

DECONSTRUCTING ANOMALIES: RETHINKING RAPE LAWS THROUGH THE LENS OF EVOLVING JURISPRUDENCE ON GENDER AND SEXUALITY IN INDIA

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ABSTRACT

Rape laws in India have been traditionally construed in binary terms. A phallogocentric conception of rape on which Indian laws are currently based stipulates that this offence can only be committed by a man against woman. In this conventional understanding and consequent legal translation certain fluidities which call for making rape laws gender neutral have been therefore ignored. The rationale of making rape laws 'gender neutral' has been considered by the Law Commissions as well as certain judicial pronouncements. Besides, in the subsequent years, there has been a significant evolution in the understanding and scope of sexual assault including rape as well as the jurisprudence of equality rights of all which has accommodated a gender-neutral conceptualisation of rape. Certain recent landmark judicial pronouncements have paved the way for legalising same-sex relations and accorded equal status to all genders in India. Consequently, the canon and jurisprudence of 'gender and sexuality' in India is being significantly broadened, diversified and is becoming progressively more inclusive over time. This calls for the need to bring about corresponding changes in the substantive legal provisions of rape and allied laws in sync with the evolving jurisprudence. In this context, the paper examines the need to make rape laws gender neutral construing sexual assault within a broader framework considering categories which have been there to excluded from the extant definition of rape in the Indian statutes. This paper also covers the International legal frameworks and comparative jurisprudence surrounding the debate. This study proposes to question the current understanding of rape laws and explore the understudied dimensions of sexual assault.

Keywords: Gender Neutral Laws, Rape, Sexual Assault, Sexual Fluidity.

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I. Introduction

RAPE IS arguably amongst the most heinous of crimes and the most egregious assault on human dignity. It is a crime which not only violates the body but also leaves indelible scars on the mind and spirit of the victim. Conventionally the understanding of rape has been gender centric wherein universally men are considered as perpetrators and women as victims. The corresponding legal constructions have also tended to co-opt this conventional understanding in the framing of penal statutes. Hence, the definition of rape in legal statutes has conformed to these settled binary notions of gender dominance and subservience. However, in recent times, the understanding of sexuality and sexual fluidities has been progressively and conceptually liberalised. Moreover, there has also been a shift in the understanding of interpersonal relationships as well as the cultural and moral perceptions around them. Rape jurisprudence and the attendant discourses must therefore also be altered to suit the changing perceptions.

In India, heinous incidents of rape like the Mathura and Nirbhaya cases¹, the resultant anger and civil society mobilisations around the issue have expedited the processes of making rape laws stricter. Such laws also cater to changing times and requirements. Both judicial reinterpretation and legislative action have led to progressive amendments in anti-rape laws. These interventions made with the underlying objective of strengthening rape laws to further protect women from humiliation during rape trials were indeed the need of the hour. However, the progress made has been self-limiting and restricted in its scope of application. It is because the amendments or modifications brought about in anti-rape legislation still work within the overall ambit of the conventional legal frameworks around rape and within the male to female binary paradigm. Scant attention has been given to other forms of assault

¹ *Tukaram and Ors v. State of Maharashtra*, AIR 1979 SC 185.

This case also referred to as the Mathura rape case for example looked into the questions of consent and premarital virginity etc. however the accused were acquitted. This led to a huge public and civil society outcry and resulted in rape law amendments including absence of consent as the presumption, in camera trial, defining custodial rape and shifting the burden of proof. Nirbhaya rape case which shook the moral conscience of the country stirred criminal law amendments to bring in stricter laws. For example, Section 375 of the IPC was amended to broaden the definition of penetration by including penetration other than penile penetration such as oral.

which there to may not constitute the offence of rape although the intent, severity and incidence may be the same.

In its current form and substance, the laws squarely leave out a host of other categories, such as homosexuals and transgender. This comes across as a major anomaly even as per the well-established canons of criminal jurisprudence, where law has to protect each and every individual equally from harm of like degree and against offences of identical nature. To these, extant laws fail to accord the same degree of protection to sexual minorities. The central argument of this paper is to extend the legal construction of rape to include categories that have been there to left out from its current purview. The paper emphasizes on a gender-neutral approach towards rape laws to make it more inclusive and equitable.

