

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 2 | Issue 3

2020

© 2020 *International Journal of Legal Science and Innovation*

Follow this and additional works at: <https://www.ijlsi.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for free and open access by the International Journal of Legal Science and Innovation at VidhiAagaz. It has been accepted for inclusion in International Journal of Legal Science and Innovation after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Legal Science and Innovation**, kindly email your Manuscript at editor.ijlsi@gmail.com.

Gender Neutral Rape Laws in India Need of a Stricter & Inclusive Regime

HARSH SINGH¹ AND PRACHIE SINGH²

ABSTRACT

The current regime of sexual offences in India are gender-biased, they contend male to be perpetrators and female to be victims of sexual offences. In the wake of social change, it is quintessential to expand the definitions provided for various categories of sexual offences, to include sexual offences of homosexual nature and recognition of woman as perpetrators to sexual offences. Sodomy criminalizes only apart of homosexual offences therefore not entirely effective. Criminal Law Amendment Bill, 2019 though paves positive step towards gender-neutrality of sexual offences but it has not been enforced yet. Beside substantive changes, procedural changes need to be incorporated for proper disposal off gender-neutral sexual offences. However, amendment in penal code is just one step towards the gender-neutrality of sexual offences. Effective change can be possible by collaborating law with judicial recognition of non-penetrative rape, elimination of social stigma, generating awareness, and proper sex education.

Keywords: *Gender-neutral sexual offence, Rape of men, Women perpetrators, Homosexual rape, Non-penetrative rape*

I. INTRODUCTION

India has responded to the cause of gender neutrality in rape laws both reactionary and consistently. However, the past judicial and legislative amendments afford no proof to the same. There is little to signify that the legislature considered the valid interests of all stakeholders on the identical time as suggesting various amendments to the offence of rape beneath the IPC.³ The Minutes of the National Consultation Meeting organized in 2001 in the aftermath of the 172nd Report of the Law Commission of India, stated that the interest of diverse sexual minorities was never taken heavily under consideration as there was immense pressure from the conflict of interests.

¹ Author is a student at UPES School of Law, India.

² Author is a student at UPES School of Law, India.

³ Section 375 of the IPC has been amended by the *Criminal Law (Amendment) Act, 1983* (India)

In 1996 Jaspal Singh, J of Delhi High Court in *Sudesh Jhaku v. KC Jhaku*⁴ first addressed the concept of gender neutrality in the regulation of rape. The court had to determine whether the definition of rape before the 2013 amendment included non-ubiquitous sexual acts such as the insertion of objects, etc. The claim that the solicitation sought could not have been granted by a judicial authority but was granted with the assistance of the legislative representative, directly entered into his decision to redefine the crime of rape regardless of gender.

The select mentioned that the offence of rape turns out to be the most effective street underneath the Indian criminal law for coping with heinous acts of sexual assault earlier than quoting the following passage from a bit of writing within the California Law Review:

“Men who are sexually assaulted must have the same protection as lady sufferers, and ladies who sexually attack men or one-of-a-type ladies need to be as liable for conviction as traditional rapists. Considering rape as a sexual attack in the vicinity of as a unique crime within the course of girls may in all likelihood do an entire lot to area rape law in a more wholesome attitude and to reduce the legendary factors that have tended to make rape jail suggestions a manner of reinforcing the reputation of ladies as sexual possession.”

In 1997, a Delhi-based completely definitely group, Sakshi, filed a writ petition earlier than the Supreme Court of India asking for it to reconsider the query that had arisen in Jhaku.⁵ In 1999, the Supreme Court framed the “precise problems” to be taken into consideration through way of manner of the Law Commission of India. Subsequently, the 172nd Report of the Law Commission of India recommended that the word rape should be substituted with the words ‘sexual assault’ to make it more gender inclusive. One of the major reasons for the same was that the number of cases of sexual assault of young boys was increasing and the accused could not be fairly dealt with due to the loopholes in the act.⁶

This however took shape in the form of Protection of Children from Sexual Offences Act, 2012 (POCSO), which aimed to protect young children from sexual attack, harassment, and pornography even as perpetrated through way of a person. The recommendations of the Law Commission only saw recognition when the Criminal Law (Amendment) Bill, 2012 proposed a totally gender-unbiased definition of rape. The Parliamentary Standing Committee expressly acknowledges that the responses received from the general public and State

⁴ *Sudesh Jhaku v. KC Jhaku* 1996 62 DLT 563

⁵ *Sakshi v Union of India* (1999) 6 SCC 591 [*Sakshi*].

⁶ Law Commission of India, *172nd Report: Review of Rape Laws* (New Delhi: Ministry of Law and Justice, Government of India, 2000)

Governments favoured, “making the offence of rape and sexual assault gender independent simplest in to date because of the fact the sufferer is concerned, however making the offender male.”⁷

Amidst the triumphing ambiguity, this arcane idea drew big grievance from feminist pupils. For instance, in her starting announcement to the Justice Verma Committee (JVC), Ms. Indira Jaising, a prominent Senior Advocate in India, labelled this float as unacceptable thinking about that rape modified into to be usually characterized as a crime constitutive of patriarchy, and therefore, gendered.⁸

After the *Nirbhaya* case that shook the conscience of the country led to protests all over the country and as a outcome to formulate new laws, the legislature constituted the Justice Verma Committee with aim to find alternatives to deal with matters of sexual attacks with quicker trials and enhanced punishments against offenders of intense nature. The JVC Report recommended that the word ‘rape’ should not be substituted with the words ‘sexual assault’ as it has become embedded in the society’s moral condemnation. The report however failed to account the reason behind this recommendation.

Despite being well obtained, the advice of partial gender neutrality did not result in the preferred change. In a as a substitute complex reversal, the legislature promulgated the Criminal Law (Amendment) Ordinance, 2013 to undertake a totally gender-unbiased definition of rape.

This choice changed into criticized as being moved fast, violative of the letter and spirit of the JVC Report, and bearing the capability to create a chilling impact on a girl’s potential to report a rape complaint.⁹ Compelled with the aid of manner of such complaint, and probably brought on with the aid of using political worries, the legislature readjusted its stance after only a few months. In the subsequent Parliamentary session, the legislature enacted the Criminal Law (Amendment) Act, 2013 to supplant the ordinance, and reverted to the gender-specific definition of rape this is presently in impact.¹⁰

While this go with the drift did appease those who had criticized the Ordinance, it also prompted a current line of criticism from great individuals of the queer movement, who taken into consideration the reversion as detrimental the interests of the transgender network. In the words of Arvind Narrain, “*the 2013 Act was a slap in the face for all and sundry who*

⁷ Parliamentary Standing Committee, *167th Report on the Criminal Law (Amendment) Bill, 2012*

⁸ The Wilson Center, “Opening Statement by Additional Solicitor General Indira Jaising to the Verma Committee” *The Wilson Center* (15 October 2013), online: The Wilson Center

⁹ MENON, Nivedita, “Gender Just, Gender Sensitive, Not Gender Neutral Rape Laws”

¹⁰ *Criminal Law (Amendment) Act, 2013* (India), s 9.

believed that in the long run transgender humans too are same residents in India”.

A biased definition of the offence of rape only acknowledges a binary information for gender completely obliterating the third gender and thus only raising doubts as to its sustainability. This poses the main question that does the pain of the “transgender” community even arise in the deliberations on gender neutral laws.

A perusal of the above chronology clarifies that India’s response to gender neutrality has been far from quality. Despite a large number of statistics and amendments, the problem hasn’t gathered any purposive deliberation it warrants. It is highly disappointing that talk on this issue has been restricted to the corridors of numerous academic establishments and insurance studies businesses instead of the Parliament or courts.

