

## **"Need for Gender Neutral Rape Laws"**

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### **Abstract**

Indian law recognizes a gender specific definition of rape. As per Section 375 of the Indian Penal Code, the offense of rape can be committed by Men, and Women are the sole victims. This is primarily due to the perception of men and women in the society and stereotypical understanding of sexuality. This paper addresses the question- Is there a need to make Rape Laws Gender neutral? The paper chronicles the attempts made in Indian regime to gender neutralize the rape law; assesses gender neutrality of rape laws under the Harm principle; compares the different ways in which other Nations having achieved gender neutral rape laws have defined the offense; presents arguments in favor of gender neutrality; and, finally addresses and counters gender specificity arguments.

### **I. INTRODUCTION**

Women are not the lone sufferers of patriarchy; it uniquely and equally affects men. Patriarchal designs expect men to be *stereotypically masculine*. A man who cannot defend himself against being violated sexually is not a man; a man who does want to have sex with a woman is not man enough; and a man who is raped, is emasculated. This perception of society that dictates men to be brawny dissuades male victims from reporting sexual crimes.<sup>1</sup> These presumptions are imitated by the rape law under legislations. The offense of rape is hence, recognized as a crime committed on the female body by a male perpetrator.<sup>2</sup> Due to being vastly unreported, and significantly less frequent than female rape, male rape in India is considered an anomaly; but it is in no manner an exception. Just as the idea of men as victims of rape is inconceivable; a woman being the perpetrator of a sexual crime is also treated as outwardly and bizarre. This cannot be farther away from the reality. Rape of males, rape committed by females, and rape involving transgenders are all excluded from the current law.

### **II. EFFORTS FOR GENDER NEUTRALITY IN RAPE LAWS**

Indian Judiciary made major developments astray the heteronormative hegemony through judgments that recognized the rights of the transgender community as the third gender<sup>3</sup> and decriminalized consensual sodomy<sup>4</sup> and hence, homosexual intercourse. The offense of rape

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<sup>1</sup> Bennett Capers, Real Rape Too, 99(5) Calif Law Rev 1259, 1265 (2011)

<sup>2</sup> Indian Penal Code § 375

<sup>3</sup> National Legal Services Authority v. Union of India (2014) 5 SCC 438

<sup>4</sup> Navtej Singh Johar and Ors. v. Union of India Ministry of Law and Justice Secretary (2018) 1 SCC 791

as laid down under the Indian Penal Law<sup>5</sup> continues to deem male as the putative perpetrator, and female as the putative victim.<sup>6</sup>

In the case of *Sakshi* (1999)<sup>7</sup> the Petitioner organization sought inclusion of all forms of penetration (including oral, digital, and anal penetration) and under the definition of rape. The judgment led to 172<sup>nd</sup> Report of the Law Commission<sup>8</sup> which prescribed substitutions in Section 375 of the IPC to penalize *Sexual Assault* in lieu of Rape which was to include all forms of sexual acts<sup>9</sup>. The report faced criticism by activists like Flavia Agnes for prescribing Gender Neutrality<sup>10</sup>. In *Sakshi* (2004)<sup>11</sup> Supreme Court ruled that it is up to the Parliament to enact or amend laws based on the recommendations.

Post the 2012 Delhi Gang rape that triggered a long needed review of the Sexual Violence Laws. Justice Verma Committee<sup>12</sup> was constituted for the purpose, which among other things recommended Gender Neutrality for victim in the rape law under section 375, as well as gender neutral definitions for Sexual Assault<sup>13</sup>. The Criminal law Amendment Ordinance of 2013 which was a resultant of the said report faced severe backlash and criticism from women's groups<sup>14</sup>. The Amendment of 2013 that replaced the ordinance adhered to the prior status of a Gendered law for rape. More recently, the question of whether the Rape law should be made Gender neutral is being considered by the Supreme Court in a Public Interest Litigations filed by Adv. Rishi Malhotra<sup>15</sup> and Sanjiv Kkumaar<sup>16</sup>.

### III. GENDER NEUTRALITY ACROSS JURISDICTIONS

Some jurisdictions across the globe have done away with Heteronormativity of Rape Laws by including Gender Neutral terms in their Criminal Codes for Definition of the Offense of Rape

<sup>5</sup> Indian Penal Code §375 (1860)

<sup>6</sup> Section 375 of the Indian Penal Code 1860 defines rape as the act of a *man* having sexual intercourse with a *woman* against her will or without her consent, or where consent is obtained by coercion or misrepresentation or fraud, or where the woman does not have the capacity to consent.

