

GENDER NEUTRAL LAWS- HOW NEEDFUL IN INDIA?

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AIR	All India Reporter
CrLJ	Criminal Law Journal
CrPC	Code of Criminal Procedure
Ed. (s)	Editor, or edited.
E.g.	'Exempli gratia', for example.
i.e.	that is
IPC	Indian Penal Code
SC	Supreme Court
Pvt. Ltd	Private Limited
TEX. L. REV.	Texas Law Review
<i>Ibid:</i>	Ibidem.
SCC:	Supreme Court Cases
<i>Supra:</i>	Above
Vs.:	Versus

CHAPTER 1

INTRODUCTION

1.1.Overview

Under Section 375 and 376 of the Indian Penal Code, only a man can be convicted of committing rape and the victim can only be a woman. Further, the laws relating to stalking, voyeurism and sexual harassment¹ are gender specific i.e. the perpetrator can only be a man while the victim can only be a woman. However, the law relating to throwing acid is gender neutral as the word used is 'Whoever'.²

The Indian law is based on the belief that a victim of rape can only be a woman. This arises from the assumption that rape is an act of sex alone³ to satisfy the sexual desire of the perpetrator. However, there is a growing awareness that sexual assault is not only an act of lust and desire but also a manner of showing dominance or superiority of one caste, class, religion, community over the other and are acts of power and humiliation⁴. If this is so, then there is no reason the male gender is excluded from being a rape victim in India. The researcher questions the present law as to why gender is the only identity that is taken care of while determining the perpetrator and the victim of a sexual assault. There are other identities on the basis of which division exists in society like caste, class, religion. Does gender surpass all of those identities? Or we need to see all of them in conjunction?

Another concern while determining what constitutes gender neutral is whether it constitutes only the set categories of the 'male body' and the 'female body'. We assume that human bodies are clearly either male or female⁵ and turn a blind eye to violence suffered by 'those who violate the normative understanding of what it means to be a man and a woman'⁶. We overlook the plight of the transgender community, which includes hijras and kothis in the Indian context and the intersex, a condition in which one's sexual organs are ambiguous.⁷

Section 376 of the IPC provides for situations of aggravated rape in cases where perpetrator is in a powerful or dominant position. Section 114A of the Indian Evidence Act 1872 as after

¹ The Criminal Law Amendment Act , Section 354 (2013)

² The Criminal Law Amendment Act , Section 326 (2013)

³Narrain, A. (2013). Violation of Bodily Integrity. *Economic and Political Weekly*, 48, (No. 11). Retrieved from <http://www.epw.in/commentary/violation-bodily-integrity.html> on January 5, 2014.

⁴ Ibid.

⁵Menon, N. (2013). *Seeing like a Feminist*. Zubaan and Penguin Books India Pvt. Ltd.

⁶ Ibid.

⁷ Ibid.

the Amendment⁸ has shifted the presumption to that of guilt if the woman in her evidence testifies that she did not consent in such a situation of aggravated rape. Again here, assuming that only women and no other identities can be dominated by persons in powerful positions is incorrect. We know that coercive sexual intercourse with men by men is covered under Section 377 of the IPC, as carnal intercourse going against the order of nature. One of the questions I seek to address in this paper is- why coercive men on men intercourse cannot be covered by the rape law? There must be a distinction between coercive and consensual homosexual sexual intercourse.

The Law Commission of India in its 172nd report has recommended that the rape law must be gender neutral.⁹ 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.¹⁰ Prima facie, it can be said that only a gender neutral rape law would result in equal protection of all identities. However, we must not forget the realities of the society we live in. It cannot be denied that the most vulnerable section of the population is women. There have been concerns that a gender neutral rape law, both for the perpetrator and the victim, may open up avenues for inflicting greater trauma and humiliation on women, already marginalised, and thereby would defeat the very purpose of the law.¹¹

1.2.Review of Literature:

Brownmiller (1975) opines that only men can coerce women into having sex.

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.

Agnes (2002) in her article in Economic and Political Weekly Journal writes “A gender-neutral rape law would open up avenues for inflicting even greater trauma and humiliation to an already marginalised section [women] and hence defeat the very purpose of reform.”

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”.

⁸ The Criminal Law (Amendment) Act, New Delhi: The Gazette of India (2013).

⁹ Agnes, F. (2002). Law, Ideology and Female Sexuality. *Economic and Political Weekly*,844-847.

¹⁰ Ibid.

¹¹ Ibid.

People's Union for Civil Liberties (2003) in its study of kothi and hijra sex workers in Bangalore has concluded that human rights violations against the transgender community are widespread and laws protecting them are urgently required.

Rumney (2007) expresses concern that effects of rape on male victims go unnoticed, and criticizes feminist critics of gender for ignoring male victimization.

Storr (2011) in his article in The Guardian has described his meeting with Ugandan survivors of sexual violence in times of war and has exposed the extent of male rape in war crimes.

Arvind Narain(2013) while commenting upon the Criminal Law Amendment Bill, 2013 in an article in The Economic and Political Weekly quotes 'There are no known instances in India where women have committed sexual assault upon men and the proposal to make sexual assault gender neutral in noncustodial situations is not based on any empirical evidence.'

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.

Justice Verma Committee report (2013) has suggested a gender inclusive law for the rape victim while retaining a gender specific law for the perpetrator.

Krishnan (2013), as reported in an article of The Hindu, 'Wanted: Gender Just Rape Laws', says that gender neutrality of rape laws will discourage women from even filing complaints.

Narrain (2013) in his article "Violation of Bodily Integrity", in The Economic and Political Weekly believes that the males, females and transgenders can be victims of sexual assault.

Nivedita Menon and various other feminists like Vrinda Grover, Kavita Krishnan, Farah Naqvi, Ayesha Kidwai(2013) demand neutrality with respect to the victim only and believe in 'Gender Just, Gender Sensitive, NOT Gender Neutral Rape Laws'

Kapur (2013) in her article in The Hindu advocates the deletion of section 377 for an effective gender neutral 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.

Vipra (2013) in his research paper has concluded that India is in need of gender neutral rape laws.