II. CHARACTERIZING RAPE

To make a fair assessment of gender neutrality of rape laws the characterization of the definition of rape needs to be looked at along with the effect it has at the victim. As regards India, Section 375 of the IPC, as amended via the Criminal Law (Amendment) Act, 2013, states that:

A man is said to have committed the offence of rape if he,

- a) penetrates his penis into the vagina, mouth, urethra or anus of a girl, or;
- b) inserts any object or part of the body (other than the penis); or
- c) manipulates any part of the body of a lady; or
- d) applies his mouth to the vagina, anus, urethra of a female or makes her to perform that with him or some other man or woman, below the situations falling beneath any of the subsequent seven descriptions .¹¹

The amended definition broadened the notion of rape to embody non-penetrative sexual acts violating a lady’s bodily integrity without any penile-vaginal penetration. The Criminal Law (Amendment) Act, 2013 what the Supreme Court of India had refused to do in *Sakshi v Union of India* in 2004.

In *Sakshi*, the apex court had held that when there can be no ambiguity inside the text of the supply, changing the definition of rape via judicial interpretation will “*result in a good deal of chaos and confusion, and couldn't be within the interest of society at huge.*” While this definition does outline the ambit of the offence, one have to travel beyond the statutory text

¹¹*Indian Penal Code, 1860 (India), s 375*

to genuinely recognize its import.

Unfortunately, judicial critiques on Indian rape law reflect a instead traditional expertise, in which rape is not extraordinary regarded as an attack on the frame of a female, however additionally her modesty, chastity, and honour. This view stands on patriarchal bedrock, and undermines the sufficiency of arguments based totally on the sufferer's character autonomy and bodily integrity. For instance, in 1980 Krishna Iyer, J opined in *Rafiq v State of UP*¹² that: "when a woman is ravished in rape what is inflicted isn't always simply physical harm, but the deep experience of some deathless disgrace. Rape for a girl is deathless disgrace and need to be handled due to the fact the gravest crime in opposition to human dignity"

In 1983, MP Thakkar, J elaborated on this idea in *Bharwada Hirjibhai v State of Gujarat*¹³ citing that when a female is raped, she is possibly to be ostracized through the usage of society, her family, household, and friends, and that she is probably overpowered via a experience of disgrace due to the upbringing in a lifestyle-sure society where sex is taboo, among other social effects evidencing of a lack of recognize in society.

The Supreme Court in *State of Madhya Pradesh v. Madanlal*¹⁴, on the idea of compromise in cases of rape or its attempt, stated that:

"Rapes are crimes in opposition to the frame of a woman it is her personal temple. These are offences which suffocate the breath of life and sully the popularity. And recognition, unnecessary to emphasize, is the richest jewel you may conceive of in existence. No one have to allow it to be extinguished. When a human frame is defiled, the 'purest treasure' is misplaced. Dignity of a woman is part of her non-perishable and immortal self and no individual need to ever consider painting it in clay. There can't be a compromise or agreement because it might be closer to her honour which subjects the maximum. It is sacrosanct."

Undeniably, this characterization of rape is a product of a belongings-primarily based positioning of ladies in society, wherein their chastity constitutes a valuable treasure of importance.¹⁵ At first, these observations can also furthermore appear to preserve little crook significance.

Placing reliance on the honour and chastity of a sufferer instead of viewing rape as a violation

¹²*Rafiq v State of UP (1980) 4 SCC 262.*

¹³*Bharwada Hirjibhai v State of Gujarat (1983) 3 SCC 217*

¹⁴*State of Madhya Pradesh v. Madanlal, 2015 (7) SCALE 261*

¹⁵*"Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard" (1952) 62(1) Yale Law Journal 55 at 80.*

of a person's physical integrity is a outright denial of a victim's basic human and only limits the justice to be provided to the victim. This is one of the motives why this method end up additionally endorsed through the JVC Report, which cited that:

*“Rape is a form of sexual assault similar to some other crime in competition to the human frame below the IPC It is the offence in opposition to the bodily integrity of the female as someone [and] it need to now not be appeared that a lady, on the same time as developing a criticism, is in any manner performing an awful lot much less honourably or in any manner annoying what is considered because the repository of honour of the own family, network and others.”*¹⁶¹⁷

In 1996, in *‘Bodhisatwa v Subhra Chakraborty’*¹⁸, the Supreme Court defined rape in terms that rape *“is a crime in competition to easy human rights and is likewise violative of the sufferer's most loved of the Fundamental Rights, in particular, the Right to Life contained in Article 21.”*

Subsequently, in *Railway Board v Chandrima Das*¹⁹, the court emphasized that rape “isn't always a mere remember of violation of an everyday proper of someone however the violation of Fundamental Rights this is worried.”²⁰

However, such times had been far too rare to reflect an institutional shift inside the interpretation of the offence. Even the alternatives in Bodhisatwa and Chandrima Das do not pertain to any crook trial, however were rendered on the identical time as figuring out the jail obligation to compensate a rape victim. It is because of this as unfortunate as it's miles sudden that the Indian judiciary, in any other case acknowledged for championing human rights, has been usually silent on this regard when it comes to rape law.

Nonetheless, one also can draw assist from the manner wherein instances of sexual harassment at art work are considered. In *Vishaka v State of Rajasthan*²¹ the Supreme Court of India stated that every incident of sexual harassment at the place of business outcomes in a contravention of the fundamental rights, which includes the proper to lifestyles and liberty, covered by using manner of way of Article 21 of the Constitution of India (Constitution). “The protection towards sexual harassment is a universally appeared human right”, and is

¹⁶ JVC, Report, supra note 20 at 83, para 27 and 94, para 38.

¹⁷ AIR 922

¹⁸ *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71

¹⁹ Supra

²⁰ *The Chairman, Railway Board v Mrs Chandrima Das* (2000) 2 SCC 465.

²¹ *Vishaka v State of Rajasthan* (1997) 6 SCC 241.

aptly recognized by the Preamble to the Prevention of Sexual Harassment at Workplace Act.

It is very essential to understand that sexual harassment is human right violation and the same must go for the offence of rape.

In order to formulate laws against rape and other sexual offences, large emphasis by human rights activists is placed international human rights and the covenants made for the same,

- a. “the Charter of the United Nations
- b. the Universal Declaration of Human Rights (UDHR), and
- c. the International Covenant on Civil and Political Rights (ICCPR),”

All these covenants push to “*train every officials and the general public in those norms, region governments failing to admire human rights at the protective, and help create and valid inner and outside pressures for human rights development.*”²²

In mild of the above, the selection for an approach emphasizing the rights of rape patients, and no longer their social positioning, becomes obvious. Such rights encompass, inter alia, the proper to lifestyles and dignity, and an warranty that those rights can be determined without discrimination at the concept of sex. Therefore, it is greater suitable to make clear the characterization of rape actually as a violation of the patients’ physical integrity and their right to life with dignity,²³ in region of an act implementing a feel of deathless shame upon them because of an alleged lack of societal honour. In the Indian context, this will require the legislature to outline the offence of rape in a responsible manner, and the judiciary to not let their interpretation be swayed thru patriarchal conceptions.

III. WHY GENDER NEUTRALITY?

After the Nirbhaya case, the Justice Verma Committee Report, made serious recommendation with respect to the reforms that are requisite in the criminal law relating to the offence of rape.

The committee based its recommendations on the fact the inclusive laws and protection from a sexual assault of any kind is the constitutional right of every person and not just a particular section of the population.²⁴

The concept of gender neutral or gender unbiased laws entails that all persons i.e., women,

²² Richard Bilder, “Rethinking International Human Rights: Some Basic Questions” (1969) 1 *Wisconsin Law Review* 171 at 205

²³ Simon Bronit and Ashutosh Misra, “Reforming Sexual Offences in India: Lessons in Human Rights and Comparative Law” (2014) 2(1) *Griffith Asia Quarterly* 37 at 51

²⁴ The Justice Verma Committee Report, 2013

men and the third gender (transgender) can be a victim or a perpetrator the crime of rape.