<sup>7</sup> *Sakshi v. Union Of India* (1999) 6 SCC 591

<sup>8</sup> Law Commission of India, 15-172 at Annexure 3 (2000)

<sup>9</sup> Sexual Assault as per the report, would include not just Penetration (in vagina, urethra, or anus) by a Penis, or any other body part or object manipulated by the perpetrator, but other forms of sexual acts such as cunnilingus or fellatio

<sup>10</sup> Flavia Agnes, Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law, 37(9) EPW 844, 844 (2002)

<sup>11</sup> *Sakshi v. Union Of India* (2004) 5 SCC 518

<sup>12</sup> Committee on Amendments to Criminal Law, at 416 (2013)

<sup>13</sup> . The report recommended inclusion of all forms of penetration where the perpetrator was a man, while the victim could be any person; thus including woman, man, and transgender, incorporation of all other forms of sexual violence under *Sexual Assault*.

<sup>14</sup> Vrinda Grover claimed that there are no men being raped by women, and amending laws towards gender neutrality in rape would be equivalent to making a mockery out of these laws. Flavia Agnes asserted that the offense of Rape is about the power dynamic and stigma attached with premarital losing of virginity for women. Gender neutral laws shall cause confusion in the minds of judges and additionally, not have the same deterrence value.

<sup>15</sup> *Rishi Malhotra v Union Of India Writ Petition (Criminal) 145 of 2017*

<sup>16</sup> *Sanjiv Kkumaar v. Union of India Writ Petition (Civil) No. 8745 of 2017*

(or Sexual Assault). An essential example of Gender neutrality is that of International Criminal Law which has always acknowledged Gender Neutrality in the offense of Rape. In National Jurisdiction, Gender Neutrality of rape has been fairly recent. These include- United States of America, United Kingdom, Canada, Philippines, Finland, Ireland, and Australia<sup>17</sup>. Some of these jurisdictions recognize both males and females as perpetrators<sup>18</sup>, others have only made their definitions gender neutral in case of victims<sup>19</sup>.

### **International Criminal Law**

International Law deems Rape as a Gender neutral crime<sup>20</sup>, recognizing that the sexual violence in wars and areas of conflict is not limited to women. Akayesu<sup>21</sup> was the one of first cases to recognize the offense of rape in International Law where rape committed on both men and women was penalized. The International Criminal Tribunal for Rwanda used the phrase '*physical invasion of sexual nature*' for rape; although ruled that rape had no specific definition<sup>22</sup>. In Furundzija<sup>23</sup> the International Criminal Tribunal for Former Yugoslavia, Rape came to be deemed as crime under the common article III of Geneva Convention as outrages upon personal dignity.<sup>24</sup> The definition of rape was constructed by identification of elements: Sexual penetration, to mouth, vagina, or anus, by penis of the perpetrator or any other object, with a threat of force or coercion towards the victim or any such third person.<sup>25</sup> In the case of Gacumbisti<sup>26</sup> a formal definition of rape was given.<sup>27</sup>

### **United States of America**

In 2013, USA has amended the definition<sup>28</sup> of Rape in the Title 18 of the US Code (which is the primary criminal code at federal level) to be Gender neutral. Earlier, rape was recognized when committed on a female victim<sup>29</sup> and was defined as sexual intercourse, against *her* will.<sup>30</sup> There had been successful attempts to bring about Gender neutrality prior to this

<sup>17</sup> Philip N.S. Rumney, In Defense of gender neutrality within rape, 6(1) Seattle J. Soc. Justice 481, 486 (2007)

<sup>18</sup> United States of America, Canada etc.

<sup>19</sup> England, Ireland, Scotland etc.

