

GENDER NEUTRALITY IN SEXUAL ASSAULT: CHANGING TRENDS IN CRIMINAL LAW IN INDIA

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Abstract

It is the need of hour that laws be more gender neutral. To bring equality and to protect the rights of the people of third sex gender and homosexuals neutral laws are imperative. These days a regular conflict can be easily seen in the mode of the men's rights movement in India. It is the outcome of high rate of manipulation and exploitation of female oriented laws. These incidents are clear evident for the conflict theory of sociology and of Karl Marx. Due to absence of proper legislation on male rape laws and less risk factor in comparison to the involvement of girls into it the demand is high. As social stigma and fear of pregnancy is less it is easily carried out. . Sexual assault and can be done of a female as well as male. Studies conducted mostly in developed countries indicate that 5-10% of men report a history of childhood sexual abuse, 3.6% in Namibia and 13.4% in the United Republic of Tanzania to 20% in Peru. The evidence available suggests that males may be even less likely than female victims to report an assault to the authorities.

Keywords: Gender neutrality, HIV / AIDS, Unnatural Sex, The criminal law (amendment) Bill, 2012, Law Commission, Indian Penal Code 1860.

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Introduction

Gender neutrality is an idea or a movement which encourages avoiding negative differentiation among people on the basis of people's sex or gender with regard to policies, language and other social roles. It basically aimed to bring parity and in society by abolishing the thought of superiority of one gender upon another i.e. equal treatment of men and women in various aspects. Right to have an equal treatment is guaranteed to every citizen of the country irrespective of sex of a person.¹ At the international level, both men and women are equal in terms of rights and dignity without any discrimination². Gender is a social, cultural and political construct. It gives a range of characteristics which lead to create a difference between masculinity and femininity in various fields, it may be in politics, workplace, economy, domestic level etc. Gender also has its legal significance as it is mentioned in governmental and official documents which is used to avail certain rights and liabilities on this basis. Which is also different for men and women. Like different tax slabs, pension status.

The concept of gender neutrality within rape has been influential over the last four decades in those jurisdictions that have engaged in significant reform of their rape and sexual assault laws. The fundamental characteristic of gender-neutral reforms is that they expand the definition of rape to recognize male victims and female perpetrators. Hence, they are "neutral," but only in the sense of including both males and females as potential rapists and victims. Gender-neutral reforms vary across the many different jurisdictions in which they have been introduced; in this section, Rumney explain some of the various ways in which gender-neutral reforms define rape and sexual assault. Rumney has also consider the reasons that law reform bodies, legislators, and scholars have used to justify the introduction of gender-neutral rape statutes³. Novotny's article is underpinned by what appear to be theoretical objections to gender neutral rape statutes that are not grounded in the wider legal and social science literature. This carries with it the attendant danger that theoretical objections to gender neutrality in rape will override the reality of male sexual victimization and its appropriate labeling by the criminal law⁴.

Across dozens of jurisdictions, gender-neutral reforms have been adopted as part of

¹ Art. 14, 15, 16, 17,18: Constitution of India, 1949

² The Universal Declaration of Human Rights, Dec 10, 1948

³ Vision by Philip N.S. Rumney has been "*In Defence of Gender Neutrality Within Rape*"

⁴ Patricia Novotny, *Rape Victims in the (Gender) Neutral Zone: The Assimilation of Resistance?*, 1 SEATTLE J. FOR SOC. JUST. 743 (2003)

a wider law reform agenda in an attempt to reflect a more modern understanding of the purpose of rape law—the protection of sexual autonomy from the harm of non-consensual penetrative sex acts⁵. Scholars have criticized traditional rape laws that only prescribe penile-vaginal intercourse, arguing that these laws exclude “*a great deal of behavior which is remarkably similar to the act legally designated as rape and...such exclusion appears to rest on no logical or justifiable grounds*.”⁶

Need of Gender Neutral Rape laws :

It is the need of hour that laws be more gender neutral. To bring equality and to protect the rights of the people of third sex gender and homosexuals neutral laws are imperative. These days a regular conflict can be easily seen in the mode of the men’s rights movement in India⁷. It is the outcome of high rate of manipulation and exploitation of female oriented laws. These incidents are clear evident for the conflict theory of sociology and of Karl Marx. It is an

established fact that criminal justice system is suffering from the misuse of pro feminist laws like domestic violence law 498 A, laws for prevention sexual harassment at workplace and male rape laws. Like USA, UK and European Union States India also needs more gender neutral anti-harassment prevention laws. There is a huge difference between the rate of rape reported and the conviction rate. Only the man is prosecuted for adultery⁸. If a man has sex at the promise of marriage and doesn’t marry, it amounts to rape⁹. If a man under 16 years of age has consensual sex with a girl of his age, will be a rapist but it is not so in case of women¹⁰. Only a wife can claim alimony and maintenance¹¹.