The following arguments summarize the basis of gender-neutral rape laws that need to be enacted in the Indian Criminal Law.

(A) Human Rights and State Obligation

As iterated above, an act of rape wants to be taken into consideration entirely as a human rights violation. However, this kind of characterization is theoretically incompatible with the gender specificity common in rape regulation. If rape is indeed a human rights violation, then a criminal offence of rape that seeks to punish the ones times can't be selective in phrases of the safety it offers, on the premise of the genders of the actors involved. Human rights, which consist of the right to lifestyles with dignity and same protection of the law, are rights that honestly every person is entitled to through manner of reason of being an individual. This consists of guys, girls, and transgender people to same extents.

The proof in guide of the above statement is ample. The Preamble to the UDHR states that “the inherent dignity and the equal and inalienable rights of all individuals of the human family is the muse of freedom, justice and peace in the international”.

Article 2²⁵ of the UDHR gives that “each person is entitled to all the rights and freedoms set forth in this Declaration, without difference of any type, collectively with intercourse or distinct repute.”

Article 7²⁶ further states that “all are equal in advance than the regulation and are entitled with none discrimination to identical safety of the regulation. All are entitled to equal protection toward any discrimination in violation of this Declaration and in opposition to any incitement to such discrimination.”

Most importantly, Article 8²⁷ prescribes that “*actually anyone has the proper to an effective remedy via the ready country wide tribunals for acts violating the important rights granted him with the resource of the constitution or via law.*”

The use of gender-impartial language in those provisions is deliberate, suggesting that the entitlement of these rights can't be confined with the aid of manner of factors like sex, and that the safety granted via the legislature in furtherance of these rights want to stay uniform.

Admittedly, a literal reading of the above covenants actually presentations a formal, in area of

²⁵*Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

²⁶*Supra.*

²⁷*Supra.*

a critical, records of equality. While the former equates same remedy with sameness, the latter is premised on the acknowledgment that at times same remedy requires the dominion to deal with a category of person otherwise:

The recognition of an essential equality approach isn't truly on equal remedy below the law, however as an opportunity at the real effect of the regulation. As Parmanand Singh notes, "it takes into consideration inequalities of social, monetary and educational history." The number one inquiry is whether or now not or not the guideline of thumb or workout in question contributes to the subordination of the deprived organization.²⁸

The Constitution consists of provisions for every formal and splendid equality, thereby "suggesting reputation on the part of the founders that uniformly implemented formal equality might possibly perpetuate the existing structural inequalities."

In truth, "India's equality jurisprudence has extended exhibited inklings of formal equality's limits, undertows, intransigence, and backlash functionality, and it presentations a energetic experience that a greater great notion of equality is wanted."

On the simplest hand, Article 14 provides that "*the State shall not deny to any individual equality in advance than the regulation or the identical safety of the criminal tips within the territory of India.*"

Similarly, Article 15(1) prescribes that "the State shall now not discriminate closer to any citizen on grounds most effective of religion, race, caste, intercourse, place of shipping or any of them."

However, Article 15(3) states that "nothing in this article shall prevent the State from making any particular provision for girls and kids."

Therefore, it expressly allows the State to enact any unique provisions for ladies and children "even in violation of the essential obligation of non-discrimination amongst residents, inter alia of sex".

The constitutionality of Section 375 as a woman centered legislation in tune with Article 15(3). Accordingly, the constitution of India under Article 15(3) gives a higher degree of protection to the women and children as they are a vulnerable group but it cannot absolve the duty of the state to protect the citizens from the violation of their fundament and human rights.

²⁸ Parmanand Singh, "Equal Opportunity and Compensatory Discrimination: Constitutional Policy and Judicial Control" (1976) 18(2) *Journal of the Indian Law Institute* 300 at 301

Thus, seemed from this angle, “the case for treating crimes of like heinousness in addition appears to be stronger than that calling for a difference to be made among penetration of the woman body and penetration of the male frame, irrespective of the sex of the actor.”²⁹

It is the duty of the state that there it fulfils all obligations of protection not just theoretically but also in practice. There should be no discrimination in the observance of human rights for all citizens.

In India National Human Rights Commission has put forward in this regard that:

“It is the primary and inescapable obligation of the State to shield the proper to life, liberty, equality and dignity of all of individuals who constitute it. It is also the duty of the State to make certain that such rights aren't violated each thru overt acts, or through abetment or negligence. It is a clean and growing principle of human rights jurisprudence that the State is accountable not best for the acts of its personal shops, however also for the acts of non-State gamers performing inner its jurisdiction. The State is, in addition, liable for any state of being inactive that would motive or facilitate the violation of human rights”

It is the responsibility of the state to ensure the safety of human rights of its citizens but in turn keeps them away from the idea of gendered safety and the insufficiency of gender neutral laws has denied them that right.

IV. JUDICIAL PRECEDENTS

The above proposition advocating for gender neutrality in rape law is however to be considered by using an Indian judicial authority, or debated within the Parliament. However, the same is without a doubt now not superb globally.

In 1984, in *People v Liberta*³⁰, the Court of Appeals of New York Court looked into the constitutionality of, Section 130.35 of New York’s Penal Code, which said that “*a male is accountable of rape inside the first degree while he engages in sexual intercourse with a girl ... By technique of forcible compulsion*”.

The defendant argued that for the cause that provision changed into not gender impartial, it violated man or woman’s constitutionally covered right to equality earlier than law.

Finding benefit within the defendant’s argument, the courtroom held that:

“Section 130.35 of the Penal Law violates identical protection because it applies to person

²⁹ SCUTT, Jocelyne A, “Reforming the Law of Rape: The Michigan Example” (1976) 50 *Australian Law Journal* 615 at 617

³⁰*People v Liberta* 64 NY 2d 152 (1984)

men who forcibly rape women however exempts women from criminal obligation for forcible rape of guys The fact that the act of a lady forcibly raping a male can be a hard or uncommon incidence does no longer propose that the gender exemption satisfies the constitutional test; a gender-impartial law might simply higher serve, irrespective of the fact that first-class marginally, the aim of deterring and punishing forcible sexual assaults.”

Upholding the precept of gender neutrality in rape law, the courtroom held that when a law is defective constitutionally owing to under inclusion, a court can both strike the statute, and as a end result make it applicable to no person, or growth the insurance of the statute to the ones formerly excluded; and can direct the legislature into formulating inclusive laws altogether.

This desire came as a surprise because it modified into proceeded with the resource of the choice of the US Supreme Court in 1980 in the case of *Michael M v Superior Court of Sonoma County*³¹. The Court delved into the question of adequateness of the California rape statute that punished the violation of a man. The Court held it to be constitutional for protective discrimination as against men. It further reasoned,

“Because virtually all the terrific dangerous and inescapably identifiable effects of children being pregnant fall on the more youthful girl, a legislature acts nicely inside its authority at the same time as it elects to punish best the player who, thru nature, suffers few of the results of his conduct. It is not often unreasonable for a legislature acting to shield minor ladies to exclude them from punishment. Moreover, the hazard of being pregnant itself constitutes a significant deterrence to the younger women. No comparable herbal sanctions deter guys. A crook sanction imposed mostly on men therefore serves to more or much less “equalize” the deterrents on the sexes.”

