

## **GENDER BIASED LAWS IN INDIA**

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### **ABSTRACT**

*Present law in India requires only a male to be a criminal and only a woman to be a victim. This specificity of gender leads to injustice because it does not include men / transgender as victims.*

*They are remediless when rape or sexual assault is committed upon them. The law should be amended to include men/transgender as potential victims of the offences of rape and sexual assault. State is duty-bound to provide the right of equality to every citizen and such discrimination on the basis of gender of the person is highly unjustified. The arguments for and against shall determine the need for the same. The aspect of women being the perpetrator is analyzed as per the prevailing circumstances of the country and it is deduced that the current step required to achieve justice is that men / transgender should be included as victims of rape and sexual assault, and women should not be included in the category of offenders because it will cause outrage in society.*

### **STATEMENT OF PROBLEM**

The article attempted to mention the importance of male and transgender being included in the definition of rape. The researcher has tried to answer questions about the frequency of male rape?

Would complete gender equality in India be accepted? What are the opinions on gender-neutral policy and against it? The article would address the importance of including men and transgender in the definition of rape through these questions.

## RESEARCH METHODOLOGY

The research method which is adopted by the author of the article is the DOCTRINAL method it is also known as a top-down approach. Analysis of major aspects regarding male/transgender rape has been done in the article which has also used the DESCRIPTIVE and ANALYTICAL research method. To reach a solution DIAGNOSTIC research method has been adopted. The research also comprises explanatory and exploratory methods as the article has presented the facts and circumstances and also discussed the aspects which are lesser-known in the society.

## INTRODUCTION

The laws of a country decide the fate of its people. Constitution of India has ensured its citizen's right to equality under Article 14. By virtue of Article 15(3), which states that nothing in this article shall prohibit the state from making special provisions for women and children, gender biased laws are able to exist and thrive in the country through this clause. The paper would address the gender biased Indian rape laws which in practice. Rape is the highest standard of sexual assault. It has always been characterized by male-on-female paradigm, this gender-specific notion where it is impossible for a woman to rape or sexually assault a man is unjust. This paper shall mention the need to include men and transgender in the definition of rape and sexual assault.

According to section 375 and 376 of IPC, the only perpetrator of rape can be a man and the victim can only be a woman. This stems from the old stereotypes and beliefs that a male can never be raped. But this line of thought stands flawed in today's world. As McMullen said "All human beings are potential rape victims. Rapists are gender and age blind".

But if we make women a rapist would that be justified and won't it violate the very law which is made to protect her. As per the statistics, the threat of counter-complaint and a negligible amount of cases of male rape and assault might come in way of the administering justice in society. But can this be a valid excuse to not provide the rights of remedy to men/transgender, as women are not the only ones assaulting them but homosexual men too rape men/transgender.

The paper shall address this question and after analyzing all the major aspects related to this topic, and also provide a solution and the way forward.

This paper shall discuss the history of rape law, position of gender neutrality in India, laws and precedents, Arguments for and against complete gender neutrality by making female perpetrators. The paper shall tell us the change which is required so that it does not end up being unjust to any section of the society.

## HISTORY

This section shall trace back the laws of rape in India which will signify the evolution of the jurisprudence of rape laws and the mindset of people in our country. Article 375 of IPC defined the offense of rape. There have been amendments through laws and judgments which has widened the scope of rape.

The ill-famed case of **Tuka Ram and Anr vs. State of Maharashtra** (Tuka Ram and anr vs. State of Maharashtra , 1978) commonly known as the Mathura rape case brought radical changes in rape. In this case, a girl named Mathura was raped by two policemen where the supreme court acquitted the accused which led to public protests and amendments were brought by the way of The Criminal Law Amendment Act 1983. It provided in-camera proceedings for the trials of rape and to not publish the name of the victim. The burden of proof was shifted to prove the consent to the accused and it was also provided that the sexual history of the victim should be irrelevant to decide the guilt of the offender.

