

Gender Neutrality of Sexual Offences is a Much Needed and Awaited Call Under Indian Penal Code

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Abstract

Criminal law of any country is enacted with an object to protect the society against criminals by prescribing punishments for their crimes. The ancient society lacked law and order. "A tooth for a tooth, an eye for an eye, a life for a life" was the forerunner of criminal justice. In the present era the criminal law all over the world is codified and all the persons falling within its ambit are bound to follow the same. In ancient India, women were viewed to be the property of men. The traditional approach towards the concept of rape was based on this premise and hence any act of sexual violence was viewed to be the debasement of the property of another man. The worth of a woman in ancient times was thought-out by her sexual purity. Such an approach towards rape has its basis in the stereotypical conceptions of the crime that have origins in the traditional patriarchal definition of rape. It is important to identify rape as an assault on individual autonomy and pave the way for gender-neutral laws and legal procedures rather than identifying this assault on the body, mind and privacy of an individual as gender-specific.

Keywords: Stereotypical Conceptions, Traditional Patriarchal Definition of Rape, Individual Autonomy, Gender-Neutral Laws.

Introduction

The Indian Penal Code criminalises the offence of rape which is considered to be one of the most aggressive crimes against person. In the past few years, it has been realised that rape should not be treated as a sex crime but rather be viewed as an aggressive crime against person. Researches time and again have unveiled that very often the intention of the offender in rape cases is aggression rather than sex enjoyment. Groth and Birnbaum¹ observed that the rapist derives an eroticised pleasure not through sex but through a horrendous assault on victim's body. Further, cases of sexual assault which do not fit into the present definition of rape are underreported as the victim is afraid of being disbelieved by the courts, the police authorities as well as the society at large. It is the stereotypical conception of the offence of rape in India, which makes it difficult for any person whether male, female or a homosexual to speak against this unlawful intrusion on the right of privacy.

Sexual Violence, Sexual Assault and Sexual Offences

Sexual violence describes the deliberate use of sex as a weapon to demonstrate power over and to inflict pain and humiliation upon, another human being. Sexual violence may be defined as any violence, physical or psychological, carried out through sexual means or by targeting sexuality. Sexual violence, apart from causing immediate physical harm, leaves a permanent scar in the memory of the victim. The World Health Organization (WHO) in its 2002 World Report on Violence and Health defined sexual violence as: "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work."²

Sexual assault is a form of sexual violence. Sexual assault is an act of intimacy done without the consent of victim, or where consent has been obtained by means of treat, fear or fraud.³ Sexual offences maybe defined as natural sexual offences like rape or unnatural sexual offences like sodomy, buccal coitus, tribadism, bestiality and certain sexual

Belu Gupta Arora
Assistant Professor,
Faculty of Law,
University of Delhi,
Delhi, India

deviations.⁴ In India, rape is defined under section 375 of the Indian Penal Code and the definition has been amended from time to time to cater to the changing needs of the society. In addition to rape, the Indian Penal Code also punishes various other forms of sexual offences as are incorporated under the head —sexual offences¹¹ of chapter XVI of the said code.

Gender Neutrality: Meaning and Scope

The Oxford Dictionary describes 'Gender Neutrality' as an adjective that is suitable for, applicable to, or common to, both male and female genders.⁵ It describes the idea that policies, language, and other social institutions should avoid distinguishing roles according to people's sex or gender, and emphasises on the equal treatment of men and women legally with no discrimination. It is a kind of society where equality will be established in its true sense, and established not at the cost of any gender. Feminism in its truest sense embodies equal rights for men and women, all the special provisions for women were made to pull up their condition and give them a level playing field as to men. But protection at the cost of the other marginalised sections is not what it advocates.

The concept of gender neutrality within rape laws has been influential over the last four decades in those jurisdictions that have engaged in significant reform of their rape and sexual assault provisions. The fundamental characteristic of gender-neutral reforms is that they expand the definition of rape to recognise male victims and female perpetrators. Hence, they are —neutral,¹¹ but only in the sense of including both males and females as potential rapists and victims.⁶ Gender specific laws refer to laws applicable to only one sex or that require differential treatment of the sexes based on the argument of necessity. On the other hand gender neutral laws are written so that no sex receives preferential or discriminatory treatment. **Sexual Offences under Indian Penal Code: Assessment of Gender Neutrality**

The provisions relating to sexual offences under the Indian Penal Code starting from S.375 which defines the offence of rape, S.376 which provides the punishment for the offence of rape, S. 376A provides the punishment for causing death or resulting in persistent vegetative state of the victim, S.376B which punishes sexual intercourse by husband upon his wife during separation, S.376C punishes sexual intercourse by person in authority, S. 376D criminalises gang-rape and S.376E reads punishment for repeat offenders, have been subject to intense criticism due to their gender-specific phraseology. These provisions have been drafted on the general presumption that sexual offences can only be committed by males and females can only be victims of such offences. These provisions assign specific roles to male and female that is of the perpetrator and victim respectively which make them gender-biased. The gender-biased nature of rape laws in India has been justified on the ground that the brutality and the number of instances of sexual violence against women are far more intense than

that against men.⁷ An attempt to reinvent the definition of rape as a gender-neutral crime was made in the form of the Criminal Law (Amendment) Ordinance, 2013 which conceptualized —sexual assault¹¹ as follows: —A person is said to commit —sexual assault¹¹ if that person—