1.3.Statement of Problem:

This research paper tries to analyse the effectiveness of a gender neutral rape law specifically in the Indian context. The researcher has tried to answer the questions regarding-

- What constitutes gender neutral?
- What are the various dimensions of a gender neutral law?
- What are the views for and against gender neutral law?
- What are the effect and consequences of a gender neutral law?
- Is there a need for gender neutral law in situations of caste, communal conflicts, custodial and war crimes?
- Whether it must be completely gender neutral or as suggested by many a midway approach of only making the victim gender neutral must be adopted?

1.4.Research Methodology:

The research method followed by the researcher in this paper is “Deduction method”, also known as the top-down approach. The hypothesis will be tested after analysing and examining the opinions of various eminent scholars, lawyers, the reports by various committees, the judgments of the Supreme Court and the prevalent Indian conditions.

1.5.Object of the study:

The aim of undertaking this study is to assess the need to reform the rape law in context of India from a gender specific to a gender neutral law. Some major concerns in this respect which needs to be addressed are-

- What constitutes gender neutral
- Whether a gender neutral law would be detrimental to the most vulnerable section of the population, i.e. women
- Power differentials arising in custodial, communal, and war situations
- Whether the solution is to make it gender inclusive for the perpetrator only

1.7.Hypothesis:

1. There is an urgent need of addressing sexual violence against males and the transgender community.

2. Making the law completely gender neutral would harm the interests of the female rape victims. Therefore, a solution would be to make the law gender specific for the perpetrator and gender inclusive for the victim.
3. There must be a separate law for aggravated situations of caste, communal conflicts and war crimes.

1.6.Coverage and Scope:

This paper analyses the opinion of various eminent scholars, lawyers, the reports by various committees, the judgments of the Supreme Court and the prevalent Indian conditions.

1.7.Data Collection:

All the data collected are secondary data and are analysed as the study is qualitative/doctrinal in nature.

CHAPTER II

HISTORY OF RAPE LAW IN INDIA

This chapter shall trace the rape law reforms in India, from the 1980s to the recent 2013 amendments. It is important to understand the social context and the mind-set of the people in India before we jump on to the gender neutrality aspect of it.

The Indian women's movement has revolved around the agenda of reforms in rape law since the 1980s.¹² Women's groups have for a long time struggled to broaden the definition of rape.¹³ Before the 2013 amendments¹⁴, rape had been restricted to only penile-vaginal form of penetration.

The Mathura rape case¹⁵ is a landmark case in the history of Indian women's rights movement. The Supreme Court in this case held that Mathura, the girl who had been raped by three policemen, had submitted and given her consent to the sexual intercourse as there were no injuries of resistance found on her body. It was held that absence of injuries implies consent. After this infamous case, four law teachers wrote an Open Letter to the Chief Justice of India criticizing the case.¹⁶ This case sparked off a demand shifting the burden of proof regarding consent to the accused, once the prosecution had discharged its burden of proving sexual intercourse.¹⁷ Another demand made by activists was to hold in camera proceedings for rape trials and not to publish rape victim's name in the media.¹⁸ Another demand was to hold the victim's sexual history irrelevant for the purpose of deciding whether the offender is guilty of rape or not.¹⁹ This brought about significant amendments in the rape law.

¹² Supra note 9.

¹³ Sakshi vs. Union of India, AIR 2004 SC 3566. Retrieved from <http://www.indiankanoon.org/doc/1103956/> on January 7, 2014.

¹⁴ Supra note 8.

¹⁵ Tuka Ram And Anr vs State Of Maharashtra, 1979 AIR 185. Retrieved from <http://www.indiankanoon.org/doc/1092711/> on January 7, 2014.

¹⁶ Baxi, U., Dhagamvar, V., Kelkar, R., & Sarkar, L. (1979) An Open Letter to the Chief Justice of India. Retrieved from <http://pldindia.org/wp-content/uploads/2013/03/Open-Letter-to-CJI-in-the-Mathura-Rape-Case.pdf> on January 10, 2014.

¹⁷ Supra note 9.

¹⁸ Haskar N. (2005). Human Rights Lawyering, A Feminist Perspective. *Writing the Women's Movement, A reader*, 135, Zubaan and Penguin Books India Pvt. Ltd.

¹⁹ Supra note 9.

2.1. Law reforms

The Criminal Law (Amendment) Act of 1983

In 1983, the CrPC was amended to provide for in camera rape trials.²⁰ It also became an offence to disclose the identity of a rape victim.²¹ A provision for enhanced punishment was made for custodial situations under section 376(2) and presumption of the absence of consent in certain situations were made by adding section 114-A to the Indian Evidence Act, 1871.

The Indian Evidence (Amendment) Act of 2002

The Indian Evidence (Amendment) Act of 2002 prohibited the defence from putting questions in cross examination of the prosecutrix about her general moral character and sexual history.²²

Reports

The 172nd Law Commission Report recommended that the rape law must be gender neutral, both the victim and the offender. The Justice Verma Committee Report recommended a gender neutral law for the victim but a gender specific law for the offender. However, none of them were incorporated into the law of the land.

The Criminal Law Amendment Act 2013

The Delhi gang rape case led to significant changes in the Indian Penal Code regarding rape laws. The amendment introduced special provisions for acid attacks, sexual harassment, disrobing a woman, voyeurism, stalking and trafficking. The laws relating to stalking, voyeurism and sexual harassment²³ are all gender specific. The laws relating to throwing acid are gender neutral.²⁴

The definition of rape was broadened to not only include penile-vaginal penetration but oral, anal, and insertion of any object into the vagina, urethra or anus of a woman as well.²⁵ 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.

²⁰ The Criminal Law (Amendment) Act, Section 327 (1983)

²¹ Indian Penal Code, Section 228-A (1860).

²² Satish, M. (2013). Virginity and rape sentencing, Times of India, the crest ed., retrieved from <http://www.timescrest.com/society/virginity-and-rape-sentencing-9566> on January 8, 2014.

