



## GENDER NEUTRALITY IN RAPE LAWS : LOOKING BEYOND THE GENDER BINARY

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### Introduction

Under section 375 and 376 of Indian Penal Code, only a male can be held guilty for committing the Offence of rape and the victim can only be a female. Moreover, the laws that are related to voyeurism, sexual harassment and stalking are also gender specific in nature, even here the perpetrators are always male and the victims are always female.

When it comes to the Indian Law, it is solely based on the perception that the victim can only be a female. From this arises the assumption that the Offence of rape is merely an act of sex<sup>1</sup>, for instant gratification of the sexual desire of the person committing it. But there has been another point of view attached to it that reflects that the act not only comprises of just lust but is also a way of asserting dominance and supremacy of a particular religion, caste, community and class over the victim and includes acts of humiliation<sup>2</sup> and acts of power. And if this point of view stands or hold any good, then there is absolutely no reason why the males are being excluded from being a victim of rape in India.

<sup>1</sup> Narrain, A. Violation of Bodily Integrity. Economic and Political Weekly (August 22, 2020, 2:43 am), <http://www.epw.in/commentary/violation-bodily-integrity.html>.

<sup>2</sup> Ibid.

<sup>3</sup> Menon, N., *Seeing like a Feminist* (Zubaan and Penguin Books India Pvt. Ltd. 2013)

Another important issue of actually comprises of gender neutrality is whether gender only includes the female body and the male body. If we assume that gender only comprises of these two, then we are clearly turning a blind eye to the plight and sufferings of the people and the section of the society that does not adhere to the gender binary.<sup>3</sup>

Section 376 of the Indian Penal code provides for a situation of the Offence of aggravated rape wherein the perpetrator is in a dominant or powerful position. Section 114A of the Indian Evidence Act has, post amendment<sup>4</sup>, changed the presumption to that of guilt and shifted the burden of proof on the perpetrator if the woman testifies that there was absence of consent. Here again, it has been assumed that only females can be dominated by people in powerful positions and no other identity. This position is, however, incorrect. Coercive sex between two males is covered under section 377 of the Indian Penal Code. But the question is why that situation cannot be covered under the Offence of rape.

In its 172<sup>nd</sup> report, the Law Commission of India recommended that the rape law must be gender neutral<sup>5</sup>. It has also been argued that the principle enshrined and provided for under

Article 14 of the Indian Constitution of that of equality before law and equal protection of law needs to be applies here as well<sup>6</sup>. Only a

<sup>4</sup> The Criminal Law (Amendment) Act, New Delhi - The Gazette of India (2013).

<sup>5</sup> Agnes, F. Law, Ideology and Female Sexuality. Economic and Political Weekly, 844-847 (2002).

<sup>6</sup> Ibid.



law that is gender neutral can guarantee equal protection of law and rights to everyone without discrimination.

### History of Rape Law in India

The reform in rape laws has been an integral part of the Indian women's movement. They have struggled for a really long time to get the definition of the rape broadened and have wider scope.<sup>7</sup> Earlier, before the amendment of 2013 took place, the Offence of rape included only penile-vaginal penetration.

The Mathura rape case<sup>8</sup> is a landmark judgment in the field of women's rights. In this case, the apex court held that the girl who was raped by the three police officers had actually given her consent and had submitted to the intercourse as there was no evidence of injury on her body that reflected resistance. For the apex court, the absence of injuries was equivalent to giving of consent. Post this judgment, there were four law professors who wrote an open letter to the Chief Justice.<sup>9</sup> This sparked the demand to shift the burden of proof to the accused once the prosecution is done with its burden to prove the sexual intercourse. This case also led to significant amendments in the rape law of the country.

### Various Dimensions of Gender Neutrality in Rape Laws

In the rape laws, gender neutrality particularly has these three dimensions:

- With respect to the victim.

- With respect to the perpetrator/offender
- Situation of war and communal tension

This article will, however, focus only on the first two.

