

“Gender Neutrality of Rape Laws”

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Abstract

Equality before law means that the law is the same for man, woman or a transgender person. It means that there is no arbitrary discrimination between different humans. The law protects everyone despite their gender, caste, sexual orientation, place of birth. Then why is it that when we talk about rape why does it always say, ‘with or without her consent’? Young boys are becoming more susceptible to sexual harassment day by day. The transgender community’s rights are being taken away on a daily basis. Their fundamental rights are being violated and a part of their life is being taken away everyday a person goes unpunished for their actions. Its not just about the rape of an individual but also the mental trauma that they suffer through. Everyday the justice system fails to restore the faith that people have in it. It took seven years to bring Nirbhaya justice and she was a woman. The laws for rape in this country stand out for women but, the young boys, men, transgender community and so many others are attacked if they speak about harassment. The ones who speak about it and the ones who report it are merely a percent of those are suffering. In the end, no matter what the gender, it all comes down to what will society say. When ‘society’ itself doesn’t have the laws to deal with it, how will people speak up?

Introduction

“Memories demand attention, because memories have teeth. That sexual assault perpetrator can move on. The only person who rapes is the rapist. The person who is left behind has to pay over, and over, and over again”

The crime of rape under Section 375 of the Indian Penal code envisages the absence of “consent” to be a precondition to constitute the offence. Sections 375 and 376(1) of the IPC, only cover instances of rape of a woman by a man and fail to cover those instances where a man or transgender becomes a victim and thus, there is in existence no remedy for victims of rape, who are not women by sex. When we speak about rape it always constitutes to the ‘male body’ or the ‘female body’, we fail to consider the transgender community or the hijras in this situation. In *Bodhisattwa Gutam v. Subhra Chakroborty*¹ the supreme court held that ‘rape is thus not only a crime against a person of a woman victim, it is a crime against the entire society. Rape is, therefore the most hated crime. It is a crime against basic human rights and is also violative of the victim most cherished of the fundamental rights that is the right to life under article 21.’ Rape violates the basic fundamental right of right to life whether a man or a woman suffers through it.

¹ Shri Bodhisattwa Gautam vs Miss Subhra Chakroborty 1996 AIR 922, 1996 SCC (1) 490

It is a crime so strong and so hated that the victim breaks down completely, physically and mentally.

It is important to mention the case of *AK Gopalan v State of Madras*², from which we can take away that segregating people from the transgender society and grouping them as an alternate gender or a third gender is a violation of their rights under Article 21. The Transgender Act does not specify if the terms ‘male’ and ‘female’ talk about biological sex which includes the human anatomy or if it also refers to one’s psychological sense of gender, which includes how a person chooses to feel, identify and express oneself. Thus, segregating people or grouping them for the same crime is what takes away the right to equality enshrined under article 14. A transgender persons rape is not taken seriously as people believe that is what they are accustomed to or that’s their lifestyle. They aren’t treated as victims or given the same importance as a female victim would.

Speaking about female victims, every time a woman is attacked, they say that she was ‘asking for it’. Somehow it is always the woman’s fault. Whether its what she’s wearing or what hour of the day it is. People fail to understand that women are raped even in the daytime in states like U.P. and women who wear ‘burkhas’ are raped too. Children, minors, girl or boy are raped. Were they asking for it too? When the laws are aren’t stringent enough for the women itself, how will they ever protect a man?

The Criminal Law (Amendment) Act, 2013, reverted to the reverted to the gender-specific definition of rape.³ Those who opposed gender-neutral rape laws questioned their relevance in the context of an intrinsically patriarchal and gendered society where sexual violence evidently acts as a medium to exercise power over the female/non-male body.⁴ The Law Commission of India in its 172nd report has recommended that the rape law must be gender neutral. It is argued that the principles of equality before law and equal protection of rights enshrined as fundamental rights in our Constitution must be applied to this situation as well.⁵

The fact that there were still people who opposed it shows the progress the country is making in terms of sexual assault laws. The pain inflicted on a person’s body is unimaginable. The sheer agony that goes through them is what needs to be brought to justice. The justice system needs to be working faster in these matters. It is said that a girl is raped every four minutes. Are these cases reported? No. Not even one percent of these are reported. As said before, this is the case for women. What is the reason for not including the male gender as a victim? Why is only the gender of an individual identified while speaking about rape? What’s next, seeing the caste or the place of birth? The justice system has made short strides when it comes to men or the LGBT

² A.K Gopalan v. State of Madras, AIR 1950 SC 27

³ The Criminal Law (Amendment) Act, New Delhi: The Gazette of India (2013).