II. Emergence of Rape Jurisprudence in India

Sir Matthew Hale, an eminent jurist had defined rape as being a vaginal penetration by a man over a female above the age of 10 years and against her will.² After a definitional framework was laid out by Sir Matthew Hale, the attention of colonial laws to control the offence of rape was set in motion. Hale considered different evidentiary parameters while dealing with the offence of rape. Sir Mathew Hale's judgments were also cited to decide the cases of rape in the colonial India.³ The Indian Laws before their codification were based on several Charters of the East India Company, the Company Regulations and customary law. After the adoption of common law in our country, Lord Macaulay drafted the Indian Penal Code, which was to be applied uniformly. This put an end to the obscurity and ambiguity created by personal and customary laws in India. The penal provisions with respect to the offence of rape thus got formalised and defined under the criminal laws of India. The penal provisions regarding sexual assault and rape began to take shape during this phase.

In the draft of Indian Penal Code, in 1837, the definition of rape included five parameters which were being against the woman's will, without her consent when she is insensible, with her consent by putting her in the fear of death or instant hurt, with her consent when the man

² Elizabeth Kolsky, "The Rule of Colonial Indifference: Rape on Trial in Early Colonial India, 1805-56" 69 *The Journal of Asian Studies* 1093-1117 (2009), available at: [https://www.jstor.org/action/doBasicSearch?Query=%E2%80%9CThe+Rule+of+Colonial+Indifference%3A+Rape+on+Trial+in+Early+Colonial+India%2C+1805-57%22,\(last%20visited%20on%20June%2029%2C%202023\)](https://www.jstor.org/action/doBasicSearch?Query=%E2%80%9CThe+Rule+of+Colonial+Indifference%3A+Rape+on+Trial+in+Early+Colonial+India%2C+1805-57%22,(last%20visited%20on%20June%2029%2C%202023)).

³ G.Geis, "Lord Hale, Witches, and Rape, 5" *British Journal of Law and Society* 26-44 (1978), available at: https://www.jstor.org/stable/1409846?searchText=%22Lord+Hale%2C+Witches%2C+and+Rape%22&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3D%2522Lord%2BHale%252C%2BWitches%252C%2Band%2BRape%2522&ab_segments=0%2Fbasic_phrase_search%2Fcontrol&refreqid=fastlydefault%3A80102ec76c0bf5f3e97aaf10edc0418d (last visited on June 29, 2023).

has tricked her into being her husband or when the girl is under nine years of age. The proposed punishment was from two to fourteen years.⁴ The definition of rape right from the beginning emphasised on the offence of rape being committed by ‘a male’ as only a male was perceived to be capable of effecting a penetration into the female vagina against her will. The penal code finally adopted largely mirrors this (original) definition. However, the semantics of this definition do not include the other forms of sexual violence. The possibility of man raping a man or female inserting objects into other woman for physical abuse was not contemplated in these provisions during that era. The 42nd Law Commission (1971) in its Report discussed the issue of rape laws at length. In this report, the Commission addressed the incompatibilities between the definition of ‘consent’ in section 90 and section 375 of the Indian Penal Code, 1860 and also the disparity in the age factor while considering the consensual sex with the minor wife.

The noteworthy contribution of this report was that it specifically considered the question of consensual sexual acts between homosexuals under section 377. Since the question was sensitive, the report sought public opinion on the issue of consensual homosexual activity. The Commission concluded that the majority of public opinion is in favour of retaining criminality attached as the act is viewed as abominable and loathsome at the societal level. This standpoint gave rise to two antithetical arguments. Whether criminal law should regulate private morality or criminality should be ascribed as per the prevailing societal morality was a crucial question which remained unanswered by this Report. The position taken by the Commission at that point was clearly due to the acceptance level of the community back then. According to the Commission, it was premature to decriminalise such an act, as societal morality of the time would not have allowed this.