However, in his dissenting opinion, Justice Brennan duly referred to that on the identical time due to the fact the goal of stopping teenage pregnancies is credible, the same also can be finished by using using a gender-unbiased statute without discriminating on the idea of the intercourse of the perpetrator. He as a end result decided it difficult to reconcile the gender specific protection afforded thru the Californian statute with the SCOTUS’s preceding opinion in *Orr v Orr*.

In *Orr v Orr*, the SCOTUS held a statutory scheme implementing alimony duties on husbands, however no longer higher halves, to be unconstitutional because it violated the equal protection principle. The court’s reasoning emerge as that in which:

“The State’s compensatory and ameliorative purposes are as nicely served by means of a

³¹ *Michael M v Superior Court of Sonoma County*, 1980 Cal LEXIS 2

gender-independent magnificence as one that gender classifies, and therefore includes with it the baggage of sexual stereotypes, the State cannot be everyday to categorise at the concept of intercourse.”³² The European Court of Human Rights (ECtHR) in 1985 touched upon the states’ responsibilities in the matter of gender neutral rape laws.

In *X & Y v The Netherlands*, the ECtHR located the Netherlands to have breached its obligations under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which, inter alia, offers that “*anybody has the proper to realize for his non-public and circle of relatives life, his home and his correspondence.*”³³

Noting the prosecutor’s refusal to initiate criminal lawsuits in opposition to a person accused of raping a mentally handicapped girl and recognize her father as an alternative complainant, the ECtHR held that Article 8 did:

“no longer truly compel the State to abstain from [arbitrary] interference: in addition to this generally terrible project, there can be awesome responsibilities inherent in an effective recognize for private or own family life These responsibilities can also incorporate adoption of measures designed to at ease recognize for personal life even in the sphere of the people of the family of humans among themselves.”

Recently inside the 1994 case of *Nicholas Toonen v Australia*,³⁴ the applicant challenged Sections 122(a)-(c) and 123 of the Tasmanian Criminal Code, which criminalized several styles of sexual touch between men, in opposition to Articles 2, 17, and 26 of the ICCPR. During those court cases, the State of Tasmania conceded that Section 123 of the Criminal Code without a doubt attracts a difference on the concept of sex because it prohibits sexual acts among men. However, the UN Human Rights Committee placed that the challenged provisions violated Articles 2 and 17 of the ICCPR, and because of this did no longer bear in thoughts it essential to talk about whether or not or now not or now not the statute discriminates on the premise of intercourse in violation of Article 26. Nonetheless, the essential factor concession made thru the State of Tasmania in this regard is enough to further my assertion.

The cause of mentioning those selections isn't to insist that a gender-precise definition of rape is always unconstitutional, despite the fact that, as said within the preceding section, the possibility can't be discarded. Instead, its miles to say that a rustic’s responsibility to make sure the observance of human rights internal its territory for parents of all genders need to

³²*Orr v Orr* 440 US 268 (1979).

³³*European Convention on Human Rights*, Rome, 4.XI.1950, art 8(1).

³⁴*Nicholas Toonen v Australia* Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

detail in even as framing its crook legal guidelines. In the absence of the identical, a differential or selective protection of human rights on the concept of gender of both the victim or the perpetrator of rape could be incompatible with the very idea of human rights, in addition to gender justice.

As highlighted with the useful resource of the Supreme Court of India in its judgment in NALSA³⁵, the “*recognition of one’s gender identity lies at the heart of the crucial right to dignity*” and that “*discrimination on the basis of ... gender identification consists of any discrimination, exclusion, restriction or preference, which has the impact of nullifying or transposing equality with the aid of the law or the equal safety of laws confident below our Constitution*”.

As a gift however it will be enough that the gender neutrality argument in rape regulation is a competing discussion to exclude gender from the scope of the human rights protection act. in the absence of any sexual assault provisions that go beyond traditional perceptions and are compatible with the principle of equality of pre-regulation the gender neutrality argument promotes adaptive awareness of rape that emphasizes rights. any rape victim without precedence over one gender over another. indeed gender neutrality disclosure allows archaic gender binary data to be scrutinized a problem that is described below.

V. RECOGNIZING TRANSGENDER RIGHTS

Despite the current process, despite multiple changes, the definition of rape under IPC still depends on double gender perception. She is considering raping women and men with a gender paradigm in which the criminal or victim has static roles. This victim-offender may have arisen from reservations about the law's tendency not to believe in a rape victim, but is also less extensive and therefore terrible.

Irrespective of which gender is assigned what function, an adamant fixation to a male-on-girl paradigm compels people of the transgender community to suppress their real identities, and perceive themselves as both adult males or girls. Consequently, fantastic sufferers and perpetrators are absent from theories of rape truly due to the fact they do now not need to sacrifice their gender identification. The laws so framed then gift a category of sufferers of nontraditional sexual attacks with a choice among gender identity and the pursuit of justice. As such, on the equal time because the conventional notions of intercourse and gender are transgressed thru the transgender network, each cutting-edge society have to attempt to

³⁵ National Legal Services Authority (Nalsa) v.. Union Of India, AIR 2014 SC 1863

unfastened itself from such preceding and rigid notions of human nature.³⁶ *“The reason of the social movement for transgender rights can not be restricted to the proper to fail to conform to at least one’s gender identity via manner of choosing to conform to the gender identity of the other sex in the [existing] gender binary.”*

Per contra its reason is to legitimize the proper to determine ones non-public gender. In this slight any insistence on gender specificity in rape law stands opposite to the edifice of uninhibited gender justice. It subverts the idea that the reach and promise of sexuality consists of people without names and identities the most conventional and privileged at the aspect of the maximum despised and reinforces an knowledge that nice genders are relevant to any discourse on rape law. On such basis one might also additionally moreover infer that gender specificity in rape regulation is or likely can be at loggerheads with the targets of the queer network this is constantly searching for to increase the binary understanding of gender and comprise gender non-conformists into the mainstream.

On such basis, one might also additionally moreover infer that gender specificity in rape regulation is, or likely can be, at loggerheads with the targets of the queer network this is constantly searching for to increase the binary understanding of gender and comprise gender non-conformists into the mainstream.

The word used for the transgender community is queer which denotes:

“anything is at odds with the ordinary, the legitimate, and the dominant. It demarcates ... A positionality vis-à-vis the normative. It is from this eccentric positionality occupied via the queer scenario that it can become viable to ascertain a variety of possibilities for reordering the members of the family amongst sexual behaviors, erotic identities, structures of gender, forms of statistics, regimes of enunciation, logics of instance, modes of self charter and practices of community.”

Thus, it's miles viable that any stubborn adherence to gender specificity in rape regulation no longer only legitimizes the social hostility within the route of gender non-conformity in India, however additionally inadvertently reinforces the heterosexual nature of the crook framework.

However, it's miles essential to look at that the mere life of this tendency can also quick turn out to be a fatal obstruction for those individuals who “have been marginalized, discriminated in the direction of, ridiculed, or perhaps dehumanized. It is probably unsurprising, given this

³⁶*Smith v. City of Salem: Transgendered Jurisprudence and an Expanding Meaning of Sex Discrimination Under Title VII* (2005) 28 *Harvard Journal of Law & Gender* 207 at 215

data of stigmatization, that transgendered humans have no longer often determined refuge inside the regulation.”

The assertions above resonate with a present day preference of the Supreme Court of India in recognize of transgender rights. In *NALSA v. Union of India*, the Supreme Court of India modified into concerned with the grievances of the transgender network, who sought a ‘third gender’ along with the binary male and female as identified to them at the time of delivery. And such discrimination leads to a violation of Article 14 and Article 21 of the Indian Constitution.

Therein, the apex court duly said the incapacity of the Indian jail device to take into account the individuals of the transgender community as belonging to a 3rd gender, and affirmed the proper of humans to select out their private gender. The courtroom docket’s reasoning is of huge help now not most effective due to its extraordinary content cloth fabric, however additionally the method it observed.

