

RAPE LAWS IN INDIA- A CRITICAL COMMENT

THARUN PRANAV*

ABSTRACT

Equality before the law refers to the fact that the law applies equally to men, women, and transgender people. It indicates that there is no discrimination based on race or gender. Regardless of gender, caste, sexual orientation, or place of birth, everyone is protected by the law. Nirbhaya case took seven years to resolve, and she's a female. The rules against rape in this nation are particularly harsh for women, but young boys, men, the transgender community, and many others are targeted if they speak up regarding sexual harassment. Only a small percentage of individuals who suffer speak out about it, and only a small percentage of those who suffer report it. This Paper would address the issue by starting the history of Rape across the world. Then, it would provide an understanding of the evolution of rape in India. This paper will also stress the necessity for gender-neutral legislation against sexual offences, as well as the gaps in existing regulations. In India, sexual offences have been identified as being primarily committed by women. The fact that males are more frequently than not the perpetrators is a fundamental argument against the neutralization of rules against sexual offences. To develop an inclusive society, variety and comprehensiveness must be instilled in both ideas and reality. The Paper concludes with the necessity of Gender-neutral laws and also provides suggestions to this proliferating issue in the contemporary world.

KEYWORDS: Equality, Rape, Male Victims, Neutralization, Gender-Neutral Laws

INTRODUCTION

The term 'Rape' is used to describe a breach of bodily integrity. Rape is India's fourth most broad offence, and it's a serious issue worldwide. Rape is ordinarily perceived to be wrongdoing perpetrated by a man against a lady, however, have we at any point thought to be the likelihood that it very well might be the reverse way around? Rape was believed all of the time to be wrongdoing being carried out essentially by men against ladies, but a measure of time has elapsed, it has become certain that different genders, including males, gay people, and transsexual people, are moreover harmed by such a crime. Rape may

* 2nd Year Student at School of Law, Christ University - Bangalore

affect everyone, irrespective of age, sexual identity, or sexual orientation. The legislative definition of the term argues that the male-on-female worldview is the main reasonable victim-perpetrator framework for this crime.¹ This crime is specified under Section 375 of the Indian Penal Code, 1860, and has been amended many times since commencement.² Until now, the term has followed a long-held belief that only males may conduct this crime and only women can be the victims. After all of these years, a progressive argument has emerged arguing that in India, males, transgender people, and other non-confirmative fluid genders can all be victims of rape. Although there are many such examples, the majority of them go unreported because individuals are afraid that disclosing them will cast doubt on their efficacy. The rape of individuals who aren't females usually goes undetected, so people are unaware of it. However, people must be aware of such wrongdoings, and that suitable lawfulness is kept up with to kill such horrendous wrongdoing. First and foremost, we must acknowledge that rape victims and perpetrators may be of any gender, and that rape can occur everywhere, including schools, offices, jails, businesses, and coaching. Only by letting go of stereotypes concerning sexual offences, such as that they can only be committed against women, can one comprehend the gravity of the situation. This paper will assess the Indian law enforcement system's lack of understanding of sexual equality in sexual offences.

HISTORY OF RAPE

Rape never was considered a crime against the sufferer in the beginning;³ instead, it was considered a crime against marital rape, and the property in question were women who were meant to belong to their fathers or husbands. The term "rape" is derived from the Latin word "repair," meaning "to grasp or possess anything," implying possession yet again. For the crime, the spouses or fathers were compensated.⁴ If someone molested a virgin, recompense was granted to the father, and the girl was engaged to a culprit, as per the Hammurabi's code, one of the earliest sets of rules known to humanity. If the lady who was raped was married, she was considered an adulterous woman and would be well sentenced to death alongside her rapist.

The Hebrews also had identical rules, and they considered the concept of an eye for an eye extremely literally, therefore the victim's father might rape the rapist's wife as a punishment for rape.⁵ However, not all legal systems were atrocious; pre-British England's Celtic laws recognized rape upon women as a crime

¹ Harshad Pathak, 'Beyond The Binary: Rethinking Gender Neutrality In Indian Rape Law' [2016] PL 11.

² Harshad Pathak, 'Beyond The Binary: Rethinking Gender Neutrality In Indian Rape Law' [2016] PL 11.

³ Julia R. Schwendinger and Herman Schwendinger, 'Rape, The Law, And Private Property' [1982] PL 28.

⁴ Peter Newman, *The New Palgrave Dictionary Of Economics And The Law* (Palgrave Macmillan 2002).