In case of death due to burns and bodily injury within seven years of marriage the husband and his relatives will be held liable for the death¹². During the Indian general election, 2014, Men-fiesta was released which dealt with the issues of men and addressable

⁵ In the context of the legal recognition of anal rape, Ruth Graham recently observed that “to argue that the harm caused is comparable is not the same as arguing that the male anus, the female anus and the vagina are similar.” Ruth Graham, *Male Rape and the Careful Construction of the Male Victim*, 15 SOC. & LEGAL STUD. 187, 196 (2006). This is a rather curious point as Graham does not examine potential similarities, nor does she attempt to argue that there is something distinctly different about anal and vaginal penetration. See LAW REFORM COMM’N, RAPE AND ALLIED OFFENCES paras. 6–14(LRC 24-1988, 1988) (Ir.), available at http://www.lawreform.ie/publications/data/volume6/lrc_46.pdf (discussing in detail this issue, which led to a recommendation by the Republic of Ireland’s Law Reform Commission for an expanded gender-neutral definition of rape); see

also Colleen Hall, *Rape: The Politics of Definition*, 105 S. AFR. L.J. 67 (1988); Jocelyne A. Scutt, *Reforming the Law of Rape: The Michigan Example*, 50 AUSTL. L.J. 615 (1976).

⁶ Hall, *supra* note 12, at 68. The similarities in terms of psychological trauma will be discussed *infra* notes 152-67 and accompanying text

⁷ Hall, *supra* note 12, at 68. The similarities in terms of psychological trauma will be discussed *infra* notes 152-67 and accompanying text.

⁸ Men’s Rights Preservation Society, Save Indian Family Foundation, Child’s Right and Family Welfare

⁹ Section 497 the Indian Penal Code, 1860

¹⁰ Section 375 the Indian Penal Code, 1860

¹¹ Section 376 the Indian Penal Code, 1860

¹² Section 37, Special Marriage Act, 1954

issues by the Govt. with regard to men's right. The other demands raised were gender neutral laws, rehabilitation of men who were acquitted, speedy trials of the accused languishing in custody, and equal rights in child custody. Due to this unjust gender divide the various factors of men's exploitation specially left unrecognized, specially in rape and sexual abuse incidents.

Sodomy and rapes in Indian jails has been unaddressed since long time. Even most rights sensitive and well-equipped jails are not freed from this problem. It has become a part of prison behavior. Particularly when so many criminals lives together in the same place fighting for supremacy, space, sex, food, entitlements and even mere survival the chances increases. As per the 75 percent of the inmate contented that homosexual behaviors are very common among¹³. "When a young boy enters, the prisoners have been known to have bid a price for the boy. The price offered is in terms of 'bidis', soap or charas. Often prisoners have been divided into camps and the groups have fought each other on the issue of who shall have the new entrant¹⁴." Around 6-8 per cent of the inmates in Tihar are HIV positive. While the national average is below 1 percent. If 74.9 percent of the inmates are under-trials, it is

highly probable that majority of the people with HIV in jails are also under-trials.

Observations

In various studies it was found that prostitution of male children is rampant in major pilgrimage centers of India – Tirupati (Andhra Pradesh), Puri (Orissa) and Guruvayoor (Kerala) etc. Further due to development of tourism without protective measures leads to sexual exploitation of children, in the form of child abuse, child trafficking, child prostitution, child pornography, child sex tourism and child labour. There is a huge rise in the demand of male children for the above mentioned purposes. They are exploited by domestic and foreign tourists and residents as well. Due to extreme poverty and less livelihood resources they are forced to the prostitution.

Due to absence of proper legislation on male rape laws and less risk factor in comparison to the involvement of girls into it the demand is high. As social stigma and fear of pregnancy is less it is easily carried out¹⁵.

As homosexuality is criminalized in India, LGBT and transgender communities are suffering by the insecurity as harassed by the authorities. These people are sexually minorities in India. There is lacking of social acceptance due to the sexual orientation of them. These rape cases are rarely reported

¹³ Indian Journal of Medical Research article, 2010

¹⁴ The People's Union of Civil Liberties, Tihar, 1981

¹⁵ Model Penal Code § 213.1 cmt. (2010)

due to social stigma. The reason for unreported cases is provision of Section 377. It is a fact irrespective of the social acceptance that the sexual abuse and rape cases against these people are increasing day by day. In absence of proper legislation the danger of HIV/AIDS is increasing which cannot be prevented by the existing provision of section 377 of IPC. Males are always considered as the perpetrators as the system has no provision for men to seek legal recourse if they are raped. It is a general presumption that they never be the victims. It is the time to admit the fact that males can be raped. Realization is required that “rape victim” is not a synonym for female. The objective of the penal provisions is to book the wrongdoer and provide justice to the Victims even though they are less in numbers. The bases of provisions in penal codes are not statistical. If the crime exists, there has to be a law for it. Woman can be a potential rapist whether it is a male or a female. All humans are capable to commit barbaric heinous crimes. Human psychology is a strange thing.

