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Dr. Rinu Saraswat



Associate Professor at School of Law, Apex University, Jaipur,
M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.

More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.



Subhrajit Chanda



BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.



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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

BRIDGING THE LEGAL CHASM: ADDRESSING THE NEED FOR GENDER-NEUTRAL RAPE LAWS IN INDIA

AUTHORED BY - THANMAI SREE THATHA

E-mail - Thatha.thanmai@gmail.com

CHAPTER I

ABSTRACT

Men and women are harmed by gender inequality. It is fairly common in India's socioeconomic and political realms. The Constitution has significantly contributed to the development and enrichment of women, yet many legislative provisions still have a patriarchal tinge. As Nehru correctly stated, a country's condition may be assessed by the status of its women. Laws must be addressed quickly to move toward gender neutrality. Many laws that are brought up in India, especially rape laws, are discriminatory in nature.

This study seeks to comprehend the call for laws that are gender-neutral, the reality of rape laws that are gender-neutral and explore the idea of equality. It also clarifies that for legislators and judges, understanding gender is a fundamental building component. It also talks about how the CrPC rape laws only refer to women's protection and do not specifically give protection to men or transgender people. In defining the recording offense, a human-rights perspective would be preferable to one prioritizing gender equality. Therefore, it is crucial to have gender-neutral rights in order to uphold the fundamental egalitarian principles of the Indian Constitution.

Keywords- Gender-neutral, Rape Laws, Section 375, Equality, and inequality, Rape victim.

CHAPTER II

INTRODUCTION

The foundation of Indian law is the idea that a rape victim may only be a woman. This results from the presumption that rape is a sex-only crime committed to gratify the sexual desires of the offender¹. Sexual assault is becoming more widely recognized to be a form of power and humiliation as well as an act of lust and desire, domination, or supremacy of one caste, class, religion, or group over another². If this is the case, men in India are not prohibited from being victims of rape.

Only a male may be found guilty of rape under Sections 375 and 376 of the Indian Penal Code, and only women can be the victim. Additionally, the rules against stalking, voyeurism, and sexual harassment³ are gender-specific, meaning that only women may be the victim and only males may commit the crime. However, because the phrase "whoever" is used, the law regarding throwing acid is gender-neutral.⁴

Following the shocking gang rape and assault in Delhi in 2012, which baffled the entire nation, there were outcries and protests everywhere in the world. As a result, the legislature established the Justice Verma Committee, which recommended laws to protect women. These laws eventually became the Criminal Law (Amendment) Act, of 2013. Although the recommendations contained impartial assault and rape legislation, the weight of activists convinced the parliament to disregard this advice, and these impartial laws were not put into effect.

While assuming that there are only two genders—male and female—we neglect to consider the intersex and transgender groups, where a person's physical parts are ambiguous and include hijras and Kothi's. The existing laws are simply discriminatory in that they classify just one aspect of society while ignoring the other aspects. In its 172nd report, the Law Commission of India made the recommendation that the rape laws be changed to be gender-neutral⁵. According to 2003 research by

¹ 3Narain, A. (2013). Violation of Bodily Integrity. *Economic and Political Weekly*, 48, (No. 11). Retrieved from <http://www.epw.in/commentary/violation-bodily-integrity.html> on December 5, 2022.

² Ibid

³ The Criminal Law Amendment Act, Section 354 (2013)

⁴ The Criminal Law Amendment Act, Section 326 (2013)

⁵ Agnes, F (2002). Law, Ideology and Female Sexuality. *Economic and Political Weekly*, 844-847.

the People's Union for Civil Liberties, India's transgender minority has suffered several cases of abuse of its human rights.

CHAPTER III

3.1 RESEARCH QUESTIONS

1. What defines or characterizes something as gender-neutral?
2. What are the different aspects or components that would need to be addressed in a law attempting to be gender-neutral?
3. Do India's current rape laws apply equally without distinction of the victim's gender?
4. Is there a need for laws that do not distinguish or discriminate based on gender in situations involving caste, religious/communal conflicts, abuse of authority, or wartime crimes?
5. What factors have prevented or slowed gender neutrality from being fully adopted or implemented in India's legal system?
6. Should laws aim to be completely impartial toward victims regardless of gender, or would a partial approach of only making the victim's gender irrelevant be more practical to implement?