<sup>20</sup> Rape is recognized as a Crime against Humanity; with the United Nations Security Council resolution 1820 of 2008, S/RES/1820 (2008) it came to be recognized as a War Crime; Also see Dimitris Liakopoulos, Male Rape And Sexual Crimes In International Criminal Law Jurisprudence: A Critical Appraisal, (Nov. 22 2019,

11:00pm) <https://revistaselectronicas.ujaen.es/index.php/rej/article/view/4493/3695>

<sup>21</sup> Prosecutor v. Akayesu ICTR-96-4

<sup>22</sup> id

<sup>23</sup> Prosecutor v. Furundzija (IT-95-17/1)

<sup>24</sup> Convention III relative to the treatment of prisoners of war, Geneva Art. 3 cl.(c) (1949)

<sup>25</sup> Prosecutor v. Furundzija (IT-95-17/1)

<sup>26</sup> Gacumbisti v. Prosecutor ICTR-2001-64-A

<sup>27</sup> *Invasion of body by conduct resulting in penetration, however slight, in the body of the victim, with a sex organ of the perpetrator, or any other object, with a threat of coercion or force, towards victim or a third person*

<sup>28</sup> "Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim"

<sup>29</sup> The offense of Rape prior to 2013 was defined as *Carnal knowledge of a female forcibly and against her will*.

<sup>30</sup> Criminal Justice Information Services Division, Rape Addendum, Crime in the United States 2013

amendment in several states such as Washington.<sup>31</sup> However some states<sup>32</sup> had continued to recognize Gender specific rape.<sup>33</sup>

## Canada

Canada reformed its Rape and Sexual Offenses Law in 1983 to be more progressive; this included a gender neutral definition for the offense.<sup>34</sup> The term *Rape* has been replaced with *Sexual Assault* and maximum penalties for Sexual Assault; Sexual assault with a weapon, threats or harm to a third party; and aggravated sexual assault have been prescribed as imprisonment for 10 years, 14 years, and life imprisonment.<sup>35</sup> The Canadian stance on rape laws was echoed in the Justice Verma Committee report (Supra). Canadian reform of the rape law however, has faced criticism from various scholars for being superficial. It has been contended that the reform diminishes the harm of rape by reducing it to sexual assault<sup>36</sup>.

## Philippines

In 1997 Philippines amended its Penal Code<sup>37</sup> to recognize rape as a gender neutral offence. This Amendment however, provides a distinct Model of gender neutral rape law, where whilst male rape is recognized, it is treated as a lesser offense. The definition given under the law is gender neutral<sup>38</sup>, but rape of Males is regarded as Rape by Sexual Assault<sup>39</sup> and carries a lesser sentence, of up to 12 years<sup>40</sup>.

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(Nov. 14, 2019 12:00 AM) [https://ucr.fbi.gov/crime-in-the-u.s./2013/crime-in-the-u.s.-2013/rape-addendum/rape\\_addendum\\_final](https://ucr.fbi.gov/crime-in-the-u.s./2013/crime-in-the-u.s.-2013/rape-addendum/rape_addendum_final)

<sup>31</sup> Wash. Rev. Code § 9A.44.010 (2006) defines rape as “A person is guilty of rape in the first degree when such a person engages in sexual intercourse with another person by forcible compulsion.” ; In United States v. Smith, 574 F.2d 988 (9th Cir. 1978), the Ninth Circuit held that sexual intercourse is “any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex [and] any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another.”

<sup>32</sup> See, Patricia Searles & Ronald J Berger, The Current Status of Rape Reform Legislation: An Examination of State Statutes, 10 Women’s Rts. L. Rep. 25 (1987)

<sup>33</sup> In Brooks v. State, 330 A.2d 670, 672 (Md. Ct. Spec. App. 1975) Special Court of Appeals in Maryland rejected plea to make Gender neutral rape law stating, “that only females may be raped is nothing short of a physiological reality.”

<sup>34</sup> Bill C-127- An Act to Amend the Criminal Code in Relation to Sexual Offences and Other Offences Against the Person

<sup>35</sup> The Criminal Code, § 127 (1985)

<sup>36</sup> Kwong-leung Tang, Rape Law Reform in Canada: The Success and Limits of Legislation 42(3) Int. J. Offender Ther. Comp. Criminol 258 (1998); Also, See, L. Cohen & C. Backhouse, Desexualizing rape: Dissenting view on the proposed rape amendments 2(4) Canadian Woman Studies 99 (1980)

<sup>37</sup> Persida Acosta, Men and Women can now both cry rape, The Manila Times, Jun. 15, 2015

<sup>38</sup> Rape is defined as “an act of sexual assault by any person either by inserting his penis into another person's mouth or anal orifice or inserting any instrument or object, into the genital or anal orifice of another person.”

