in the temple where the rape evidently took place. This caused a lot of nation-wide outrage because the victim of this brutal incident was a minor, crime took place in a religious place and the main accused was the priest. This made the case highly politicized. This led to the amendment of the Criminal Act in 2018. The main change was done in the POCSO (Protection of Children from Sexual Offences) because the victim was a child. It provided for the imprisonment of 20 years if the victim is a child below the age of 16 years.²⁰

3. Gender Neutrality in Rape Laws

¹⁶ (2017) 6 SCC 1

¹⁷ Indraneel Chakraborty, *International Journal of Law, Management and Humanities*, (August 12 2021), [Shifting-Perspectives-The-Exigency-of-Gender-Neutrality-in-Indian-Rape-Laws.pdf \(ijlmh.com\)](https://www.ijlmh.com/Shifting-Perspectives-The-Exigency-of-Gender-Neutrality-in-Indian-Rape-Laws.pdf)

¹⁸ *Supra*.

¹⁹ 19 April 2022

²⁰ Rachit Garg, *A Critique of Rape Laws in India*, (August 12 2021), [A critique of rape laws in India - iPleaders](https://www.iPleaders.com/a-critique-of-rape-laws-in-india/)

Gender Neutrality means no distinction between the gender and equal treatment between them. It tries to eradicate the male-female paradigm in the rape. It is very disturbing to see that Indian legal system considers only the female to be the victim of the sexual crimes. There are various reasons for rapes to occur other than the age-old notion of bodily lust. Some other reasons are: the depiction of the dominance of one gender over the one, caste-class conflicts etc. It can also happen to humiliate or degrade the victim in the society. Not only males are given this unequal treatment in the matter of sexual assault but also the transgender people faced the biased viewpoints in the matters related to rape, sexual harassment etc. The research regarding the male rapes in India started in 1980s. Even in the 21st century, males feel insecure to file a complaint, as that might trigger the question of their potency. Gender Neutrality was first dealt in the case of *Sudesh Jhaku v K.C Jhaku*.²¹ In this case, Supreme Court held that the male victims are also equivalent to the female victims. They are to be protected by law also.

In another case, *Sakshi v. Union of India*²² Supreme Court diverted the whole case to law commission and demanded for their recommendation. The Law Commission in its 172nd report advised that the rapes should be gender neutral. There should not exist a partiality between male and female while dealing with the cases relating to rapes. But soon after the report, the country engaged in the infamous rape case, *Nirbhaya Rape Case*.²³ After this, Government of India appointed Justice Verma Committee (JVC) to recommend the necessary reforms in the rape laws in India. It advised to widen the definition and the punishment of rape. It also recommended for making a gender-neutral atmosphere in the Indian legal system. This generated a lot of criticism from the women organizations. They contended that the already powerful male will become more dominating, and the

²¹ *Smt. Sudesh Jhaku v/s K.C.J. And Others*, 23 May (1996)

²² *Sakshi vs Union of India*, 26 May (2004)

²³ *Mukhesh & Anr vs State for Nct of Delhi & Ors*, 5 May (2017)

position of women will become miserable.²⁴ This persuaded government to alter its stance and again introduce the gender-specific rape laws.

In our legal system, the victim is always considered as a 'female'. There are empirical evidences which shows the case otherwise. According to a study (hannon et al) it was concluded that 10.5% of men were raped and there were attempts of rape on other 10.5% men. The definition of rape should contain male and transgender community also. There are instances where females are accused or attempted to commit rape against males. In a case, Supreme Court held that female cannot rape another female because there is no penile-vaginal intercourse, which was considered to be an essential ingredient to commit the crime of rape. This judgement was flawed as there are empirical evidence to show the case otherwise.