²³ The Criminal Law Amendment Act , Section 354 (2013)

²⁴ The Criminal Law Amendment Act , Section 326 (2013)

²⁵ The Criminal Law Amendment Act , Section 375 (2013)

²⁶ The Criminal Law Amendment Act , Section 376 (2013)

CHAPTER III

MEANING OF GENDER NEUTRALITY

The phrase ‘gender neutrality’ is ambiguous and as Arvind Narrain (2013) puts it, it “perhaps disguises more than it communicates”. Arvind Narrain (2013) gives three dimensions of gender neutrality-

- 1) Gender neutrality with respect to the victim
- 2) Neutrality with respect to the perpetrator
- 3) Neutrality in custodial, communal, war, and conflict situations

The present chapter would deal with the first and the second kind of gender neutrality. The third one would be dealt with in the next chapter.

3.1. Neutrality with respect to the victim

The word ‘victim’ has traditionally been understood to include only ‘a woman’. It is quite unfortunate that the Indian law on rape is still based on the belief that a victim of rape can only be a woman. This arises from the assumption that rape is an act of sex alone²⁷ to satisfy the sexual desire of the perpetrator. However, there is a growing awareness that sexual assault is not only an act of lust and desire but also a manner of showing dominance or superiority of one caste, class, religion, community over the other and are acts of power and humiliation²⁸. If this is so, then there is no reason the male gender is excluded from being a rape victim in India.

Further, the word ‘gender’ is widely understood to constitute only the set categories of the ‘male body’ and the ‘female body’. We assume that human bodies are clearly either male or female²⁹ and turn a blind eye to violence suffered by “those who violate the normative understanding of what it means to be a man and a woman”³⁰. We overlook the plight of the transgender community, which includes hijras and kothis in the Indian context and the intersex, a condition in which one’s sexual organs are ambiguous.³¹ Let us understand these two arguments in detail in the present section.

²⁷Supra note 3.

²⁸ Ibid.

²⁹ Supra note 5.

³⁰ Ibid.

³¹ Ibid.

3.1.1. The transgender community

There is ample historical and mythological evidence that India has always been home for the transgender community. In fact, the Hijra community in India trace their origins to myths in the Ramayana and the Mahabharata.³² Why is it, then, that they are barely recognized by the Indian law and denied rights as full citizens of the country?

‘Transgender’ is a term to describe “people who do not conform to traditional notions of gender identity, appearance and expression.”³³ It includes hijras, kothis, and trans-sexuals.³⁴ While some undergo surgical operations to transform into the opposite sex, others perform the role of the opposite sex³⁵. This diverse range of identities makes them vulnerable to sexual violence, according to Arvind Narrain (2013).

In India, various studies have documented the sexual and physical violence against transgender persons.³⁶ The Peoples' Union for Civil Liberties – Karnataka (PUCL-K) studied human rights violations against the transgender community in Bangalore. Its conclusions were shocking-

“Sexual violence is a constant, pervasive theme in all the narratives that we’ve collected in our report. Along with subjection to physical violence such as beatings and threats of disfigurement with acid bulbs, the sexuality of the hijra also becomes a target of prurient curiosity, at the least, which leads to brutal violence, at the most. As the narratives indicate, the police constantly degrade hijras by asking them sexual questions, feel up their breasts, strip them, and in some cases rape them. With or without the element of physical violence, such actions constitute a violation of the integrity and privacy of the very sexual being of the person.”³⁷

³²Narrain, S. (2003). Being a Eunuch. *The Frontline*, Retrieved from <http://www.countercurrents.org/gen-narrain141003.htm> on January 4, 2014.

³³ Appaji, PR. The Hijra and Kothi Movement; a struggle for respect. *Centre for Public Policy Research Initiative*. Retrieved from http://www.mindtext.org/view/118/The_Hijra_and_Kothi_Movement:_a_struggle_for_respect/ on January 2, 2014.

³⁴ Narrain, A. (2012). The Criminal Law (Amendment) Bill 2012: Sexual Assault as a Gender Neutral Offence. *Economic and Political Weekly*, 47, (No. 35). Retrieved from <http://www.epw.in/web-exclusives/criminal-law-amendment-bill-2012-sexual-assault-gender-neutral-offence.html> on January 6, 2014.

³⁵ Ibid.

³⁶ ‘Human Rights violations against the transgender community: A study of kothi and hijra sex workers in Bangalore, India’ (2003). People’s Union for Civil Liberties, Karnataka. Retrieved from <http://www.pucl.org/Topics/Gender/2004/transgender.htm> on January 3, 2014.

³⁷ Ibid.

They are routinely harassed by police and/ or assaulted under the garb of Section 377.³⁸ Section 377 of the Indian Penal Code criminalises "carnal intercourse against the order of nature with any man, woman or animal". The law, which has its origin in colonial times, in effect presumes that a hijra or a transgender, homosexual person is engaging in unnatural sex, thus making them vulnerable to police harassment and arrest.³⁹

3.1.2 Male on male rape

"I was raped by six drunk men. They verbally abused me for being a homosexual, and took turns filming the whole thing," he says. Confused, ashamed and angry, Vinodhan did not even seek medical help. "I thought everyone would blame me for hooking up," he says. "I did not know how the police would treat a gay man."⁴⁰ (Menon, P.)

In the US, male rape has been documented by a few organizations. Statistics show that in 2003 one in every ten rape victims was male.⁴¹ 2.78 million men in the U.S. have been victims of sexual assault or rape.⁴²

In India, coercive man on man sexual intercourse is covered under Section 377 of the IPC, as carnal intercourse going against the order of nature. It is indeed shocking, that in India, male on male rape is clubbed with voluntary sexual intercourse between homosexuals. There must be a distinction between coercive and consensual sexual intercourse.

The minimum punishment for rape, as after the Criminal Amendment Act 2013, is seven years while maximum is imprisonment for life⁴³. On the other hand, Section 377, which penalises coercive sexual intercourse between men, has prescribed no minimum punishment. When a minimum punishment is prescribed, it is assumed that the crime is a heinous one and, therefore, a minimum term of seven years is prescribed for rape.⁴⁴ There is no such

³⁸ Supra note 32.

³⁹ Ibid.