⁵ Crystal M. Shepherd, 'A Word From A Seminarian: Freeing Tamar: The Church's Response To Rape Culture' [2015] PL 112.

against the woman and particularly distinguished between no assent and being incapable to provide consent (i.e. drunkenness).

These regulations, on the other hand, were the exception rather than the rule in the early rape laws. Rape did not been regarded as a crime against the victim until the 12th century.⁶ The laws of Westminster, which were enacted in the 13th century, were one of the first to authorize the crown to prosecute rapists if the victim's family refused to cooperate. This was a watershed moment because rape was suddenly being recognized as a crime against the state as well as against the victim's family. Rape was first defined in the early 18th century in comparable terms to how it is defined now.

EVOLUTION OF RAPE IN INDIA

For the first time, the International Penal Code (IPC) defined rape in the 1860s. It was described as having intercourse against a woman's will or permission, as well as consent acquired by placing the victim or anyone close to her in fear of death or harm. For the following 100 years or more, the definition of rape remained constant.

Since the 1980s, there has been a need for rape legislation reform. Before 2013, the definition of rape was limited to solely penile-vaginal penetration.⁷ Then, following the Supreme Court's acquittal of the culprits in the Mathura custodial rape case, which was the case of *Tukaram and others Vs. In the state of Maharashtra*, the rape statutes underwent significant revisions. Because there were hardly any damages observed on the girl's body, the Apex Court made an error in its reasoning when it concluded that the victim agreed to it. The defendant's (3 police officers) defence was that the victim's sexual past showed she is a 'crazy' woman. Surprisingly, the Supreme Court agreed with this argument and overturned the High Court's verdict.⁸ This prompted a lot of discussion and outrage around the country. However, a considerable number of revisions occurred as a result of this case. The term "custodial rape" was introduced to the definition of rape to refer to rapes perpetrated by police officers. The Indian Evidence Act of 1872 was amended to include 114 A as a result of this.⁹ This new clause pertained to prison rapes and implied a lack of consent in particular cases if the victim claimed so. The IPC was also amended to include Section 228A, which made it illegal to reveal the identities of sufferers of specific offences, including rape. It also barred victim character assassination. Although it was illegal, character assassination did not entail cross-examination. When a victim entered the testimony, attorneys made a conscious effort

⁶ Riikka Kotanen and Johanna Kronstedt, 'Attribution Of Responsibility For Sexual Crimes Beyond Individual Actors – Construction Of Responsibility Of Offenders, Victims And Society In Laypersons' Explanations' [2019] PL 25.

⁷ John Sebastian, 'The Opposite Of Unnatural Intercourse: Understanding S 377 Through S 375' [2018].

⁸ Mohammad Dulal Miah and Yasushi Suzuki, *Power, Property Rights, And Economic Development* (Springer Singapore 2018).

⁹ Shahid Shahidullah, *Crime, Criminal Justice, And The Evolving Science Of Criminology In South Asia* (Palgrave Macmillan 2017).

to degrade her by questioning her about her sexual past and invalidate her testimony by demonstrating to the court that the victims were 'wrong'.¹⁰

The victim's sexual dignity was invaded, and she was severely traumatized as a result. After a PIL urged the law commission to suggest reforms to our rape laws, the Supreme Court took notice. Section 155(4) of the Indian Evidence Act was amended as a result of this.¹¹ Cross-examination of survivors was disallowed after the modification.

DEFINITION OF RAPE UNDER SECTION 375 OF IPC

Rape.— A man is said to carry out "rape" who, besides for the situation hereinafter excepted,¹² has sex with a lady under conditions falling under any of the six after descriptions¹³:—

(First) — Against her will.¹⁴

(Secondly) —Without her assent.¹⁵

(Thirdly) — With her assent, when her assent has been gotten by placing her or any individual in whom she is keen on apprehension about death or of harm.¹⁶

(Fourthly) — With her assent, when the man realizes that he isn't her significant other and that her assent is given since she accepts that he is one more man to whom she is or trusts herself to be legally married.¹⁷

(Fifthly) —With her assent, when, at the hour of giving such assent, because of instability of brain or inebriation or the organization by him actually or through one more of any stunning or unwholesome substance, she can't comprehend the nature and results of that to which she gives assent.¹⁸

(Sixthly) — With or without her assent, when she is under the age of sixteen years.¹⁹ Explanation.— Penetration is adequate to establish the sex important to the offence of rape.²⁰

(Exception) — If a man has sex with his wife who is above fifteen years of age, it is not termed rape.²¹

¹⁰ Adfer Rashid Shah, 'The Culture of Rape: Understanding Delhi Rape Horror and Underlying Perspectives' [2013] PL 43-53.