In World Health Organization’s 2011 World Report on Violence Health in the chapter titled “Sexual Violence” defines rape as, “physically forced or otherwise coerced penetration even if slight of the vulva or anus,

using a penis, other body parts or an object. There could be many effect of the rape upon the male victim which may include mental trauma, physical trauma, Identity crisis etc. Rape has been gendered for too long. Since very long time there was an unjust silence with regard to male rape or sexually abused population. Rape is not solely dominion over women. Most of the male rape victims lack the resources to file a case. As a society, one rarely thinks of male victim rape. According to the American Law Institute, rape is likely the most underreported crime of violence¹⁶. According to the American Law Institute, rape is likely the most underreported crime of violence¹⁷. There are definitional hurdles as well. For example, some jurisdictions continue to define rape in gender-specific terms, specifying a female victim or vaginal penetration. The Uniform Crime Reporting Program also defines rape as requiring a female victim¹⁸.

Need was felt to bring a new definition of sexual offences to deliver justice to the vulnerable segments of the society. In 1993, the National Commission for Women responded to this felt need through a bill titled, ‘Sexual Violence Against Women and Children Bill’. The bill advocated deletion of Sections 354 (violating modesty), 375 (rape), 376 (punishment for rape) and 377

¹⁶ Model Penal Code § 213.1 cmt. (2010)

¹⁷ Model Penal Code § 213.1 cmt. (2010)

¹⁸ Crime in the United States 2009, at 15 (3d ed. 2009)
(2) Through the usage of the term ‘person an element

of gender neutrality seem to have cropped in, specifically to include the violation of male children

(unnatural offences) of the Indian Penal Code (IPC) and brought them under the broad banner of 'sexual assault. The bill seemed to be introducing two important legal principles: (1) Repeal of S 377, which dealt with cases of 'unnatural sex', and for the first time, provided legitimacy to same sex relationships between consenting adults. An attempt was there for the process of redefining sexual assault. While this was a positive move in redefining sexual norms of a predominantly heterosexual society, the gay rights support groups, whose concern this provision seemed

to articulate, were excluded from the debate.

The latest example is The Protection of Children from Sexual Offences Act of 2012. The law prepared by the ministry of women and child development considered the possibility of the child victim being either a girl or a boy. The criminal law (amendment) Bill, 2012, defying the gender stereotypes associated with rape, was in keeping with a report from the Law Commission in 2000. In a departure from the definition of rape in the Indian Penal Code enacted in 1860, the Law Commission replaced most references to "man" (the offender) or "woman" (the victim) with "person", who is either the offender or the victim, depending on the context. In fact, it went to the extent of bringing oral sex committed by either gender under the ambit of sexual assault. However, in 2013, pressure has been made by women

activists, the government decided to restore the term "rape" in criminal law that states only men can be booked for committing the offence against women.

The spirit of gender neutrality also did not extend to another far reaching legislation. As the name suggests, The Sexual Harassment of Women At Workplace (Prevention, Prohibition and Redressal) Act 2013 is based on the premise that only female employees need to be safeguarded. The women and child development ministry, which had broken the gender mold in the law to sexual offences against children, adopted a conservative approach when it came to the issue of sexual harassment. The Act also overlooks the possibility of a male employee being sexually harassed by another male employee. The issue of homosexuality had reached the public domain, when prevention of the spread of AIDS became a concern of public health and homosexual men and prostitutes were marked as 'high risk' groups needing interventions to spread the message of safe sex among them. The groups working with sexual minorities also started questioning their marginalized existence, lack of public space and visibility and social stigma enforced through the application of social norms.

The jurisprudence consists of scientific and psychological investigation of the social phenomenon of law and justice generally. Law is a social phenomenon and it is related

with the justice. Law is the part of the society whether primitive or modern. Law both shapes and shaped by the society. Law puts psychological impact upon the act and thinking of the population living in the society. Law lays down the rules of conduct via its normative approach. As per the present context of gender neutrality there is a need to protect the rights and justice of the male victim of the sexual harassment and rape via effective rape laws with penal provisions. Under existing Indian legal system the condition of male rape law is quite problematic in nature. Criminal law even refuses to recognize it even though equal harassment suffered by the victim. Awareness and sensitivity in the society is important to create a collective sense of respect among the two sexes.

