



RAPE LAWS IN INDIA: LIMITED, CONSERVATIVE AND DEVOID OF GENDER-NEUTRALITY

Divya Sharma & Lokesh Bishnoi*

ABSTRACT

Rape is a crime not only against the body but also the soul. There no single part of the country that has not witnessed this heinous crime. Time and again, the judiciary has heard several cases that have brought in light the various dimensions of this offense. However, they have still failed to consider two very significant branches emanating from this offense, namely, marital rape and gender-neutrality in rape laws. The authors have made an attempt to study in-depth the reasons behind the marital rape exception and the lack of gender neutrality in rape laws.

Moreover, the article discusses the various cases where the court has addressed these issues and how the legislature has not come up with a substantial law regarding the same. The authors, through this article, have tried to analyze the premise on which the argument of marital rape and gender neutrality has been made. The article focuses on ignorance of administration towards age-old patriarchy, stereotypical outlook towards crimes, stigmatization of victims, and the tendency of adhering to conservative definitions of laws. We have addressed the need to focus on the new aspect and facets of laws present and to ensure that laws are not made gender-specific. In this article, we have aimed at looking deep into the status quo of the rape laws, the premise on which they are based, and the need to bring adequate reforms in them. We have analyzed why the security and justice system has not been successful in protecting women and girls, and worse, failed to even address the crime of rape against men. We have emphasized the need to reform, under law, the patriarchal system which leads to never-ending misogyny defines social gender roles, rationalizes many forms of violence against women and creates stereotypical definition of masculinity due which crime against men are being overlooked.

* Students, National Law University, Jodhpur.

INTRODUCTION

The cases of gender-based violence have seen a horrifying rise. The cases categorized are rapes, acid attacks, dowry deaths, domestic violence, eve-teasing, and murder. Although crimes based on gender are not specific to any country, India has a distinct place in regards to endemic forms of Gender-based violence. Despite constant efforts by commissions, activists, and even the law-making authorities, the crimes have not seen a decline. On the contrary, the increase in the same has been unprecedented.

India has a history of gender-based violence. From JC Bose rape case¹ to Priyanka Reddy's brutal rape, Laxmi Agarwal vs. Union of India² and many others which are 'forgotten,' or haven't been brutal enough to make a space in our memory, India has seen an ascend in such heinous crimes. But what is worse than the increase in these crimes is the reality that many victims do not even have a legal remedy. With the course of time, not the laws but the crimes have become gender-neutral. We not only have women facing such atrocities, but we also have men being subjected to sexual harassment or 'rape,' which is not even recognized in I.P.C. Another crime that lacks adequate legal recognition is marital rape.

There is an urgent need to address the issues that have been overlooked. Rape statistics in India have been horrific enough to make the commentator's name Delhi as the 'Rape Capital.' And the numbers that have given this tag to the city don't even include the statistics of male rape. Moreover, while we indulge in praising the low divorce rates in India, we overlook the rate of domestic violence and the need to address marital rape as a crime. In order to fight these endemically horrific crimes, we need to address the flaws in the socio-political system we live in and the loopholes in the Indian criminal justice system.

¹ Bhanu Pratap Singh, "*JC Bose Gang Rape case: 8 sent to jail for 10 years*", The Times of India, October 27 2012.

² Laxmi Agarwal vs. Union of India (2014) 4 SCC 427.

MARITAL RAPE: AN EXEMPTION ROBING WOMEN OF THEIR RIGHTS

Section 375, I.P.C., 1860, defines rape as follows:

A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under the circumstances falling under any of the six following descriptions: —

(First) — Against her will.

(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 sixteen years of age. Explanation. — Penetration is sufficient to constitute the sexual intercourse necessary to the offense of rape.”³

Thus, Section 375 describes the conditions that make an act rape. However, this act has an exception, which reads, “Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape.” And thus, marital rape is not considered a crime. Shockingly, phrases like “against her will” and “without her consent” seem to lose their value in regards to compelled sexual intercourse with the wife.

Laws regarding marital rape in India have a limited and inadequate ambit. I.P.C. keeps marital rape as an exception and considers it as an offense only if the wife is below the age of

³ Indian Penal Code, 1860§375.

15 years.⁴ Thus, there is no lawful security provided, against forced sexual intercourse, to a wife after the age of 15 years, which is against the human rights directions.

The Patriarchal system in society has always treated women as an unimportant property of her significant other or maybe guardian. And therefore, rape was just considered theft of ladies from their 'owners,' and this belief has affected our law-making authorities in not considering the offense of spousal rape. Sexual intercourse has thus been seen as a husband's wedding right or privilege.⁵ Such an approach has reduced women as a mere protest of her husband's sexual satisfaction, disregarding her entitlement to uniformity and equity.