Regarding the first dimension, the lawmakers in India have made a wrong interpretation of the term 'victim' and have confined the meaning of the term only to the females. Such a narrowed interpretation neglects the member of the male community as well as those who do not identify themselves within a gender binary. Peoples' Union for Civil Liberties, Karnataka did a survey<sup>10</sup> in order to study and examine the prevalence of infringement of human rights in the transgender community and found out that sexual assaults are pervasive and very frequent for the people belonging to that community. Another survey was done between the students of college and it was found that almost 10.5% of males were victims of the Offence of rape and that 10.5% more faced attempts of rape.

The other dimension has two sub-dimensions, them being a female who is a rape offender and the victim is a male and a female being a rape offender where the victim is a female too. A survey was conducted and it was found out that 54.8% cases of 28.6% of sexually assaulted men, the perpetrators or the offenders were females.

<sup>7</sup> Sakshi vs. Union of India, AIR 3566 (2004).

<sup>8</sup> Tuka Ram and Anr vs State Of Maharashtra, AIR 185 (1979).

<sup>9</sup> Baxi, U., Dhagamvar, V., Kelkar, R., & Sarkar, L. An Open Letter to the Chief Justice of India. Partners for Law in Development (September 2, 2020, 6:55 pm), [http://pldindia.org/wp-](http://pldindia.org/wp-content/uploads/2013/03/Open-Letter-to-CJI-in-the-Mathura-RapeCase.pdf)

[content/uploads/2013/03/Open-Letter-to-CJI-in-the-Mathura-RapeCase.pdf](http://pldindia.org/wp-content/uploads/2013/03/Open-Letter-to-CJI-in-the-Mathura-RapeCase.pdf).

<sup>10</sup> 'Human rights violations against the transgender community: A study of Kothi and Hijra sex workers in Bangalore, India. People's Union for Civil Liberties, Karnataka (September 5, 2020, 4:29 pm), [https://queeramnesty.ch/docs/HR\\_Violation\\_Transgender\\_India\\_PUCL2003\\_text.pdf](https://queeramnesty.ch/docs/HR_Violation_Transgender_India_PUCL2003_text.pdf).



In the case of *Priya Patel v State of M.P.* the court held that it is humanly inconceivable that one female can commit the Offence of rape on another because there was absence of any penile-vaginal sexual intercourse between the two. However, this statement of the court is flawed as there is evidence of female on female rape and that its existence is not inconceivable anymore. A survey was carried out by the Centre for Disease Control and Prevention and it observed that 43.8% of sexually assaulted lesbians, 67.8% accounted for had female perpetrators or offenders.

### India's Response With respect To Gender Neutrality in Rape Laws

When it comes to describing India's response to the neutrality of gender in rape laws, it can be best described in two words, inconsistent and reactionary. Both, the legislative amendments as well as the past judicial decisions do not provide for any properly focused discussion where the assessment of the contours of competing legal principles was involved. In the minutes of the National Consultation Meeting which was organised in 2001 post the 172<sup>nd</sup> report of the Law Commission of India, the various opinions and arguments were not taken into consideration when they struggles for their basic human rights.<sup>11</sup>

This issue of gender neutrality in the rape laws was first and foremost raised in the year 1996 by Justice Jaspal Singh of the Delhi High Court in the case of *Sudesh Jhaku v KC Jhaku*<sup>12</sup>. Here, the court was asked to determine whether before the change in 2013

in the definition of rape, it could be interpreted in a way to include non-penetrative sexual acts. The court went on to opine on the gender neutrality issue as well which was well beyond its mandate as well. The court while holding that the relief prayed for could not be granted by the judicial authority and could take place with the help of a legislative amendment. He further went on to articulate his preference for gender neutral laws for the Offence of rape.<sup>13</sup> He noted that the only and only recourse or avenue which is present under the Indian Criminal Law, IPC for dealing with heinous acts of sexual assault and nature was the Offence of rape. He further quoted the following paragraph for the article in the California Law Review:

“Men who face sexual assault or sexual violence must have the same level of protection as their female counterparts. Women who sexually assault men or women should be made equally liable for the offence as their male counterparts. Rape should be considered a sexual assault rather than a special crime which can only be committed against women as that would allow rape law to be more gender neutral and prevent them from reinforcing the idea that women are sexual possessions.”<sup>14</sup>

In the year 1997, a Delhi based organisation, Sakshi, filed a writ petition in the apex court of India requesting the same to re-assess and consider the same question that arose in the Jhaku case of 1996. In 1999, the Supreme

<sup>11</sup>Background to Discussions by Women's Groups on Sexual Assault Amendments, PLD (August 23, 2020, 5:45 am). <http://pldindia.org/wp-content/uploads/2013/04/Background-to-discussions-by-womens-groups-to-sexual-assault-amendments.pdf>.