Another important report that addressed the issue of rape laws was as a reaction to the infamous judgment of *Tukaram v. State of Maharashtra*⁵ was the 84th Report in 1980. The discussions highlighted the issue of ‘consent’ and the recommendations emphasised having a ‘free and voluntary consent’. The report emphasized that for any sexual assault to qualify as an offence of rape, there must be an unquestionable coercive action on a non-consenting woman without her resulting from uncontrollable lust of a man. It is pertinent to note that there was no discussion on the scope of section 377 of the Indian Penal Code, 1860. It was

⁴Cameron, C H, and D Elliott, *The Indian Penal Code as Drafted in 1837* (Higginbotham and Co, Madras 1888).

⁵*Supra* note 1 at 143.

due to the jurisprudence of the factor of ‘penetration’ that naturally construed the consent of a woman and not that of a man.

The ferocity and violence of the Nirbhaya case shook the conscience of the nation and brought the issue of sexual assault to the centre stage of national socio-political discourse. Ever-growing concerns regarding such incidents, rallying public opinion and efforts of the civil society and feminist groups, as well as NGOs like Sakshi, started conversations about effecting changes in the existing laws. J S Verma, J. was subsequently set up to examine the issues surrounding rape laws. The Committee *inter alia* acknowledged and noted that sexuality is a fundamental right and that sexuality can be diverse. The suggestion was hence to make rape laws gender neutral and to extend the protection against child abuse to children as well. Nevertheless, the legislature left out certain aforementioned key recommendations and only incorporated suggestions which reverberated with the Nirbhaya Rape case⁶ because of the strong public opinion it galvanised. The amendments carried out therefore only expanded the definition of rape to make it inclusive of multiple forms of penetrations. The crucial suggestion of making the rape laws gender neutral was not incorporated in the amendments. The overall outcome of these amendments was that while it did respond to the victimisation of women, it failed to remedy the plight of other communities, such as transgender and homosexual. Simultaneously along with the subsequent amendments, various judgments have played a pivotal role in defining sexual abuse and laying jurisprudence of rape in India.

III. Judicial Interpretation: Towards a Liberalised Context

The first case which touched upon the aspects of gender neutrality was in 1996 when the Delhi High Court in *Sudesh Jhaku v. K.C. Jakhu*⁷ made a case for addressing male sexual victimisation and noted that “men who are sexually assaulted should be accorded the same protection as female victims, and women who sexually assault men or other women should be liable for conviction as conventional rapists.” Further, in *Priya Patel*⁸ case also the Court recognised the complicity of women as abettors or accessories in gang rape cases, it however negative the idea that a women can have the requisite *mens rea* to commit rape on a woman. This case further bolstered the prevailing idea of rape which is mono centric where the victims are only women. This fosters a binary conception of rape and also restricts the

⁶ *Mukesh v. State (NCT of Delhi)*, 2017 6 SCC 1.

⁷ *Sudesh Jhaku v. K.C. Jakhu*, 1998 CriLJ 2428.

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

category of rape survivors to a narrow subset. There appears to be a condescending patriarchy which looks at women as the only ones who can be molested. Masculinity and biologism then becomes the basis for providing a legal definitional framework of rape when such approach is etched in the penal laws.

Newer dimensions were brought in the NALSA Judgement⁹ in 2014, providing a distinctive identity to the third gender outside the male-female binary gender identity. The court, while pronouncing the judgement, noted that gender identity and any concomitant sexual orientations (which can operate over a spectrum) are an essential component of an individual's intrinsic personality. The court made a distinction in biological sex and psychological sex and accorded fundamental human rights pertaining to life and liberty, dignity, privacy and non-discrimination, and no one can be deprived of it on the basis of gender identity and sexual orientation. The Court also referred to international conventions and principles, particularly the Yogyakarta principles which call for a pluralistic approach in the state policy and decision making that recognises and affirms the interrelatedness and indivisibility of all aspects of human identity, including sexual orientation and gender identity. Furthermore, a person's sexual orientation forms an intrinsic part of self-identity whose denial shall negatively impinge on the right to life itself.