The court in the present case adopted a human rights approach and reasoned that,

*“By recognizing transgender humans as gender, they’ll be capable of revel in their human rights, to which they’ll be in huge detail disadvantaged of for want of this recognition The problem of transgender [rights] isn’t clearly a social or medical trouble but there is moreover a need to undertake [a human-rights-based] technique in the direction of transgender women and men which also can consciousness on functioning as an interaction among someone and their environment highlighting the place of society.”*³⁷

Unsurprisingly, the court did not discover any reason to keep why a transgender individual ought to be denied their number one human rights, collectively with the right to existence and liberty with dignity. During this machine, it now not simplest discarded a binary know-how of gender, however moreover exposed its sheer incompatibility with the perception of human rights. When extended to the location of rape law, this reasoning clarifies that a gender-unique definition of rape that is based totally mostly on, or even furthers, a binary facts of gender is incompatible with and contrary to the characterization of rape as a human rights violation; specifically at the same time as there may be no unique equal provision in Indian regulation to deal with the excluded elegance of patients.

It is pertinent to examine that not one of the commands given through the apex courtroom in *NALSA* pertain to rape law. Nonetheless, the results of the choice are a ways-achieving in numerous contexts because it displays an institutional shift within the knowledge of gender as

³⁷ Ibid

a social assemble. Thus, it is going to be futile to view the stated choice as being constrained to a theoretical reputation of the transgender community as a third gender, and no longer spotting their problem, oppression, and discrimination.

After all, as opined with the useful resource of the usage of Radhakrishnan, J,

“The non-reputation of the identification of Hijras/transgender oldsters denies them identical safety of regulation, thereby leaving them extremely susceptible to harassment, violence and sexual assault in public regions, at home and in jail, moreover with the aid of the usage of the police. Sexual assault, which include molestation, rape, compelled anal and oral sex, gang rape and stripping is being devoted with impunity and there are dependable information and materials to help such sports.”

Given this situation, to widely recognized the vulnerability of transgender people to sexual attacks but preserve to exclude them from the definition of rape beneath the IPC may, in my opinion, constitute an inexplicable and entire abdication of the USA’s constitutional responsibility to protect the rights of its residents, in addition to its duty to make certain observance of human rights inside its territory. As such, implementing the actual spirit of the NALSA choice necessitates a ramification of the male-on-girl paradigm, and a reconsideration of the definition of rape below the IPC. One might also moreover additionally argue that instances of non-consensual same-intercourse sexual violence may be prosecuted under unique provisions which encompass Section 377 of the IPC, which criminalizes voluntary carnal intercourse in opposition to the order of nature as an unnatural offence.³⁸

However, even overlooking the reality that the constitutionality of the stated provision is itself questionable, the stated provision isn't an accurate crook foundation to criminalize sexual assaults violating a person’s physical integrity, as doing so creates an artificial difference amongst sexual attacks which can be heterosexual in nature and people that are not. Thus, it now not only reinforces a differential attitude within the route of gender non-conformity, but moreover perpetrates the idea that even as heterosexual assaults are acts of rape, the latter extraordinary quantity to a lesser violation of physical integrity. Further, there are big variations in the punishment awardable for committing an unnatural offence below Section 377 of the IPC and for committing rape. First, on the same time because the latter is punishable with imprisonment for a term no longer a extraordinary deal much less than seven years, there can be no such minimum threshold in case of the previous. Additionally, as regular with the amended Section 376A, inflicting the death of a rape victim or committing

³⁸*Indian Penal Code, 1860 (India), s 377.*

an act which finally ends up within the victim lapsing into a continual vegetative state shall be punishable with death.

However, the stated provision does now not observe to an offence committed beneath Section 377. Coupled with its infrequent use to prosecute the ones carrying out non-consensual “unnatural offences”, it is amply smooth that Section 377 of the IPC does now not offer an ok possibility to the offence of rape, as punishable under Section 376 of the equal Code.

Similar concerns would possibly persist if one desires to cope with the arrayed inadequacies by the use of enacting a separate gender-unbiased offence of like seriousness catering to the nontraditional instances of sexual assault, much like Section 377CA of the Malaysian Penal Code or Section 376(2) of the Singapore Penal Code.

For instance, a conscious choice to not term the equally condemnable acts of sexual violence as “rape” only due to the fact they do no longer comply with the traditional belief diminishes their gravity in the eyes of society. It can be apposite to reiterate the observations of the JVC acknowledging that the time period “rape” is belief as an expression of society’s robust ethical condemnation. In fact, the Committee, whilst relating to the offence of “sexual attack” defined below Section 265 of the Canadian Criminal Code, opined that:

“the drawback of this method is that the epithet “rape” keeps holding with it a immoderate diploma of ethical and social opprobrium, which is not conveyed with the resource of the phrases “sexual assault.” By removing the epithet “rape”, there may be a threat of diluting the volume of ethical condemnation.”

Acknowledging that rapes have traditionally been a device for gender subordination does no longer constitute a sufficient justification to distinguish sexual attacks on the idea of a gendered characterization of the sufferer-perpetrator framework. It ignores the truth that despite the fact that rape is an act of electricity, this strength differentia among a wrongdoer and a victim need no longer be based absolutely mostly on their respective genders, but may be a impact of different energy systems based totally on, for instance, caste, race, or economic versions. Most importantly, the failure to apprehend a category of sexual attacks as rape is probable to trivialize the critiques of people who do no longer agree to the male-on-girl paradigm. Therefore, from a holistic attitude, enactment of separate gender-neutral offences, even as retaining the gender specificity inside the offence of rape, is in reality reachable, however not ideal. Yet, considering the wider dreams of gender justice and the need to offer prison redress to a big quantity of rape patients outside the traditional notion, it will though be construed as a step within the right course, notwithstanding the truth that a far

less than great one. What remains essential is to understand that the sufferers and perpetrators of sexual violence may be guys, women in addition to transgender people.

VI. THE ARGUMENT AGAINST GENDER NEUTRALITY

The State has the freedom to protect human rights in its jurisdiction in consonance to the International Covenants but it doesn't dissuade it from making laws according to the social and cultural conditions of the county. As every state has a different set of cultures and social norms, it is not feasible for a country like India to adapt to the western cultures in some aspects and make laws according to a global norm.

The first argument toward gender neutrality in rape regulation is that, no longer like with ladies, there aren't any legitimate information to evidence that non-girls are raped in India or that girls can rape some other person. This argument draws beneficial useful resource from an underlying notion that “it's far however guys who are raping and ladies who're being raped” and that “gender unbiased rape laws do not reflect the fact of rape.” It additionally furthers the traditionally supported knowledge that “rape is ‘a conscious method of intimidation through which all guys maintain all girls in a country of worry’”. Indeed, after the constitution of the JVC, a plethora of feminist corporations had advised that a gender-independent definition of rape implies “that ladies can dedicate sexual attack towards men for which there may be no empirical evidence the least bit”. A few others were greater aware, keeping that “nearly 90 seven% of the survivors of rape or sexual assault are ladies”, or that there have been a “negligible kind of instances wherein women were the perpetrators.” Similar pointers have been moreover made by the usage of the People's Union for Civil Liberties, the prominent human-rights Advocate Ms Vrinda Grover, and the Women's Research and Action Group, Mumbai. In effect, the opinion endorsed through maximum feminist businesses is that:

at some degree in the many years of warfare, not a single case of a reversal of gender roles, within the realm of sexual offence, had ever surfaced inside the Indian context nor at any time shaped a part of the discourse. In this entire data, no person has ever superior the plea of sexual violation with the aid of ladies.