This ideology can be traced back to Sir Matthew Hale's explanation as to why marital rape is not an offense. He gave various justifications for the same. In this article, we would critically analyze the justifications given by him. The justifications entailed the following; The contract theory which treats marriage as an agreement between a man and a woman, wherein intercourse is a clause a woman agrees to as soon as she marries, the consent theory which postulates that consent to marry is also a consent to indulge in sexual intercourse, proof problems in showing lack of consent and fear of false accusations.

Hale has stated that the institution of marriage indicated an irrevocable consent on the part of the wife for the physical relations. This argument forms the fulcrum for the legislation existing even today.⁶ As sexual intercourse forms an integral part of marriage, the consent for marriage also acts as consent for sexual intercourse. And thus, a husband is not required to obtain fresh consent for sexual intercourse every time, and the demand for sexual intercourse has been called a husband's marital right.⁷ However, these justifications were given when marriage was considered as an irrevocable contract, which is not the truth today. However, the justifications still seem to hold water for the legislature.

Marriage is an institution way beyond mere sexual intercourse. It is a bond created out of love and trust that forms the base of human relationships. Rape, within marriage, not only violates a woman's body and her right over it but also violates the trust she invests in the marriage. Marital rape not only has a physical impact on the woman but also leaves mental

⁴ *Id.*

⁵ F. POLLOCK & F. MAITLAND, "THE HISTORY OF ENGLISH LAW", (1968).

⁶ M. HALE, PLEAS OF THE CROWN, 629 (1847).

⁷ *State v. Smith*, 148 N.J., 372 A.2d 386 (1977), 82 DICK. L. Rev. 608, 610 (1978).

scars, which have been overlooked by legislations. In a marriage, a woman consents for companionship, trust, cohabitation, and above all, seeks protection by the spouse. However, listing marital rape as an exception misinterprets not only the idea of consent but also ignores the violation of trust and sanctity in marriage. This issue was well addressed by Delhi High court in *R.I.T. foundation v. Union of India*.⁸ The bench constituting Acting Chief Justice Gita Mittal and C Hari Shankar observed that "Marriage does not mean that the woman is all time ready, willing and consenting (for establishing physical relations). The man will have to prove that she was a consenting party," Thus, consent for marriage cannot be considered as consent for all sexual intercourses to follow. A man should be held responsible for not considering the partner's consent.

Moreover, presuming consent of marriage as consent to all sexual intercourse brings into picture the concept of prolonging and implied consent. Through various judgments, the judiciary has made it clear that sexual intercourse is considered consensual only if there is an "unequivocal" communication from the woman. Explanation 2 of Section 375 defines consent as "*an unequivocal voluntary agreement when she, by words, gestures or any form of verbal or non-verbal communication, communicates a willingness to participate in the specific sexual act.*"⁹ Those who argue the consent to marry to be the consent for all sexual intercourse tend to ignore the word 'specific' given in the explanation. In case of rape, a woman's consent for any past flirtations or sexual activity cannot be considered as consent for all sexual activities ever to follow. Thus, the judiciary has, time and again, emphasized the need for a fresh consent for every 'specific' sexual act. Why does this principle fail to make any place in the institution of marriage? Therefore, the marital rape exemption seeks to violate the very basic concept of consent and thus very much constitutes to be rape as described by Section 375, according to the first and second conditions.

Among other justifications given by Hale is the 'proof problem in showing a lack of consent.' He argues that the biggest obstacle in marital rape is proving a lack of consent on the part of the wife. This argument is based on two assumptions; first, as discussed, the consent of marriage as consent to sexual intercourse and second that resistance on the part of the wife is

⁸ Writ petition (Civil) No. 382 of 2013.

⁹ *Supra* note 1.

difficult to prove. But while this 'lack of consent' dilemma acts as a major issue, what is more, challenge is to overcome the judiciary's predisposition to doubt a marital rape charge and not in the unavailability of evidence.¹⁰ For this predisposition to be disproved, the judiciary demands signs of physical injury, resistance as corroborative evidence. This restricted outlook on how a lack of evidence can be proved ignores various other situations under which rape can be committed in a marriage. The Delhi High Court, while hearing petitions on making marital rape an offense, has observed that physical force is not necessary for rape as a man could bring her wife under financial pressure to force her for sex."Force is not a pre-condition of rape. If a man puts his wife under financial constraint and says, he will not give her money for household and kids expenses unless she indulges in sex with him, and she has to do it under this threat. Later, she filed a rape case against the husband, what will happen," the court said.¹¹It cannot be strictly presumed that force will always precede rape. In relation to emotions or institution of marriage to be precise, force is not the only way in which a woman can be made to indulge in sexual intercourse against her will. And thus, courts should consider other dimensions of marital rape.