3.2 Objectives of the Study

1. To analyse what is the meaning of gender-neutral and what constitutes gender-neutral.
2. To find out various dimensions of gender-neutral law.
3. To critically analyse if rape laws are gender neutral.
4. To find Power differentials arising in custodial, communal, and war situations.
5. To understand the reasons for gender neutrality getting imposed in Indian laws.
6. To find out whether the solution is to make it gender-inclusive for the perpetrator only.

3.3 SCOPE AND LIMITATIONS OF THE STUDY

In this paper, I would like to throw some light on the lack of gender neutrality in Indian Law, as well as, how there are rape laws that has the potential to maintain gender neutrality and how there are needs to make and amend certain laws to prevail gender neutrality in its true sense within the society.

The limitation of this paper is that it only focuses on gender neutrality on rape laws and no other laws. It is also only limited to Indian rape laws and no other country laws.

3.4 RESEARCH METHODOLOGY

The research was conducted by referring to a variety of both well-known and lesser-known websites. For this topic, I have also referred to various textbooks. Doctrinal Methodology of research has been used i.e.; the reference has been given through various authorized websites. For the proposed study on the concept of gender-neutrality in rape laws in India, data and information has been collected from published papers, relevant articles, relevant cases, Google books, legislations, treaties, and internet websites. The study involves analyzing both legal and non-legal texts. The period of the study will be limited to achieve the objective of scrutinizing the concept of gender-neutrality in rape laws in India. To accomplish this, a combination of analytical and critical study methods have been adopted.

CHAPTER IV

4.1 MEANING OF GENDER-NEUTRAL LAWS

According to the Oxford Dictionary, gender neutrality is an adjective that may be applied to anyone, regardless of gender. It supports the belief that social institutions, laws, and policies shouldn't discriminate based on a person's gender and that everyone should have access to the same opportunities and resources, regardless of the gender they were born with or were assigned.

Given the rising crime rates of all kinds and the fact that society's victims are both men and women equally, it is only just that comprehensive legislation is passed that acknowledges both the crime and the individual, regardless of gender. Feminist and women's movements have strongly opposed the implementation of gender-neutral legislation, arguing that doing so will suddenly shift the attention away from the women who are victims and that such laws will only do harm and not fulfill the intended objective of protecting the victims.

However, this principle is contested on the grounds that feminists do acknowledge that the offense has a stigma attached and that making it gender-neutral will not remove it but will instead normalize

the fact that even men experience the same stigma as women and that both men and women should be treated equally when seeking legal protection. To see male victimization as equivalent to female victimization and that the crimes have to be fought against collectively by bridging the gap of inequality, taboos and stereotyped ideas must be destroyed. This process begins with establishing laws that are gender-neutral in nature. Men cannot come forward with allegations unless rape, sexual assault, and harassment of men are made legal norms.

Arvind Narrain (2013) provides three dimensions into which he categorized gender-neutrality-

4.1.1 Gender Neutrality with respect to the victim

It is really unfortunate that the way rape is seen by Indian law is predicated only on the idea that the victim of rape must be a woman. This assumption entirely ignores the fact that rapes and sexual assaults against males and transgender persons are just as common as crimes against other individuals and do not carry the same weight as assaults against women or rapes against men. As a result, it is clear that there is a lack of gender neutrality, and it should be underlined that the punishment for such horrible crimes should be the same regardless of the victim's gender. Furthermore, it is often believed that rape is just an act of sex committed to gratify the perpetrator's desire for sex, which is in direct opposition to the rising understanding that sexual assault is not only a manifestation of passion but also of domination over one caste or group religion. Therefore, there is no justification why males or transgender individuals cannot be raped or otherwise abused. Analogous to this, the historic ruling in *Vishakha and others v. State of Rajasthan*⁶ protected the rights of women who had been sexually assaulted at work, but similar legislation for males or transgender individuals has not yet been discussed.

4.1.2 Neutrality with respect to the perpetrator

The question of whether or not a woman may commit a crime has been a subject of constant discussion.

⁶ *Vishakha and others v. State of Rajasthan*, AIR 1997 SC 3011

People who spoke in favour of the motion claimed that it is impossible for women to rape men, particularly in a patriarchal environment, as Susan Brownmiller put it: "It is a biological impossibility."⁷ More persons opposed the proposal, arguing that it is not physically impossible. In instances like State Govt v. Sheodayal (1956), the Madhya Pradesh (M.P.) Highcourt said that a woman's modesty might be violated by another woman in violation of Section 354 of the IPC⁸. Women-on-women rapes have also come to light. In the case of Priya Patel v. State of M.P, the Supreme Court addressed the issue of whether a woman may engage in gang rape.