<sup>12</sup> *Sudesh Jhaku v K C Jhaku*, Cri LJ 2428 (1998).

<sup>13</sup> *Ibid* at para 29.

<sup>14</sup> Legrand, Camille E, *Rape and Rape Laws: Sexism in Society and the Law*, California L. R. 919 at 941 (1973).



Court framed the particular issues which were to be taken into consideration by the Law Commission of India. In the aftermath came the 172<sup>nd</sup> report of the Commission which recommended the gender neutrality of the laws for the Offence of Rape.<sup>15</sup> One of main reasons to make recommendation was that there was an increase in the number of incidents where young boys were victims of sexual assault that could not have been covered under rape because of the narrow definition that it holds.<sup>16</sup> This issue of sexual assault against young boys hold no relevance now as Protection of Children from Sexual Offences Act, 2012 (POCSO) was enacted whose objective was to protect the children from sexual assaults, pornography and harassment which was perpetrated by a man. The recommendations made by the Law Commission were never translated in a legislative amendment until the year 2012, when the Criminal Law (Amendment) Bill, 2012 sought to propose and involve a gender neutral definition of the term rape.<sup>17</sup> This proposal was very surprising for many post POCSO because the reasons why the amendment was needed was not very clear. The 167<sup>th</sup> report of the commission on the Bill of 2012 was compiled by Parliamentary Standing Committee also did not make a disclosure of the factors or the reasons as to why the Parliament proposed a gender neutral law.<sup>18</sup> The two notes of dissent that were given by the two members of the Council of States explained that the adoption of a gender neutral definition would amount to an trivialising or subduing the increasing

number of rape cases wherein they were conducted by the males on the females. The proposal, however, faced severe criticism and backlash from various scholars of Feminism. They labelled this proposal to be unacceptable as the Offence of rape was always something that was to find its origin in patriarchy and, hence, gender specific.

Before this Bill of 2012 could be passed, the nation was in dismay with the gang rape of a 23 year old girl in a moving public bus in Delhi in December, 2012. Therefore, as a result of this, the Justice Verma Committee was formed in order to make amendments in the criminal law for quicker and more efficient trials and also to enhance the punishments which were there for committing sexual assaults of heinous or grave nature against females.<sup>19</sup> Here, the committee also made recommendations for the gender neutrality of the rape laws but only with respect to the victim and not the offender. However, the report is too detailed but does not provide for the underlying reasons for its recommendations.

Although the report was well received, but the recommendation regarding the gender neutrality with respect to the victim did not get culminated into the law. The legislature then came up with the promulgation of the Criminal Law (Amendment) Ordinance, 2013<sup>20</sup>, to have a fully gender neutral definition for the Offence of rape. This decision was, however, not very well received and was considered to be violative of the letter and spirit of the Justice Verma

<sup>15</sup> Law Commission of India, 172<sup>nd</sup> Report: Review of Rape Laws, para 7.2 (2000).

<sup>16</sup> Ibid at para 3.1.

<sup>17</sup> Criminal Law (Amendment) Bill, 2012 (India), s 5.

<sup>18</sup> Parliamentary Standing Committee, 167<sup>th</sup> Report on the Criminal Law (Amendment) Bill, 2012, 43 (2013).

<sup>19</sup> Justice Verma (Retd) Committee, Report of the Committee on Amendments to Criminal Law, (2013).

<sup>20</sup> Criminal Law (Amendment) Ordinance, section 8 (2013).