The issue of proving lack of consent can also be seen as a result of posing the entire burden of proof on the victim. This is one main factor that has prevented rape victims from having the court rule in their favor, or sometimes even worse, preventing them from even reaching the court. The entire burden was on the woman to show that she did not consent for the sexual intercourse in question. However, in the case of *Karnel v. the State of M.P.*¹², the court held that in a rape case, a woman should not be treated as an accomplice in the crime but as a victim. Her testimony, as a victim, should not be treated with the same suspicion as that of the offender.¹³ Rape is now one of those few offenses, where the burden of proof lies on the defendant to prove that the consent of the woman existed. As this burden has been shifted to the defendant for unmarried rape victims, it will be just to shift the same in case of marital

¹⁰ One commentator suggests that the predisposition of juries to doubt a woman charging her husband with rape is a more difficult obstacle than proving no consent. Griffin, In Forty-Four States, It's Legal To Rape Your Wife, Student Law, Sept., 1980, at 57.

¹¹ *Supra* note 6.

¹² *Karnel v. State of MP* 1995 SCC (5) 518.

¹³ *Id.*

rape as well. Instead of treating a married woman with suspicion, she should be treated as any other rape victim who has suffered physical and mental violation.

Even if the burden of proof is shifted in marital rape cases, there will be another problem to be addressed, i.e., believing the woman's testimony over her husband's. In an unmarried woman's rape, the court has, several times, questioned a lack of consent owing to the woman's sexual history with the man. In cases of marital rape, the issue aggravates as the woman, in most cases, has had a sexual history with the husband, and thus the court inclines towards presuming consent. This presumption has been discussed in detail in the case of *Haryana v. Prem Chand*.¹⁴ In this case, the Supreme Court heard the appeal filed by the appellants. It held that a woman's sexual history, character, or any conduct of the past could not be used to determine the veracity of her testimony. This principle also found its place in the books of law after the infamous Delhi gang-rape case of 2012. The 2013 Criminal law (amendment) bill, passed after *Mukesh & Anr vs. State for N.C.T. of Delhi & Ors*.¹⁵, de-recognized the victim's sexual history and presumed a lack of consent in rape cases, thus establishing an objective standard for determining consent.¹⁶ Therefore, there is a need for the legislature and the judiciary to treat a marital Rape victim similarly and stop hitching the perpetrator with the victim to neglect the severity of the offense.

In 2005, the Protection of women from Domestic violence act was passed, which considered marital rape to be a part of local violence. The act pushes out marital rape from the very ambit of Section 375. According to the act, in case of marital rape, a woman can resort to court to demand partition from the husband. For a crime that not only hurts the body but also damages the trust in the holy relation of marriage, it is being reduced to an act of physical violence. The severity of the offense being overlooked by the legislature and the court is unacceptable. The fundamental premise of these laws is that when a woman agrees to be a part of a marriage, she also consents for all sexual intercourse to follow. So, does that mean consent to have sexual intercourse once, with a person, counts as consent forever? Is marriage a permit to rape?

¹⁴ *Haryana v. Prem Chand* 1990 AIR 538.

¹⁵ *Mukesh & Anr vs. State for NCT of Delhi & Ors* (2017) 6 SCC 1 : (2017) 2 SCC (Cri) 673].

¹⁶ Criminal Law Amendment Act, 2013, §375 (2013).

RAPE LAWS IN INDIA: LIMITED, CONSERVATIVE AND DEVOID OF GENDER-NEUTRALITY

A lingering question regarding the matter of marital rape is that how it is expected from a woman to ensure her right to life and freedom while the law does not allow her to ensure her right to her body in marriage. Marital rape is a clear infringement of a woman's right to live with human dignity.¹⁷ It was in the case of *Francis Coraille Muin v. The union territory of Delhi*¹⁸, that idea of Right to life under Article 21, was highlighted. It was held in this case that article 21 also incorporates the right to live with human dignity and all that accompanies it. The Supreme Court has held in a plethora of cases that rape abuses and violates the right to live with the human dignity of the victim. However, the court seems to unequivocally disregard the Human dignity of women if she is married, and the rape is committed by the spouse. In cases like *Bodhisattwa Gautam v. Subhra Chakraborty*,¹⁹ the court held that rape is not only a sexual offense but also a demonstration of hostility. Therefore, the marital rape exception violated the right to live with the human dignity of a spouse and empowers a husband to indulge in sexual intercourse against her will, as a matter of right.

NON-RECOGNITION OF MARITAL RAPE: A VIOLATION OF THE CONSTITUTION

In addition to the violation of the Right to live with Human dignity, marital rape also blatantly abuses the Right to Bodily self-determination. Although the constitution does not explicitly talk about this right, this exists in the bigger ambit of Article 21. The idea of this right rests on the belief that an individual is a chief in matters mainly related to his/her body or prosperity. This right pertains to the most private of matters as one's control over one's body. The Supreme court, in the case of *State of Maharashtra v. Madhukar Narayan Mandikar*,²⁰ has accepted the fact that one has security over his/her body. But it is unfortunate how the court has still kept spouses out of this ambit. A woman has right over her body, but only if subjected to rape by a stranger while it is perfectly acceptable for a husband to violate the same in the name of marriage. There is a need for the courts to understand that rape does not reduce to anything if the victim is hitched to the attacker.