⁴ Ibid.

⁵ Agnes, F. (2002). Law, Ideology and Female Sexuality. Economic and Political Weekly, 844-847

community in terms of sexual assault laws. Even now there aren't laws against stalking or voyeurism for them. Its high time that every individual starts getting the equal protection they deserve under the law.

Review of Literature

- Perera (2013) in her article in The Firstpost while expressing concern for male and transgender sexual violence writes that a gender neutral law is not an anti- women law.
- Siddharth Narain (2013) in The Indian Express while supporting a gender inclusive law in case of the victim of rape feels that the present law denies millions of transgender persons, intersex persons and sexual minorities not born as women of their rights.
- Sreekumar (1992) in his research paper highlighting the problems of under trial prisoners in India points out that homosexual gang rape was common in Indian prisons.
- Novotny (2003) in her article in the Seattle Journal of Social Justice expresses concern that gender neutral rape laws would lead to negative consequences for female victims of rape and calls it a “backlash against feminism”.
- Brownmiller (1975) opines that only men can coerce women into having sex.

History

The talks of rape or alleged rape in this case started in 1972. It was the Mathura rape case which put the word ‘rape’ on the mark. The question is what happened in 1972? Till this case the criminal laws relating to sexual assault and rape were the same. On March 26th, 1972 a young girl named Mathura was allegedly raped by policemen in Maharashtra. During the trial proceedings it was found out that yes, intercourse had taken place, but there was no proof of rape. It was also stated that she was ‘used to intercourse’. The sessions court acquitted the two policemen but the High Court reversed the order. When the case finally reached the Supreme Court, it was overturned. The alleged intercourse was considered a peaceful affair.

Due to absence of injuries it was said that she had given her consent. Numerous issues were raised after this case. Firstly, it was noted that women were raising issues of not bringing their sexual history in the cases of rape. Secondly, it said that leaving the name out of the woman during the case should be essential. The prosecution in this case had left the burden of proof in this case and blamed it on the girl’s sexual history. The Mathura case was a landmark case for the history of women. Women’s rights revolved around this case for a long time. Women’s groups, Non- Governmental Organizations have been fighting for these rights since the 1980’s. These groups have been trying to broaden the scope of rape from only penile-vaginal intercourse since the 1980’s.

People need to realize that men and women do not suffer from sexual assault differently. It’s a surprising fact that since 1972, the Mathura Case till 2012, the Nirbhaya Case, there were no

reforms, no changes and no additions made in the law. Even when they were finally made, they were protested against. It took India 40 years to make a reform to a law that isn't even accepted by society yet. The rate of progress is 40 years for safety laws for citizens.

Law Reforms

The Criminal Law (Amendment) Act, 1983

In 1983, the Code of Criminal Procedure was amended to provide for in camera rape trials. It also became an offence to disclose the identity of a rape victim.⁶

The Criminal Law (Amendment) Act, 2013

The Delhi gang rape case led to major changes in the Indian Penal Code regarding the rape laws. It now included acts such as acid attacks, sexual harassment, disrobing a woman, voyeurism, stalking and trafficking. The laws relating to stalking, voyeurism and sexual harassment are all gender specific. The laws relating to throwing acid are gender neutral. It also now penile-vaginal penetration but oral, anal, and insertion of any object into the vagina, urethra or anus of a woman as well. The punishment for rape in aggravated and non- aggravated situations was enhanced.²⁶ The offence is not gender neutral under the Act as under the Ordinance. Therefore, only a man can commit rape on a woman.