Conclusion

Law may differ from individual morals as in the present case the formation of gender neutral rape laws are aggressively opposed by the feminist activists in the country. Feminist movements support the more female favour law in the name of women empowerment. As this section is considered as oppressed and exploited one. So here is a need to rise from the point of traditional moral and equality policies of feminists. The one of the object of law is to bring parity in the society

irrespective of the individual sense of morality. In the words of British legal theorist Jhon Austin, "Law is the command of sovereign". According to Austin's legal positivism, law is a social fact and reflects relations of power and obedience. This two-fold view, that (1) law and morality are separate and (2) that all human-made laws can be traced back to human lawmakers.

According to HLA Hart, law comprises primary rules of obligation. Law itself holds the element of obedience by the people as backed up by the credible threats of punishment or other adverse consequences like sanctions in the course of noncompliance. It plays the pivotal role in changing the mindset and social construct. The idea to legislate male rape laws is a new on across the world. It is the demand of the era not to restrict the concept of rape victim up to the female population. Sexual assault and can be done of a female as well as male. Studies conducted mostly in developed countries indicate that 5-10% of men report a history of childhood sexual abuse, 3.6% in Namibia and 13.4% in the United Republic of Tanzania to 20% in Peru. The evidence available suggests that males may be even less likely than female victims to report an assault to the authorities¹⁹. Theory of Scandinavian realism law changes the behavior of the people. Scandinavians tried to explain the law

¹⁹ World Report On Violence Health, Chapter 6: Sexual violence, Pg 154

scientifically, free from metaphysical element embedded in the traditional definitions. Via scientific approach it was tried to find out the psychological effects caused by the ritualistic modes of law making by Parliament or decisions of Courts.

According to Hagerstrom “A civilized life is not possible without law”.²⁰ Further he emphasized upon the nature of the law, capable to guide the behavior of the people. There must be causal connection between the law and the problem existing in reality. In the present matter there is a need to bring changes in the existing of rape and sexual assault laws of the Country. Out of 96 countries studied, 63 have rape or sexual assault laws written in gender-neutral language, 27 have rape laws that are completely gender-specific. (i.e., the perpetrator defined as male and the victim as female) and 6 had partly gender-neutral laws (the perpetrator defined as male and the victim can be male or female).

Law is not a dry subject, it's not static. Law is dynamic in the sense that it is subjected to the constant change, depending upon the variation in society such as new needs, different morals and obsolete principles. It is the duty of the state to make, recognize and enforce the law to bring effective legal

system. So that citizens can have confidence upon the rules that the courts or other state officials will recognize and enforce. Law is inseparable part of society and society is complex dynamic and emergent order. For the peaceful cohabitation the observation of common rules for conduct are necessary. Set of laws gives the required structure of the society. The legal philosophers like Jhon Austin and Jeremy Bentham had separated the law on the basis of “what law is and what law ought to be”.²¹ In the present context the rape laws are there which are extremely favouring women in all sense of sexual abuse and rape cases but in reality conditions also involves different aspects. So gender neutral laws are needed so that equal protection be given to all victims which may be men, gay men, lesbian women, bisexuals and transgender groups. As per the functionalists²² society is a system of interconnected parts that work together in harmony to maintain a state of balance and social equilibrium for the whole. In India legal system this equilibrium itself is difficult to establish because of huge socio-political and economic diversity. One side feminists are demanding facilities in the name of women empowerment at the same time men's rights activists are demanding protection of their rights via gender

²⁰ Accessible at [https:// www. legalindia. com/gender-neutrality-and-legal-complexities-in-india /](https://www.legalindia.com/gender-neutrality-and-legal-complexities-in-india/)

²¹ Accessible at [https:// www. scribd. com/.../john-austin-s-theory- a-critical-analysis](https://www.scribd.com/.../john-austin-s-theory-a-critical-analysis)

²² Herbert Spencer, Emile Durkheim, Talcott Parsons etc

neutrality. Laws are widely used and greatly misused at the same time. According to the Therapeutic jurisprudence legal systems affect the emotions, behaviors and mental health of people²³.

Judicial decisions and policy making can change the views of people with time. So

legal attention and social awareness is needed in the present matter to acknowledge the present complexities of law. So that the equality and justice can be ensure to society as whole. The shift from gender equal approach to gender neutrality will be more beneficial to a civilized society.

²³ Black's Law Dictionary 9th ed. (West Group, 2009)