The 172nd Law Commission Report in the year 2000 recommended that rape law should be gender-neutral from the perspective of the victim as well as the perpetrator. The infamous case of **Mukesh and Anr vs. State for NCT of Delhi and ors** commonly known as the 2012 Delhi gang-rape case was the driving force behind The Criminal Law (Amendment) Act 2013. The act broadened the definition of rape to not only include penile-vaginal penetration but oral, anal and insertion of any object in the vagina or urethra of a woman. (Kabra) Justice Verma Committee was established which recommended amendments, wherein it stated that law

should be gender-neutral for the victim but gender-specific for the perpetrator. However, it was not adopted by the act.

## **MALE RAPE AND ITS PREVALENCE**

The rape of male/transgender is any sexual assault that involves compelled penetration of anus or mouth by a penis, finger or any other object. (Gupta, 2015) English law was the first one to recognize male rape in the year 1994 by the way of the Criminal Justice and Public Order Act where the definition was broadened to include males as victims. Many other countries like U.S, Philippines, and China recognize the victimization of males. Male/transgender rape has always been a taboo and has a negative connotation among people in society.

As our society is driven by the ideas of patriarchy it is believed by people that a man cannot be raped or sexually assaulted as a 'real' man will be able to defend himself from such situations. The cases of male rape go under noticed as men hesitate to file a report as it will tarnish their image in the society. They are also subjected to mockery and such a grave offense is treated so lightly by the people that it is not even considered as an offense in our country. Sexual autonomy of a man is violated when a woman has sexual intercourse without his consent.

The prevalence of male rape can be adjudged by the various statistics and surveys conducted across various countries which shall prove the existence of male rape and that it is a grave issue that must be addressed by the governments to maintain justice in the society. The National Intimate Partner and Sexual Violence survey where Centers for disease control (CDC) in the category of 'being made to penetrate' which turned out to be that 1.715 million men (S.G. Smith, 2017) reported that they were either by physical, verbal, intoxicated or otherwise without their consent were compelled to penetrate.

In the U.K. according to the statistics by the government which estimated about 78,000 people to be raped out of which 9,000 people are men. (Merz, 2014) In Indonesia, a woman named Emayartini became the first women in their country to be punished for raping six teenage boys. In China, the United Nations' 2013 multi-country study on men and violence in Asia and the

pacific surveyed that 3% of men acknowledged that they were raped in their lifetime by another man. (Bengkulu, 2013)

## **GENDER NEUTRALITY**

Gender neutrality can be viewed from two different perspectives. Firstly, neutrality related to the concerns of the victim. It means that both men and transgender can be victims of rape. Rape has traditionally been recognized as penile-vaginal penetration; according to this notion male/transgender cannot be raped. But the Criminal Law Act 2013 brought an amendment that expanded the definition of rape. Legislation should not be gender blind rather it should be gender-sensitive. The reversal of the gender role of the male being the aggressor and female being the submissive victim is not the correct truth behind rape.

One of the consequences of rape is the production of a child. It is usually held that rape of women is more grave as she has to bear an unwanted child. But when men are raped they also have to bear the burden of having a child with a woman who has sexually assaulted her. Woman still has the option of using pills to not have the baby, but the man has to father the child as he has no other option.

Second, neutrality concerning perpetrator, male is traditionally associated with the perpetrator but women too can rape both male and female. The fact that rape of a woman is worse than the rape of a man does not mean that man should not be even given the remedy and he should still be recognized as a victim of rape. There are cases where a woman is drugged and in the state of unconsciousness, she is raped. Though she has not gone through the suffering that still violates her right for which she has a remedy available. Such rights should also be guaranteed to a man as rape is a violation of human rights.

## **LAWS**

The present legal framework which governs the cases of rape in India is mentioned below According to section 375 only a man is eligible for committing rape which defines rape. In section 376D defines the offense of gang rape, where the word 'person' is used, meaning that

a woman can also be convicted in the case of gang rape by applying the literal rule of interpretation.