⁴⁰ Menon, P. (2013). Lacking support, male rape victims stay silent. *The Times of India*. Retrieved from http://articles.timesofindia.indiatimes.com/2013-02-16/chennai/37132653_1_gay-man-drunk-men-straight-men on January 12, 2014.

⁴¹ Catalano, S.M. (2003). National Crime Victimization Survey. *U.S. Department of Justice*. Retrieved from <http://www.bjs.gov/content/pub/pdf/cv03.pdf> on January 10, 2014.

⁴² Greenfeld, L. A. (1997). Sex Offenses and Offenders. *U.S. Bureau of Justice Statistics*. Retrieved from <http://bjs.gov/content/pub/pdf/SOO.PDF> on January 10, 2014.

⁴³ Indian Penal Code, Section 376, (1860).

⁴⁴ Gupta, T. S. Child Abuse. Retrieved from <http://www.sos-sexisme.org/english/IndiaChildAbuse.htm> on January 1, 2014.

presumption for male on male rape. Far from being considered as heinous, it is not even recognized as rape in India.

The three member Verma Committee⁴⁵ recommended that the victim be made gender inclusive, therefore, sexual assault on men, as well as homosexuals, transgendered and transsexual persons be covered by the rape law. Ratna Kapur (2013) advocates the deletion of section 377 for an effective gender neutral law. She writes that “Criminalising non-consensual sex regardless of gender can only work if sexual minorities are granted the right to have consensual sex in the first place⁴⁶.” It is feared that such a law is only likely to further harass the LGBT community.⁴⁷

Flavia Agnes (2013) considers the effectiveness of Section 377 in providing protection for homosexuals against violent attacks from either homosexual or heterosexual men and concludes that the law, at present, does not provide any protection to these marginalized communities.⁴⁸

Siddharth Narrain (2013) while addressing the plight of the rape victims who are not women puts forward a very pertinent question: “Who is to say that the sexual humiliation suffered by transgender persons and men, and by those intersex persons and sexual minorities not born women, is a lesser violation of the personal, inner space, a lesser injury to mind, spirit and sense of self?⁴⁹” Indeed, this holds true. The law, at present, takes away the rights of millions of transgenders, trans-sexuals, and sexual minorities.

⁴⁵ Report of the Committee on Amendments to Criminal Law (2013), retrieved from <http://nlrd.org/womens-rights-initiative/justice-verma-committee-report-download-full-report> on January 2, 2014.

⁴⁶ Kapur, R. (2013). The new sexual security regime. *The Hindu*. Retrieved from <http://www.thehindu.com/opinion/op-ed/the-new-sexual-security-regime/article4379317.ece> on January 3, 2014.

⁴⁷ Ibid.

⁴⁸ Supra note 9.

⁴⁹ Narrain, S. (2013). Crimes of Exclusion. *The Indian Express*. Retrieved from <http://www.indianexpress.com/news/crimes-of-exclusion/1094515/> on January 4, 2014.

3.2. Neutrality with respect to the perpetrator

While there is usually a consensus on making the victim gender inclusive, whether a female can be a perpetrator or not is widely debated. There are both, views for and against making female the perpetrator. This section analyses two kinds of rape:

- 1) Female on male rape
- 2) Female on female rape

The Law Commission of India in its 172nd report recommended that the rape law must be gender neutral.⁵⁰ The Criminal Law Amendment Ordinance 2013 made the offence of rape gender neutral. However, gender specificity was retained in the Amendment Act 2013.

3.2.1. Female on male rape

There are views both for and against making female the perpetrator in case of female on male rape. We shall discuss all of the diverse views in the present section.

Views against complete gender neutrality:

- 1) It is physically impossible for women to rape men.

Susan Brownmiller says “I think it is a biological impossibility”⁵¹ (Moore, S. 1975)

“I have doubts whether a woman can commit rape; the reason is that a man has to be aroused sexually to be able to have sex with a woman. If a woman tells a man that he must have sex with her, it won't work because the man will be so frightened and disorientated that he won't really be able to do it. Under that circumstance, the man won't be able to be in the proper physical mood to be able to have sex with the woman.”⁵² (Madukwe 2013)

This argument presumes that men are stronger, therefore they can commit rape and women cannot commit rape because it is physically and biologically impossible for a woman to commit rape.

⁵⁰ Supra note 9.

⁵¹ Moore, S. (1975). Rape is a crime not of power but of lust, argues Susan Brownmiller. *People*. Retrieved from <http://www.people.com/people/archive/article/0,,20065841,00.html> on January 7, 2014.

⁵² Madukwe, B. (2013). Can A Female Commit Rape? It's Difficult For A Man To Be Raped – Prof Itse Sagay. *Vanguard*. Retrieved from <http://www.vanguardngr.com/2013/04/can-a-female-commit-rape-its-difficult-for-a-man-to-be-raped-prof-itse-sagay/> on January 16, 2014.

2) “Real” men can defend themselves against rape.⁵³

“Rape became not only a male prerogative, but a man’s basic weapon of force against woman, the principal agent of his will and her fear. His forcible entry into her body, despite her physical protestations and struggle, became the vehicle of his victorious conquest over her being, the ultimate test of his superior strength, the triumph of his manhood.⁵⁴” (Brownmiller 1975, 14)

Agnes (2013) believes that rape is an expression of power and control by men over women.⁵⁵ Men are stronger, many believe, therefore, they must be able to defend themselves against rape. A man not able to defend himself is an absurd impossibility.

3) Does not reflect social reality

“There are no known instances in India where women have committed sexual assault upon men and the proposal to make sexual assault gender neutral in non-custodial situations is not based on any empirical evidence.⁵⁶” (Narain 2013)

Kavita Krishnan believes that women raping men is not a problem in society⁵⁷. Flavia Agnes (2002) emphasized that in the entire history not even one case of a woman raping a man has surfaced in India. This argument states that there have been no cases of women raping men. The law cannot be made gender neutral unless there is strong empirical evidence which shows that men have been raped by women.

4) Men and women experience sexual assault differently.