The Criminal Law (Amendment) Act, 2018

This reform was brought about when an eight year old girl was abducted, raped and murdered by a group of men in Jammu and Kashmir. This case led to a nation wide protest and called for a harsher punishment. This reform consisted of a rape of a girl below twelve years of age could have a death penalty or the minimum imprisonment of twenty years. In the Indian Penal Code, it was also added that it was to specifically deal with girls under the age of 16 and the minimum punishment would be twenty years and the maximum would be life imprisonment.

Need For Gender Neutral Rape Laws

In India, only Section 377 criminalizes male on male rape. When a person is raped, they are stripped off their dignity. Indian Law gives us the right to live with dignity. In the case of *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*⁷ the court held that the right to dignity forms an essential part of our constitutional culture which seeks to ensure the full development and evolution of persons and includes "expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings. As held in the landmark case of *K.S Puttaswamy v. Union of India*⁸, the dignity of an individual is a foundational pillar of

⁶ The Criminal Law (Amendment) Act, Section 327 (1983)

⁷ Francis Coralie Mullin v. Administrator, Union Territory of Delhi AIR 1981 SC 746,753

⁸ K.S. Puttaswamy v. Union of India, 2017 (10) SCC

the constitution and thereby inalienable. One must be able to live without construing with the so-called norms of society. The minimum punishment for rape in India is seven years but there is no minimum punishment for the offences under Section 377. Hence, the researcher firmly believes that the punishment for male on male rape, female on male rape, transgender rape, should be minimum seven years too.

In India, men are supposed to be the protectors, they are supposed to be the “heroes”, a real man doesn’t show his emotions. These are the reasons as to why most victims suppress their torture. Women are considered to be the ‘victims’ who need help. The reason very few men come forward are because they are considered to fight back. This toxic masculinity is the reason why such few men come forward. Its time like these where I call the feminists forward to fight for equal rights. The rights of one often lead to the abrogation of rights of the other.

In *Olga Tellis v. Bombay Municipal Corporation*⁹, it has been held that the right to livelihood is born out of the right to life, as no person can live without the means of living, that is, means of livelihood. The rape laws under Sections 375 and 376 only cover the rape of a woman. It is the duty of the state to protect all its citizens. It fails to cover those instances where a man or transgender becomes a victim and thus, there is in existence no remedy for victims of rape, who are not women by sex. These are violations of fundamental rights. It was enunciated in the case of *Namit Sharma v. Union of India* that, a law which violates the fundamental right of a person is void. Fundamental Rights are intrinsic to the existence of a person and it is the paramount duty of State to provide and protect such rights of its citizens.¹⁰

The issue of gender-neutral rape laws received attention during the passage of the Criminal Law (Amendment) Act, 2013 which contained gender-neutral provisions for the offences of rape, sexual harassment and sexual assault. This meant that women could now be charged with these offences as perpetrators. When it was passed in 2013, a large section of civil society was rightly vocal against these gender-neutral provisions, highlighting the high probability of double victimisation of women wherein complaints of rape, sexual harassment and assault could be met by counter-complaints to build pressure to withdraw their cases. What the researcher doesn’t understand are the counters against this law. Do men and transgender don’t deserve the same rights? In the case of *Navtej Singh Johar v. Union of India & Ors*,¹¹ the Hon’ble court rightfully observed that the diction of Section 377 is gender neutral and that of Section 375 is female-centric. In the absence of equal protection to men and women alike, the provision of Section 375 of the Code is grave violative of Articles 14, 15 and 21 of the Constitution of India.

The real problem between male and female rape is that society believes that real men can defend themselves. In India a female’s virginity is considered to be sacred. Pre-marital sex for a woman

⁹ *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180

¹⁰ *Namit Sharma v. UOI*, (2013) 1 SCC 745

¹¹ *Navtej Singh Johar v. Union of India & Ors*, W.P. (Crl) No. 79/2016

is a taboo and she immediately is lowered in the eyes of society. A woman has to face a certain social stigma. As explained before it is always the women's fault. Why did she have to go out that late in the night? Why did she have to wear such a short skirt? How did her parents allow her? There are no 'norms' that regulate the behavior of men. The problem with having gender neutral laws is that if a female complains a man can just counter it.