Committee Report. Therefore, compelled by this, in the next parliamentary session, the Criminal Law (Amendment) Act, 2013 came to be enacted with the same gender specific definition of rape.<sup>21</sup>

There was criticism for the queer members of the society who viewed this gender specificity in the rape law to be a force that is damaging their interests. Presently, there is not one offence under the Indian Penal Code which is equivalent to rape and actively and sufficiently protects the class of victims that are presently excluded.

### Characterisation of Rape

As regards India, Section 375 of the IPC, as amended by the *Criminal Law (Amendment) Act, 2013*,<sup>22</sup> states that:

*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, and urethra of a woman or makes her to do so with him or any other person,*

*Under the circumstances falling under any of the following seven descriptions....<sup>23</sup>*

The definition post amendment broadened the definition to also include sexual acts that are non-penetrative but still violate the woman's bodily integrity. This is what was prayed for in the case of *Sakshi v Union of India*<sup>24</sup> in 2004. In this case, the Supreme Court held that when there exists no ambiguity in the textual interpretation of the provision, its alteration through a judgment will lead to "good deal of chaos and confusion and will not be in the interest of the society at large". Unfortunately, the judicial decisions and opinions related to the rape law reflect a very traditional understanding of the offence, where it is not only looked upon as a form of sexual assault on the body of a female but also on her honour, chastity and modesty. And this view stands with the notion of patriarchy and undermines the arguments that are based upon a victim's bodily integrity and autonomy. In 1980. Justice Krishna Iyer opined in the case of *Rafiq v State of UP*<sup>25</sup> that "when a woman is ravished in rape, what is inflicted is not merely physical injury, but the deep sense of some deathless shame."

Again in 1983, Justice M.P. Thakkar explained more on this idea by Justice Iyer in the case of *Bharwada Hirjibhai v State of Gujarat*<sup>26</sup> opining that when a woman becomes the victim of rape, she is more likely to be ostracized by the members of the society, even her own friends and family and that she is overpowered by the sense of shame because of the present situation of the tradition held society where sex is a taboo and is an evidence for the loss of dignity and respect in the society. In *State of MP v*

<sup>21</sup> Criminal Law (Amendment) Act, section 9 (2013).

<sup>22</sup> Ibid.

<sup>23</sup> Indian Penal Code, section 375 (1860).

<sup>24</sup> *Sakshi v Union of India*, AIR SC 3566 (2004).

<sup>25</sup> *Rafiq v State of UP*, 4 SCC 262 (1980)

<sup>26</sup> *Bharwada Hirjibhai v State of Gujarat*, 3 SCC 217 (1983).



*Madanlal*<sup>27</sup>, the apex court while refusing the notion of compromise in the cases related to the Offence of rape or its attempt reasoned that, “rapes are crimes against the body of a woman which is her own temple. These are offences which suffocate the breath of life and sully the reputation. And reputation, needless to emphasise, is the richest jewel one can conceive of in life. No one would allow it to be extinguished. When a human frame is defiled, the “purest treasure” is lost. Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct.”

When rape is conceptualised only to be a violation of the person’s bodily integrity, it can be characterised then as a violation of the human rights too because then the adjudication is not based upon the victim’s positioning the society but on the fact that the victim has entitlement and autonomy to his/her body. This approach based on the violation of human rights has been witnessed in two cases. Firstly, in the year 1996, the case of *Bodhisattva v Subhra Chakraborty*<sup>28</sup>, the apex court was of the opinion that Offence of rape is an Offence that goes against the basic human rights of a person also against his or her most important fundamental right like the Right to Life enshrined under Article 21 of the Indian Constitution. Again, in the case of *Railway Board v Chandrima Das*<sup>29</sup>, the apex court stressed upon the similar point stating that

this Offence is not just a violation of the simple private rights of the victim but also violative of the person’s fundamental rights. However, in the case of *Vishakha v State of Rajasthan*<sup>30</sup>, the Supreme Court held that every time the sexual harassment takes place at the workplace, it is automatically a violation of the fundamental rights of the victim including the right to life and personal liberty mentioned under Article 21. Even the Preamble to the Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013 also mention that protection against the Offence of sexual offence is a universally recognised basic human right.<sup>31</sup> Therefore, it is strange to treat sexual harassment as a violation of the human rights and fundamental rights but not rape.