4. Gender Neutrality and Human Rights

Human Rights are those rights which we as a human possess. They are universal rights which are guaranteed to us irrespective of gender, nationality, ethnicity, color, religion, language and any other status. They are the fundamental rights e.g., right to water, right to education, right to work, health etc. It is widely accepted that human rights and gender equality goes hand in hand. Right to life and personal liberty are guaranteed to us irrespective of sex.²⁵

The Supreme Court in a case held that rape is the violation of human right. But Indian law formulates on the perception that women are the victim of the rape and thus violates the human rights of men. Universal Declaration of Human Rights (UDHR) preamble clearly states that 'the inherent dignity and the equal and inalienable rights of all the individuals of the human family is the muse of freedom, justice and peace in the international'. Article 2 (UDHR) states that everyone is entitled to the human rights

²⁴ Arjit Mishra, Gender-Neutral Laws: Need of Hour, (August 13 2021), [Gender Neutral Rape Laws: Need of the Hour – The Criminal Law Blog \(wordpress.com\)](#)

²⁵ [OHCHR | What are Human Rights](#) (August 13 2021)

irrespective of sex.²⁶ Article 7 also states that everyone is equal before law and they will be subjected to equal protection. Article 8 also prescribes that ‘actually anyone has the power to an effective remedy via the ready country wide tribunals for acts violating the important rights granted him with the resource of the constitution or via law’. These articles clearly depict the intention of UDHR in implementation of a gender-equal society and at the same time impose duty on the national government to establish gender neutral rape laws.²⁷ Article 15(3) of the Indian constitution empowers Indian government to make special provisions for the betterment of women and children. But this argument does not put hindrance in the way of the State to protect the interest of the males and this is where State fails to discharge its responsibility of providing equal protection of law to its citizen.

5. The Third Gender

From the very beginning, the society was divided between two genders namely- Male and Female. All the rights and duties were divided between them only. So, coming up of a new gender is not acceptable by most of the people. This ‘third gender’ or ‘transgender’ is subjected to humiliation, hared, contempt etc., by most of the people. Sometimes, their families abandon them because of their gender, then the treatment of the people and the government towards them escalates the already existing hardships for them. They are welcomed with hatred and contempt in the public at large. According to the survey of National AIDS Control Organization, out of 5000 transgender people, one fifth had experienced sexual violence in the last 12 months. In the last decade, India had been strict in penalizing the crime related to rape, but these punishments are only confined to man and women. The activists of the transgender community argues that it is not enough to protect the rights of other genders.²⁸

²⁶ Supra.

²⁷ Universal Declaration of Human Rights | United Nations (August 13 2021)

²⁸ Esha Mitra, India’s Laws do not cover transgender people. They say that it is putting them at risk, (August 14 2021) [India's rape laws don't cover transgender people. They say it's putting them at risk - CNN](#)

In 2014, the astonishing judgement of the Supreme Court in *NALSA v. Union of India*²⁹, opened up new dimensions in the legal system as well as in the society. It recognized the transgender as 'persons' under the Article 14 of the Indian Constitution. This was done in order to give them equality and put a stop to the discrimination which they were subjected to.

On 5 December 2019, the Transgender Persons (Protection of Rights) Act, 2019 was assented by the President and came into force for governing the laws related to the transgender people. But this act proved to be unfulfilling. The long hard struggle of transgender people for fair treatment in the society proved to be a failure. Section 18 (d) of this act treats the offence of sexual crime as a trivial offence. Under this section, the offences related to the transgender people are punishable up to six months, which can be extended to six years with fine. But, when a man is found guilty of raping a woman, then he is sentenced to a minimum of 10 years which can be extended to life imprisonment with fine. Death penalty is also imposed in cases, where a woman is left in the vegetative state, or a rape has been committed against a girl under the age of 12 years. Activists argue that this minimum protection regarding the rape laws in the transgender community, sends a message that they their lives are not worth protecting.³⁰