¹⁷INDIA CONST., art. 21.

¹⁸Francis Coraille Muin v. Union territory of Delhi 1981 AIR 746, 1981 SCR (2) 516.

¹⁹Bodhisattwa Gautam v. Subhra Chakraborty 1996 AIR 922, 1996 SCC (1) 490.

²⁰ *State of Maharashtra v. Madhukar Narayan Mandikar* AIR 1991 SC 207.

JS Verma Committee report also stood incongruence to this idea and recommended that Marital Rape as an exception should be removed, and marriage should not be considered as a prolonging act of irrevocable consent.²¹ Therefore, in a case of whether a sexual activity happened with or without consent, it should not consider the relationship between people as an excuse. However, the recommendations on Marital rape were not accepted or worked upon.

This issue was further raised in a petition filed by the R.I.T. foundation and All India Democratic Women's Association. An argument was raised by N.G.O. Men welfare trust that to constitute an offense of rape, the force has to be proved. Delhi High court heard this matter in-depth, taking into consideration all aspects. The court observed that force is not a critical pre-condition for rape.²² The court also held that a marriage does not act as a permit for sexual activity and cannot amount to consent for all physical activity.

More so, Article 14 of the Constitution guarantees the fundamental right 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."²³ Article 14, therefore, protects a person from State discrimination. But the exception under Section 375 of the Indian Penal Code, 1860, discriminates with a wife when it comes to protection from rape. Thus, it can be deduced that to this effect, the exception provided under Section 375 of the Indian Penal Code, 1860, is not a reasonable classification and, thus, violates the protection guaranteed under Article 14 of the Constitution. Protection of the dignity of women is a fundamental duty under the Constitution, casting a duty upon every citizen "to renounce practices derogatory to the dignity of a woman"²⁴; it seems that domestic violence and marital rape do not come under the definition of dignity.

While hearing a case against a man, accused of forcing his wife for unnatural sex, additional sessions judge Kamini Lau opined that "non-recognition of marital rape in India, a nation set upon the bedrock of equality, is gross double standard and hypocrisy in law which is central to the subordination and subjugation of women."²⁵

²¹ Justice J.S Verma, Justice Leila Seth, *Report of the Committee on Amendments to Criminal Law* (2013).

²² *Supra* note 6.

²³ INDIAN CONST., art. 14.

²⁴ INDIAN CONST., art. 51, cl. a, sub cl.e.

²⁵ Rukmini S, *The Many Shades of Rape Cases in Delhi*, The Hindu, Jul 19, 2014 (<https://www.thehindu.com/news/cities/Delhi/nonrecognition-of-marital-rape-is-hypocrisy-court/article6473013.ece>).

It is high time that India, the nation known for its values and morals, stood against the unethical and illegal treatment given to women. The laws based on ideas that no longer hold relation to today's society and thus need to be done away with.

GENDER NEUTRALITY IN RAPE LAWS: AN URGENT NEED

Another limitation that makes the Indian criminal justice system ineffective, in rape laws, is the lack of gender neutrality. According to Black's Law Dictionary, the word 'Neutral' means 'indifferent; impartial; not engaged on either side'.²⁶ Thus Gender-neutrality refers to the impartial and unbiased treatment of men and women. This article emphasizes on the concept of Gender-neutrality as an idea that the legislature and the judiciary should avoid distinguishing roles according to a person's gender or sex. In the article, we will talk about the need to make rape laws gender-neutral and avoid the fixed definitions of victims and perpetrators based on sex.

In India, rape is considered an offense that can only be committed by a man against a woman, i.e., a perpetrator is always a man and a victim, a woman. Though it is agreed that this definition of rape has been built based on the experience of the society over a period of time, but there is a need for change in the particular law owing to the change in dynamics of the society today. The definition given in Section 375 of the Indian Penal Code, fails to recognize the act of male/transgender rape. Moreover, the fixed requirement of penetration, for an offense to constitute rape, also negates the possibility of a woman being a perpetrator. The Law concerning rape, earlier, required the act of penile-vaginal penetration to call an offense rape. This criteria/requirement was questioned in *Sakshi v. Union of India*,²⁷ after which the court asked for recommendations by the Law commission.

The law commission in its 172nd report recommended amending the law to widen the definition of rape. In its report, the Commission had recommended that rape be substituted by sexual assault as an offense. Such assault included the use of any object for penetration.

²⁶ 4 HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY, St. Paul Minn. (West Publishing Co., 1968).

²⁷ *Sakshi v. Union of India* AIR 2004 SC 3566.

It further recognized that there was an increase in the incidence of sexual assaults against boys.²⁸

The recommended changes aimed at widening the definition in order to include sexual assaults not involving penile-vaginal penetration.