#### **Arguments in Favour Gender Neutrality of Rape Laws**

As discussed above, the Offence of rape must be looked at and perceived only as an act that violates human rights of the victim. But this perception would be inconsistent with the gender specific rape laws that is prevalent. If this Offence is a violation of the human rights, then its punishment as well as the protection must not be made contingent upon the genders of the persons involved. Basic human rights like that of personal liberty, dignity, life and equality are rights are that provided to every human right by their virtue of being a human being. So every person be it a man, a woman or a transgender is entitled to it.

<sup>27</sup> State of MP v Madanlal Criminal, Appeal No 231 (2015).

<sup>28</sup> Bodhisattwa v Ms Subhra Chakraborty, 1 SCC 490 (1996).

<sup>29</sup> The Chairman, Railway Board v Mrs Chandrima Das, 2 SCC 465 (2000).

<sup>30</sup> Vishaka v State of Rajasthan, 6 SCC 241 (1997)

<sup>31</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, (2013).



The evidentiary support for this assertion is in abundance. The Preamble of the Universal Declaration of Human rights states that, “the inherent dignity and ... the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. Article 2 of the same Declaration states that, “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, including ... sex ... or other status.”<sup>32</sup> Article 7<sup>33</sup> provides for equality before law and protection of law. Article 8 provides for the right to an effective remedy by competent national tribunals against acts that violate the fundamental rights granted to them through the constitution and law.<sup>34</sup> These provisions are made gender neutral on purpose and deliberately so that it can be inferred that these rights guaranteed to every human being without any discrimination on grounds of factors like sex or gender.

The above mentioned provisions reflect formal equality as opposed to the substantive one. Formal equality contains the element of sameness of treatment whereas the substantive one recognises that sometimes equal treatment requires treating a class of people differently and this is termed as Intelligible Differentia. In the Indian Constitution both formal and substantive equality is provided for. Article 14 and 15 provide for equality before law, equal protection of law and no discrimination on grounds of religion, race, caste, sex, and place of birth or any of them, respectively<sup>35</sup>. But 15(3) states are free to make special provisions in favour women and children and that they shall hold good.

Now, article 15(3) can be used to justify the gender specificity under section 375 of the IPC. But this can also be read as that the states are free to make special provisions for the advancement of women and children without abdicating the constitutional duty that it has to protect the others from any kind of human rights violations. Also, the Offence of rape is the only Offence in the entire Indian criminal Law that acknowledges such extreme and grave incidents of sexual assaults violating a person’s bodily integrity, there is no other offence that deals with the same kind of gravity or seriousness.

#### Judicial Precedents

This above mentioned gender neutrality in the rape law is yet to be taken into consideration by the Indian Judiciary and the Parliament, however, it is not unprecedented when it comes to a global outlook.

In the year 1984, in the case of *People v Liberta*<sup>36</sup>, the Court of Appeals was dealing with a challenge to the constitutionality of Section 130.35 of the Penal Code of New York which provided that a man will be guilty of the offence of rape of first degree when he has a sexual intercourse with a woman through forcible compulsion. It was argued by the defendant that the said provision was not gender neutral and that it violated his right of equality before law guaranteed to him by the constitution. Therefore, the court held that the said provision did in fact violate the equal protection clause as it only applies to a man forcibly raping a woman and not vice versa. Just because that its occurrence is rare, does not mean that the gender must be exempted

<sup>32</sup> Universal Declaration of Human Rights, (1948) 71, art 2.

<sup>33</sup> Ibid, art 7.

<sup>34</sup> Ibid, art 8.

<sup>35</sup> Indian Const. art 14 & 15.

<sup>36</sup> *People v Liberta*, 64 NY 2d 152 (1984).



and that a gender neutral law would serve better. In another case of *Orr v Orr*<sup>37</sup>, the US Supreme Court held that a statute that imposes the obligations related to alimony only on the husband and not the wife is unconstitutional because it was violative of the principle of equal protection of law.