<sup>39</sup> Revised Penal Code § 266-A (1930)

<sup>40</sup> As opposed to rape of a Woman which is punishable by Life imprisonment.

## United Kingdom

Erstwhile English Common Law did not formally recognize male rape. Sexual Assault of Males was recorded and penalized as non-consensual buggery, which carried a lesser sentence. 1994 onwards, the Law recognizes males as victims of Rape.<sup>41</sup> The 2003 Sexual Offences Act 2003 recognizes penetration of the *mouth, anus or vagina* with the defendant's penis as Rape.<sup>42</sup> The Judiciary in Ismail<sup>43</sup> has further barred distinction between "*mouth, anus or vagina*" while sentencing. The Scottish and Irish Statutes for Sexual Offences also recognize males as victims.<sup>44</sup> However, a female or a non-male person cannot be charged with Rape; but can be charged with Sexual Assault which carries a lesser sentence.

## IV. WEIGHING GENDER NEUTRALITY FOR RAPE UNDER HARM PRINCIPLE

The Harm Principle propounded by John Stuart Mill is one of fundamental principles of criminalization. The Principle prescribes Criminalization of an act on basis of the act causing *Harm* to another. In order to determine whether as per the Harm Principle Rape should be criminalized as a Gender Neutral offense, it is imperative to ascertain the Harm is it seeking to remedy.<sup>45</sup> In cases of rape, it is often argued that rape is *Mala in se*, implying that it is a wrong in itself. There is no reason for a crime like rape to not be penalized.

Another justification for criminalization derived out of the Harm principle is that is rape causes harm not merely for the victim, but for society in general.<sup>46</sup> This justification however, is slim as it is abundantly clear that the harm under the harm principle should be an actual harm, and not mere offense.<sup>47</sup> The Actual Harm is suffered by the victim of the act.

Indian Jurisprudence on the Harm cause by rape has advances through various decisions. In the case of Rafiq<sup>48</sup> Justice Krishna Iyer opined that rape cause not just physical harm but the "*deep sense of some deathless shame*." In the case of Madan Gopal Kakar<sup>49</sup> the phrase "*traumatic experience and the deathless shame*" was used to describe the harm caused to the victim. The chief Harm in the offense of rape, as recognized today is deemed to be violation of Sexual Autonomy and Bodily integrity<sup>50</sup>.

<sup>41</sup> Criminal Justice and Public Order Act § 142 (1994)

<sup>42</sup> Sexual Offenses Act § 1 cl. 1 (a) (2003)

<sup>43</sup> R v Ismail [2005] All ER 216

<sup>44</sup> See, Sexual Offences (Scotland) Act 2009; and Sexual Offences (Northern Ireland) Order 2008

<sup>45</sup> Dennis J. Baker, Constitutionalizing the Harm Principle, 27 Crim. Just. Ethics 3 (2008).

<sup>46</sup> S. E. Marshall and R. A. Duff, Criminalization and Sharing Wrongs, 11 Canadian Journal of Law and Jurisprudence 20 (1998).

<sup>47</sup> Baker (Supra)

<sup>48</sup> Rafiq v. State of U.P. 1981 AIR 559

<sup>49</sup> Madan Gopal Kakar v. Naval Dubey 1992 SCR (2) 921

<sup>50</sup> Alessandro Spena Harmless Rapes? A False Problem for the Harm Principle Diritto Question Pubbliche, (Nov. 25 2019, 11:00pm) [http://www.dirittoquestionipubbliche.org/page/2010\\_n10/3-12\\_stu\\_A\\_Spena.pdf](http://www.dirittoquestionipubbliche.org/page/2010_n10/3-12_stu_A_Spena.pdf)

This Harm caused by rape is not merely physical, but also emotional and psychological. The crime of rape begets immense trauma to the victim, irrespective of the Gender of the victim or the perpetrator.<sup>51</sup> One of the concerns for recognition of female rape and non-recognition of male rape is that men and women experience rape differently. Rape of a female has stigma and shame attached to the crime.

The patriarchal notions of virginity and purity attached with females add to the agony of a victim. But, men who are victims of rape go through albeit different, yet in no manner, lesser trauma. Rape as an offense of violation of sexual autonomy and bodily integrity harms men, women and the third gender in a similar fashion. Thus, there is no reason for one to be recognized and others to be neglected.