Subsequently, the celebrated *K. Puttaswamy*¹⁰ judgement too recognized the right to privacy as a fundamental right. The Supreme Court expanded the amplitude of privacy in the judgement and observed that privacy attaches to the individual and not to the place where it is associated. Furthermore, by juxtaposing articles 14, 15 and 21 in order to emphasise that the freedom to control significant aspects of one's life, including sexual orientations, "preservation of personal intimacies" which were held to be sacrosanct and quintessentially linked to dignity and privacy. The manner in which the concepts of privacy and their intricate correlation with dignity were elucidated and understood had far-reaching implications for sexual minorities, notably the LGBTQIA+ communities. The judgement served as a path-breaking precedent and subsequently paved the way for the decriminalisation of homosexuality in the *Navtej Singh Johar* case.¹¹

⁹ *National Legal Ser.Authv. Union of India &Ors*, AIR 2014 SC 1863.

¹⁰ *K. Puttaswamyv. Union of India*, AIR2017 10 SCC 1.

¹¹ *Navtej Singh Johar v. UoI*, AIR 2018 SC 4321.

The recognition and decriminalisation of consensual homosexual intercourse in *Navtej Singh Johar*¹² was another milestone in the discourse on sexuality and sexual fluidity. The judgement was again premised upon the universal values of equality, dignity, non-discrimination and privacy in matters of choosing sexual partners. The Court building further on the previous judgments reiterated that discrimination based on sexual orientation and criminalization of consensual sex between two adults violates the right to equality and privacy. These judgments are not stand-alone judgments dealing with specific legal issues. In fact, they form a precedential continuum to understand how dignity, privacy, and non-discrimination have been read into the right to life and progressively liberalised in favour of communities which bear minority sexual identities and orientations. The judgments by legitimisation further opened the platform for homosexuality and sexuality discourse.

IV. Effecting Changes in Rape Laws: A Pressing Priority

In the era post NALSA judgment, the consensual sexual activity within the homosexual and transgender contexts have been legitimised, non-consensual or forced sexual activity within the same context has still not been brought under the purview of rape. This highlights a legislative lag where the jurisprudence now recognises the legality of relationships as long as they remain consensual, yet fails to address the issue of non-consent within homosexual relationships, which can transmute into physical abuse.

To further buttress the principles of equality and non-discrimination even in criminal law jurisprudence, is that all persons need to be equally protected from harm of a like degree. Crimes of equal heinousness should therefore be dealt with equal severity in terms of punishment. A penal distinction made between penetration of a female body and that of a transgender or male body militates against not only the core principles of equality but also against the very principles of criminal jurisprudence. In terms of both self-determination of identity, sexuality and sexual orientation and also consequently the freedom of choice to engage in relationships which were hitherto considered as immoral or against the order of nature, the regime has been liberalised. However, the prospect of sexual abuse within such relationships has not yet been given the consideration it is due.

Historical oppression is often given out as an argument for opposing gender neutral rape laws however the plight of the transgender is often ignored in this that have also been

¹² *Ibid.*

traditionally marginalised. Cases of sexual abuse and assault are also perpetrated within the lesbian, gay as well and transgender communities.¹³ By starting with the decriminalisation of same sex relationships (homosexuality) the conversation has now moved to legalisation of same sex marriages. While frozen notions of binary nature of human sexuality as normal are thawing and homosexual relationships have been taken cognizance of, the legal construction of rape still confines itself to a strict gendered interpretation. Since as per the extant legal understanding of rape in India only man can commit rape a woman, it inhibits any non-binary situations of rape. As a result, it precludes the possibility of rape being perpetrated within homosexual relationships or rape as a result of inducement of marriage by a woman to a man. In other words, other forms of non-consensual penetrative sex are not considered in the conventional notions around rape that need to be accommodated within a liberal social framework.

In times when fluidities within gender are being progressively accepted and normalised, it is dichotomous that the law ignores any potential rape victim not identifying as a woman. The other possibility of same sex couples committing rape on one other or instances of a person being raped by a transgender¹⁴ is completely ruled out by the existing definition under the Penal Code.