From *AK Gopalan v State of Madras*¹² we can take away that confining people of the transgender community to identify only as the third gender is a violation of their rights under Art.21. Furthermore, the Transgender Act does not specify if the terms 'male' and 'female' talk about biological sex which includes the human anatomy or if it also refers to one's psychological sense of gender, which includes how a person chooses to feel, identify and express one self. The transgender bill views crime against transgender persons as less violent and only grants penalty of imprisonment from six months to two years, viewing that such crimes of sexual assault, harassment and abuse are of not serious nature, complicit with such a view that violence committed against them is not of serious nature. This violates article 14 as the punishment for rape of a woman can be sentenced from seven years of jail time to life sentence.

Gender Specific Laws and Human Rights

Penetration in all body parts equally suffices to constitute the offence of rape. Thus, in its elemental form the offence of rape can be committed equivalently upon women as well as persons belonging to LGBT community.¹³ The Universal Declaration of Human Rights includes right to life, right to privacy, right to health and equality before the law, as well as the right to freedom of expression and freedom from discrimination and violence, including torture but the Lesbian, gay, bisexual and transgender (LGBT) persons are constantly at risk of prosecution and gross violations of their fundamental human rights in a number of countries. In cases like *Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath* the Hon'ble Court has expanded the scope of 'Right to Life' and implied that the said Art. also includes the Right to Livelihood.¹⁴

The Transgender Protection does not define what is exactly meant by 'sexual abuse', thus making it difficult for the transgenders to report such cases. Secondly, if all degrees of sexual offences are covered under the single term, then the same punishment for all its degrees will defeat the purpose. This also indicates how the State does not treat the transgenders at par with cisgenders and considers them as lesser beings. In the case of *Jayalakshmi v. The State of Tamil*

¹² A.K Gopalan v. State of Madras, AIR 1950 SC 27

¹³ W.P. (C) No. 400/2012; Jackuline Mary v. The Superintendent of Police, Karur District, W.P. No. 587/2014.

¹⁴ Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath (1983) 1 SCC 124.

is evidence of the oppressive attitude that the society cultivates against them and manifests this unacceptance of diverse gender identity and sexual orientation in the form of sexual violence.¹⁵

In the NALSA case, the right of self-determination under Article 21 is illuminated. It encompasses the right of self-determination of the gender to which one belongs, and it is supposed to be decided by the person concerned. Gender identity is one of the essential aspects of dignity and self-determination. Therefore, the transgender community needs to be considered as a third gender.¹⁶

In the case of *Khanu v Emperor*¹⁷, the Hon'ble Court held that "the natural object of carnal intercourse is that there should be the possibility of conception of human beings." In this case the Supreme Court meant or implied consent. Consent is the biggest factor when it comes to rape. There have been incidents highlighted on multiple occasions in newspapers when a woman has said 'no' to a man, but the man didn't stop. This happens in the case of men and transgender's too. There is no prescribed punishment for male on male rape in India. Far from being a heinous crime, it isn't even considered to be a crime. At the same time, for female on male rape, it isn't even 'physically impossible'. There are various reasons for this. One being that one, as mentioned before, for women to be physically weak to rape men. Another one being, that men can protect themselves from being raped. Thirdly, it does not reflect well on society or it doesn't reflect in society at all. There have been slim to no reports of men being raped by women hence it's considered unreal.

In the case of female on female rape, *Priya Patel v. State of Madhya Pradesh*, the court held that a woman cannot have an intention to commit rape. Consequently, it is inconceivable that a woman can rape another woman.¹⁸ This judgement is flawed as in the Delhi gang rape case, the Court clearly said that even if each member has not penetrated or 'committed rape' the intention is what counts and each member will be held responsible for rape. Hence, even if the woman is the perpetrator, the intention must count.