¹¹ 'AMENDMENTS TO RAPE LAWS - SahelSITE' (*Sites.google.com*, 2021)

<<https://sites.google.com/site/sahelorgsite/violence/sexual-assault/amendments-to-rape-laws>> accessed 28 December 2021.

¹² The Indian Penal Code 1860, s 375 (Act 45 of 1860).

¹³ *Ibid.*

¹⁴ The Indian Penal Code 1860, s 375(Firstly) (Act 45 of 1860).

¹⁵ The Indian Penal Code 1860, s 375(Secondly) (Act 45 of 1860).

¹⁶ The Indian Penal Code 1860, s 375(Thirdly) (Act 45 of 1860).

¹⁷ The Indian Penal Code 1860, s 375(Fourthly) (Act 45 of 1860).

¹⁸ The Indian Penal Code 1860, s 375(Fifthly) (Act 45 of 1860).

¹⁹The Indian Penal Code 1860, s 375(Sixthly) (Act 45 of 1860).

²⁰ Shally Prasad, 'Medicolegal Response To Violence Against Women In India' [1999] PL 5.

²¹ The Indian Penal Code 1860, s 375(Exception) (Act 45 of 1860).

WHAT CONSTITUTES RAPE?

We have to know what activities genuinely constitute rape since we've perused the regulation that characterizes rape. Is rape even necessitated by penetration? What if the permission was not granted but the penetration was not explicitly rejected? To address all of these and other issues that may occur in our thoughts, we must examine the numerous Supreme Court and High Court judgments and derive solutions through those.

The Supreme Court clarified the concept of rape in *Sakshi v. UOI*²², ruling that "only heterosexual penetration, for example, entrance through penis or vagina, has to be treated as assault under the ambit of Section 375 of the IPC. The court's reasoning for this choice had been that even though there are different sorts of sexual maltreatment, all of which are horrifying, not that every sexual violation may be classified as rape. As a result, penetration is required for the wrongdoing of rape to be perpetrated."²³

In *Smt. Sudesh Jhaku v. K.C.J. & Ors*, the Apex Court determined that while introducing any outside substance like a flask into a woman's vaginal area might lead to injury as well as a long period of emotional harm, quite an act does not fit within Section 375's definition of rape.²⁴ The court decided that penetration of artificial items would be unlawful per Section 354 of the IPC, which specifies viciousness or the usage of unlawful brutality on a lady in purpose to affront her respect is penalized by up to two years in jail. However, the Court has fined the term of rape to the nonconsensual penial-vaginal entrance.²⁵ The court neglected to take gay rape, anal and every other type of penetration into account while making its decision.

MALE RAPES

Male victims of sexual abuse were mainly studied after the 1980s, and they were largely focused on child sex abuse. Even within the twenty-first century, it truly is trying for one male assault survivor to report a rape since now we live in a framework where men are thought to simply have the capacity to safeguard themselves along with others, and they are thought to have traditionally masculine strength, and so most men are frightened that trying to report their rape will give occasion to feel qualms about their vigour or make them homosexual. However, while some courageous men have had the bravery to come out and share their experiences, many men continue to be afraid of society and never disclose their rape. According to research done by the Centers for Disease Control and Prevention in the United States (US)²⁶, 1 out of 17 guys has been compelled to perforate sooner or later in their life, with 86.5 per cent of assault victims

²² *Sakshi v. India and Ors*, Writ Petition (Crl) No33, 1997, with SLP (Crl) Nos 1672-1673, 2000; ILDC 868 (IN2004).

²³ Clare Connelly, 'Prosecution Of Rape And Sexual Assault' [2002] PL 28.

²⁴ *Smt. Sudesh Jhaku vs K.C.J And Others*, (1998) CriLJ 2428.

²⁵ Deborah Rogers and Mary Newton, 'Sexual Assault Examination' [2005].