This argument’s premise is that since men and women are treated differently in our patriarchal society, the consequences and impact of sexual assault is also different on them. Therefore, we cannot have the same law governing both of them. Women have to face the social stigma. They are even scared to file a police report against the offender. The policemen do not miss this opportunity to mock and harass them. But it does not stop here. The doctor

⁵³Perera, A. (2013). Why a gender neutral anti-rape law isn’t anti-women, *The Firstpost*. Retrieved from http://www.firstpost.com/living/why-a-gender-neutral-anti-rape-law-isnt-anti-women-657065.html?utm_source=ref_article on January 9, 2014.

⁵⁴Brownmiller, S. (1975). *Against Our Will – Men, Women and Rape*. Penguin Books.

⁵⁵Divya (2010). Can a woman rape a man?, *The Times of India*. Retrieved from <http://timesofindia.indiatimes.com/home/stoi/Can-a-woman-rape-a-man/articleshow/5733229.cms> on January 5, 2014.

⁵⁶ Supra note 34.

⁵⁷ Supra note 53.

conducts the extremely humiliating two finger test. The society gets an opportunity to blame the victim- 'Why did she have to go out at night? She wore short clothes. She must have consented to it. She is a slut.' The remarks are endless. Her behaviour is analysed at every point of trial (Why is she not crying while giving testimony? She must be lying!). The judgments assert that rape is a matter of "deathless shame"⁵⁸. The society's so-called sympathy ("Ab is ladki se shaadi kaun karega? i.e., who will marry her?") towards the victim also results in lowering of the self-esteem of the victim. A woman has to face this social stigma. There are certain norms which she must follow. There are no such norms which regulate the behaviour of men. Therefore, a sexual assault affects the psychological state of a woman deeply. Men do not have to face this.

"The consequences of rape for a woman are far-reaching. She has to battle social stigma, social mind set. While fixing marriages, nobody asks a man if he is a virgin." (TNN 2012) - Flavia Agnes

5) Patriarchal society

Another argument given by people who do not support gender neutrality for women is that the status of women in India has been degrading over the years and the situation would only worsen if a gender neutral law comes into force⁵⁹.

A woman's virginity is always viewed as her most important asset. Women who engage in pre-marital sexual intercourse are considered immoral. In fact, even the judges of our country do not refrain from passing such remarks on the character of the victim. The two-finger test is a deeply invasive and humiliating procedure for rape victims⁶⁰. It is used to ascertain the sexual history of the victim and is still conducted by doctors on rape victims. A study showed that lower sentences were imposed on the offenders in cases where the medical report indicated that the woman had been sexually active before marriage⁶¹, even though the law prohibits past sexual history from being considered.⁶²

⁵⁸Madan Gopal Kakkad v. Naval Dubey, (1992) 3 SCC 204. Retrieved from <http://indiankanoon.org/doc/1314858/> on January 9, 2014.

⁵⁹ Supra note 9.

⁶⁰ Supra note 22.

⁶¹ Ibid.

⁶² Indian Evidence Act, (2003).

The court has the power to mitigate the sentence of a rape offender only in certain special circumstances.⁶³ These circumstances have not been laid down but judges give reasons like the offender has lost his job⁶⁴, suffered humiliation in society⁶⁵, the young age of the accused due to which “they could not overcome the fit of passion”⁶⁶, and the victim got married during the trial⁶⁷, therefore harm caused is less. These reasons have no rationale behind them and reinforce the patriarchal stereotypes of ‘Men will be men’, ‘the woman’s fault’, ‘marriage is the most important part of a woman’s life’ etc.

Unless and until, we shed these patriarchal stereotypes and sensitize the judges, police, society, the law must not be made gender neutral because men and women are not in the same position. As Fran Olsen puts it, it is pointless “to pretend that men and women are similarly situated.”⁶⁸

6) A gender neutral law will have negative consequences for female victims.

Flavia Agnes(2013) opines that “A gender-neutral rape law would open up avenues for inflicting even greater trauma and humiliation to an already marginalised section and hence defeat the very purpose of reform.”⁶⁹ Female victims would be pressurized to withdraw their cases as the offender would be able to file a counter complaint easily.⁷⁰ The female victims would be frightened to even file complaints. As many rapes go unreported already⁷¹, bringing about a gender neutral law would only discourage women from coming out in the open and filing complaints⁷².

⁶³ Supra note 22.

⁶⁴ Bharwada Bhoginbhai Hirjibhai v. State of Gujrat, (1983) 3 SCC 217. Retrieved from <http://indiankanoon.org/doc/207774/> on January 11, 2014.

⁶⁵ Ibid.

⁶⁶ Raju v State of Karnataka with Krishna v State of Karnataka, (1994) 1 SCC 453. Retrieved from <http://indiankanoon.org/doc/838870/> on January 12, 2014.

⁶⁷ Baldev v State of Punjab, AIR 2011 SC 1231. Retrieved from <http://www.manupatrafast.com/pers/Personalized.aspx> on January 20, 2014.

⁶⁸ Olsen, F. (1984). *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV.387, 412.

⁶⁹ Supra note 9.

⁷⁰ Perappadan, B. S. (2013). Wanted: Gender Just Rape Laws, *The Hindu*. Retrieved from <http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/wanted-genderjust-rape-laws/article4483445.ece> on January 10, 2014.

⁷¹ Rukmini (2013). India officially undercounts all crimes including rape, *The Hindu*. Retrieved from <http://www.thehindu.com/news/national/india-officially-undercounts-all-crimes-including-rape/article5121114.ece> on January 9, 2014.

⁷² Supra note 72.

7) New law for child sexual abuse

A new law, i.e. The Protection of Children from Sexual Offences Act, 2012, to protect children from sexual abuse has been brought about by the Parliament. Under the Act, a child is defined as any person below the age of 18 and is gender-neutral.⁷³ Therefore, this law shall cover all cases of child sexual abuse of young boys and girls.⁷⁴

These are the main arguments that supporters of gender specific laws give. However, they have been rebutted and criticized by many people all around the world. Now we shall analyse the validity of these criticisms.

Views for complete gender neutrality:

1) It is not physically impossible for women to rape men.