While female on male rape has been discussed, female on female rape is a subject that the government has been silent on. One of the reasons could be that there are people who don't even believe in the LGBT community and think it's a hoax so for them to believe that such an abomination is real is far from reality. These matters are usually hushed upon in India. They are considered as abomination to society and are judged by society. Rape is a touchy subject and not everyone can discuss it at the level it needs to be discussed at. It is something that the educated class needs to put forward but. These laws cannot be made by an uneducated individual's who don't change with the changing times. The laws need to be made keeping the year and time in

¹⁵ Jayalakshmi v. The State of Tamil Nadu, (2007) 4 MLJ 849

¹⁶ National Legal Services Authority v. Union of India, (2014) 5 SCC 438

¹⁷ Khanu v Emperor 1928 SCC OnLine Lah 605 : 1928 Cri LJ 772

¹⁸ Priya Patel v. State of Madhya Pradesh, (2006) 6 SCC 263.

mind and need to be reformed accordingly. Clothes and time cannot be a reason when it comes to male rape. Hopefully with this in mind these can also stop being the main reasons when it comes to female rape.

In the NALSA case Justice Radhakrishnan stated that safeguarding the rights of transgender people was especially called for due to the increasing universal recognition and acceptance of transgender issues and as recognition of one's gender identity lies at the heart of the right to dignity and freedom, it must be protected under Article 21 of the Constitution.¹⁹ Gender neutrality in Indian rape laws was first time dealt in *Sudesh Jhaku v. K.C. Jhaku*²⁰ wherein the court said that sexually assaulted men should be given the same protection of the law as given to female victims.²¹

It was only after this that the 172nd Law Commission Report recommended making rape laws unbiased. They then took form in the Criminal Law Amendment Bill, 2012. Before this bill could become an Act did the Delhi Gang rape case take place which we now know as the Nirbhaya case. It was only after this Justice Verma Committee made the reforms that needed to take place. These reforms were the adopted in the Criminal Law Amendment Act, 2013. In this rape did not just consist of penile-vaginal intercourse. This reform obviously backlashed and created a social stigma amongst the women who were already oppressed by male power. The latest development in this regard is the bill presented by Mr. KTS Tulsi which seeks to make rape laws gender-neutral which hasn't been passed yet and there is no such update even.

In the case of *Maneka Gandhi v. Union of India*, it was stated that equality is the faith and creed of our democratic republic and without it, neither the Constitution nor the laws made under it could reflect the common conscience of those who owe allegiance to them. And if they did not, they would fail to command respect and obedience without which any Constitution would be doomed to founder on the rocks of revolution.²²

How are reforms supposed to be made when the central government itself opposes the gender neutrality of rape laws? In a PIL filed by Advocate Sanjib Kumar filed a PIL at the Delhi High Court in 2017 he challenged the constitutionality of the rape laws under the Indian Penal Code. "Gender neutrality is a simple recognition of reality — men sometimes fall victim to the same or at least very similar acts to those suffered by women. 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." Kumar stated in his petition.²³ Men are denied

¹⁹ Supra, note 15

²⁰ *Sudesh Jhaku v KC Jhaku*, 1998 Cri LJ 2428.

²¹ <https://criminallawstudiesnluj.wordpress.com/2020/05/01/gender-neutral-rape-laws-need-of-the-hour/>

²² *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248

²³ <https://www.shethepeople.tv/news/central-govt-no-making-rape-laws-gender-neutral>

protection as the question of intention comes to play? Why will a woman want to rape a man? What will she gain by raping a man? Rape is an instrument of terror and domination. Why will a woman want to be in a dominant position and also can a woman be in a dominating position?

In the case of transgenders, one must acknowledge the fact that the right to choose one's identity is an essential right and the State is supposed to protect it under Article 21 of the Constitution. Various inhuman acts such as human trafficking and beggary are declared as an offence and punishable according to law. The scope of Article 23 of the Constitution of India is very wide as it includes within any form of discrimination which are forbidden. Immoral activities such as prostitution are usually seen down in the society. Everyone has a right to personal development, and this could be secured only when there exists a right against exploitation which creates a free environment for an individual. Transgenders are the worst victims of exploitation due to their degraded economic status they indulge into prostitution and other immoral activities and are usually seen as taboo by the society. Kerala High court has held that "The word 'penetrate' means in the Concise Oxford Dictionary, 'find access into or through, pass through.'" ²⁴

In *Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat*²⁵, it is observed that "Rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted". In *Machindra Vs Sajjan Galfa Rankhamb & Ors*²⁶ has stated that in criminal cases relating to offences against the human body, Medical evidence has a decisive role to play. Further, Madhya Pradesh High Court has also contended that 'Medical Evidence' has been accepted as being corroborative of the charge.²⁷