The transgender community argues that the punitive action in the act is not harsh enough to stop the perpetrators from committing crimes against them. According to *Injustice at Every Turn: A report of the National Transgender Discrimination Survey (2011)*, concluded that 12% of the transgender youth, particularly males have been facing sexual abuse by their peers or educational authorities. According to the report 'Gender Identity Disparities in Criminal Victimization: National Crime Victimization Survey (2017-2018)' found that the transgender people are abused over four times more than cisgender people. Only in 2017-2018, the transgender people suffered 86.2 victimization per 1000

²⁹ National Legal Services Authority (*NALSA*) V. Union of India, AIR 2014 SC 1863

³⁰ Ankita Ramgopal, Rape Laws: Why is Sexual Violence against India's transgender not been taken seriously, (August 14 2021), [Sexual violence: Amid the debate over gender-neutral laws, have transgenders been forgotten? \(scroll.in\)](#)

people as compared to the 21.7 victimization per 1000 of cisgender people. Now, to confirm their status as a transgender, they had to get a certificate from the district magistrate which makes this provision to be applicable according to the whims of the magistrate.

Even though the number of males and transgender being the victim of sexual offences is comparatively smaller than females, yet it does not mean that they can be discriminated against their females' counterparts in equality. Women's rights activists negate this fair treatment provided to the transgender people in relation to the sexual crimes. They consider that the notion of the perpetrators should only be confined to men alone. Implementing gender-neutral laws will promote equality and will be in consonance of Article 14 of the constitution.³¹

6. Obstacles in Achieving a Gender-Neutral Laws

Patriarchy plays one of the important roles in accomplishing the gender-neutral laws. It not only defines women but also men. It specifies roles which are to be performed by men only as they are considered strong and brave. Therefore, men cannot be sexually assaulted or abused by a woman or another man. Some of the examples of how a man should perform in an Indian patriarchal society are he cannot show his emotions publicly, cannot cry in front of anybody as it will depict his weakness and impotency. This holds up men from filing a complaint in the police station because they know that they will be judged there also. Many of the male rapes go unreported or uninformed and that further give chance to the perpetrators of the crime to commit more sexual offences against him. Contrary to this popular belief, it was found that the males have the same reaction to the sexual abuse as that of women according to a study conducted in America 'The Effects of Sexual Assault on Men: A Survey'.

In this contemporary society, media plays a very important role in affecting the psychological aspect of human beings. Young minds are greatly influenced by the media

³¹ id.

and cinema. . The conventional media does not depict man as being the victim of sexual offence rather it presents what a man should look like in a society. Dialogue of an actor stating that a man does not feel pain infers that a man cannot show his emotions as it will question his masculinity. The harassment or satire of transgender people in Indian cinema is taken as for granted or comically. The movie Aitraaz gained success in Bollywood cinema because it depicts that man can also be the victim of sexual harassment, which the society is not ready to accept.³²

The transgender and males do not report any incident of sexual assault against them, which further leads to non-awareness of the issue. According to report of 'Gender Identity Disparities in Criminal Victimization: National Crime Victimization Survey (2017-2018)', it was found that about half of the violent victimization related to the transgender people remains unreported. Non-granting of equal protection and equality before the law, wholly undermines the basic structure of Indian constitution. It has been argued by the feminists that gender-neutrality is anti-women in nature because it will undermine the female victims and males are stronger than females.³³ Therefore, rape against males is unrealistic. But only on the basis of this contention males and transgenders should not be treated as second class citizens with respect to rape and other sexual offences.³⁴

7. Conclusion

To make the legal system in India gender-neutral, the definition of victim and perpetrators should be broadened. The laws regarding sexual offences should take into consideration the plight of males and transgender community. The mental torture and suffering are the same for all the victims regardless for their gender. Gender-Neutrality does not mean to desexualize the rape victim rather it means include all the genders

³² Kerti Sharma and Shipra Tiwari, Should Sexual Violence be Gender-Neutral, (August 15 2021), [Should Sexual Offences be Gender Neutral | SCC Blog \(sconline.com\)](#)

³³ Anjitha Santhosh, Gentle Neutral Rape Laws: A Steps Towards Equality, (August 15 2021), [Gentle Neutral Rape Laws: A Steps Towards Equality | ProBono India \(probono-india.in\)](#)