This is based on the presumption that rape includes only penile- vaginal penetration.⁷⁵ But the definition of rape is not, as hitherto, limited to penile-vaginal penetration anymore in India. It includes insertion of objects, oral and anal penetration as well⁷⁶. Secondly, even if it is penile-vaginal, it cannot be said that arousal, i.e. erection of the penis implies consent. This argument is based on various studies which have shown that anxiety, fear and humiliation can cause erection⁷⁷.

2) There have been cases of female on male rape.

This argument on one hand agrees to the fact that there have been more incidences of women getting raped, while at the same time they bring forth the fact that it happens to men as well- mostly by other men by sometimes by women as well.⁷⁸ There have been various surveys with sufficient empirical data to prove that women do rape men.

⁷³Tough law on sexual offences against children comes into force (2012). *The Hindu*. Retrieved from <http://www.thehindu.com/news/national/tough-law-on-sexual-offences-against-children-comes-into-force/article4095666.ece> on January 1, 2014.

⁷⁴ Menon, N. (2013). Gender Just, Gender Sensitive, NOT Gender Neutral Rape Laws. Retrieved from <http://kafila.org/2013/03/08/gender-just-gender-sensitive-not-gender-neutral-rape-laws/> on January 5, 2014.

⁷⁵ Vipra J. (2013). A case for gender neutral rape laws in India, *CCS working paper*. Retrieved from http://ccsinternship.files.wordpress.com/2013/05/286_case-for-gender-neutral-rape-laws-in-india_jaai-vipra.pdf on January 8, 2014.

⁷⁶ Criminal Law Amendment Act, Section 375 (2013)

⁷⁷ Sarrel, P. M., & Masters, W.H. (1982). Sexual molestation of men by women. *Archives of Sexual Behavior*, 11, no. 2, 117-131. Retrieved from <http://link.springer.com/article/10.1007%2F01541979#page-1> on January 8, 2014.

⁷⁸ Supra note 53.

“Victim surveys of British and American males have shown that 3 to 8 per cent of males reported at least one adulthood incidence of sexual assault in their lifetimes with at least 5 to 10 per cent of all rape victims being male. While the majority of these crimes are committed by male offenders, an estimated 6 to 15 per cent of these sexual assaults can involve female perpetrators⁷⁹” (Pino & Meier, 1990; Coxell & King, 1999) There has been growing recognition of male victimization all around the world. Jurisdictions that have adopted gender-neutral laws include: Canada, all Australian states, the Republic of Ireland, Finland, England and Wales, and the vast majority of states within the United States.⁸⁰

3) Right to equality

Part III of the Constitution guarantees fundamental rights to every citizen of India.⁸¹ Article 14 enshrines the right to equality before law and Article 15 provides for prohibition of discrimination on the grounds of sex. Men therefore must be entitled to the same rights as women. Even though male rape is a less frequent occurrence than female rape, they cannot be denied of the right to equality.

As noted by scholar Jocelyne Scutt:

“The principle of criminal law is, surely, that all persons should be protected equally from harm of like degree . . . The case for treating crimes of like heinousness similarly appears to be stronger than that calling for a distinction to be made between penetration of the female body and penetration of the male body, whatever the sex of the actor.”⁸²

4) Gender neutrality is not anti- women

Gender neutrality has been seen as against feminist principles and an attack on women activists⁸³. Feminists have criticized it as a ‘backlash against feminism’.⁸⁴ However, the answer to this question is that the recognition of male victimization does not in any way

⁷⁹ Ibid.

⁸⁰ Rumney, P. (2007). In Defence of Gender Neutrality Within Rape. *Seattle Journal of Social Justice*, 6, 481. Retrieved from <http://ssrn.com/abstract=1316252> on January 3, 2014.

⁸¹ The Constitution of India, (1950).

⁸² Rumney, P. (2007). In Defence of Gender Neutrality Within Rape (2007). *Seattle Journal of Social Justice*, Vol. 6, 481.(quoting Jocelyne A. Scutt, Reforming the Law of Rape: The Michigan Example, 50 AUSTL. L.J. 615, 616-17 (1976)). Retrieved from <http://ssrn.com/abstract=1316252> on January 3, 2014.

⁸³ Ibid.

⁸⁴ Novotny, P. (2003). Rape Victims in the (Gender) Neutral Zone: The Assimilation of Resistance?. *Seattle Journal of Social Justice*, 1, (Iss. 3, Article 62). Retrieved from <http://digitalcommons.law.seattleu.edu/sjsj/vol1/iss3/62/> on January 1, 2014.

undermine feminist understanding of rape. Various feminists have actually recognized male victimization.⁸⁵ For e.g., Susan Brownmiller in her *Against Our Will: Men, Women and Rape* has also suggested that the offence must not be bound by the victim's gender.⁸⁶ In essence, gender neutral laws does not make female victims more vulnerable but just acknowledges the existence of male victimization.⁸⁷

5) Consequences of male rape

The social stigma that women victims face is a harsh fact of reality in India. However, this is no reason to deny protection to the male victims of the same crime. There are different consequences and social stigma that men face as well.

If a man alleges that a female raped him, he is not seen as a 'real man' because of course, the stereotypical patriarchal assumption of 'men are superior and stronger to women' comes into play⁸⁸. The 'male domination' and the notion of patriarchy in fact is the very reason males do not come out of the closet to report rapes. Forman (1982) finds that about 90-95% of men who are raped do not report it⁸⁹. Therefore, men are even afraid of reporting rapes. Their masculinity is doubted upon⁹⁰; he is mocked and harassed by the society because he got himself 'raped by a female'. It is seen as his fault.

3.2.2. Female-on-female rape

In *State Govt. v. Sheodayal* (1956), Madhya Pradesh (M.P.) High court opined that modesty of a woman can be outraged by another woman under the purview of Section 354 of IPC.⁹¹

The question whether a woman can commit gang rape was dealt by the Supreme Court in the case of *Priya Patel v. State of M.P.*⁹². The language of section 376(2)(g) provides that 'whoever' commits gang rape shall be punished etc. Further, the explanation elucidates that

⁸⁵ Supra note 80.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ When men are raped. Ohio Department of health. Excerpt retrieved from <http://www.odh.ohio.gov/~media/ODH/ASSETS/Files/hprt/sexual%20assult/appendix182011.ashx> on January 6, 2014.

