



GENDER VULNERABILITY AND DEMOLISHING 'GENDER- NEUTRAL LAWS

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ABSTRACT

Gender neutrality in India is a work that is still in the process. Though world wide most number of societies are moving towards reformation ,there is also an understanding that there is too much to be changed. In India, only men can officially be said to commit rape, and only women can officially be raped. Rape is the fourth most common crime that is committed against women in India. According to the National Crime Reports Bureau of 2013 annual report 24,923 rape cases were reported across India in 2012. Out of these 24,470 that were committed by someone related or known to the victim (98% of the cases). In India, rape is defined under section 375 of the Indian Penal Code in a very narrow manner. It states only a man can rape a woman. This does not mean that male and other rapes cannot be prosecuted. The term 'other rapes' are criminalized under Section 377. There is a need for just one definition of rape, that should cover all forms of rape, be it inflicted on a man or a woman or people from some other gender. There exist a huge taboo that surrounds rape, in particular male rape, and it is an extremely difficult task to break down the barrier. We many a times tend to overlook the plight of the transgender community, which takes into its ambit the hijras and kothis in the Indian context and the

inter sex, which is a condition in which one's sexual organs are ambiguous. Bisexual or gay men are often targeted for their sexual orientation. This sort of an assault is known as hate crime. Bisexual and gay men suffer through the same types of mental and physical plight. Despite male rapes not being researched as vividly as female rape, there are various numbers to suggest that men are raped. The National Intimate Partner and Sexual Violence Survey (2010) is a telephone survey that identifies the magnitude of sexual and other form of violence among adult men and women in the United States.

Diverging Arguments against gender-neutral rape laws

"It is physically impossible for a woman to rape a man. Arousal implies consent." – Dr. Anand Kumar, Department of Reproductive Biology, AIIMS, in an interview. "I oppose the propose to make rape laws gender neutral, There is physicality in the definition of rape, there is use of power and the victim has a stigma attached to her. If made gender-neutral ,rape laws will not have the deterrence value and it will make it more complicated for judges in court." –Agnes told The Times of India.¹

A woman raping a man is quite impossible according to feminists ,doctors, professors, lawyers etc. In this scenario ,it is difficult to proceed with the argument for gender-neutral rape laws.

The anomaly of Rape laws in India
Male on female rape (Section -375)
The Criminal Law (Amendment) Act, 2013,
Section 375 of the Indian Penal Code reads

¹ Rape law amendment : 'Where are the cases of sexual violence against men?', available at: <https://www.firstpost.com/india/rape-law->

[amendment-where-are-the-cases-of-sexual-violence-against-men-384227.html](https://www.firstpost.com/india/rape-law-amendment-where-are-the-cases-of-sexual-violence-against-men-384227.html) (last visited on October19,2019).



such:

A man is said to commit “rape” if he has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

1. Against her will
2. Without her consent.
3. With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
4. With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
5. With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequence of that to which she gives consent.
6. With or without consent, when she is under eighteen years of age.
7. When she is unable to communicate consent. Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception1- A medical procedure shall not constitute rape.

Exception2- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape. Here, the law is absolutely gender-specific. Rape does not only include Penile-vaginal penetration. The laws related to

stalking, sexual harassment are all gender specific in nature.²

Male on male rape [LGBT] Section 377

Section 377 of Indian Penal Code, 1860 reads as :“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. Explanation-Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”³In simple words, the section makes physical relations existing between two consenting adults of the same sex a punishable offence. The reference to “intercourse against the order of nature” also criminalizes sexual activity like anal sex, fellatio (commonly known as blowjob) etc ; even if it that happens between a man and a woman. There are two main issues with this law: one, that the offence is not termed as rape; and two criminalization of gay sex, or a specific process of having sex for that matter, cannot be a part of a progressive society and nation. Female on female rape : The law on gang rape (Section 376D) reads as - “Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment....”⁴ Thus it is very much possible to convict a woman of raping a woman as part of a gang. Other female on female rape is not

² Indian Penal Code, 1860, s.375.