The 2010 draft Criminal Laws Amendment Bill, released by the Ministry of Home Affairs, attempted to redefine rape. The draft provisions substitute the offense of rape with “sexual assault.” Sexual assault is defined as penetration of the vagina, the anus or urethra or mouth of any woman, by a man, with (i) any part of his body; or (ii) any object manipulated by such man under the following circumstances: (a) against the will of the woman; (b) without her consent; (c) under duress; (d) consent obtained by fraud; (e) consent obtained by reason of unsoundness of mind or intoxication; and (f) when the woman is below the age of 18.²⁹

This landmark change ended up being a blessing for women as it widened the definition, incorporating various other ways of violating a woman’s body. In addition to that, the very idea that sexual violation is way more than penile-vaginal penetration brings us to question another dimension, i.e., male rape.

Rape of males or transgender is any kind of sexual assault that involves forced penetration of the anus or mouth by penis, fingers, or any other object or coerced/compelled penetration. This definition itself does not take into consideration the aspect of women being a perpetrator of rape.

This article will study the aspect of gender neutrality from two dimensions, i.e., Gender neutrality in terms of a victim as well as the perpetrator.

In India, Male rape is not recognized and finds no place in the laws. There have been endless justifications for the same. Some of them are:

A. Rape requires forced intercourse, and it is difficult to force a man physically.

This justification stems from Gender stereotyping, where a man is assumed to be capable of defending himself of any force, whatsoever, rendering the possibility of rape negligible. This argument was seen to be made by the victim’s father in *Commonwealth v. Gonsalves*.³⁰ This case came up in Massachusetts Appellate Court,

²⁸ Law Commission of India, 172nd Report on Review of Rape Laws, (Mar 2000).

²⁹ Simran, “Cabinet Approves bill to amend law on rape”, PRS Legislative Research, Feb 8 2012.

³⁰ *Commonwealth v. Gonsalves* Ed. 2d 41 (1997).

wherein the father argued that why wasn't the son able to defend himself. These arguments are a reason to create an image of invincible masculinity. Due to such stereotypes, a stigma is attached to the victim, which event leads to under-reporting of the cases.

The fallacy in this justification is not only restricted to Gender stereotyping but also includes a presumption of force as a pre-requisite of rape. It needs to be understood that consent need not be obtained only through physical force, and thus there is a possibility of other manipulations. In many cases, the victim succumbs to the power of the perpetrator to escape and get rid of the brutality. The Delhi High court had negated the belief that rape is always preceded by force.³¹

Apart from that, in cases where force has preceded rape, have included gang rapes. A presumption of invincible masculinity fails to understand the basic idea of outnumbering. How can a man be expected to defend himself against an entire group of people, using any force whatsoever?

These prejudices and the absence of legal recognition force the victims to live in silence. Many victims in the past have taken recourse to social media to bring in light their experience. One of the most glaring examples is the incident of Vinodhan, a boy from Chennai who shared in the Gang rape incident at the age of 18 years.³² Another such incident was in September 2014, where a Mumbai based transgender was raped and video graphed by three police officials at Ajmer Dargah Police station.³³ Despite these Victims' attempt to bring their stories out in public, the law has not addressed the issue of Male/Transgender Rape.

B. Erection and Implied Consent.

Due to a lack of required information among people, there is a belief that a man cannot have an erection while being sexually assaulted by someone. This belief has led to a myth in people's minds that if a man has a physiological response to sexual intercourse, that is a sign of his consent, and it is mistaken to mean that he was

³¹*Supra* note 6.

³² Priya M Menon, "*Lacking Support, Male Rape Victims stay Silent*", The Times Of India, Feb16, 2013.

³³ Maria Akram, "*Transgender Raped by Cops Fight For Justice*", The Times of India, Sept 14, 2014.

enjoying it.³⁴ In *R v. R.J.S.*³⁵ a Canadian court held that when a male victim maintains an erection during a sexual encounter and this ‘arousal’ can be taken by the assaulter as consent.³⁶

This judgment was highly criticized for interpreting erection as a prima facie proof of consent. This very idea of considering an erection as a sole response of arousal is completely flawed. Such ideology upholds the stereotype that ‘men always want sex.’ In response to this misinterpretation, it has been argued that many times victims ejaculate out of anxiety or in order to put an end to the assault by making the offender believe that it is over. This is even used by the offenders as a technique to bewilder the victim and make him believe that he enjoyed the sexual act, which leads to the victim’s self –blaming.³⁷ Researcher John Bancroft in his work titled ‘Psychophysiology of sexual dysfunction (1980)’ has given three explanations for a male’s physiological response, i.e., erection/ejaculation during sexual assault:³⁸

- (i) Such a response may be a part of a “generalized body reaction to an emotional turmoil.”
- (ii) Such responses may have biological roots, that is to say, that while sexual responses are influenced by the brain; they are mediated through the spinal cord and function independently. A sexual response determined by spinal cord discharge without control is, therefore, possible when one is ‘paralyzed with fear.’
- (iii) The response may be a natural reaction to anxiety or some other previous role reflected in the victim’s subconscious.