In the year 1994, in case of *Nicholas Toonen v Australia*<sup>38</sup> where two provisions of the Tasmanian criminal Code were challenged on the ground that they criminalised various kinds of sexual intercourse between two men and that it was against articles 2, 17 and 26 of the ICCPR. While the proceedings went on, Tasmania agreed that one of the said provisions did make a distinction on grounds on sex as it prohibited sexual intercourse only between men. Even the court found that the provision did violate the Articles 17 and 2. Still, the concession that was made by the state is sufficient in support of the argument for the gender neutrality in rape laws.

The reason why these decisions are being cited is not to insist that gender specific rape laws and definitions are per se unconstitutional but it is to reiterate that it is the responsibility of the state to ensure that protecting the human rights of everyone must be a factor when it is framing its laws. A selective and partial protection of the human rights on the basis or sex and gender of either the offender or the victim is inconsistent with the idea of gender justice and human rights.

### Recognising the Transgender Community

The fixation of the paradigm to a male-on-female perspective lead to the suppression of their true identities by the members of the transgender community to fit within the gender specific notion of the Offence of rape. As a result, certain offenders and victims are absent from the various theories of rape because they refuse to give up their respective gender identities.

The main objective of the social movements supporting transgender rights must not be limited only to the right to identify with the present gender binary but also to legitimise that determination of that particular identity and any gender specific law would then be contrary and inconsistent with the cause and nature of gender justice.<sup>39</sup> Therefore, this gender specificity in the rape law is nothing but an obstruction in the social movements by the queer community that is attempting to evolve and expand the traditional binary understanding and notion of gender and also to involve people who do not conform within this binary to the mainstream. The word “queer” as used by David Halperin and Arvind Narain means “whatever is at odds with the normal, the legitimate, the dominant. It demarcates ... a positionality vis-à-vis the normative .... It is from this eccentric positionality occupied by the queer subject that it may become possible to envision a variety of possibilities for reordering the relations among erotic identities, forms of knowledge, logics of representation, sexual behaviours, regimes of enunciation, modes of self-constitution and practice of community.”<sup>40</sup>

<sup>37</sup> *Orr v Orr*, 440 US 268 (1979).

<sup>38</sup> *Nicholas Toonen v Australia*, (1994).

<sup>39</sup> TRAN, Stevie V and GLAZER, Elizabeth M, Transgenderless, *Harvard Journal of Law & Gender* 399 (2012).

<sup>40</sup> Narain Arvind, *The Articulation of Rights around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva*, *Health and Human Rights Journal*, 144-145 (2002). (Quoting Halperin, David



This strict adherence to the gender binary notion in the rape law of the country does not only legitimise the hostility that the transgender community is compelled to face but also reinforces the idea of the heterosexual nature of the law. In 2014, in the case of *NALSA v Union of India*<sup>41</sup>, the apex court decided upon a few grievances put forth by the transgender community that asked for a legal declaration for their gender identity, other than the other that was assigned to them at the time of their birth. Also, that the recognition of the same is violative of Article 14 and 21 of the Indian Constitution.<sup>42</sup> The Supreme Court acknowledged the Indian Legal System's inability to take into consideration the transgender community as the ones who belong to the third gender and also affirmed the right of every human being to choose and determine their own gender identity. The court reasoned that "By recognizing transgender persons as third gender, they would be able to enjoy their human rights, to which they are largely deprived of for want of this recognition ... The issue of transgender rights is not merely a social or medical issue but there is also a need to adopt a human-rights-based approach towards transgender persons which may focus on functioning as an interaction between a person and their environment highlighting the role of society."<sup>43</sup>

The court was unable to find any reasons to why the basic human rights must be denied to the transgender community. It discarded the binary notion attached to the understanding of the gender identity also expressed views regarding the inconsistency of the gender

binary notion with the edifice of the human rights. Therefore, a gender specific rape law furthers this binary understanding and is incompatible with the categorisation of rape as a violation of the human rights, especially when there is an absence of a similar provision in the Indian Criminal law that deals with the cases of similar gravity to provide redressal and justice to the excluded victims.