Most women take months to process the trauma that they have been through and the men take even longer. They take time to understand and process the trauma and hence the medical evidence doesn't come into play. The crimes are reported months after they take place. Rape Rakes their characters through the coals and speaks of 'attention' when women call out their attackers. Justifying rape makes you an enabler and a rape apologist. They will always find a way to blame the victim, they will always tend to gravitate towards the accused and they act fussy about why the victims speak at their own time. Rape culture is a culture where social attitude and institutional systems trivialise sexual assault as normal, thereby enabling sexual assault to be committed with more frequency and without consequence. Rape culture is a deep societal issue that combines serious problems because it does not help in eliminating sexual violence.

²⁴ State of Kerala v. Kudumkara Govindan, CriLJ 818 (1969)

²⁵ Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, (1983) 3 SCC 217

²⁶ Machindra v. Sajjan Galfa Rankhamb & Ors, (2017) 13 SCC 491

²⁷ Vinod Kumar V State of Madhya Pradesh, (1987) CrLJ 1541, 1543

There are various myths about male rape such as a male becomes a victim of sexual assault when he is forced to engage in unwanted sexual activity. Rape is not about sexual attraction but about the desire to overpower and hurt another person. Any individual can be forced to have sex against their will. Men can be physically stimulated without feeling aroused. In traumatic situations a man can feel unsafe in these painful sexual situations. Something so raw and intimate is not easily shared. It is up to the survivor to disclose the information. Survivors deserve more than being used as a political football by disinterested parties. A culture of acknowledging harm can't exist if we continue to view sexual violence as a catastrophic outlier rather than an embedded toxic element of our culture. The police do not provide resources to survivors, rape crisis centres do. The police systematically neglect survivor's cases and disregard their humanity in the name of 'catching the perpetrator', which they only do about one percent of the time.

Trauma is individualistic. What trauma may be for one many not be for another on and vice versa. One of the many reasons why we can't compare our trauma to the other's is that trauma overwhelms your own capacity to cope. It is not dependent on how others were similarly affected. Rape is never the survivor's fault. Yet it always them who is blamed in any scenario. One can equally argue that in the last two decades, our understanding of male rape and sexual assault has grown so "contested and outmoded" that images of male victims can no longer go unchallenged. Thus, drawing on wider perspectives not only assists our understanding of female rape, it is also essential in our understanding of how the legal process deals and should deal with male victims of rape and sexual assault.

On the basis of what we know of men's experiences of rape and sexual assault, along with the evidence that exists on how male sexual consent is constructed within the legal process, there appear to be similarities between male and female rape. In fact, there appears to be no current evidence to suggest that "gendered power relations" differ so greatly in male and female rape to justify the different legal labelling of those experiences by the criminal law. In the legal sphere, it would, of course, be naive to assume that notions of consent, submission, acquiescence, or agreement will be constructed in identical ways in all cases of male and female rape. There are likely to be differences, for example, because facts and defence tactics vary between cases, just as there are likely to be differences between cases where the victims are of the same gender.

It would appear that those opposed to gender neutrality within rape incorrectly assume that the concept means ignoring gender in rape and that the incidence and context of female rape cannot be considered relevant under gender neutrality. Significantly, the critics can provide no sources to support their claim. Rather, their views appear linked to a debate that has occurred between feminists who believe in formal equality—that is, gender neutrality—and those feminists who are critical of formal equality because it fails, they argue, to effectively address issues of social and gender inequality and, indeed, is positively harmful to women.

In *State of Punjab v. Gurmit Singh and Ors*²⁸ it was enunciated that, “We must remember that a rapist not only violates the victim’s privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault-it is often destructive of the whole personality of the victim”. In Art 13(1) of the Constitution provides that all laws in force at the commencement of the Constitution which clash with the exercise of the fundamental rights conferred by Part III of the Constitution shall, to that extent, be void. This has been reiterated in the case of *Keshavan Madhava Menon v. State of Bombay*²⁹. Hence, it must be declared unconstitutional to the extent that the laws are not gender neutral.