³⁴ id.

under the ambit of rape. The ideas of equality and justice which forms the basic structure of Constitution can also be upheld. It has been argued that if the gender-neutral laws be implemented in the country then, the patriarchal nature of the Indian society would try to provide unconditional powers to men which they can use against the women. But by solely relying on this statement, we cannot restrict men from the granting them basic human rights. Laws should be reasonable to protect the weaker section of the society, but at the same time it should not mistreat or neglect the interests of other sections which are equally vulnerable to the same crimes. The language should be made sexually neutral in the laws.

To bring inclusivity in the Indian legal system, the Indian Evidence Act, The Criminal Procedure Code, Indian Penal Code etc should be altered in such a way as to make the laws gender-neutral. Harsher penalties should be imposed on the perpetrator of the crime. Transgender laws should be established and taught to police officers as a part of their training, in order to ensure that they are not facing sexual harassment and the crimes are being reported. It is the need of an hour to create an inclusive society which provides diversity and comprehensiveness in the Indian Legal System.

8. REFERENCES

- Flavia Agnes, *Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law*, *Economic and Political Weekly*, 844, 844-847 (2002), available at <http://www.jstor.org/stable/4411809>, last seen on 18 August 2021.
- Shweta Kabra, *Gender-Neutral Laws-How Helpful in India*, (August 10 2021), [ALRRJ Vol 1 eBook \(2\).pdf \(manupatra.in\)](#)
- Nikhil Mishra, *Gender Neutrality Rape Laws in India-A Necessity* , (August 10 2021), [Gender Neutral Rape Laws in India: A Necessity \(latestlaws.com\)](#)
- Kairali, *Article 14-15 of the Indian Constitution-Eradicate Discrimination and Bring Equality*, (August 10 2021), [Article 14 And 15 Of The Indian Constitution-Eradicate Discrimination And Bring Equality \(legalserviceindia.com\)](#)

- Samapika Mahopatra, Mathura Case (August 11 2021), [MADVS2003C04_Gender_Dev.pdf \(cusb.ac.in\)](#)
- Saheli-Women Resource Centre, Amendments to Rape Laws, (August 12 2021), [AMENDMENTS TO RAPE LAWS - sahelisite \(google.com\)](#)
- Indraneel Chakraborty, International Journal of Law, Management and Humanities, (August 12 2021), [Shifting-Perspectives-The-Exigency-of-Gender-Neutrality-in-Indian-Rape-Laws.pdf \(ijlmh.com\)](#)
- Rachit Garg, A Critique of Rape Laws in India, (August 12 2021), [A critique of rape laws in India - iPleaders](#)
- Arjit Mishra, Gender-Neutral Laws: Need of Hour, (August 13 2021), [Gender Neutral Rape Laws: Need of the Hour - The Criminal Law Blog \(wordpress.com\)](#)
- [OHCHR | What are Human Rights](#) (August 13 2021)
- Universal Declaration of Human Rights | United Nations (August 13 2021)
- Esha Mitra, India's Laws do not cover transgender people. They say that it is putting them at risk, (August 14 2021) [India's rape laws don't cover transgender people. They say it's putting them at risk - CNN](#)
- Ankita Ramgopal, Rape Laws: Why is Sexual Violence against India's transgender not been taken seriously, (August 14 2021), [Sexual violence: Amid the debate over gender-neutral laws, have transgenders been forgotten? \(scroll.in\)](#)
- Kerti Sharma and Shipra Tiwari, Should Sexual Violence be Gender-Neutral, (August 15 2021), [Should Sexual Offences be Gender Neutral | SCC Blog \(sconline.com\)](#)
- Anjitha Santhosh, Gentle Neutral Rape Laws: A Steps Towards Equality, (August 15 2021), [Gentle Neutral Rape Laws: A Steps Towards Equality | ProBono India \(probono-india.in\)](#)