

## “Should Sexual Offences be Gender-Neutral?”

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### INTRODUCTION

By the definition, a gender neutral Legislation would be one which is drafted in general terms, overlooking gender-specific conditions concerning women and men, which emphasise sex-and gender-based inequities.<sup>1</sup>

The Constitution of India under Article 14 states that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India on the grounds of (religion, race, caste,) sex(or place of birth).<sup>2</sup> But the definition and penalty of rape is gender specific. According to section 375 and 376 of the IPC: the victims are women, and the offenders are men. The definition of rape starts with, “A man is said to commit ‘rape’ if he<sup>3</sup>.....”

As the Indian Penal Code section 375 stands, rape is something that only a man can do to a woman. Although the Protection of Children from Sexual Offenses Act 2012,broadens to child survivors of both genders, the existing rape laws excludes a large section of male victims who, for fear of ignominy and lack of legal remedy are unable to come forward to seek justice for the wrong done to them.

Gender neutral laws will provides sharp acceptance of the fact that even men can fall victim to similar heinous crimes happening to that as women. Male rape is far too common to be considered an exception or a freak accident.

### Rape laws around the world

How many are gender-neutral?

Out of the 96 nations surveyed, 63 were found to have assault or rape laws drafted in sexually unbiased language, 27 had rape laws that were totally sex explicit (i.e., the culprit was characterized as male and the victims as female) and 6 had mostly unbiased laws (the culprit was characterized as male and the unfortunate casualties could be male or female).

### Rape laws in India

#### Male-on-female rape:

After the Criminal Law (Amendment) Act, 2013, Section 375 of the Indian Penal Code reads such: A man is said to commit “rape” if he<sup>4</sup> penetrates his penis, to any extent, into the

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<sup>1</sup>See: <https://eige.europa.eu> (Jun. 12, 2020, 22:19 hrs.), <https://eige.europa.eu/thesaurus/terms/1192>.

<sup>2</sup> The Constitution of India, 1950, art. 14.

<sup>3</sup>Indian Penal Code, 1860, Section 375.

<sup>4</sup>*supra* note 3.

vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or 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 body of such woman or makes her to do so with him or any other person; or applies his mouth to the 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 7 descriptions:--

- First.—against her will.<sup>5</sup>
- 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.<sup>6</sup>

### Critical analysis of section 375 of the Indian penal code

Although there is much to praise and much to criticize in the law, the following are directly relevant to this article:

- The law is completely gender-specific.
- Rape does not only include penile-vaginal penetration.
- It requires active consent.

Mere lack of physical resistance cannot be construed as consent. The legislations concerning with stalking, and sexual harassment are altogether gender specific. Whereas the legislations regarding acid attack are gender neutral.

### Male-on-male rape:

Section 377 of the Indian Penal Code reads such:

“Unnatural offences: 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

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<sup>5</sup> *Id.*

<sup>6</sup> *supra* note 3.

imprisonment of either description for term which may extend to ten years, and shall also be liable to fine.

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section.”<sup>7</sup>

The law has criminalised “oral sex, anal sex and penetration of other orifices.” (*Naz Foundation vs. Government of NCT of Delhi, 2009*)<sup>8</sup>.

### **CRITICAL analysis of section 375 of the Indian penal code**

There are two issues with this law:

One, that the offence isn't called rape; what's more,

Two, that the State doesn't enable you to agree to what it regards unnatural.

#### **Female-on-female rape:**

The law on gang rape (Section 376D)<sup>9</sup> reads thus: “Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each one of them shall be considered to have committed the offence of rape and shall be penalised with rigorous imprisonment...”

### **CRITICAL analysis of section 375 of the Indian penal code**

Along these lines it is conceivable to convict a female of raping a female as a part of the gang. Other female on-female rape isn't culpable under law since considerably under Section 377, penile penetration is an important condition.

Transgendered/transsexual rape: This also must be culpable under Section 377 given that there is penile penetration. Female-on-male rape- In the Criminal Law (Amendment) Ordinance, 2013, the crime of rape and sexual assault were sexually unbiased. The expression "rape" was expelled and was subbed with "sexual assault". In any case, solid protests were raised by women.

#### **Contentions against sexually impartial assault laws**

Women cannot rape men. Reason being, a man has to be provoked sexually to be able to have sexual intercourse with a woman. Flavia Agnes<sup>10</sup>, articulated that “It is physically impossible for a woman to rape a man. Arousal implies consent.”

The conviction here is that a female cannot assault a man, as they need to be sexually aroused. Excitement is thought to infer assent, yet there is a lot of proof to recommend that excitement does not, truth be told, mean assent.

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<sup>7</sup>Indian Penal Code, 1860, Section 377.

<sup>8</sup>160(2009), DLT ,277.

<sup>9</sup> Indian Penal Code, 1860, Section 376(D),.

<sup>10</sup>Fuchs, Siegmund Fred. "Male sexual assault: Issues of arousal and consent." Clev. St. L. Rev. 51 (2004): 93.