The matter of gender neutrality came into the picture when the Supreme Court in the case of **Sakshi v union of India** (Sakshi vs. Union of India , 2004 ) 1999 directed the law commission to analyze the rape law of the country. Law commission did so in the year 2000 wherein its report stated that law should be gender-neutral and it also expanded the definition of sexual assault.

After Law commission report the Criminal Law (amendment) bill 2012 was brought which is considered to be one of the most progressive proposals. This bill proposed sexual assault as a gender-neutral offense. In the year of 2012, a radical change was brought by way of the 2012 Delhi rape case, where a high-level committee of justice J.S Verma was formed which said that rape victims should be gender-neutral but perpetrator should be gender-specific.

Criminal Law (Amendment) ordinance 2013 was promulgated which removed the difference as to the gender of the person from rape was a reformatory one. But women activists across India were against making a woman a perpetrator and there was a huge backlash from them. Thus the criminal law (amendment) act 2013 was brought in place of the ordinance.

The act of 2013 is what we follow in our present legal framework. Gender specificity was brought back and is currently followed.

The present framework is not in consonance to the international norms of gender neutrality as the stereotypes, myths and the fear that condition of women shall be deteriorated has restricted the gender-neutral rape laws in our country.

## **ARGUMENTS FOR COMPLETE GENDER NEUTRALITY IN RAPE LAW**

*Men Also Face Social Stigma*

It is often contended that the plight of women after rape is much worse than that of a man. But the stigma of male rape is very high in our society. The studies show that men have a higher rate of suicide than females (Canetto SS, 1998) and Elizabeth Donovan said that men have added pressure from society as most of them don't believe that a man can be raped (Trent, 2013). As the gender role of a male is supposed to be a strong, independent and risk-taker. Being raped by another man or female is to the opposite gender role due to which society condemns male rape which turns out to be having ill effects on the male victim. Reporting of the crime can make the man a subject of mockery and ridicule, is also looked down upon in the society not only by others but the family members too. This suggests the need for gender neutrality in cases of rape.

### ***Statistics***

In India, there have been not many cases of male rape in comparison to women's rape. Research in this area has been very less. And cases of mal rape go unreported which does not a clear picture of the scenario. A survey was done by center for civil society where they interviewed 222 men and 16.1% of them reported that they were forced to have sex by a woman, 2.1% men stated that they were forced to have sex by a man. (S.G. Smith, 2017): In a country where male rape is not recognized, victims of such take recourse of anonymously blogging their experiences on social media. This suggests the need for including men/transgender as victims in the definition of rape.

### ***Violation Of Human Rights***

Rape is the gross violation of human rights. The right to equality and equal protection of law is guaranteed to every citizen by the constitution of India. But the prevailing rape law which bars the men/transgender their right to remedy in case of rape is highly unjustified.

The laws should be gender-sensitive but not gender blind. (Tuka Ram and anr vs. State of Maharashtra , 1978) he state must protect the right of equality but ousting the men out based on gender is violative of their rights enshrined in our constitution.

### ***Gender Neutrality Is Not Anti Women***

Gender neutrality does not mean that it will violate the rights of the other gender. It simply means that there should be no discrimination based on sex or the gender of the person. By recognizing the male/transgender rape it does not make female victims unsafe. The rape of a transgender is much more prevalent than male rape.

Transgender often hide their identities and present themselves as either male or female. When we talk about gender usually it is viewed from a binary perspective i.e. male and female. Here we ought to forget transgender which is gross under inclusion and violation of the right of equality for them.

## **JUSTIFICATIONS AND ARGUMENTS AGAINST COMPLETE GENDER NEUTRALITY**

### ***Physically Impossible For Women To Rape A Man***

This argument stems from the fact that sex is something that men do to women and not with the woman. Sex can only happen when a man is aroused. And the difference arising out of the human anatomy for males and females makes it impossible to commit rape. As men are considered to be stronger than women they can only be the ones eligible for committing rape as a woman cannot have sex by the time the man doesn't want to. The role of the man is that of sexual agent where he is dominant and the role of women is always sexually submissive where they have sex done to them and as women cannot have sex without a man's consent thus is considered to be impossible for a woman to rape a man. (McKeever, 2019)

This argument stands false, as the stats and cases mentioned in the section of Male rape and prevalence proofs that woman can rape a man and laws must recognize such offense to achieve justice in our society.