## V. A CASE FOR GENDER NEUTRALITY

Rape is chiefly a crime of dominance. It is an invasion and violation of sexual autonomy and bodily integrity. It is deplorable that the offense is seen largely in light of Gender. Despite popular belief, there is prevalence of rape among homosexuals, transgender community and even the rape of men by women. Hence, there is a normative and functional need to amend the current rape law in favor of gender neutrality.

### Constitutional Perspective: Manifestly Arbitrary Rape Laws

Any Law which creates classifications in an unreasonable manner, or which is arbitrary is violative of Right to Equality guaranteed under The Indian Constitution.<sup>52</sup> The classification test propounded by the Judiciary requires intelligible differentia, and nexus with the object of the Act<sup>53</sup>. It has further been held that an act is arbitrary where in it is unequal according to both political logic and constitutional law.<sup>54</sup> The Supreme Court of India in Navtej Singh Johar (Supra) affirmed that a law that is manifestly arbitrary<sup>55</sup> violates Article 14 of the Constitution. In order to be manifestly arbitrary the arbitrariness should be ostensible.

While male rape is considered a rarity by a considerable portion of the population, empirical data suggests that male rape not only occurs in India, but also a significant number of males claim to have been coerced or forced into sexual intercourse by men and women.<sup>56</sup> Further, bearing the mind that the purpose of section 375 is protection from sexual violence, the law should prescribe punishment irrespective of the Gender of the accused or the victim. Sexual violence perpetrated by women, and suffered by men is undeniably existent, and declining the same remedy to a victim because of his gender, or the gender of his/her perpetrator is

<sup>51</sup>See, David P. Bryden, Redefining rape 3(2) Buff. Crim. L. Rev. 317 (2000)

<sup>52</sup>Indian Const. Art 14 (1949)

<sup>53</sup>State Of West Bengal v. Anwar Ali Sarkar 1952 AIR 75

<sup>54</sup>E. P. Royappa v. State Of Tamil Nadu & Anr. 1974 AIR 555

<sup>55</sup>See, Shayara Bano and Ors. v. Union of India and Ors. (2017) 9 SCC 1

<sup>56</sup>Jai Vipra, A Case For Gender-Neutral Rape Laws In India, 286 CCS working Paper, 12 (2013)

arbitrary and unreasonable. This is reminiscent of the same kind of discrimination which has been proven unconstitutional<sup>57</sup> in several cases.<sup>58</sup>

### **Inclusion of the Transgenders**

Gender Specificity of legal provisions for rape affects not only male victims of rape, or women raped by women. Transgenders are excluded from the conversion around rape, which assumes binary genders. The Transgender Community in India has been neglected, abused, and discriminated against. Transgenders in India face sexual violence, threats of acid attack and disfigurement, and other forms of physical violence<sup>59</sup>. This can be attributed to the curiosity surrounding sexuality of the transgenders, and the culture of discrimination against anything which is unfamiliar or peculiar<sup>60</sup>.

The NALSA (Supra) judgment gave recognition to transgenders as the third Gender, and proved to be a major step towards non-binary inclusion. However, outside of the legal recognition little has been done for the neglected community of transgenders; and the fact remains that they are assaulted, violated, and abused without being considered as victims in the definition of rape. Gender Neutrality in the definition will not only legally recognize them as victims, but also encourage them to report crimes committed against them.

### **Insufficiency of current laws**

One may make a case for amending the rape provision itself being unnecessary due to existence of Section 377 of Indian Penal Code 1860<sup>61</sup> or gender neutral law under POCSO.<sup>62</sup> However, these provisions are not sufficient to address the problem of Gender specificity in the rape law under section 375. POSCO<sup>63</sup> protects minors from sexual assault, sexual harassment, and other sexual offenses, irrespective of the Gender of the victim. The law under Section 377 criminalizes sodomy of non-consensual nature (and hence homosexual intercourse). This law categorically refers to sodomy as “sexual intercourse against the order

<sup>57</sup> See, Leslie G. Landau Gender-Based Statutory Rape Law Does Not Violate the Equal Protection Clause: Michael M. v. Supreme Court of Sonoma County 67(6) Cornell L. Rev 1109, 1127 (1982)