At the outset, it's far useful to study that feminists have lengthy diagnosed sexual assaults past the male-on-woman paradigm without obstructing themselves from highlighting troubles of gender inequality or lady victimization. To quote Susan Brownmiller, a renowned feminist creator:

“The the penis may additionally additionally furthermore continue to be the rapist's preferred

weapon, his excessive tool of vengeance, his a hit show of energy, it is not in truth his only tool. Sticks, bottles or maybe palms are frequently substituted for the “natural” element. And as guys can also invade ladies through awesome orifices, so, too, do they invade different guys. Who is to mention that the sexual humiliation suffered through pressured oral intercourse or rectal penetration is a lesser violation of the personal, non-public internal area, a lesser damage to thoughts, spirit and enjoy of self?”

All acts of intercourse forced on unwilling victims need to be handled in concept as further grave offenses in the eyes of the law, for the road of penetration is an lousy lot much much less massive than the reason to degrade. Similarly, the gravity of the offence ought not to be positive via the sufferer’s gender. That the regulation must circulate on this route seems smooth.

Likewise, in its recommendations to the JVC, Alternative Law Forum had advocated that the conceptualization of a victim be broadened from a “girl” to a “man or woman” so as to defend folks that are assaulted on grounds in their gender identification. In precise, it had said that:

“sexual violence is commonly gendered and is perpetrated because of one’s gender. Thus it isn’t great ladies, however all people who are seemed as though it’d be transgressing the limits of gender who are hassle to sexual attack. This category consists of female to male transsexuals, hijras, kothis, effeminate homosexual guys and all individuals who violate the social codes of gender. Our notion is rooted in the concrete information of discrimination and seeks to growth protection to susceptible companies.”

Thus, the goal of gender equality want no longer continuously be inconsistent with spotting non-lady victims of rape.

The argument against gender neutrality has two sides.

First, a gender-specific definition of rape based completely at the male-on-woman paradigm to only friends the victim and the offender with a selected gender, however moreover the numerous stereotypes related to it. There are countless theories of gender which further the idea that “gender and sex are ordinary notions which can be inherently linked: men are, or need to be, masculine, and ladies are, or want to be, lady.” This creates a belief in which a male wrongdoer is not handiest a man, however a person who demonstrates masculine aggression, and a female sufferer is associated with a sense of passive feminine subordination. Therefore, further to belonging to particular genders, rape sufferers and perpetrators are expected to behave according with their gendered roles for any sexual attack

to symbolize rape. This is equal to Zsuzsanna Adler's description of a simply perfect rape, wherein every participant to an act of rape is needed to behave in a specific way, conforming to the expectancies from every gender. For instance, while rape patients should be sexually green and very own suitable character, rape perpetrators need to use physical force.

In India, numerous attempts have been made to cope with the aforementioned issues, and limit the common references to gender-based totally stereotypes. As stated inside the JVC Report, "proof of the victim of rape is at the identical footing due to the fact the proof of an injured complainant or witness. Her testimony by myself is enough for conviction." Additionally, in certain instances of aggravated rape beneath Section 376(2) of the IPC, the burden of proving

"consent" is positioned upon the accused. However, but the ones efforts, the dangers of stereotyping roles keep to plague the Indian criminal justice system even in recent times. The normal affiliation of the sufferer/culprit framework with gendered roles encourages a jail device to label rape perpetrators as "beasts" or "sex-starved wolves". This particular danger turned into said even via the SCOTUS in *Orr v Orr*, even as it opined that: legislative classifications which distribute blessings and burdens on the premise of gender supply the inherent threat of reinforcing stereotypes approximately the "proper vicinity" of ladies and their need for particular protection. Thus, even statutes purportedly designed to make amends for and ameliorate the outcomes of beyond discrimination ought to be carefully tailor made.³⁹

At first, they said tendency appears innocent. However, over the years, it creates a state of affairs wherein if each player to an act of rape does not comply with his or her role, then one famous it tough to understand the incident as an act of rape or be a part of blameworthiness to the culprit. The judicial picks reflecting this tendency are hundreds. In my opinion, if the knowledge of the judges falls prey to such stereotypes as an alternative regularly, then not many can be considered immune. In this mild, the primary argument toward gender neutrality might be a crafted from the sheer loss of capability or reluctance to well known the incidence of rapes beyond the traditional perception, in which actors do not show the predicted behaviour.

Indeed, Alletta Brenner fears that "such a locating seems sudden excellent due to the truth the sufferer/perpetrator framework simultaneously constructs male sexual preference as everpresent and aggressive, woman sexual preference as absent or passive, and the male/woman sexual participants of the circle of relatives as defined via male dominance and

³⁹ BARUAH, Amit, "Dealing with 'Wolves' and 'Beasts'" *The Hindu* (26 April 2014),

woman subordination.” It can also want to now not be unreasonable to increase her opinion to the Indian state of affairs wherein severa one-of-a-kind electricity systems which aren't based totally totally on gender preserve to ply with brilliant strain. As said through Laxmi Murthy:

ladies too are capable of perpetrating sexual attack on men ... and additionally on extraordinary ladies. Such instances are greater feasible in conditions of custody ... or situations of caste/communal violence and so forth. , in which women can also collude, or absolutely provoke sexual assault on men of lower castes/ minority businesses.

Accordingly, gender neutrality may additionally allow us to abrogate intercourse stereotypes, and float beyond an facts of men due to the truth the natural aggressors and ladies because the perennial victims.

Second, it can't be denied that there are likely to be no records in India to evidence sexual attacks past the conventional perception of rape. This, however, does now not cause a cease that such times do no longer rise up. The absence of any dependable records is explainable on 3 counts.

One, inside the context of male patients, there may be an anti-masculinity stigma linked to any shape of sexual attack, discouraging them from reporting an incident of victimization. This is commonly called hegemonic masculinity, it really is the “most honoured way of being a man, requiring all different guys to place themselves with regards to it, and ideologically legitimating the global subordination of ladies to guys.” Supplemented by means of manner of non-forestall sexual segregation in society, “three important traits of hegemonic masculinity [are] that guys aren't girl, are heterosexual, and are bodily aggressive.” In a patriarchal society, this creates a well-known, but unfounded notion that men who are raped are rendered woman via it. Such perceptions bypass on to demonstrate how men enjoy rape and its reporting as a danger to their masculinity and concept of self. In a society that celebrates masculinity, guys are stereotypical aggressors. However, men, like women, are also high-quality with the aid of stereotypes, perpetuated in society and legitimized through law, which deny them opportunities for self-definition and coerce them into stifling identities. Thus, social constructs of patriarchy also discourage men from registering their complaints if they'll be sexually assaulted, especially in which the culprit is a female.⁴⁰

Two, sociological studies have indicated that there may be a chance of blaming the sufferer for his or her revel in of rape, but whether or not or no longer or no longer the sufferer is male, lady, or transgender. 142 In the context of women, this tendency of victim-bashing

⁴⁰ Ibid

drew the ire of the JVC Report at the identical time because it said that:

“even after the cutting-edge awful incident of gang rape, many political leaders, ... religious experts ... and one-of-a-type eminent individuals were making statements reinforcing the gender bias. Some have even blamed the victim for having facilitated the rape through her personal behaviour.”

While the JVC’s observations were with reference to sexual violence in competition to ladies, the tendency of victim bashing creates a socially destructive surroundings for patients of all genders. For instance, many gay guys might also keep away from searching for assist because of the reality they do not understand how the police will cope with them, a hundred and forty four or due to the fact they will be afraid that “humans will forget the rape and blame them for hooking up with strangers, in particular other men”.

Accordingly, this tendency of repositioning the blame on the rape sufferer, regardless of gender, contributes to the absence of any statistical proof on the issue.