²⁶ Amy E Caruso Brown, Travis R Hobart and Cynthia B Morrow, *Bioethics, Public Health, And The Social Sciences For The Medical Professions* (1st edn, Springer 2019).

reporting male attackers²⁷. Nearly one out of every 38 males have been the victim of a rape attempt or completion throughout his lifetime,²⁸ yet this male-centric culture doesn't acknowledge that a person can be assaulted, and they often decline to recognize any such instances. An example of Mumbai, India, where an RPF officer was convicted under sodomy for raping a cab driver who didn't agree to drop him off. As per psychiatrist Sarah Khan, less than one out of every ten male-male rapes is reported, and male victims of rape often lack assistance and support, as well as judicial systems that are not equipped to prevent this sort of crime.²⁹

The IPC's definition of rape is quite specific, stating unequivocally that only a man's forced vaginal penetration qualifies as rape. As a result, as per our laws, guys can never be assaulted and ladies can never be accused of assault. The sole arrangement in the Indian Penal Code that males can take help from in case of sexual offences is Section 377, which allows either a man or a woman to be charged with forceful physical penetration. Forced sexual activity with a guy, on the other hand, does not constitute rape. There is now a clause in the POCSO Act that penalizes sexual attacks towards male children, but no comparable provision exists for adult males. Rape on a male youth is dealt with uniquely in contrast to rape on a grown-up male. The cause of this predilection is unclear. If India can make provisions now for the rape of a male kid, this should certainly make provisions for something like the rape of adult males. However, the fundamental precept that men are the only ones who use power to abuse women has left men susceptible. With so many of these legal protections for sexual assault and crimes against children and women,³⁰ it appears that the spirit of equality established by Article 14 of the Indian Constitution³¹ is also lacking. Because all statutes ought to be unbiased, all laws with more grounded means to secure ladies must as well be aware of the closeness of sex assaults towards males as well as other genders.³²

NEED FOR GENDER-NEUTRAL LAWS

Rape is classified as sexually unbiased wrongdoing in international law, recognizing that sexual violence in wars and places of conflict is not restricted to women. Although the International Criminal Tribunal for Rwanda ascertained that rape had no clear definition, it used the phrase "physical invasion of sexual nature" to describe it.³³ Rape is considered a crime under the common Article III of the Geneva Convention as

²⁷ Athira Nortajuddin, 'Taking Male Rape Seriously' (*The ASEAN Post* | *Your Gateway To Southeast Asia's Economy*, 2020) <<https://theaseanpost.com/article/taking-male-rape-seriously>> accessed December 2021.

²⁸ Crystal M. Shepherd, 'A Word From A Seminarian: Freeing Tamar: The Church's Response To Rape Culture' [2015] PL 112.

²⁹ Patrizia Riccardi, 'Male Rape: The Silent Victim and the Gender of the Listener' [2010] PL 12.

³⁰ Louise Chappell, 'Women, Gender And International Institutions: Exploring New Opportunities At The International Criminal Court' [2003] PL22.

³¹ Constitution of India, Article 14 (1959).

³² A Kaufman, P Divasto, R Jackson, D Voorhees and J Christy, 'Male Rape Victims: Noninstitutionalized Assault' [1980] PL 221-223.

³³ Nicola Henry, 'Theorizing Wartime Rape' [2015] PL 30.

an assault on personal dignity by Furundzija, the International Criminal Tribunal for the Former Yugoslavia.³⁴ The following factors were used to create the meaning of rape: sexual entrance into the sufferer's mouth, vagina, or anus by the culprit's penis or some other item,³⁵ with a danger of power or compulsion coordinated at the victim or any third party.

It is a well-known fact that in Indian law, adult male victims have no place. The necessity for gender-neutral laws is rising. There have been several cases of women who are raped, but it is also true that males and transgender people are being raped. As shown in a victim study of British and American males, 3-8 per cent of males have experienced at least one sexual abuse in their entire lifetime,³⁶ with male victims accounting for at least 5-10 per cent of all victims of rape, and female perpetrators accounting for an estimated 6-15 per cent.³⁷ As indicated by a survey performed by the Centers for Disease Control and Prevention, 67 per cent of lesbians who reported sexual assault said that women were the assailants.

Part III of the Indian Constitution protects fundamental rights. Article 14 ensures equality under the steady gaze of the law and equivalent legitimate assurance.³⁸ Sex-based prejudice is prohibited under Article 15.³⁹ While article 15(3) of the constitution permits the state government to take measures for the upliftment of man,⁴⁰ it does not preclude the government from passing legislation to safeguard the interests of other groups. Even if rape against males and members of the transgender community is less common, their right to equality must be respected. The law that arbitrarily categorizes specific groups of people violates the Indian constitution's essential foundation.

SUGGESTION

The definitions of victim and perpetrator should not be gender-specific to achieve gender-neutral legislation in India. When adopting laws to safeguard the vulnerable elements of the community, the legislation should not disregard the predicament of other genders. Laws should be sensible to protect the weaker parts while not harming or neglecting the other sections who are equally vulnerable to the same harms and offences.