<sup>58</sup> See, Mary Roy v. State Of Kerala & Ors 1986 AIR 101; Air India v. Nergesh Meerza 1981 AIR 1829

<sup>59</sup> People's Union for Civil Liberties, Karnataka, Human Rights violations against the transgender community, A study of kothi and hijra sex workers in Bangalore, India 2003, 161 (Nov. 15 2019 1:00PM) [http://pucl.org/sites/default/files/reports/Human\\_Rights\\_Violations\\_against\\_the\\_Transgender\\_Community.pdf](http://pucl.org/sites/default/files/reports/Human_Rights_Violations_against_the_Transgender_Community.pdf)

<sup>60</sup> id, 37

<sup>61</sup> “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

<sup>62</sup> Affidavit of Central Govt. filed in the case of Sanjiiv Kkumaar (Supra) stated “These sections have been enacted to protect and keep a check on the rising levels of sexual offences against women in India...Keeping in view the ambit of POCSO Act which covers all forms of sexual offences against minors and section 377 of the IPC, it was felt that existing definition of rape under section 375 should be left untouched.”- Pallavi Pundir, Indian Rape Laws Cannot Be Gender-Neutral, Says Central Government, The Vice (Nov. 15 2019 1:00PM) [https://www.vice.com/en\\_in/article/mb8dey/rape-laws-in-india-cannot-be-gender-neutral-says-ministry-of-home-affairs](https://www.vice.com/en_in/article/mb8dey/rape-laws-in-india-cannot-be-gender-neutral-says-ministry-of-home-affairs)

<sup>63</sup> Protection of Children from Sexual Offences Act 2012

of nature” and does not espouse the various protective provisions under the Evidence Act and Criminal Procedure Code for victims of rape.<sup>64</sup>

Law under Section 377 is not fleshed out as elaborately as Section 376. The latter, with various case laws and legislative reports, has undergone developments to encompass instances of rape in various instances, and prescribes stringent penalties. Section 377 on the other hand is a simpler law which does not endow these complexities. Another concern is that Homosexual Intercourse is referred to as “Unnatural Sex” or “Sex against the Order of a Nature” which is derogatory and discriminatory. It further does not recognize non-consensual Homosexual Act as rape, but merely the offence of unnatural sex. Additionally, the instance of adult heterosexual rape committed by a woman is not criminalized under any law in India. Hence, the current laws insufficient, and there is a need to amend the rape law under section 375 and 376 to be Gender neutral.

## VI. COUNTERING ARGUMENTS FOR GENDER SPECIFICITY

Hitherto efforts to amend the law to make it Gender neutral have met with resistance from certain women’s right groups.<sup>65</sup> This resistance stands on various grounds ranging from skepticism with respect to the biological possibility of male rape, to grounds of patriarchal history of gender based violence.

### Biological Impossibility

One argument against recognition of rape committed by women on men is the biological impossibility of women raping man. This stands on the contention of sexual intercourse requiring arousal.<sup>66</sup> Gender neutral definitions, such as that developed in the International Criminal law<sup>67</sup>, or American federal law<sup>68</sup> require *Penetration however slight*, which can be achieved without arousal.<sup>69</sup> Studies show that men can experience ejection during a sexual assault<sup>70</sup>. It has in fact been studied and propounded by Groth and Burgess (1980) that

<sup>64</sup> Indian Evidence Act § 114 A (1872); Criminal Procedure Code § 53A(1973); Criminal Procedure Code § 164A (1973); Criminal Procedure Code § 375B (1973)

<sup>65</sup> See, TNN, Cabinet nod to make rape gender-neutral riles women's groups, TOI, Jul 20, 2012 (Nov. 19 2019, 6:00PM) <https://timesofindia.indiatimes.com/india/Activists-oppose-making-rape-gender-neutral/articleshow/15049606.cms>; Nagender Sharma, Only men can be booked for rape, HT, Mar. 06, 2013 (Nov. 19 2019, 6:00PM) <https://www.hindustantimes.com/delhi/only-men-can-be-booked-for-rape/story-qQNnSnT8lzd1QOCsansK1H.html;jsessionid=D1989A3382D15FCFF821816924B03EC9>

<sup>66</sup> See, Rumney (Supra) 516

<sup>67</sup> Invasion of body by conduct resulting in *penetration, however slight*, in the body of the victim, with a sex organ of the perpetrator, or any other object, with a threat of coercion or force, towards victim or a third person.