⁸⁹ Forman, B. D. (1982), Reported Male Rape. *Victimology: An International Journal*, 7, 235-236.

⁹⁰ Supra note 80.

⁹¹ Annavarapu, S. (2013). Heteronormativity and Rape: Mapping the construction of gender and sexuality in the rape legislations in India. *International Journal of Criminal Justice Sciences (IJCJS) – Official Journal of the South Asian Society of Criminology and Victimology (SASCV)*, ISSN: 0973-5089, 8 (2), 248–264. Retrieved from <http://www.sascv.org/ijcjs/pdfs/snehaijcs2013vol8issue2.pdf> on January 12, 2014.

⁹² *Priya Patel v. State of Madhya Pradesh*, (2006) 6 SCC 263. Retrieved from <http://www.manupatrafast.com/pers/Personalized.aspx> on January 12, 2014.

when a woman is raped by one or more in a group of persons acting in furtherance of their common intention each such person shall be deemed to have committed gang rape. Therefore, technically the act of penetration is not required to be performed by each member of the group. Rather, the presence of 'common intention' is sufficient for a person to be convicted of gang rape. However, the court held that a woman cannot have an intention to commit rape. Consequently, it is inconceivable that a woman can rape another woman.⁹³ This logic is substantially flawed because the section requires the presence of common intention only. Why cannot a woman have common intention to rape another woman, even if we assume that it is physically impossible for her to rape?

While the issue of whether a female can rape a male has been widely discussed and debated in the public domain, scholars and activists in India have largely remained silent on this facet of gender neutrality.

⁹³ Ibid.

CHAPTER IV

SEXUAL VIOLENCE IN SPECIAL SITUATIONS

Rape has often been used as an instrument of terror and domination in situations of caste, class and communal conflicts, and custodial. It is important to know why these special situations must not be equated with the normal situation. The answer to this question is that a person has many identities. Apart from being a male, female, or a queer, he/she is also a part of a particular religion, race, and a certain caste or community.⁹⁴ In a normal situation, or a non- aggravated act, gender is the identity on the basis of which the perpetrator and the victim is determined. However, in the extraordinary situations of war, conflicts and custodial, the gender of the perpetrator becomes irrelevant as the caste, race, or religious identity becomes the dominant identity.⁹⁵ In this section, we shall look at sexual violence in all of these situations in detail.

4.1. War crimes

Sexual violence against men in war times and conflict situations is a global and dreadful problem. It is one of the most horrifying tools of terror used not only against women but also against men.⁹⁶ It has been contended by various scholars that the assaults are not acts of sex alone but acts of power and humiliation.⁹⁷

Lara Stemple in her study, *Male Rape and Human Rights* observes sexual violence inflicted upon male during times of war in countries such as Chile, Greece, Croatia, Iran, Kuwait, the former Soviet Union and the former Yugoslavia.⁹⁸ It was found that “twenty-one per cent of Sri Lankan males at a London torture treatment centre reported sexual abuse while in detention. In El Salvador, 76% of male political prisoners surveyed in the 1980s described at least one incidence of sexual torture. A study of 6,000 concentration-camp inmates in Sarajevo found that 80% of men reported having been raped.⁹⁹” British Journalist, Will Storr brings forth how male rape is widespread in many conflicts around the world.¹⁰⁰ He travelled

⁹⁴ Supra note 5.

⁹⁵ Supra note 34.

⁹⁶ Storr, W. (2011). *The Rape of Men: the darkest secret of war*, *The Observer*. Retrieved from <http://www.theguardian.com/society/2011/jul/17/the-rape-of-men> on January 12, 2014.

⁹⁷ Supra note 3.

⁹⁸ Rauhala, E. (2011). *Rape as a weapon of war: Men suffer too*. Retrieved from <http://world.time.com/2011/08/03/rape-as-a-weapon-of-war-men-suffer-too/> on January 12, 2014.

⁹⁹ Supra note 96.

¹⁰⁰ Supra note 98.

to Congo and met a refugee who was raped three times a day, every day, for three years.¹⁰¹ In the case of Prosecutor v. Dule, the International Criminal Tribunal of Yugoslavia recognized that men are victims of rape in war time situations.¹⁰²

Shame and stigma surrounds male rape. They are assumed to be gay, their ‘manhood’ is questioned upon, their wives and families often leave them¹⁰³, and they are taken lightly by the society. As Will Storr puts it “Before receiving help from the RLP, one man went to see his local doctor. He told him he had been raped four times, that he was injured and depressed and his wife had threatened to leave him. The doctor gave him a Panadol.¹⁰⁴”

4.2. Caste and communal conflicts

The Khairlanji massacre in Maharashtra involved brutal sexual violence against the Bhotmange family as described below:

“Four members of the households Surekha (44, the mother), Priyanka (18, daughter), Roshan and Sudhir (23, 21, sons, one of whom was blind) were dragged out of their household by a mob of about 40 people, which included women. They were beaten mercilessly, were stripped naked and paraded through the village streets to the main choupal of the village. As can be imagined, both the women were gang raped by all the men of the village. Brutality saw its height when the brothers were asked to do the same to their sister. The stunned boys refused to do this and as a punishment, their penises were cut off.¹⁰⁵”

Further, women have been found to be active participants and perpetrators of sexual assault in communal riots.¹⁰⁶ In the Gujrat riots of 2002, Hindu Gujarati women were accomplices in some serious crimes committed against the Muslim community.¹⁰⁷

¹⁰¹ Supra note 96.

¹⁰² Supra note 3.

¹⁰³ Supra note 96.

¹⁰⁴ Ibid.

¹⁰⁵ Khairlanji Massacre, A collection of reports, A VJAS Press Release. Retrieved from <http://www.sabrang.com/kherlanji/reports.pdf> on January 12, 2014.

¹⁰⁶ Sarkar, T., & Butalia U.(1995). *Women and the Hindu Right, A collection of essays*, Kali for Women, 3, New Delhi.

¹⁰⁷ Ibid.