Three, there can be a further attention justifying the absence of true data on the problem, particularly within the context of transgender human beings. In India, there may be no regulation that recognizes rape beyond the traditional notion, which makes it greater difficult for non-woman victims to file a grievance with an insensitive police established order.

For corporations first-rate currently afforded a legally-recognizable gender identity, such problems proper away multiply. As such, “the ancient failure of the prison way in most jurisdictions to apprehend rape outdoor the male-on-girl paradigm can also have furthermore contributed to the failure of society to famed male or transgender sexual victimization.” In any event, the absence of legitimate statistics evidencing non traditional instances of rape need to be considered in the precise social context, particularly after the apex court said how individuals of the transgender network are frequently subjected to rape and exclusive styles of sexual assault. Therefore, the statistical imperfections do now not manage to pay for a legitimate foundation to deny they want to revisit the problem of gender neutrality in rape law. Nonetheless, I renowned that instances of sexual assault past the traditional perception of rape is probably few in assessment to folks that follow the male-on-girl paradigm. However, the capability length of the class of sufferers possibly to experience the advised reforms want to live beside the factor to any discourse in regulation. If no longer, then the sort of controversy could be disastrously much like the appalling reasoning followed by means of manner of the Supreme Court of India in *Suresh Kumar Causal v. NAZ*

*Foundation*⁴¹ whilst upholding the constitutional validity of Section 377 of the IPC, which criminalizes consensual sex among adults of the equal intercourse.

This line of reasoning turned into defined as “counterintuitive to the belief of discrete and insular minorities who're unable to fend for themselves or use the political system and in want of judicial intervention to guard their rights and freedoms.” Many considered it to be an abdication of the obligation to protect all minorities from the vicissitudes of most people’s opinion, and a few sarcastically labelled it as “the upward push of a constitutional numerical equality check”. Similarly, the fact that instances of non traditional rapes might also best represent a miniscule fraction of universal rapes ought not to maintain any relevance.

As mentioned thru the Court of Appeals of New York in *People v. Liberta*⁴²:

“at the equal time as forcible sexual assaults thru ladies upon adult men are simply masses much less common than those with the aid of way of guys upon women this numerical disparity cannot by way of using itself make the gender discrimination constitutional. Women can be answerable for a far decrease sizable style of all essential crimes than are guys, however the type of disparity might not make it permissible for the State to punish great guys who commit, for instance, robbery.”

Consequently, “at the same time as women are the principle patients of sexual violence and man or woman guys the principle perpetrators, one nevertheless has to don't forget how sexual assaults past the male-on-woman paradigm are to be labelled through manner of the crook law.”

The most usual argument for neutrality in Indian rape law pertains to the ill-effects of spotting ladies as functionality perpetrators in an incident of rape.

Many keep in mind patriarchal societies like the ones in India to be ill-organized to simply accept a totally gender-impartial definition of rape given that doing so could introduce a crucial hazard of counter complaints being filed inside the route of each bona fide girl complaining of being raped. In first-rate words, if the offence of rape is made absolutely gender-impartial, it “will allow guys to file faux instances of penetrative sexual assault in competition to women”.

As a give up stop end result, for each grievance of rape via a female, there might be a counter complaint filed via the accused guy, so you can deter female rape sufferers from coming in advance.

⁴¹*Suresh Kumar Koushal & Anr v NAZ Foundation & Ors (2014) 1 SCC 1.*

⁴²*People v. Liberta 1982 N.Y. App. Div*

In this kind of scenario, it's far strongly argued that "a gender-unbiased rape law may open up avenues for inflicting even greater trauma and humiliation to an already marginalised segment and as a result defeat the very reason of reform", and may erode "the deterrence value of criminalizing rape because it will always be used in the direction of ladies in rape trials, wherein guys will nation that women have been the aggressors". As such, many recall it prudent to "be suspicious of the manner that a gender unbiased lens now not simplest obscures factors of girls' oppression, but moreover provides the gear ... For dismantling some of the gains that have been made for girls."

In India, the ones worries stand further improved due to the apathetic and insensitive nature of the criminal procedure –beginning from the time of registering a complaint with the police to the ordeal that a rape trial is. Even the JVC said that "right here is, glaringly, a high quality diploma of institutional bias inside the path of ladies. Their court cases aren't taken extensively thru the police. On account of the patriarchal form the male cops do not take complaints of rape critically."

However, the very existence or quantity of this hazard is contingent upon the submitting of a counter complaint thru someone in the direction of a lady, this is by no means a fact. The nonstop and overbearing emphasis on masculinity deters men from voicing their sexual victimization thru each different person, specially a female. As said by means of the JVC: a easy examination of male enjoy shows that boys are anticipated to advantage masculinity in any respect odds to expose their manhood via a system of social or mental evolution the usage of numerous messages "Such exercise of strength and violence in the direction of women and specific guys now not best form man-female relationships, but moreover among guys themselves in society..."

Thus, "while girls have had to go through the discrimination that derives from being perceived as bodily and emotionally susceptible, men have needed to undergo the discrimination that derives from being perceived as bearers of physical braveness."

In such mild, to record a counter complaint of rape, guys, just like ladies, want to be desirous of braving an agonizing trial device an first rate way to question their masculinity at each diploma. Assuming the lifestyles of such braveness as a foregone surrender, but, is unreasonable. Some surprise if they may additionally be believed first of all, whilst many others doubt whether or not others will take the crime notably and worry becoming the "butt of myriad jokes." This illustrates that the social barriers that have a tendency to make the criminal justice device inaccessible for ladies additionally save you the potential of guys to

file a rape complaint towards each exceptional character. After all, “maximum gender theorists well known the easy truth that the dominant societal notion of being masculine way ‘doing subjects that cannot and must no longer be done through girls’.”⁴³ Accordingly, this attention need to be factored in to mitigate the perceived risk of a counter complaint.

In any event, a considerably less than perfect social structure tormented with male controlled society isn't in every case any thought process to dispose of the possibility of impartiality in assault law in light of the fact that the privilege of human rights isn't generally dependent upon the social, or prison, quirks of a general public. This announcement is prefaced at the all inclusiveness of human rights, which expresses that human rights are common in nature and look at to individuals paying little heed to social or social varieties.

As referred to via Fernando Tesón, albeit in reaction to the concept of cultural relativism: “to mention that cultural identities ought to be legit does no longer propose that international human rights regulation lacks a massive middle Unless one needs to surrender the very notion of an global regulation of human rights altogether, the ones rights ought to have basically the same which means that irrespective of network traditions.”⁴⁴

VII. THE CRIMINAL LAW AMENDMENT BILL, 2019

India recognizes the need of a gender-neutral law in cases of rape as it progresses along with the world. To initiate this after a number of attempts by various human right protection groups, a bill was introduced in the Rajya Sabha by K T S Tulsi, as a Private Member Bill.

Presently the law against rape recognises that a woman only can be a victim of rape, not a man or a transgender Supreme Court in *Navtej Johar vs Union of India*⁴⁵ declared Section 377, which criminalises sexual intercourse between same sex individuals, or transgender, as unconstitutional for it to recognize the right to equality and dignity as enshrined in the Constituion of India. Thus the only remedy which lies for a homosexual or transgender rape victim is under Section 377 which has now been struck down. This leads to a lacunae in the law where it fails to provide remedy to rape victims other than heterosexual women.