<sup>68</sup> *Penetration, no matter how slight*, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim

<sup>69</sup> People v. Liberta, 474 N.E.2d 567

<sup>70</sup> Philip M. Sarrel & William H. Masters, Sexual Molestation Of Men By Women, 11 Archives Sexual Behav. 117, 118 (1982).; Michael King & Ernest Woollett, Sexually Assaulted Males: 115 Men Consulting A Counselling Service, 26 Archives Sexual Behav. 579, 587 (1997)

offenders (women and men) use this as a strategy of obtaining full control over the victim. The victim, misidentifying ejection for orgasm may refrain reporting the crime due to embarrassment over sexuality, or fear of impeachment of veracity of their narrative.<sup>71</sup>

### **Male rape as a rarity**

Vrinda Grover, a Delhi based Advocate, claimed that *there are no men being raped by women.*<sup>72</sup> She however, accepts the possibility of homosexual male rape<sup>73</sup>. Women raping men is deemed extremely rare. Largely heteronormative society has troubling recognizing homosexual intercourse, whether consensual or not. Conversely, males actually form a significant portion of rape survivors.<sup>74</sup>

Male rape during Armed Conflicts<sup>75</sup> and in Prisons<sup>76</sup> is prevalent and frequent. Yet, due to the taboo attached with male on male rape, it is hardly reported. No reliable statistics depict the true intensity of male rape during conflicts.<sup>77</sup> Male rape, committed by both men and women is rampant in other institutional settings<sup>78</sup> and times of peace as well.<sup>79</sup> It has been found, that 1 in 71 men has been raped once in his lifetime. Although, the figure for women is much larger (1 in 5) the one for males is not negligible by any measure.<sup>80</sup> Albeit largely unreported, and somewhat rarer (in comparison to male perpetrators) women are likely perpetrators of rape committed on both men and women.<sup>81</sup>

### **Men suffer rape differently due to Patriarchy**

It is popularly believed that men and women experience sexual assault differently. Crimes like Rape have to be understood in the context of society in which the criminal act happens, and the victim and accused exist.<sup>82</sup> In India, where the society is intrinsically Patriarchal, rape is a means of exerting power over the female. Further, due to social stigma around pre-marital loss of virginity women are often scared of reporting the crime.<sup>83</sup>

The plight of a male victim is diminished in comparison to that of the female victim. The rape of males however, is even more of a taboo. Men are parallel sufferers of patriarchy, and

<sup>71</sup> A. Nicholas Groth & Ann W. Burgess, Male Rape: Offenders and Victims, 137 AM. J. Psychiatry 806, 809 (1980); Rumney (Supra) 517

<sup>72</sup> TNN (Supra)

<sup>73</sup> Danish, Rape law amendment: ‘Where are the cases of sexual violence against men?’ Firstpost Jul 20 2012

<sup>74</sup> Roni Caryn, Men Struggle for Rape Awareness, The New York Times, Jan 23 2012

<sup>75</sup> Will Storr, The Rape of Men: The Darkest Secret of War, The Guardian, Jul. 17 2011

<sup>76</sup> Jennifer C. Kerr, 60,0000 Inmates Sexually Assaulted Every Year , Huffingtonpost, June 23, 2009

<sup>77</sup> Leylah Ndinda, Uganda, Male rape victims in Uganda speak out, DW May 13 2013

<sup>78</sup> Capers (Supra) 1272

<sup>79</sup> Kathy Marks, Man abducted from train and raped, Independent Oct. 15 1992; Rumney (Supra) 517; Sarrel and Masters (Supra) 117; Groth and Burgess (Supra) 806

<sup>80</sup> Vipra (Supra) 10

<sup>81</sup> National Intimate Partner and Sexual Violence Survey, Findings on Victimization by Sexual Orientation, Centers for Disease Control and Prevention (2010)

<sup>82</sup> Narraim, A. & Mundkur, A, Betraying the Third Way. The Hindu Feb. 20, 2018

<sup>83</sup> id

despite differing conceptions of virginity and purity of men and women, men who are raped bear no less ignominy from the society. The inherent heteronormativity and homophobia in the society prevents males from reporting sexual crimes.<sup>84</sup>

### **Gendered history of rape**

Certain Feminist theorists opine that rape is central to women's subordination.<sup>85</sup> It has historically been an instrument of exerting dominance over the feminine sex. The oppression of females through sexual violence is a direct consequence of gender inequality in the society. Radical Feminists such as Angela Dworkin and Catherine MacKinnon consider Male sexuality as aggression towards those in position of less power.