This proposition demonstrates that the physiological response of the victim is not proof of consent or enjoyment against the sexual act. This proposition explains how

³⁴ Sarah LeTrent, ‘Against his Will: Female-On-Male Rape’, CNN, Apr 6, 2015.

³⁵ *R v. R.J.S.*[1995] 1 SCR 451.

³⁶ *Id.*

³⁷ Nicholas A. Groth and Ann Wolbert Burgees, “Male Rape: Offenders and Victims”, American Journal of psychiatry, 1980.

³⁸ Siegmund Fred Fuchs, “Male Sexual Assault: Issues of Arousal and Consent”, 51 Cleveland State Law Review, 2004, P.101-102; Noreen Abdullah-Khan, “Survivors of Male Rape: The Emergence of Social Legal Issue”, 2002.

the stereotype that ‘men always want sex’ is flawed and disrespects the plight of a victim, and overlooks a victim’s agony on the basis of sex.

Another dimension to study, in case of rape, is gender neutrality in the context of the perpetrator. This has been the most contended in the domain of rape law. Reasons like physical force and stereotypical outlook towards men have made people believe that a woman can never commit rape against a man. However, in a survey conducted by Centre for civil society, they interviewed 222 men, out of which 16.1% reported that they had been coerced or forced into sex as an adult by a woman.³⁹ These numbers show the reality in response to the belief among people that a female rapist is against “social reality.” The issue of woman as a perpetrator of rape needs to be seen under the following dimensions:

A. “It is physically impossible for women to rape men.”

The argument made by people against gender-neutrality is based on the interpretation of rape as mere penile-vaginal penetration. However, India no more recognizes rape with the same definition. Now it also includes insertion of foreign objects, oral and anal penetration as well.⁴⁰ Thus, a woman can be said to rape a man. Secondly, even if penile-vaginal penetration is kept as a requisite, erection cannot be considered as arousal or consent. This argument is based on various studies that show that erection/ejaculation can be a result of anxiety, fear, and humiliation.⁴¹

B. “There have been no cases of female rape on men.”

Kavita Krishnan believes that women raping men is not a problem in society.⁴² This is an argument full of fallacies. There have been incidences of male rape perpetrated by women. There have been surveys that have substantiated the same.⁴³ Although I agree that in male rape, majority offenders are men, however, there are instances of women perpetrators that cannot be ignored. In 2015, Lara

³⁹ Jai Vipra, “*A Case for Gender-Neutral Rape Laws in India*” Centre for Civil Society.

⁴⁰ *Supra* note 14.

⁴¹ Sarrel, P. M., & Masters, W.H. *Sexual molestation of men by women*, Archives of Sexual Behavior, 11, no. 2, 117-131 (1982).

⁴² Perera A, “*Why a gender-neutral anti-rape law isn’t anti-women*”, The Firstpost, 2013.

⁴³ *Supra* note 32.

Stemple, Director of UCLA's Health and Human Rights Law Project, came upon a statistic that surprised her: In incidents of sexual violence reported to the National Crime Victimization Survey, 38 percent of victims were men—a figure much higher than in prior surveys.⁴⁴ Several surveys have been conducted that have shown that there are men who have suffered sexual molestation and have had no law to address the problem. Thus, saying that a female rapist is a non-existent character, is highly misleading⁴⁵

C. “Gender-neutrality in rape law is anti-women.”

The idea behind gender-neutrality is not to retaliate against women victims or disregard the magnitude of the same. It is well noted that male rape is way less in occurrence as compared to female rape; however, it is not non-existent. For example, while the rate of rape in women is 1 in every five women, the rate in men is 1 in 71 men.⁴⁶ It is understood that rape has been a crime against women at an unacceptable rate, and due to that, women have faced stigma, fear, and have lived a life with curbed freedom. But it has to be understood that crime or criminal does not restrict itself to sex. A crime can be perpetrated against anyone regardless of their sex.

Bringing in gender neutrality is not based on the motive of pulling the feminist movement down. In fact, it is aimed at upholding the fundamental rights of men as well. Article 14 enshrines the Right to equality, and article 15 prohibits discrimination on the grounds of sex. Therefore, men should be entitled to the same rights as women and should be provided recourse in law against rape.

Such justifications have not only overlooked an offense that is existing in the society but also has added to the mental pain of the victims. Due to no legal recognition, there has been no official or documented research on male/transgender rape. But, National Crime Record Bureau (NCRB) has tabulated some

⁴⁴ Conor Friedersdorf, “*The Understudied Female Sexual Predator*”, The Atlantic, November 28 2016.

⁴⁵ Rituparna Chatterjee, “*The mindset is that boys are not raped: India ends Silence on Male sex abuse*”, The Guardian, May 23 2018.