³ Indian Penal Code, 1860, s. 375

⁴ Indian Penal Code, 1860, s.376D



considered as punishable under law since even under Section 377, penile penetration is an essential condition. Transgendered/ transsexual rape : This too can be made punishable under Section 377 provided there is penile penetration. Female on male rape : There have been several cases of female on male rape. There have been different surveys with enough empirical data to prove that women do rape men. "Victim surveys of British and American male have shown that 3 to 8 percent of males reported atleast one adulthood incidence of sexual assault in their lifetimes .While the majority of these crimes are committed by male offenders, as estimated 6 to 15 percent of these sexual assaults can involve female perpetrators." (Pino& Meier, 1990, Coxell& King ,1999). There has been growing identification of male victimization all around globe. Countries that have adopted gender-neutral laws include Canada, all Australian states, the Republic of Ireland, Finland , England and Wales and the majority of states within the United States.

Writ Petition in the High Court of Delhi

Naz Foundation (India) Trust v. Government of Delhi and Ors. [Writ Petition (Civil) No. 4755 of 2001]⁵

In 2001, Naz Foundation (India) Trust, filed a writ petition in Delhi High Court challenging the constitutionality of Section 377 on the grounds of violation of right to privacy, dignity and health under Article 21 of the Constitution of India, equal protection of law and non-discrimination under Article 14 and 15, freedom of expression under Article 19 of the constitution. A notice was given to Union of India in 2002 and the Attorney General

was asked to appear before the court. The Ministry of Home Affairs filed an affidavit opposing the petition in September ,2003. The petition was dismissed by the High Court on 02..09.2004 for derth of cause of action as no prosecution was pending against the petitioner.

The petitioner filed a review, a petition (RP 384/2004) in the High Court against the order of dismissal but that was also dismissed on 03.11.2004. Aggrieved by the same, the Petitioner filed a Special Leave to Appeal (C.N. 7217-18/2205) in the Supreme Court of India in 2005. On 03.02.2006, the Supreme Court passed an order holding that "the matter does require consideration" and is not of a nature which could have been dismissed on the ground afore-mentioned. Taking the matter back to the High Court of Delhi to be decided on merits, the Supreme Court set aside the said order of the High Court. Subsequently, the Ministry of Health and Female Welfare through National AIDS Control Organization (NACO) submitted an affidavit supporting the petition in the High Court contending that Section 377 acted as an impediment to HIV prevention efforts in July 2006.

On, 02.07.2009, the Delhi High Court passed a very famous judgment holding Section 377 is in violation of Article 21, 14 and 15 of the Constitution, so far criminalized various sexual acts of adults in private.

How Men are Affected

Fraizer(1993) examined 74 male and 1,380 female rape victims and found that male victims were more in depression and hostile immediately post rape compared to female victims.

⁵ 160 Delhi Law Times 277



Carpenter(2009, citing Mezey,1987) noticed that the “male coping strategy characterized by denial and control renders them more prone to later psychiatric problems and diminishes the likelihood of seeking help.”⁶

Perhaps, rape does not affect men and women in a similar way, it does, however, affect men vehemently.

Non-consent should be enough to qualify any sexual act as rape. It does not matter whether the victim is a male or a female . Seriousness of rape is same in both the cases. Rape is an act of power and control over the other person, not just sex. Susan Brownmiller has a very broad definition of rape:

“...rape became not only a male prerogative but a man’s basic weapon of force against woman, the principal agent of his will and her fear. His forcible entry into her body, despite her physical protestation and struggle became the vehicle of his victorious conquest over her being, the ultimate test of his superior strength, the triumph of his manhood.”⁷ (Brownmiller 1975,14)

Steve Pinker, a cognitive scientist said in an “Ask me Anything” on popular website reddit