4.1.3 Neutrality in custodial, communal, war, and conflict situations

Rape has frequently been employed as a method of intimidation and control in caste, class, and community conflicts as well as in custodial settings. It is crucial to understand why these unique circumstances should not be compared to everyday life. In addition to being a male, female, or gay person, he or she belongs to a certain ethnicity, caste, and/or religion. The identification that distinguishes the perpetrator and the victim in a typical circumstance or non-aggravated crime is gender. The perpetrator's gender is not significant under extreme circumstances like war, hostilities, or confinement, where caste, race, or religious identity predominates. The Kathua rape case⁹ has garnered a lot of attention recently because to its gravity, which suggests that rape is becoming into a tactic to sow terror and demonstrate one's supremacy over others. Asifa Bano, an eight-year-old girl, was raped by the priest of Devasthan, his son, and his nephew while she was a victim of this horrible crime. Eight males were charged with engaging in one or more illegal activities that resulted in the murder of the youngster who had just been raped. Three of the defendants were accused of attempting to obliterate the evidence, and they were all public employees. Therefore, it is evident that rape is a tactic used in intercommunal disputes to get the upper hand.

4.2 HISTORY OF RAPE LAWS

India inherited its current rape laws from Section 375 of the 1860 Indian Penal Code formulated during the British colonial rule. At that time, rape was understood narrowly through a patriarchal lens

⁷ Moore. S 1975; Rape is not a crime but an act of lust argues Susan Brownmiller

⁸ Priya Patel v. State of Madhya Pradesh, (2006) 6 SCC 263.

⁹ The State Of Jammu And Kashmir (Now U.T. Of Jammu And Kashmir) And Ors Versus Shubam Sangra|Crl.A. No. 1928/2022

as a property crime against male honor rather than a crime against the autonomy and dignity of the survivor. The law reflected prevailing Victorian notions of morality that did not recognize marital rape or consider men as potential victims.

After Independence, though other parts of criminal law were amended and modernized, rape laws remained largely unreformed for over 60 years. The Criminal Law (Amendment) Act, 1983 was the first to widen the definition of rape to include sex with a woman against her will or without her consent. However, the gender-biased wording specifying only male perpetrators and female survivors was retained.

Since the 1980s, the goal of rape legislation reform has been central to the Indian women's movement. Women's organizations have fought to expand the definition of rape for a very long time¹⁰. Rape was only permitted in penile-vaginal form prior to the 2013 changes.

A significant case in the history of the Indian women's rights movement is the Mathura rape case¹¹. In this case, the Supreme Court determined that Mathura, the girl who had been sexually assaulted by three officers, had surrendered, and given her permission because there were no signs of resistance on her body. It was decided that consent entails the absence of harm. Four legal professors expressed their disapproval of the controversial case in an open letter to India's Chief Justice after it occurred. Once the prosecution had satisfied its duty of showing sexual intercourse, there was a demand that the weight of proof regarding consent be shifted to the accused. Another demand made by activists was for rape trials to be conducted behind closed doors and for the name of the victim to not be released to the media. Another request was to disregard the victim's past sexual behaviour when determining whether or not the perpetrator committed rape. The rape legislation was significantly changed as a result.

It was only after the brutal 2012 Delhi gang rape case, popularly known as the Nirbhaya case, that significant amendments were made through the Criminal Law (Amendment) Act, 2013. Marital rape was included, punishment was enhanced, and other positive changes were made. However, the core

¹⁰ Sakshi vs. Union of India, AIR 2004 SC 3566.

¹¹ Tuka Ram And Anr vs State Of Maharashtra, 1979 AIR 185.

definition still retains a gender-biased view by specifying "man" and "woman", failing to recognize the equality and autonomy of all genders.

The definition of rape was expanded as a result of this case to include oral, anal, and insertion of any object into a woman's vagina, urethra, or anus in addition to penile-vaginal penetration.¹² In both aggravated and non-aggravated cases, the penalty for rape was increased.¹³ Under the Act, as opposed to the Ordinance, the offense is not gender neutral. As a result, only a guy may rape a woman.

4.3 SECTION 375 AND 377 OF IPC

In Indian Law, Section 375 of the IPC, as amended by the Criminal Law (Amendment) Act, 2013 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.¹⁴

Section 375 of the IPC is considered a gender-specific law and not gender-neutral law. It solely talks about what is considered to be rape and it is specified that a victim of rape can only be a woman and no other gender can be a victim of rape.