The courts earlier have dealt with a few pertinent questions such as whether rape should only be restricted to penetration by the penis of vagina or any other bodily orifice (including anus or mouth). This establishes a premise for identifying penetration in body parts other than the vagina. On the other hand, conspicuously, insertion of objects, manipulation of body parts, application of mouth has been included in the definition of rape.¹⁵ It is thus not just confined to penetration by the penis, there can be penetration by insertion of objects as well. This notion shakes the basis of rape laws in India under Section 375 of the Indian Penal Code, 1860 which is phallocentric.

¹³ See, Lori B Girshick, *Woman to Woman Sexual Abuse*, 70 (North-eastern University Press, 2002).

The lesbian, bisexual, and gay communities have generally denied abuse, silenced victims, and protected abusers. This loyalty to the community has made it difficult to expose the negative aspects of abusive same-sex relationships. In fact, lesbians or bisexual women may blame survivors for their abuse rather than hold an abuser accountable, since this would require community acknowledgment of the abuse.

¹⁴ PTI, "First Trans Person Convicted of Rape in Kerala" *Onmanorama* (Kerala), available at: <https://www.onmanorama.com/news/kerala/2023/02/07/first-transgender-crime-convicted-rape-kerala-pocso-lgbtqia.html> (last visited on June 25, 2023).

¹⁵ Criminal Law (Amendment) Act, 2013, available at: https://www.indiacode.nic.in/bitstream/123456789/15357/1/criminal_law_ammend_act_2013.pdf (last visited on June 25, 2023).

V. Comparative Analysis of Rape Laws and Statutory Amendments in Indian Penal Code, 1860

From a comparative global perspective, many jurisdictions have adopted a gender-neutral approach that aligns with gender neutrality. Most of the jurisdictions have done so by amending their “penile-vaginal” centric definition of rape in favour of a more expansive definition which includes penetration of orifices other than just vagina such as anus, mouth etc with penis, hand, tongue or any other inanimate object. For instance, jurisdictions such as US, Scotland, Australia, Sweden and many others have defined the term rape in gender neutral terms by using the word ‘person’ in place of woman to indicate the victim of this crime. The focal point of such a legal definition is ‘criminalising all kinds of penetrations done without consent’. Many countries, such as Scotland also consider artificially constructed genitalia after sex reassignment surgery thereby also covering transgender and other gender fluid identities within its ambit.

Although rape laws in the United Kingdom¹⁶ still recognize men as the only perpetrator of rape, the statute has broadened its scope to include all kinds of penetration including the vagina, anus or mouth which has had the effect of including men as victims of rape perpetrated by other men. On the basis of the above analysis, it is evident that the rape laws globally are based upon three important ingredients. First is the recognition of penetrations through devices other than the penis, secondly, the question of consent in addition to the question of force has assumed significance and thirdly, many jurisdictions have also taken note of male sexual victimisation by men and also in some cases by women and hence using gender neutral terminology such as “persons” to denote the victim as well as the perpetrators.

VI. Need for a Robust Theoretical Analysis and Recommendations for Statutory Changes

By confining the legal incidence of rape only to cases of penile-vaginal intercourse, sexually violent behaviour of an identical nature or severity which may result in trauma, embarrassment or terror of an identical kind is omitted from public discourse and rendered socially invisible in the relevant criminal statutes. In scholarly discourses male rape victimization or the victimization of sexual minorities has been marginal and due attention has not been given in India. However, a number of scholarly studies elsewhere have pointed

¹⁶ Sexual Offences Act 2003 (UK), cl 42, Part 1, Section 1, *available at*: <https://www.legislation.gov.uk/ukpga/2003/42/section/1>(last visited on July 17, 2023).

out that the trauma or the embarrassment faced by a male victim of rape is identical to that of a female victim as well as documented symptoms of post stress traumatic disorder.¹⁷

Another argument that is given against is the relative lack of evidence to support male rape thereby reducing it to a hypothetical or theoretical issue rather than a real one. This approach, too, is problematic on many counts. First of all, though theory is often informed by practice, the reverse is also true. Lack of theory, discussions and the consequent legal redress can lead to a lack of understanding and also underreporting.¹⁸ This is not just true for male victims of rape perpetrated by women but also in homosexual lesbian and gay contexts where there could be a culturally induced taboo not to report cases of such sexual assault including those taking place in coercive total institutions like prisons. Furthermore, theoretical development in a particular area throws light, animates newer dimensions and dispels myths and misinformation surrounding a social issue.