⁴⁶ Statistics About Sexual Violence, National Sexual Violence Resource Centre, Info and Stats For Journalists, 2012, 2013, 2015.

statistics related to crimes against men under various categories like kidnapping and abduction for several purposes like prostitution, illicit intercourse, slavery, etc. According to the NCRB 2013 report, 123 men, from different age groups, were kidnapped or abducted for the purpose of illicit intercourse; 20 men for slavery; 20 for prostitution.⁴⁷ Though cases registered with the police, officially are way less, but we can gather from these numbers the extent of this problem. If the offense of Male rape is considered by our criminal justice system, it will bring to light, to some extent, the real magnitude of this problem.

Thus, it is high time we addressed the issue of male rape. There are consequences that male victims have been facing due to the lack of legal recognition. If a man is raped, especially by a woman, he is not considered as a 'real man.' This not only stigmatizes a man's life but also encourages patriarchy both in a man and a woman's wife. Male rape also brings into light that Patriarchy is not only toxic for women but also for men. While women under this social system have been subjected to dominance for years together, men have also been covertly forced to adhere to a stereotypical definition of men. This system has constructed ideologies like 'men cannot cry,' 'men are supposed to be the bread earners,' etc. While such thinking is getting normalized day by day, the need to address and eradicate these is, in turn, augmenting.

While it is essential to talk about gender neutrality in terms of the perpetrator, another issue to be addressed under the same is female on female rape. The question of whether a woman can be charged for a woman's rape was first raised in *Priya Patel v. the State of M.P.*⁴⁸ it was a case where a woman was gang-raped, and the gang in question included a woman. The language of section 376(2)(g) is "whoever" commits gang-rape; thus, there are no specific perpetrator mentions, making the section gender-neutral. Further, the explanation elucidates that 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.

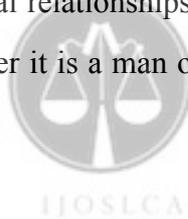
⁴⁷ National Crime Records Bureau, *Reports on Crime in India 2013*, Ministry of home affairs 2013, P.338.

⁴⁸ *Priya Patel v. State of M.P.*(2006) 6 SCC 263: AIR 2006 SC 2639, 2641, 267.

Therefore, technically the act of penetration is not required to be performed by each member of the group.⁴⁹

This means that mere common intention is sufficient to make a person liable. Despite the explanation, the court held that a woman could not have an intention to rape another woman, and it is inconceivable that a woman can rape another woman.⁵⁰ The reasoning given by the court is flawed as the section completely talks about the 'common intention.' When in *State of M.P v, Sheodayal*,⁵¹ the High court opined that a woman's modesty could be outraged by another woman, then why cannot a woman be said to have the intention to rape, regardless of whether she is physically capable of raping a woman or not.

Moreover, the need for Gender-neutral rape laws has become an urgent affair after the section 377 verdict given by the Supreme Court, decriminalizing consensual same-sex relations. Including a male on male rape as an offense under 'unnatural sex' could have been called justified until the same-sex relations were criminalized. However, as now-Supreme Court has recognized these relations, it has become all the more pertinent to address these relations in the same way as we address heterosexual relationships. A forced, non-consensual sex should be considered rape, regardless of whether it is a man or a woman being raped, or it is a man or a woman raping.



SUGGESTIONS AND RECOMMENDATIONS

1. RECONSIDER THE DEFINITION OF CONSENT IN MARRIAGE

Since we have discussed how marital rape exemption is based on the belief that consent to marry is consented to engage in sexual intercourse, we require the courts to address and reconsider this definition. Just like in sexual intercourse outside marriage, fresh consent is required for every sexual intercourse. Similarly, the criterion of consent should be kept the same in marriage. This change will not only give women a right of decision in their marriage but also will give them their dignity and security in wedlock.

⁴⁹ Indian Penal Code, 1860, §376(2) (g).

⁵⁰ *Supra* note 38.

⁵¹ *M.P v, Sheodayal* 1956 CrLJ 83 M.P.

2. ALTER THE OUTLOOK WHILE HEARING A RAPE CASE

The courts should apply the decision held in *Kernel vs. State of Madhya Pradesh*⁵² that rape victim's testimony should not be treated with suspicion, and she should not be treated as an accomplice in the crime, even to the victims of marital rape. As discussed, the problem in proving rape in marriage is considered an impediment in recognizing marital rape as an offense; this change in outlook will facilitate hearing of these cases. Just like ordinary rape cases, the burden of proof in a marital rape case should also rest on the perpetrator.

3. NEED FOR CULTURAL AND SOCIAL CHANGES

Patriarchy- In order to get rid of problems like marital rape exemption and sex-specific rape laws, we not only need legal reforms but also changes have to be made in our social system. Indian Social system has been patriarchal for ages. And this patriarchy has not only reduced women as chattels and subordinates to men but also has tied men in the shackles of toxic masculinity. As a society, getting rid of patriarchy will give women their right to be treated as equals and will also prevent crimes like rape, domestic violence and, in fact, let women live a life not subjected to judgments and fears. Moreover, it will allow men to live a life that does not have to fit in the definition of social prejudices.