According to Section 377, having unnatural sexual relations with any man, woman, or animal is

¹² The Criminal Law Amendment Act, Section 375 (2013)

¹³ The Criminal Law Amendment Act, Section 376 (2013)

¹⁴ The Criminal Law Amendment Act, Section 375 (2013)

punishable by up to 10 years in jail and penalties. As a result, neither transgender individuals nor males have their own established laws.

Even though there is no separately defined law for men, under the Transgender Persons (Protection of Rights) Act, 2019, for rape or sexual assault to a transgender person, the convicted is penalized with a term ranging from six months to two years in jail and a fine of 10,000 rupees, but the sentence for raping a woman ranges from ten years to even the death penalty along with a fine.

As a result, the Indian Law lags behind in terms of rape legislation since it places more emphasis on a certain gender than it does on the distress that the events potentially bring to any human being.

4.4 WHY RAPE LAWS SHOULD BE GENDER NEUTRAL

The first assumption that women can never be predators comes from the fact that, even while the legal definition of rape lists a variety of actions that might constitute rape, such actions would still be viewed as penile-vaginal intercourse by the general public. The common population believes that only males can create control since they are frequently biologically built to be stronger than women.

The second presumption is based on the notion that men can never be sexually assaulted since they are always enthusiastic during sexual acts, indicating their agreement. This is meant to convey that several things, such as the desire to be a willing participant, may arouse the male body. But research has shown that arousal may be brought on by a number of things, such as worry, shame, and fear, all of which can cause erections. Male exploitation is finally being acknowledged to occur on a larger scale. Several developed nations have also embraced impartial and gender-neutral law, including Canada, Finland, Australia, the Republic of Ireland, and the vast majority of the states in the United States of America.

But the point of contention is how sexual violence occurs in the workplace and how India's fundamental rights to equality and dignity do not apply only to one gender. This Act underlines the idea that violence is only used against women and should never be used against men or any other group.

In truth, section 375 of the Indian Penal Code defines rape as an act of non-consensual sexual activity

committed against a woman. This section is likewise predicated on the idea that only men can commit rapes and that only women may be victims of rapes. Male attacks are less frequent than female assaults, but it's still crucial to realize that men need protection from the law just like women do. Equal protection under the law for men and women in sexual assault and rape cases does not imply that women's rights are being violated. On the other side, giving men a platform to talk about their abuse and the capacity to report incidents would reduce the toxic masculinity of dominance assertion, which has historically been the main cause of violence against women.

One of the reasons why men do not come out about being victims of sexual assault and rape against them is the fear of being judged by society and the fear of retaliation from a culture that upholds the stigma that "men cannot be victims of the attack." Bringing gender-neutral laws will not only change this stigma but also will bring protection to all genders despite the fact that the Indian rape laws are discriminatory to other genders.

CHAPTER V

5.1 HOW ARE GENDER AND LAW ARE RELATED

To write laws pertaining to a certain gender, one must comprehend gender itself. Although the subject is still up for debate, many theorists and academics agree that gender is a social, psychological, and cultural trait inherent in the human mind. On the other hand, sex is only a biological feature of the human body. As previously stated, gender is an identity that is also influenced by social influences and evolves as a result. Legislators should thus consider both gender and the constructionist nature when crafting legislation. As a result, that legislation ought to be applicable given how frequently it changes. Instead, what the law does is presume certain things about gender, which is a unitary account of gender, and then it makes regulations based on that assumption.

5.2 WHAT IS HOLDING GENDER NEUTRALITY BACK

While the concept of gender neutrality holds appeal, its full implementation in the Indian context presents significant challenges. The Supreme Court itself dismissed a Public Interest Litigation (PIL) seeking to gender-neutralize laws pertaining to rape, sexual harassment, stalking, voyeurism, and sexual assault, labeling it an "imaginative petition" for a modern world. It is imperative to delve into

the factors hindering India's progress towards gender- neutral legislation.

Firstly, In India women are considered a vulnerable section of the country, they don't consider any other sections like transgender or men as vulnerable, instead, they consider men as a dominant sector of the country. The fact that discrimination and crimes against men and transgenders are also prevalent in India but such facts are given importance. Secondly, India is a patriarchal country where men are considered politically, physically, and economically stronger, therefore they cannot be assumed to have been victims of any crime such as rape. Thirdly social reality is ignored in India that even a man or a transgender person can be the victim of rape or any sexual assault case where the accused may be a woman, recently there have been cases that have been filed in the police station regarding gang rape of a man by 4 women.