4.3. Custodial Situations

In a report¹⁰⁸ highlighting the problems of under trial prisoners in India, it was noted that homosexual gang rapes were common in Indian prisons. It observed that apart from spread of HIV Aids and various other infections, it is a traumatic experience for prisoners and leads them to commit suicides. Recently, Delhi gang rape accused, Ram Singh who was found hanging in his prison, claimed that other male prisoners raped him.¹⁰⁹ As reported by the Bureau of Justice Statistics (BJS), nearly one in 10 prisoners were raped or sexually assaulted in the US.¹¹⁰

Kumar, G. P. (2013) in his article in The Firstpost writes what The People's Union of Civil Liberties said about Tihar way back in 1981:

“When a young boy enters, the prisoners have been known to have bid a price for the boy. The price offered is in terms of 'bidis', soap or charas. Often prisoners have been divided into camps and the groups have fought each other on the issue of who shall have the new entrant.”

¹⁰⁸ Sreekumar, R. (1992). Access to Justice for under trial Prisoners: Problems and Solutions. Retrieved from <http://www.humanrightsinitiative.org/artres/Access%20to%20Justice%20for%20Undetrial%20Prisoners.pdf> on January 12, 2014.

¹⁰⁹ Kumar, G.P. (2013). Ram Singh's death: Rape and ugly sexual violence in Indian jails, *The Firstpost*. Retrieved from <http://www.firstpost.com/india/ram-singhs-death-rape-and-ugly-sexual-violence-in-indian-jails-657071.html> on January 12, 2014.

¹¹⁰ Rahman, F. (2013) Rape behind prison bars, *Live Mint and the Wall Street Journal*. Retrieved from <http://www.livemint.com/Opinion/BzOQYSLEsQ9YrXmcbipwrN/Rape-behind-prison-bars.html> on January 12, 2014.

CHAPTER V

CONCLUSION AND RECOMMENDATIONS

In summary, the researcher has tried to examine the need for a gender neutral rape law in India. The first chapter gives an overview of the research paper along with the questions the researcher tries to answer, the research method adopted and the hypothesis. The second chapter has traced the rape law reforms that have taken place in India. The third chapter of the research paper discusses the various aspects of a gender neutral law.

The first aspect, i.e. Gender neutrality with respect to the victim, highlights the extent and prevalence of male and transgender sexual violence in India. It can be concluded that the existence of male and transgender rape in India, especially male-on-male rape cannot be denied. This verifies the first hypothesis of this paper- 'There is an urgent need of addressing sexual violence against males and the transgender community.'

The chapter further goes on to discuss the conflicting views on complete gender neutrality for the perpetrator and victim both. The most prominent view against complete gender neutrality is the patriarchal mind set of the Indian society and the negative consequences for female victims that it might lead to. On the contrary, the supporters of complete gender neutrality rely on the argument of right to equality and the social stigma that surrounds male rape. After analysing both the sides, the researcher has come to the conclusion that while sexual violence against males and transgender must be addressed, it must not create a detrimental environment for female victims for rape. We must strive to create an equal society and must move in the direction of achieving gender neutral laws. However, taking into account the situation and treatment of women in India at present, it would not be wise to drastically change the rape laws into gender neutral laws. We must adopt a step-by-step approach. Therefore, as recommended by the Verma Committee¹¹¹, the rape law must be amended to make the victim gender inclusive while the perpetrator remains gender specific. This verifies the second hypothesis- 'Making the law completely gender neutral would harm the interests of the female rape victims. Therefore, a solution would be to make the law gender specific for the perpetrator and gender inclusive for the victim.'

Sexual violence in special situations of war crimes, prisons and caste, communal conflicts has been dealt with in the fourth chapter. The chapter concludes that the gender identity becomes irrelevant in such cases as other identities of religion, caste and race becomes the dominant

¹¹¹ Supra note 45.

identity¹¹². The researcher feels that at least in cases of caste, communal conflicts and war crimes, women must be recognized as perpetrators in cases of gang rape and abetment to rape. Further, measures to protect male victims from homosexual rape in prisons must be taken urgently. Thus the third hypothesis- 'There must be a separate law for aggravated situations of caste, communal conflicts and war crimes' stands verified.

Thus, the conclusions and recommendations can be summarised as follows-

- 1) The existence of male and transgender rape in India cannot be denied.
- 2) The direction towards which we must strive to move is gender neutral laws for rape.
- 3) However, the fear of the law being misused creates a complex situation. Here, we must try to balance the rights of all identities. It is clear that we require a law which on the one hand protects all identities, i.e., men, women and the transgender community against sexual violence, and on the other does not create a detrimental environment for the most vulnerable section of the society, 'women'.
- 4) Justice Verma Committee Report suggested a midway solution to make the victim gender inclusive while the perpetrator remains gender specific.¹¹³ This is the way to go for India. This ensures protection of the transgender community and male victims from homosexual rape. At the same time, the fear of counter complaints and prejudice against women does not come into play. As various feminists, queer groups and individuals put it, the law must be "Gender Just, Gender Sensitive, NOT Gender Neutral Rape Laws¹¹⁴".
- 5) The need of the hour is to have gender neutral laws in caste and communal conflicts. All other identities that a person is associated with surpass the gender identity in such situations. As for custodial sexual violence, it must be recognized that homosexual rape is a norm in Indian prisons and justice must be meted out to the victims.
- 6) The perpetrator must be inclusive of a woman in cases of gang rape and abetment to rape. At the least, in situations of aggravated forms of rape, as in war crimes, caste and communal conflicts, women must be included as perpetrators in cases of gang rape and abetment to rape.

¹¹² Supra note 34.

¹¹³ Supra note 45.

¹¹⁴ Supra note 74.

7) Section 377 must be read down to decriminalise homosexuality for an effective gender neutral or a partly gender neutral law. As Kapur (2013) suggests:

“Criminalising non-consensual sex regardless of gender can only work if sexual minorities are granted the right to have consensual sex in the first place. Otherwise, such a provision is likely to be applied to further harass sexual minorities who are not recognised as citizens entitled to rights, but continue to be viewed through the lens of contamination and deviancy, to be criminalised and stigmatised.¹¹⁵”

¹¹⁵ Supra note 46.

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