For MacKinnon, consent for sexual intercourse is not voluntary, as the parties are never in positions of equal power. She further argues that women, who claim to enjoy sexual intercourse, do so due to the social conditioning in a world of male supremacy.<sup>86</sup> This argument furthers the notion of sexual intercourse being something which is done *to women by man*<sup>87</sup> and therefore making it impossible for a man to be raped or for a woman to perpetrate rape.

It was observed by the US Supreme Court that laws based on Gender specificity are often a result of stereotypes in the society rather than informed attempts to meet legislative purposes.<sup>88</sup> Evidently, the purpose of a law against rape is the protection victims from sexual violence; and remedying the violation of sexual autonomy and bodily integrity. Gender specificity in the law is a result of stereotyping gender dynamics. The implications of a gender specific rape law are heteronormative and patriarchal, and serve a contrary purpose by denying women any sexual agency.

## **VII. CONCLUSION**

The fallacy of the heterosexual man, enjoying the act of sexual intercourse<sup>89</sup> makes the thought of a woman forcing herself on a man without his consent, implausible. The swaying notions of masculinity, and ideas of 'mighty man' being able to defend himself against a 'feeble and frail' woman make it even harder for the society to appreciate the sheer possibility of a female perpetrator, or a male victim.<sup>90</sup>

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<sup>84</sup> Caryn (Supra)

<sup>85</sup> Emily Jackson, Catharine MacKinnon and Feminist Jurisprudence: A Critical Appraisal, 19(2) J. Law. Soc 195, 197 (1992)

<sup>86</sup> Jackson (Supra) 200

<sup>87</sup> G. Chase, An analysis of the new sexual assault laws 4(4) Canadian Woman Studies 53, 54 (1984)

<sup>88</sup> Califano v. Goldfarb, 430 U.S. 199, 208-09 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636, 650-52 (1975)

<sup>89</sup> Sarah LeTrent, Against his will: Female-on-male rape, CNN, Oct. 10 2013

<sup>90</sup> S. Brownmiller, Against our will- Men, women, rape, (Penguin Books 1975)

Although, it cannot be denied that rape is a crime of dominance and oppression of those with less power and man have enjoyed the position of power in the society; in the past few decades, position of gender in the society has evolved dramatically. Secluding women from the definition of perpetrator, and men from victim, hence is regressive and myopic. Further, with emerging questions of gender identity and sexuality there is an entire community of sexual and gender-based minorities who face discrimination, harassment and sexual violence at a larger scale.

Homosexual rape, while still considered probable, are severely stigmatized in a society like India, causing the victims of such rapes suffer not just abuse and harassment on account of their victimization, but also sexual preference or inclination. Gender Specificity only further harms these minorities by not granting them equal protection and remedy under rape laws. All things considered, there is a need to identify that rape is an offense against dignity, bodily integrity and sexual autonomy, and any and every victim deserves to be identified as a victim irrespective of their Gender or the Gender of their perpetrators.

In order to inception Gender Neutrality and therefore true gender justice, both the definitions of Victim and Perpetrator should be neutral. Classification of the offense as rape shall further bring more severity than reducing the crime to sexual assault. Of the various models of Gender Neutrality across the globe<sup>91</sup>, idyllic is that of the International Criminal Law, and the US Federal Statute, which recognizes Gender Neutrality in case of the victim and the perpetrator. Mere identification of non-male perpetrators and non-female victims of rape lamentably is not adequate. The society which holds the veracity of stereotypically gendered forms of victim and perpetrator also needs to evolve, and making the law gender neutral shall be a means to achieving that end.

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<sup>91</sup> USA Model recognizing Gender neutral definition of victim and perpetrator of rape; Canadian Model recognizing sexual assault instead of rape as a gender neutral offense; Philippines Model prescribing a lesser punishment for male rape as compared to female rape; and finally the UK Model which recognizes only gender neutrality of victim, assuming male to be the perpetrator.