It is a system like patriarchy that has made women a chattel of her husband, leading to loopholes like the marital rape exemption. In addition to that, this social system has set stereotypes like "men cannot be physically raped," or "men always want sex," shutting the male rape victims. It is high time the legal system stopped basing its laws on such societal beliefs.

Educational Reforms- A society does not change by legal or administrative reforms alone; it is important to change to people. It is necessary that children from a very young age should be educated about gender sensitization and should be conditioned in a way where they do not discriminate against someone on the basis of sex, which

⁵²*Supra* Note 12.

includes understanding the differences between the sexes but not making them a premise to exploit any.

4. GENDER SENSITISATION TRAINING FOR THE ENTIRE LEGAL MACHINERY

Apart from making changes in the definition of rape law, we need to sensitize the entire legal machinery to make it suitable to deal with present India. Police form the first authority in the legal machinery that victims' approach and it is important to ensure that they are sensitized first. However, the incidences of Police's apathy are so all-pervasive that it discourages victims from speaking up.

In the U.K., the Stern Review was setup to examine certain issues within the criminal justice system.⁵³ The reaction of public authorities to rape complaints and the recommendations to encourage victims were amongst the top issues addressed. The report showed that the police officials had shown changes in their attitude, but the implementation of the same in legal duties was not good. It is important that the system of justice is not focused on the procedure but its motive, because in this race of sticking to the system, the victim is ignored. Further researches have also corroborated the grim reality that male rape victims seeking help have been turned away from rape crisis centers considering there are no systematic provisions in place even though these centers are publicly funded by the Ministry of Justice, UK.⁵⁴

In India, a case like the Bhanwari Devi rape case has brought in light the nonchalant and ruthless behavior of the police force. In the Bhanwari Devi case, the act of police demanding the submission of the skirt she was wearing and not providing her with alternative clothing shows how insensitively this matter was handled. Apart from that, the vaginal swab was taken after more than 48 hours, while the requirement is for this act to be done within 24 hours.⁵⁵

⁵³ Baroness Vivien Stern CBE, Government Equalities Office UK.

⁵⁴ Catherine Pitfield, *Male Survivors of Sexual Assault: To tell or not to tell?*

⁵⁵ Namita Bhandare, *"The Long march to Justice"*, Hindustan Times, February 22 2019.

Since Judicial officers have quite a reclusive life, it is important to sensitize them in order to prevent them from having narrow views. One such ugly incident of projection of narrow views happened during the Bhanwari Devi rape case. The Judicial Officer of the trial court, while dismissing the case, made such observations for acquitting the accused, which would further worsen the situation of a rape victim. Some of the reasons for acquittal given were – the head of a village cannot rape, men of different castes cannot participate together in gang rape, a higher caste male cannot rape a lower caste woman because of reasons of purity and Bhanwari Devi's husband couldn't have quietly watched his wife being gang-raped, among other such ridiculous reasons.

Such Shameful incidences tell how reclusiveness not only hampers a judicial officer's mental outlook but also subjects the people seeking justice to unreasonable actions. In order to make our legal justice system open and sensitive, it is important that our legal machinery is well aware of gender sensitization and starts practicing it.



CONCLUSION

This article has analyzed the changes needed in Rape laws. From the above discussion, we have tried to emphasize on the need to criminalize marital rape to address the issues faced by victims in marriage. Courts and even Law commission has time and again discussed the need to criminalize marital rape and the demerits of not doing so. It is high time the legislature acted upon the recommendations made by the Law commission in its 172nd report. The exemption given to marital rape is based on the belief that a wife is a husband's chattel, and this thought strengthens the inequality established by the patriarchal system. In today's view, marriage is a partnership, a companionship between two equals. Thus, both the spouses must have an equal say in all decisions in a marriage. Moreover, the concept of consent should be kept as cardinal in a marital relation, and the idea that consent to marry is also consent for sexual relation needs to be questioned. The removal of the marital rape exemption will provide women recourse to address their pain, and the legal recognition will further enlighten the nation about the magnitude of this problem by prevention under-reporting.

Another issue discussed is the need for Gender neutrality in rape laws. While the magnitude of female rape is incomparably high, the issue of male rape requires legal recognition, too, irrespective of its magnitude. The patriarchal notions of ‘men cannot be physically forced’ or ‘men always want sex’ have attached a stigma to many victims who have suffered this crime. Patriarchy has not only dominated women but also forced men to adhere to social notions created by it. Many men have stayed silent because of the toxic masculinity forced on them. Rape has to be seen as an offense committed by perpetrators against innocent victims, whether a man or a woman, leaving a mark on their lives forever. As questioned in a few cases, the courts have to consider the truth that a woman can rape, and a man can be raped. The authors believe that lack of gender neutrality denies the existence of crimes that are perpetrating and robs the victims of any legal remedy, and thus there is an urgent need for the same.