The Transgender Act sheds light on the offences and penalties related to transgender which includes the offence of sexual abuse. The punishment for rape or any kind of sexual abuse in accordance with the Transgender Act is very moderate and less in contract with the punishment under of Sec 376 of the Indian Penal Code, which applies to female victims of rape. This disparity in the punishments under both the Acts is a clear indication of the fact that the dignity and safety of Transgenders is not as imperative to the law makers of the country as the dignity and safety of cisgender people.

It was stated in the case of *Anita Kushwaha v. Pushap Sudan*³⁰ that, “Access to justice may as well be the facet of the right guaranteed under Article 14 of the Constitution which provides equality before law and equal protection of laws”. There are no equal protection of laws given to transgender people when the matter of sexual offences is under consideration. The Transgender Act gives a cap of punishment for 2 years to a transgender victim’s sexual abuser.

In a landmark case of *Ashby v. White*³¹, the Court observed, “When the law clothes a man with a right he must have means to vindicate and maintain it and remedy if he is injured in the exercise and enjoyment of it, and it is a vain thing to imagine a right without a remedy for want of right and want of remedy are reciprocal”. Taking reliance on the aforesaid case, the mere reason of according the Transgender with a third gender has given rise to ambiguity in regards to gender based laws. They have no remedy hence no right arises for them. This is a violation of transgender people’s right to equality under Article 14 and Article 15 of the Constitution.

In addition to all of the aforesaid elements, there subsists lack of affirmative action to help the transgender community. While the Bill prohibits discrimination, it does not explicitly include a definition of discrimination that covers the range of violations that Transgenders face. However, despite the Supreme Court in 2014 73 directing the government “to extend all kinds of

²⁸ State of Punjab v. Gurmit Singh and Ors,(1996) 2 SCC 384

²⁹ Justice KS Puttaswamy(Retd) v. Union of India (2017) 10 SCC 1

³⁰ Anita Khushwaha v. PushapSudan, (2016) 8 SCC 509

³¹ Ashby v. White, (1703) 92 ER 126

reservations in cases of admission in educational institutions and for public appointments” to transgender persons, the Bill does not contain any provisions related to affirmative action.

CONCLUSION

The definition of rape is currently limited to male/female sexual genital assault. That definition is out of step with the fact that male/male and male/female anal sexual assault occurs. A gender neutral approach, through a generic offence of unlawful sexual connection, would reflect reality and would be consistent with the positive trend in the reforms to use gender neutral language. Many forms of sexual offending are horrific. Any victim who has suffered a degrading form of abuse, but not penetration, should not be made to feel that what he or she has endured is less serious because it is not technically ‘rape’.

This article has focused primarily on male victimization, but many gender-neutral laws have recognized that women can also physically commit the act of rape. The traditional invisibility of these sexual assaults in law is reflected, in part, by a historic denial on the part of scholarship and court decisions that such assaults even occur. Understanding of sexual offending by women is growing; as such, legal discussion and analysis should take into account these new understandings. If we are to be a society that takes sexual violence seriously, then it is important we recognize all victims and perpetrators of rape. It is also of central importance to this process of recognition that sexual violence is correctly labeled by the criminal law. This can and should be achieved, while recognizing the fact that most victims are female and that there are important issues of gender to consider in understanding the causes of rape. It has yet to be convincingly argued, however, that these wider understandings should lead to the exclusion of male victims or transgender victims from the definition of rape.

The claim that gender neutrality does not allow for the examination of gender when discussing rape is not the purpose or the effect of gender neutrality within rape. In addition, some critics, relying either on misrepresentation of evidence or no evidence at all, seek to construct an “ideological projection” in which they claim gender neutrality harms women. If the critics were correct, and gender neutrality harmed women or meant the exclusion of issues of gender from discussions about rape, they would have a justifiable concern. In reality, it is difficult to imagine a responsible discussion of rape that does not consider all issues relating to gender and the realities of sexual violence faced by both women and men.

It is high time that the reality of sexual victimisation for all those who suffer its pain and degradation be our concern when defining criminal acts. The pursuit of theory has its place, but not at the cost of recognizing the reality of rape for all its victims.