1. penetrates, for a sexual purpose, the vagina or anus or urethra or mouth of another person with— (i) any part of the body including the penis of such person; or (ii) any object manipulated by such person, except where such penetration is carried out for proper hygienic or medical purposes;
2. Manipulates any part of the body of another person so as to cause penetration of the vagina or anus or urethra or mouth of such person by any part of the other person's body;
3. Engages in —cunnilingus¹¹ or —fellatio¹¹ This attempt at expanding the scope of sexual assault to embrace both genders, although argued by many to be a much needed step forward, was not sustained. When the Bill was passed, the gendered version of the crime was reverted to. Section 375 of the IPC, after the Criminal Law (Amendment) Act, 2013, has been reformed and reads as follows: —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 manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of the body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:- First— Against her will Secondly— Without her consent Thirdly— With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt Fourthly— With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly— With her consent, when at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. Sixthly— With or without her consent, when she is under eighteen years of age. Seventhly—when she is unable to communicate consent.⁹ Similarly the provisions succeeding S.375 falling under the head —Sexual Offences¹¹ of the Indian penal code have been drafted

in gender-specific manner wherein the perpetrator as well as the victim has been assigned specific roles. The Indian Penal Code has failed to recognise that sexual offences can be and have been committed by and against men, women as well as homosexuals which do not fall within the ambit of the gender specific language of these provisions. Arguments in Favour of Gender Neutral Approach A gender neutral approach towards rape would open the doors of justice for those victims who by virtue of a gender specific definition of rape under the Indian penal code, 1860 are unable to stand against this unlawful intrusion on the right of privacy.

It is not Practically Impossible for Females to Rape

Researches and studies prove that it is not physically impossible for a female to rape a male. Sarrel and Masters, in their study of eleven males sexually assaulted by females said that, —Men or boys have responded sexually to female assault or abuse even though the males' emotional state during the molestations has been overwhelmingly negative – embarrassment, humiliation, anxiety, fear, anger, or even terror.¹⁰ These physical responses may be confused by the victim as indications of pleasure or unrecognised consent and consequently he might fail to report the offence. Furthermore, getting the victim to ejaculate is a tactic which most sex offenders use. In the case of male offenders, if the victim ejaculates, the victim himself may be bewildered by his physiological reaction to the act of rape, and, therefore, fail to report the act in fear that his sexuality may become suspect.¹¹ This, in turn, in trial testimony, may destroy the credibility of the victim's statement.¹² In the case of female sex offenders, the motivation for ejaculation might seem like a symbol of complete domination over the male body. The myth is that a woman cannot really rape or sexually assault another woman. However, this is false. There exists a popular misconception that rape or sexual assault requires penile penetration, whether oral or vaginal. However, sexual assault between women can include:

1. Forced vaginal/anal penetration with digits or objects;
2. Forced oral sex; and
3. Forced sexual touching.¹³

Therefore to state that a female is incapable of raping a male or a female is misconception on which rests the Indian Penal Law with respect to sexual offence. Hence, the definition of rape as well as other sexual offences defined under Chapter XVI of the Indian Penal Code must be reframed.

There have been Cases of Male Rape

The definition of rape in India as provided under S.375 of the Indian penal code does not cover cases where the men are the victim of the offence of rape. The most glaring example of the plight of male rape survivors is that of Vinodhan, a young man from Chennai. In the media frenzy that followed the brutal rape of the 23-year-old in Delhi, Vinodhan was moved to write about his traumatic gang rape incident at the age of 18.¹⁴ Many male rape survivors like Vinodhan have silently suffered for many years with no recourse to the law and nowhere to turn to for psychological

relief. Several other victims have also come out with their stories such as Krishnan, who was raped in Kerala and was too ashamed to come out in the open.¹⁵ Hence male rape cases though not recognised as an offence falling within the ambit of S.375 of the Indian Penal Code, is a reality which cannot be denied. It is submitted that there is a possibility that a female has sexual intercourse with a man in such a way as to fall within the ambit of a sexual offence. For instance, a man might feel forced to engage in sexual intercourse because he has been threatened with violence or has been unlawfully detained to perform the physical action necessary for sexual intercourse. Equally, men who are unable to communicate consent due to physical disability or intoxication may also have the reactions necessary for sexual intercourse. It is imperative to note that in all these cases, lack of consent is presumed for a female victim. However, if the victim is male, and the defendant female, there can be no offence of rape established, due to the necessity of male penetration of the victim contained in the definition of —rapell under S. 375. The irrationality underlying the said classification finds credence in the fact that the emotional responses to non-consensual sexual intercourse of a male victim are akin to that of a female victim. Moreover, to assert that the same action, if committed by a man, will be classified as —rapell, but if committed by a woman, will be not be classified as an offence, certainly amounts to reverse gender bias against men. Male rape is far too prevalent to be termed as an anomaly or a freak incident. By not having gender-neutral rape laws, we are denying a lot more men justice than is commonly thought.