These are some of the reasons that are holding gender neutrality back from coming into effect, it is true that women are the most affected section in society of sexual assault and rape cases, but there are instances and cases where men are the victims, there is no protection and proper legislation that provides punishment for the convicted person and the victim.

5.3 REFORMS IN OTHER COUNTRIES

Many other jurisdictions have recognized the need for gender-neutral rape laws and undertaken reforms to bridge legislative gaps. Some of them are:

- Canada revised its law in 1983 to define rape in a gender-neutral manner, recognizing female perpetrators and male victims.
- UK enacted the Sexual Offences Act 2003 which defined various sexual offenses without reference to gender of perpetrator or victim.
- South Africa's Sexual Offences Act of 2007 ensures legal parity for all genders in matters of sexual consent and crimes like rape.
- Australia states like Tasmania, Northern Territory and Victoria have adopted an affirmative model of consent focusing on communication and respect between partners regardless of attributes like gender.

These reforms reflect an evolving understanding of rape as a violation of consent and dignity rather than just a crime of violence or sexual intercourse. They recognize all individuals have equal rights over their bodies and establish legal frameworks supporting this modern approach. India can benefit from these positive international experiences of overcoming archaic gender biases in rape laws.

5.4 Recommendations for Reform

Based on the evidence and analyses presented, there is a compelling case for undertaking urgent reforms to make Indian rape laws gender-neutral. Some key recommendations are:

- Amend Section 375 IPC to define rape in a way that does not specify or restrict perpetrator or survivor attributes based on gender alone. Focus should be on non- consensual sexual acts and violation of bodily integrity.
- Introduce affirmative consent as the legal standard to determine consent rather than just examining force or lack of consent in specific cases. Silence or absence of 'no' should not imply consent.
- Sensitize police, judiciary and public about male vulnerability, female perpetration and expand support services gender-neutrally to help reporting and access to justice for all.
- Enact new gender-neutral laws for other non-consensual sexual offenses like unnatural sex, sexual harassment and exploitation to complement a comprehensive legal framework.
- Review other flaws in criminal law like marital rape exemption that discriminate against certain survivors on grounds of gender.

CHAPTER VI

6.1 ANALYSIS AND SUGGESTIONS

In a nation like ours where women are now the most vulnerable demographic, gender-neutral legislation won't be achievable. Fully embracing gender neutrality would be counterproductive, but there are other solutions that may be discovered to address the "bigger issue" without further complicating the already complex subject. That does not mean that laws should be gender specific in nature, there must be laws to protect all the genders equally and no one should get the higher benefit of the law protection.

In India, crimes like rape, sexual assault, stalking, voyeurism, etc. are solely regarded as affecting women, despite the reality that men can also become victims of similar crimes. The patriarchal mentality and masculine supremacy that prevail in India are the parents of this. The bodies of the transgender communities, which include hijras, kothis, and trans-sexual, are completely ignored.

Men and transgender communities should be given the same opportunity as women to come out into the open without fear of being criticized for their manliness for doing so. Only when we are in the need to seek justice and the law is strict enough to punish the offender based on the crime done and not based on their gender, then and only then will there be genuine and complete equality.

Simply proclaiming that India possesses gender-neutral legislation will not suffice. Instead, it is crucial to recognize that men can also be victims of sexual assault and raise awareness of this issue, extending inclusivity to transgender individuals as well.

We should adopt such a law that states that the perpetrator may be gender specific as usual, but the victim can be of any gender, i.e., gender neutral.

6.2 CONCLUSION

Gender equality is not about identical treatment but about ensuring equal access to opportunities, resources, and protections for all individuals, regardless of their gender identity. It's not about forcing uniformity but about fostering an environment where everyone can thrive. Gender-neutral rights play a vital role in creating a just and equitable society, where everyone feels safe and valued. When implemented effectively, gender neutrality promotes social harmony by dismantling the notion of gender-based superiority, a root cause of many harmful behaviours.

Both sexual assault and rape are not recognized as crimes that can be perpetrated against males in India. Only a guy may commit these crimes against a woman since the definition of each is so specific. It is widely believed that gender neutrality is a coercive tactic used by academics to divert attention away from female rape victims. The aim of gender neutrality in sexual assault and rape legislation stands apart from other objectives and holds a unique and legitimate position. This distinction should be emphasized.

Rape laws being gender specific have to be changed to gender neutral as rape victims are not only women but can also be men and transgender people, the pain and suffering that a victim undergoes is similar for every gender, this has to be treated equally and not treated differently.

CHAPTER VII

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