Sarrel and Masters (1982) directed contextual investigations on 11 men who had been explicitly attacked by women. The men experienced embarrassment, uneasiness, dread, outrage and fear but reacted explicitly. They had erections; a few even detailed discharge. Physical reaction even occurred at the danger of mutilation.<sup>11</sup>

## STATISTICS

As rape cannot be committed against men by legal definition, there is no clear way to determine just how many male survivors are there in India. The Indian government in 2007 found, when they were specifically looking at child sexual abuse, that of surveyed children, who reported experiencing severe sexual abuse, including rape or assault. Of which boys were 57.3% and girls were 42.7%. More recently, the Centre for Civil Society, based in Delhi they found that about 18 percent of surveyed Indian adult men reported of being coerced or forced into sex. Out of these, 16% are claimed to be female offender and 2% claimed a male offender.<sup>12</sup>

### Survey results

Given the absence of male rape insights in India, a review was led among 222 men. The overview was purposely kept short, getting some information about demeanor towards rape and cases of sexual coercion. The outcomes came out to while astonishing, are not so much startling. They are additionally to a great extent steady with some past research<sup>13</sup>

An aggregate of 305 men filled the online study. While it has constraints in that it is unknown and self-announced, these are likewise its strength. It is difficult to get individuals to confess to being raped, and the assurance of namelessness is a decent helper. In the wake of disposing of reactions from respondents beneath 18 years old, reactions starting outside India, and conflicting responses, the example was limited to 222 men.

## KTS TULSI'S PRIVATE BILL

Senior lawyer and Parliamentarian Mr. KTS Tulsi tabled a private bill before the Rajya Sabha so as to bring amendments in the criminal laws to make sexual offences gender neutral. Similar issue of making sexual offences gender neutral was postponed which was brought up by the then law minister in 2013 due to the outrage happened because of the Nirbhaya rape case.

In an interview Mr. KTS Tulsi said that the law needs to be balanced. "The balance has been disturbed. All sexual offences should be gender neutral. Men, women and other genders can

<sup>11</sup>See: <https://www.cdc.gov.pdf> (Jun., 12, 2020, 22:23 hrs.).

<sup>12</sup>See: <https://ccs.in> (Jun., 12, 2020, 22:23 hrs.), <https://ccs.in/indias-law-should-recognise-men-can-be-raped-too>.

<sup>13</sup>Temkin, Jennifer, and Barbara Krahé *Sexual assault and the justice gap: A question of attitude*, Bloomsbury Publishing, 2008.

be culprits and also victims of these offences. Men, women and others need to be protected,"<sup>14</sup>

This would provide the safeguard to women, men and transgender people too. Furthermore, the bill also calls for a new crime to be incorporated in the rape laws-including penalties for "touching" without entering the victim's vagina.

It demands for the inclusion of S375A into the IPC to penalise "sexual assault" outlined as deliberately affecting the individual's genitals, anus or breast or permitting the individual to touch that individual's or any other being's vagina, penis, anus or breast, minus the consent of the other person, except such touching is made for appropriate medical reasons."<sup>15</sup>

### Suggestion

Acquiescent to KTS Tulsi, improvements should be made in the Indian Penal Code,1860 (IPC) the Code of Criminal Procedure,1973(CrPC)<sup>16</sup> and the Indian Evidence Act,1872 to assure that the words "any man" and "any women" in the sections identifying with sexual offences in the laws are to be altered as "any individual or person".<sup>17</sup>

By swapping the meaning of the culprit and victim of sexual assault from "man" and "women" to "any individual or person", the bill takes into thought of not just transgender people who are regarded as the 'other' sex but would credibly offer the recognition of other sexual individualities.

This would widen the safety of the law to women, men and transgender people.

Aside from different modifications, the time equally demands for embedding additional offense in the assault laws - to include penalty for "contacting or touching" with no penetration of the privates of the person in question.

The IPC Section 375 and 376 ought to be made unbiased laws as the current law relating to rape was gender oriented and ensures justice only to the female as victims and male as offenders.

In India, sexual violations against young men under 18 years are secured under the Protection of Children from Sexual Offences Act (POCSO)<sup>18</sup>, 2012 yet once they turn grown-ups they don't have any lawful plan of action.

### Conclusion

By ignoring the fact that men too can be a rape victim or a prey to assault, and by not having gender neutral rape laws, we are denying men and transgender the right to equal protection before the law administered under article 14 of the constitution on India, 1950 and right to

<sup>14</sup>Ambika Pandit, *KTS Tulsi floats Rajya Sabha bill to make rape laws gender-neutral*, TOI, July. 14, 2019.

<sup>15</sup>*Supra* note 14.

<sup>16</sup>Code of Criminal Procedure, 1973, No. 02, Acts of Parliament, 1973 (India).

<sup>17</sup>*Supra* note 12.

<sup>18</sup> The Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012 (India).

privacy administered under article 21 and various other fundamental rights proffered by the constitution of India, 1950. If not now then whether there will ever be a right time to make rape and its punishment under the Indian Penal Code “gender-neutral”.