Thus, non-consensual sex between persons of same gender has to be treated as rape and not an unnatural sexual offence leading to another loophole in the law. To make the offence of rape gender neutral, premise of the same is that homosexuals and transgender can be a victim of rape and that not only a man can be the offender in cases of rape. The Bill raised the issue

⁴³ Cohen, “Sex Segregation”, *supra* note 124 at 175 (quoting JORDAN, Ellen, “Fighting Boys and Fantasy Play: The Construction of Masculinity in the Early Years of School” (1995) 7(1) *Gender and Education* 69 at 75

⁴⁴ *Ibid*

⁴⁵ *Navtej Singh Johar v. Union of India* (2018) 1 SCC

and has the following provisions. This bill if passed would be the most progressive change in the Indian Criminal Law against rape.

(A) Defining Modesty

The bill proposes to add the definition of “modesty” to Section 2 of the Indian Penal Code, 1860 describing “it as an attribute that attaches to the personality with regard to the commonly held belief of morality, decency and integrity of speech, behaviour, in any man, woman or transgender.”

Amendment of Sections 354 – 354D of IPC:Section 354 to 354D which define the offences of outraging of modesty, sexual harassment, criminal intent to disrobe, voyeurism and stalking have been modified to the extent that the sex of the perpetrator of the offence and the victim is irrelevant.

Amendment to Section 375 of IPC: The Bill proposes to replace pronouns referencing “men” and ‘women’ specifically with words such as “any person” or “other person” effectively making the offence of rape gender-neutral. However, sub-clause (fourthly) according to which consent under the impression that the man is her husband is rape has not been modified and rightly so.

The Bill also proposes to replace the words ‘penis’ and ‘vagina’ with the phrase ‘genital’ which is subsequently defined under Explanation 1 to mean the penis and vagina.

This shall not apply to the insertion of foreign objects which amount to rape.

Insertion of Section 375A:

A new offence of intentional touching of private parts, the anus or breast without consent or use of words that cause uncomfortableness and create an “unwelcome threat of actionable nature” be added under Section 375A and be punishable with a rigorous imprisonment of up to three years and/or fine.

Sections 376A, 376B, 376C & 376D of IPC shall also be gender neutral, apart from specific sub-sections related to the rape of women and children in custody.

Apart from this, the appropriate sections of the Code of Criminal Procedure, 1873 and Indian Evidence Act, 1872 are amended to include the new proposed Section 375A.

(B) Analysis of the bill

The Bill has sidestepped potential issues that may have emerged with the meaning of transgender, by not characterizing it by any stretch of the imagination, particularly because of

contentions that may emerge with the proposed Transgender Bill. Rather, it has quite recently included a classification called 'other' which incorporates transgender. Along these lines, any individual who doesn't relate to one of the pairs can in any case have response under the altered IPC, regardless of the prohibitive meaning of transgender that might be presented in different enactments.

The most hazardous part of this Bill is its endeavour to characterize the term modesty. The meaning of 'modesty' that is looked to be embedded is one that is extremely abstract dependent on familiar ways of thinking of individuals. The justification for including this definition is indistinct since it makes disarray in regards to what establishes unobtrusiveness given that it puts together humility with respect to extremely emotional convictions of tolerability.

The Supreme Court in the case of *Tarkeshwar Sahu vs State of Bihar*⁴⁶, in the context of Section 354 of the IPC had defined modesty of a woman by stating that the essence of a woman's modesty is her sex. By this norm, any demonstration against a lady that meddles with her substantial trustworthiness exclusively due to her sex would add up to an offense under Section 354. It would have been proper if a similar standard which is outright in understanding be followed.

While the presentation of the offense of rape must be valued, there are sure issues with the phrasing that has been utilized in the new proposed Section 375A. Right off the bat, what establishes an "unwanted noteworthy danger" is indistinct from the arrangement. Sadly, obscure wording has been utilized to recognize the commission of an offense since the impression of what establishes a "significant danger" can be incredibly shifted in any individual who is in the dread of being explicitly ambushed.

Furthermore, while it adopts the meaning of "assent" under Explanation 2 from Section 375 which additionally characterizes agree to incorporate any type of non-verbal correspondence, conveys a readiness to take part in the particular demonstration. In any case, it has not embraced the stipulation from Section 375 which completely expressed that insignificant non-obstruction of infiltration will not add up to assent.

In the present day and age, there is no clear motivation to intentionally leave a lacuna in the law. It is hence important to incorporate an end product stipulation here also such that nonproduction from contacting, will not sum as assent.

⁴⁶Tarkeshwar Sahu v State of Bihar Appeal (cr.l.) 1036 of 2005

Thirdly, Explanation 3 while characterizing "contacts" expresses that the word will mean contacting of a sexual sort without the assent of the person in question and without a sensible conviction that the casualty has agreed for the equivalent. The risky meaning of assent as clarified above combined with the utilization of the expression "sensible conviction" completely weakens the substance of the segment. The meaning of assent is as it is an unfilled definition under the new area and the expression "sensible conviction that.." demonstrations like an umbrella that can be utilized to legitimize any type of ambush by utilizing it as a guard. On the other hand, the Bill ought to have quite recently received a practically equivalent to stipulation to Explanation 2 and excluded Explanation 3 by any stretch of the imagination.

After the refusal of the Supreme Court to make assault an impartial offense expressing that it is the activity of the Parliament, the idea of acquainting a Bill with such impact is an invite measure.

Nonetheless, it is vital that these progressions are actualized methodically and comprehensively so that don't bring about the prohibition or making of laws that are not adequate to handle the different types of rape. It additionally should be brought up that since a correction to Section 375 of the IPC was being proposed, conjugal assault could have been condemned too. With the expansion in the talk on such subjects, it is appropriate that the Legislature tries harder and acts carefully while actualizing these transformative changes in criminal law.

VIII. CONCLUSION TO THE ARGUMENT FOR GENDER NEUTRALITY

Gender neutrality towards the victim underscores the extent and prevalence of male and transgender sexual violence in India. It can be concluded that the existence of rape among men and transgender people in India especially rape between men cannot be denied. The most prominent opinion against total gender neutrality is the patriarchal state of mind of Indian society and the negative consequences it could have for women victims. On the other hand proponents of full gender neutrality rely on the argument of the right to equality and on the social stigma associated with male rape. After analyzing both sides the researcher concluded that sexual violence against men and transgender people should be combated but should not create a dangerous environment for women who are victims of rape. We must strive to create an egalitarian society and we must move towards non-sexist laws. However given the current situation and the treatment of women in India it would be unwise to radically convert rape laws into gender-neutral laws. We have to go step by step.

Therefore, as recommended by the Verma Committee⁴⁷, the rape law must be amended to make the victim gender inclusive while the perpetrator remains gender specific. Sexual violence in special situations of war crimes, prisons and caste, communal conflicts concludes that the gender identity becomes irrelevant in such cases as other identities of religion, caste and race becomes the dominant identity. Thus 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.

Therefore, the recommendations for the creation of gender neutral laws are as enumerated below:

- The fact that males and transgender can be raped is an undeniable and the legislature must go ahead and make such laws to deliver justice for such offences too.
- To prevent the misuse of law there must be an attempt to balance the rights of all identities. A set of laws must be brought in force which must balance scales that is protect the identity of men, women and transgender alike and not create a detrimental affect on one community by criminalizing one and victimizing the other.
- According to the Justice Verma Committee Report the most balanced solution is to make the victim gender inclusive while the perpetrator remains gender specific. 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.
- 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.
- 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.

Section 377 must be read down to decriminalise homosexuality for an effective gender neutral or a partly gender neutral law. As Kapur (2013) suggests, “consensual sex regardless of gender can only work if sexual minorities are granted the right to have consensual sex in

⁴⁷ Report of the Committee on Amendments to Criminal Law (2013), retrieved from <http://nlrd.org/womensrights-initiative/justice-verma-committee-report-download-full-report> on January 2, 2014

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.”⁴⁸

⁴⁸ 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.