Constitutional Mandate: Right to Equality

Part III of the Constitution guarantees fundamental rights to every citizen of India. Article ¹⁴ enshrines the right to equality before law and Article 15 provides for prohibition of discrimination on the grounds of sex. Men, therefore, must be entitled to the same rights as women. Even though male rape is a less frequent occurrence than female rape, they cannot be denied the right to equality, that is to say the equal protection of law. That, the social stigma that women victims face is a harsh fact of reality in India. However, this is no reason to deny protection to the male victims of the same crime. There are different consequences and social stigma that men face as well.

Need to change the Stereotypical Patriarchal Thinking

Retaining a penetrative definition of —rapell, seems to reinforce a stereotypical view that women are weaker and also in need of greater protection than men.

If a male alleges that female raped him, he is not seen as a 'Real Man' because the stereotypical patriarchal assumption of 'men are superior and stronger to women' comes into the picture. The same 'male domination' and the notion of patriarchy is, in fact, the very reason males do not come out of the closet to report rapes. Forman (1982) finds that about 90-95% of men who are raped do not report it.

Therefore, men too like females are afraid of reporting rapes. Their masculinity is doubted upon; he is mocked and harassed by the society because he got —raped by female. It is seen as his fault and weakness.¹⁶

In Indian patriarchal society, a woman's virginity is always viewed as her most important asset. Women who engage in pre-marital sexual intercourse are considered immoral. Even the courts of our country refrain from following a patriarchal approach towards the offence of rape. The court has the power to mitigate the sentence of a rape offender only in certain special circumstances.¹⁷

These circumstances have not been specifically laid down but the judges provide reasons like the offender has lost his job¹⁸, suffered humiliation in the society¹⁹, the young age of the accused due to which —they could not overcome the fit of passion²⁰, and the victim got married during the trial²¹, therefore harm caused is less. These arguments have no rationale behind them and reinforce the patriarchal stereotype of 'men will be men', 'the woman's fault', 'marriage is the most important part of a woman's life' etc. Therefore, it is pointless to pretend that men and women are similarly situated unless and until, we shed these patriarchal stereotypes. Thus, to extend the definition of —rape to include all forms of non-consensual sexual intercourse, irrespective of whether it is perpetrated by a man or a woman, would not undermine the offence of rape, but in fact strengthen it, by removing an obvious anomaly.

Recognizing Transgender Rights

Despite undergoing multiple amendments, the definition of rape under the IPC is still affixed to a binary notion of gender. It views rape through a male-on-female paradigm, where men and women are assigned static roles of the perpetrator and the victim respectively. While this victim-perpetrator framework may stem from a push back against the law's tendency to disbelieve a female rape survivor, it is also under inclusive, and therefore damaging.²² Irrespective of which gender is assigned what role, an adamant fixation to a male-on-female paradigm compels members of the transgender community to suppress their actual identities, and identify themselves as either males or females. Consequently, certain victims and perpetrators are absent from theories of rape simply because they refuse to sacrifice their gender identity.

The laws so framed then present a class of victims of non-traditional sexual assaults with a choice between gender identity and the pursuit of justice. As such, when the traditional notions of sex and gender are transgressed by the transgender community, every progressive society must strive to free itself from such outdated and rigid notions of human nature.²³

Conclusion

Greatest virtue of law is its adaptability and flexibility.²⁴ Law is dynamic and not immutable or static. It constantly adapts itself to critically changing compulsions of society.²⁵ A Gender Neutral approach towards sexual offences portrays the progressive attitude of the society. A gender neutral approach

towards sexual offences is the need of the hour in view of increase in the number of male and homosexual rape victims in India. The first and foremost step that needs to be taken is to bring about a change in the stereotypical conception of the offence of rape which has its roots in the patriarchal stereotypical mindset of the individuals in the country. It is important that every individual recognises the seriousness attached with sexual offences and identifies the same as a gender neutral offence rather than a gender specific offence. The definition of rape as stipulated in the Indian penal code under S.375 is a gender specific definition. Similarly the provisions succeeding S.375 falling under the head —Sexual Offences of the Indian penal code have been drafted in gender-specific manner wherein the perpetrator as well as the victim has been assigned specific roles. These definitions ignore the existence of male and homosexual rape victims. The definitions being gender-specific have failed to recognise a proven fact that the perpetrator as well as the victim can be a person from either sex, that is, male or female as well as a homosexual. Only the establishment and implementation of gender-neutral legislation would be successful in increasing the coverage of these crimes. The legal definition of rape must be reassessed, sexual assault must be categorised in compliance with the varying degrees of harm caused by each, and each must always be described comprehensively. The author strongly believes in the notion of gender equality, that is to say, that men and women must be equally placed in the society. To assert that an offence committed by a man will be classified as rape, but if committed by a woman will not be classified as rape just because the definition of rape under S.375 requires male penetration of the victim is an unreasonable argument which amounts to gender inequality. The fundamental rights as guaranteed by the Indian constitution must be kept at the highest pedestal at all times. The guarantee of equal protection of the laws as enshrined under the constitution cannot be disregarded.

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