It may be argued that one of the first issues to address to achieve gender equality is the acceptance of all genders and the abandonment of gender classifications that are too narrow. Second, the victim's gender

³⁴ Andrea Kay Kent, 'Geneva Convention Relative To The Protection Of Civilian Persons In Time Of War And Additional Protocol' [2019].

³⁵ Gloria Gaggioli, 'Sexual Violence In Armed Conflicts: A Violation Of International Humanitarian Law And Human Rights Law' [2014] PL 96.

³⁶ Melanie S. Harned, 'Harassed Bodies: An Examination Of The Relationships Among Women's Experiences Of Sexual Harassment, Body Image, And Eating Disturbances' [2000] PL 24.

³⁷ Diane R. Follingstad and others, 'Sex Differences in Motivations and Effects in Dating Violence' [1991] PL 40.

³⁸ Samantha Besson, 'The Principle Of Non-Discrimination In The Convention On The Rights Of The Child' [2005] PL 13.

³⁹ David Kucera, *Qualitative Indicators Of Labour Standards* (Physica-Verlag 2007).

⁴⁰ U.C. Agarwal, 'Judicial Verdicts On Pressures For Questionable Reservations Issues' [2015] PL 61.

neutrality underlines the frequency of male and transgender sexual abuse in India. A gender-neutral community is equitable, and thus the Constitution's core rights are guaranteed. It may be inferred that male and transgender rape, particularly male-on-male rape, is a reality in India. The case for total sexual equality is based on the right to equality and the societal shame associated with male rape. After considering all viewpoints, it is important to remember that, while gender-neutral legislation and the acknowledgement of fluid genders are essential, they should not create a hostile atmosphere for female rape victims.

CONCLUSION

A crime's penalty should be just as horrific as the act itself, and that should not be limited to a single class; it should apply to all people, regardless of sex. Pain is unmatched; it affects everyone in the same way. Whether male, female, or Trans, the survivor experiences the equivalent physical, mental, as well as emotional suffering. Due to the usage of gendered terminology, a male can't seek after an instance of assault against a woman. The gendered wording implies that a man can't guarantee rape by a lady because the meaning of assault states that it can only be done by a male, as evidenced by the word 'his' in the definition.⁴¹ Even if the conduct was the same, a guy can document a complaint under savagery or assault however not rape, and the punishment will not be the same. Men and women are designed to cohabit and augment one another to ensure their own and society's existence. However, this fundamental societal link has sadly become the most misused component of social life.

Why should India's legislation deal with male rapes lag? India's legislation is adjusting and adopting reforms that will help India become a prosperous nation, so for what reason would it be advisable for them they fall behind in arrangements connecting with male rapes?⁴² Therefore, India's parliament should pass unbiased rape regulations comparable to that of the US and the UK. Indeed, even ladies are fit for assaulting males, and the Indian judicial system and citizenry must acknowledge this. The law should consider men to be victims, not similarly as culprits of violence.⁴³ Bringing the problems of male sexual assault to the knowledge of the government and the public, as well as changing society's stereotypical thinking, is vital. Male victims' cries for help must be heeded.⁴⁴ The existing rape laws in our nation demand significant modifications and amendments. The law must evolve and adapt to the changing requirements of society.

⁴¹ Lubomir Stanchev, 'Measuring The Strength Of The Semantic Relationship Between Words' [2015] PL 24.

⁴² Bhargavi Akanksha , 'Gender Neutrality of Sexual Offences' (2021) 4 (4) IJLMH
<<https://doi.org/10.10000/IJLMH.111657>> accessed 12 January 2022.

⁴³ Benjamin Hine and others, 'But, Who Is The Victim Here? Exploring Judgments Toward Hypothetical Bidirectional Domestic Violence Scenarios' [2020].

⁴⁴ CD Ellis, 'Male Rape- The Silent Victims' [2002] PL 34-39.

Gender neutrality's goal and impact within rape are not the same as the idea that it prevents the investigation of gender while addressing rape. Furthermore, some detractors attempt to develop an "ideological projection" in which they believe gender neutrality damages women, based on either distortion of facts or no evidence at all. If the critics are true, gender neutrality harms women or results in the absence of gender considerations from rape conversations, they have a valid worry. In truth, it's impossible to conceive a serious debate about rape that doesn't take into account all concerns of gender and the actuality of sexual abuse both for males and females.

When defining criminal crimes, it is past time that we consider the reality of sexual victimization for all individuals who endure its anguish and shame. The pursuit of theory is important, but it should not come at the expense of acknowledging the reality of rape for all of its victims.