### ***Counter Complaints***

Making the laws completely gender-neutral shall make women eligible to be rapists. This can have ill effects as men can easily file complaints against bonafide women to get back at them.

Counter complaints can be the biggest flaw of complete gender neutrality as it shall defeat the purpose of law and such allegation on a person is enough to ruin one's life as one loses the respect in the society.

This argument stands false, as it also happens in the case of females. Females also maliciously file rape charges against innocent men which also deteriorates their image in society. The fact that there can be false filing of charges cannot bar the right to file the charge as it will violate their right to remedy. There should be a proper mechanism to check whether the charges filed against are real or malicious.

### ***Women's Purity More Important***

The virginity of women is the prized possession of hers. The 'purity' of women decides the honor of her family in the society. We live in a society where a woman's sexual integrity is much more valuable than her intellectual capability. (McKeever, 2019) The value of a woman depends on her sexual purity. All these aspects are not all applicable to a man. The threat of rape for a woman is much graver than for a man. Thus even when a man is raped, the value of the man remains intact.

The argument stands false, as rape is a violation of the sexual autonomy of a person, the gender of a person has a little role to decide the impact of rape on a person. Men are also prone to the stigma in society; this aspect was covered in the previous section of the article.

### ***Gendered History And Statistics***

The problem of male/transgender rape is not a significant social problem as the number of cases is almost negligible in our country. The historical understanding of sexual assaults and rape has been such that we view it as a male-only crime (S.G. Smith, 2017) because women are sexually submissive. It is usually believed that men are always up for sex due to which they cannot be raped as they have given their consent for the sexual intercourse

The argument stands false as men are less likely to report the offense as it is considered to be 'unmanly' as a 'real' man can easily defend himself from such offenses which is the reason for the negligible number of cases. Women can easily force a man for penetration by drugging, verbally threatening and using other ways to have sex, thus woman nowadays is not sexually submissive.

## CONCLUSION

Male/transgender rape is not a myth. Women rape men, men rape men, as rape is not just for pleasure of lust; it is also for the demonstration of dominance and superiority. The statistics, interviews explains that women can also commit the crime for which they should penalize. A drastic change in the law may result in injustice towards women. There should be small but significant changes in the law in order to achieve justice in society. Initially, the law should include male / transgender in the definition of rape to protect them from homosexual rape. Upon witnessing the reaction with this change in society, then women should be brought under the ambit of perpetrator of rape.

By then, women can be included in the definition of sexual assault which is a less serious crime than rape. It shall also secure the rights of male victims. Workshops, seminars, awareness programs should be arranged for acceptance of rape of men/transgender which will help the victims to come forward and fight for their right. A step by step approach will help us to render justice.

If the laws are made completely gender-neutral it shall have an ill effect on females as rape for women is deathless inevitable shame and the chance of pregnancy is also associated with the same. Pregnancy is not a possible consequence in the case of rape of man/transgender. The consequences and the impacts cannot be the reason to not provide men/transgender the right to file for the offence committed upon them. The right of equality (Article 14) is right available to everyone, but by not including men and transgender it violates their right which is guaranteed by the state.

Analyzing the various aspects concerning the male/transgender rape the author believes that rape laws should include men and transgender as victims but not include women as a perpetrator of rape as per the current scenario of the country. The outrage of the women activists which were observed against the Criminal Law (Amendment) ordinance 2013 which removed the difference of gender making the woman a perpetrator was not accepted by the society. Criminal law (amendment) act 2013 was brought in place of the ordinance 2013 and is currently followed in our country. It shows that people are not open to think a woman as a rapist, thus the will of the people should be respected. To prevent injustice in the cases where men are assaulted by women, women should be allowed as a perpetrator of sexual assault. By this way, rights of men are not curtailed and the social balance in the society is also achieved.

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