One can state that the incidents of non-consensual same sex sexual assaults and violence are covered under section 377 of the Indian Penal Code which considers it against the order of nature and denotes it as an unnatural offence<sup>44</sup>. However, this section is not the accurate or the correct legal basis to penalise and criminalise sexual Offences that violate a person's bodily integrity because in equalising the same and difference is being created between heterosexual sexual assaults and the homosexuals one. This reflects a differential treatment towards those who do not conform to the gender binary and also that only heterosexual assaults can amount to rape while the homosexual ones only a lesser violation of the person's bodily integrity. There also exists a substantial distinction between the punishments that are given for committing an unnatural Offence under 377 and for rape under 375. There exists no minimum threshold or quantum of punishment for committing an unnatural Offence. Post the amendment, 376A punishes causing death of the victim or committing an act that puts the victim into persistent vegetative state with death penalty<sup>45</sup>. However, the same is absent under section

M, Saint Foucault, *Towards a Gay Hagiography*, Oxford University Press, (1995).

<sup>41</sup> *National Legal Services Authority v Union of India* 2014(5).

<sup>43</sup> *Ibid* at para 111.

<sup>44</sup> Indian Penal Code, section 377 (1860).

<sup>45</sup> *Ibid*, section 376A.



377. Therefore, it is clear that section 377 is not an adequate or a proper alternative or substitute to rape.

Similar problems would come up if a separate Offence covering the non-traditional incidents of sexual assaults is made like section 377CA of Malaysian Penal Code and Section 376 of the penal code of Singapore<sup>46</sup>. Now such provisions would help a lot of victims by giving them the legal protection which they were earlier denied but they would also carry with them a few social consequences. For example, not terming the acts of sexual assault and violence of equal seriousness and gravity as rape because they do not fit into the generalised tradition perception and notion diminishes their importance in the society.

Therefore, there male on female paradigm needs to shift and become more neutral in nature. Considering the fact that the Offence of rape has been historically used as a mode of gender subordination but that justification does not suffice the distinction being made in sexual assaults on grounds of a gendered framework. Such a classification is an is indifferent to the fact that although the said Offence is an act or power and control, but the difference in power between the victim and the Offence must be based on the basis of their gender but other factors need to be taken into account too like race, caste, economic conditions etc. also, not recognising a particular class of sexual violence as the offence of rape is equivalent of trivialising the incidents of people who do not fit into this paradigm. Making a separate legislation but maintaining the gender specificity in the Offence of rape is easy but it's not ideal.

<sup>46</sup> Malaysian Penal Code, Section 377CA (1936); Singapore Penal Code, Section 376(2) (1871).

However, the most crucial step to be taken towards achieving gender justice is to recognise that offenders and victims of sexual assault or violence can be anyone irrespective of which gender they belong to.

### Conclusion

Majority of opposition to making the rape laws gender neutral is because of an incorrect understanding of the offence itself. They presuppose that by making the rape law gender neutral, it will be desexualised and the stigma that is attached to it will disappear. However, that is not true. The purpose is not desexualise the offence but to understand and go beyond the male on female paradigm that requires not only a change in the language of the law itself but also reforms that are social and institutional. Therefore, it is important that problems like laxing and corrupt investigative processes and machinery and deteriorating the cross examinations of the victims are corrected so that the rape trials are not adding on to the trauma of the victims.

When viewed from the perspective of the victim, characterising rape as human rights violations puts an obligation on the state to provide protection to the citizens from offences that violate their bodily integrity and autonomy without any distinction made on grounds of their sexual preference and gender. The apex court had already supported this view in the NALSA judgment and addressed the sufferings and problems of the transgender community and them being more prone to sexual assaults. Therefore, the law must evolve and change to make changes to such social constructs. Making the rape law gender neutral is imperative and need of the hour.



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From the perspective of the offender, the gender specificity of the rape renders a lot of its victims remediless because the law does not recognise their perpetrators due to the incident being one belonging to the non-traditional nature. And the idea that human rights are universal does not permit or support such a distinction. Therefore, gender neutrality of rape law is imperative along with simultaneous institutional reforms for protecting the victims during the trials and proper sentencing guidelines etc.

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