Considering the recent changes in the gender jurisprudence in India, as well as in light of the current practice in multiple jurisdictions as outlined above, it is worthwhile to bring about modifications in the Indian Penal Statutes as they exist today. Section 375¹⁹ of the Indian Penal Code, 1860 can be amended to reconsider ‘a man is said to commit rape’ to be worded as ‘a person is said to commit rape.’ Section 375 (b) and (c) define the commission of rape by insertion of objects or manipulation of body parts. The clauses should be made gender neutral by bringing in the relevant modifications by making the terminology referring to the victim gender neutral instead of ‘woman.’ The subsequent descriptions (one to seven), dealing with

¹⁷M, Peel. “The Sexual Abuse of Men in Detention in Sri Lanka” *The Lancet*, available at: [https://doi.org/10.1016/S0140-6736\(00\)02368-0](https://doi.org/10.1016/S0140-6736(00)02368-0). (last visited on July 17, 2023).

“of the 184 men, 45 (24%) described a range of psychological symptoms that included difficulty getting to sleep, waking with nightmares, jumpiness and irritability, behaviour to avoid being reminded of the detention, and depression. These are all symptoms of post-traumatic stress disorder (PTSD).”

¹⁸See, Colin Derek, *et. al.*, “Male Rape-The Silent Victims”, available at: <https://www.sciencedirect.com/science/article/abs/pii/S1322769608604321> (last visited on June 25, 2023).

“Male rape survivors do not seek help unless they consider that the trauma is severe enough to warrant attention. Failure to report can be due to the assumption due to assumptions and misunderstandings on the part of the individual survivors and the communities in which they live, - for instance, that men do not get raped because they are strong and can fend off the attacker...”

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

“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, urethra of a woman or makes her to do so with him or any other person.”

consent, should also be made gender neutral to address the non-consensual sexual activity in any form by any person.

VII. Conclusion

The conceptualization of sexual assault of which rape is arguably the most aggravated form is not just an act of physical aggression against an individual's body with a depraved sexual intent. The psychology of rape in fact is inextricably linked to violence, dominance, discrimination and dignity. In most conventional social contexts and understanding these apply to male-perpetrator victim- female typology has been superimposed and the legal framing has also followed suit. However, such neat categorization in black and white has been challenged by an ever-evolving jurisprudence in terms and both theory and case law that has recognized and appreciated the fluidities involved. This renewed understanding needs to get reflected in law as well. A comparative analysis suggests it has already been undertaken in many jurisdictions across the globe. The need of the hour is to also incorporate this in the Indian legal context by co-opting the various gender and sexual categories and fluidities and effectuating an expanded definition. Given the fact that male to female rape remains the dominant subtext in rape, the central argument of the paper is not brought about a disruptive change in definition but a more inclusive one.

Gender neutrality in rape laws is not an adversarial question oscillating between the male female binary. It in fact traverses an entire spectrum of gender and sexual identities and fluidities and the relationships that are contingent upon it. However, in the light of the progressive judicial discourses, such questions are important to be authoritatively settled. The relatively recent laws like the Protection of Children from Sexual Offences Act, 2012(POCSO) have already been drafted with a gender-neutral approach. It is also pertinent to note that during the amendments of 2013, the offence of Acid Attack was introduced in the Indian Penal Code, 1860, which was also drafted in gender neutral terms. An evolving judicial interpretation of interpersonal sexual relationships therefore has to be followed up and matched by corresponding legal evolution of the textual legal construction and also the attendant laws of rape in India.