“I believe that the rape-is-not-about-sex doctrine will go down in history as an example of extraordinary popular delusions and the madness of crowds. It is preposterous on the face of it, does not deserve it’s sanctity, is contradicted by a mass of evidence, and is getting in the way of the only

morally relevant goal surrounding rape, the effort to stamp it out.”⁸

Recommendations

The most note worthy view against complete gender neutrality is the patriarchal mindset of the Indian society and the negative results of female victims that it might lead to. The supporters of complete gender neutrality supports the argument of right to equality and the social stigma that surrounds rape. After taking both the sides into consideration one must create an equal society and try to achieve gender neutral laws. We should adopt a step-by-step approach. As recommended by the Verma Committee⁹, the rape law must be amended to make the victim gender inclusive while the perpetrator remains gender specific. The recommendations can be summarized as follow:

- 1) Presence of male and transgender rape in India cannot be denied. By not having gender-neutral rape laws, we are denying a lot more men justice.
- 2) Gender-neutral laws are extremely unlikely to be used against women just to harass them. We must try to balance out the rights of all identities.
- 3) Justice Verma Committee Report suggested a solution to make the victim gender inclusive while the perpetrator remains gender specific. This will be used as

⁶ Frazier, Patricia A., A comparative study of male and female rape victims seen at a hospital-based rape crisis program, 8(1) *Journal of Interpersonal Violence*, 64-76

⁷ Interview with Brownmiller, Feminist Journalist, *Time*, October 7,2015.

⁸ Ask me anything, available at: <https://www.reddit.com/r/IAmA/comments/1a67x4/i>

[am steve pinker a cognitive psychologist at/](#) (last visited on October 19,2019).

⁹Justice Verma Committee report on rape laws addresses sexuality concerns, available at: <http://orinam.net/justice-verma-committee-report-on-rape-laws-addresses-sexuality-concerns/> (last visited on October 19,2019).



a protection of transgender community and male victims from homo sexual rape.

4) Prior to making rape laws are made gender neutral, homosexuality must be effectively decriminalized. As Kapur (2013) writes “Criminalizing non-consensual sex regardless of gender can only work if sexual minorities are granted the right to have consensual sex in the first place. Otherwise, such a provision is likely to be applied to further harass sexual minorities who are not recognized as citizens entitled to rights, but continue to be viewed through the lens of contamination and deviancy, to be criminalized and stigmatized.”

5) A gender neutral rape must still in essence be a rape law and not simply a sexual assault law.

If a woman’s complaint accusing her husband and in-laws of cruelty the dreaded Section 498A of the Indian Penal Code turns out to be false, then the man is entitled to divorce, the Supreme Court has ruled.

Conclusion

The courts and the legislature have to make various changes if the laws of rape are to be any encumbrance. The term of punishment, which under normal situation varies from one to ten years, where on an average most number of convicts scot free with three to four years of rigid imprisonment with a meager amount of small fine; and in some scenarios, where the accused is famous or influential- may even get free by paying huge amounts of money. The courts have to decipher the fact that these conscienceless criminals- who at times even beat and torture their victims- which even include small

children, are not going to be free by serving for a small time of imprisonment. Thus, in the best interest of justice and the society, these criminals should be sentenced to life imprisonment.

However, if they in reality have realized their mistake and wish to return to society, the Court and jail authorities may give freedom such men on parole; but only on the ground that they have served a minimum of half the sentence imposed on them.

It is downright clear that sexual offences are to be punished, but if death sentence is given to such convicts- so as to deter the rest, then no doubt that the number of rape cases will come down considerably- but it can also happen that those who commit such offences will simply have to leave no witnesses or evidence, may even murder their victims and be done away their bodies (whereas it is noticed that in most cases- it is the victim who is the only source of evidence in most cases), thereby serving no purpose the main object of the Indian Penal Code and the legislature.

Practicing and studying the laws, the process, the application of those laws, one thing is certain- the entire structure of justice needs an over haul, otherwise the victim will be no longer the woman or man, but humanity
