



STEP TOWARDS GENDER-NEUTRAL SEXUAL OFFENCES IN INDIA

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Abstract: 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 a part 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 of gender neutral sexual offences. However, amendment in penal code is just one step towards 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.

Index Terms – Gender-neutral sexual offence, Rape of men, Women perpetrators, Homosexual rape, Non penetrative rape.

I. INTRODUCTION

Sexual offences are lamentable crime which are punished by state. Sexual offences not only taint the body of victim but also stains the mind and soul of the victim. It leads to unimaginable trauma. In some fatal cases being unable to cope up with this trauma the victim commits suicide. Criminal Law around the globe curbs sexual offences with stringent punishments. Offences of these nature dents the modesty of a person, the sole element which constitute for the pride over self body. However, often this fundamental element of pride is attributed only to women. The Criminal Law bluntly does not recognize modesty for men. The definitional aspect of Criminal Law limits modesty only to women. In addition to that the according to the definition, victim of sexual offences can only be women. Further the definition illustrates man to be sole executioner of sexual offences. The deduction of all these implies that men are void of modesty, men cannot be victim of sexual offences and women are unable to commit sexual offences. Further more sexual offences cannot be directed towards women by a woman and every kind of sexual offence against men can be encompassed within sodomy.

In general terms sexual offences are defined as heterosexual in nature, i.e. involvement of two opposite genders with exception to sodomy. Sexual offences characterize forceful, nonconsensual, act by one gender (generally assumed to be male) towards other gender (generally assumed to be female). This rigid definitional aspect of sexual offences seems a bit off the mark in present scenario. Every so often we come face to face with news which defies this definitional order of sexual offences. The Penal Code of India was enforced in 1860 when patriarchy was prevalent. The laws were distinctively incorporated to protect women from the patriarchal regime of the then society. The society has undergone major evolution since then. The constitutional methods of equal opportunities, and protective discrimination in favour of women, the campaigns of women education and empowerment of women in personal as well as public sphere has brought a change in the era old scenario. Today's world favour general neutrality, equal opportunities, equal rights and justice. The decriminalization of same sex relationship and social acceptance of LGBTQ screams for the social change, social acceptance, and changing mentality of common subjects in the entire nation. Standing in the wake of this current state, are gender biased sexual offences still valid? Can still men be considered as only executioner and not sexual offences victim? Can women be still considered as only victims and not executioner of sexual offences? Can sexual offences be only committed heterosexually and not homosexually? Can modesty be solely reserved for female

and not male? Can a woman not be perpetrator of commission of sexual offences against a woman? Is sodomy enough to encompass entire range of sexual offences against men? We will try to seek an answer to these question in the upcoming discussion.

II. DEFINITIONAL RIGIDITY

Sexual offences are embedded in Indian Penal code under the umbrella term of Offences affecting Human Body. Sexual offences may be further categorized into following-

1. Outraging the modesty
2. Sexual harassment
3. Disrobing
4. Voyeurism
5. Stalking
6. Rape
7. Unnatural offences

It is quite interesting to note that according to the definition, perpetrator of all the above offences are men. The definition therefore rules out any chances of men being a victim or women being an executioner of the aforesaid offences.

Section 354 of Indian Penal Code provides for the offence of outraging modesty. To constitute offence under section 354 the victim must be a woman and accused must have used criminal force to outrage modesty. As to what constitute modesty, the Penal Code is silent, but court rules out in *Tarakeshwar Sahu v. State of Bihar* (2006 8 SCC 560) that modesty is associated with female human beings as class. It is a virtue attached to a female on account of her sex. Whereas Merriam Webster dictionary differs by putting forward the definition of modesty as, "propriety in dress, speech or conduct, which depicts modesty to be gender neutral." Instance of outraging modesty is presented in *Vidyadharan v. State of Kerala* (2004 Cri L.J. 605 SC) accused enters the kitchen where the victim was involved in cooking while accused attempted to hold her hand, she escaped and locked herself in a room, the room was forcibly opened by accused and the victim was grasped. The Court framed a charge under section 354 as the facts satisfied all the ingredients necessary under section 354. Now let's consider an example, 'A' a man working on his workshop, through the door comes another man 'B' who tries to grope A. A escapes but B follows and ultimately grasps him. In this example every ingredient specified for offence under section 354 is fulfilled except for the fact that victim is a man. Similarly, in the above example if we substitute 'A' and 'B' to be female, the result remains same. In both the cases the 'B' outrages the modesty of 'A' but still the offence of outraging modesty is not made out due to the definitional rigidity.

Sexual harassment is provided under section 354-A. Sexual harassment is committed when a man makes sexual advances, or demands sexual favours, or show pornography against the will, or makes sexually coloured remarks, towards a woman. Let us consider an example if 'A' a male working in an office, 'B' also a male and A's boss, calls A into his cabin, and makes sexual advances or demands sexual favours, or forces his to watch pornography, or makes sexually coloured remarks towards A. By general conscience these facts should constitute offence of sexual harassment. In case we substitute 'A' and 'B' to be female, still general conscience implies the offence would remain unchanged. But according to Indian Penal Code the above circumstances would not constitute the offence of sexual harassment. As to constitute the offence of sexual harassment it should be directed from a male towards a female. Therefore, the definitional rigidity lets 'B' escape liability of sexually harassing 'A'

Compelling any woman to be naked is an offence under section 354-B. It provides that if any man, assaults or uses criminal force in order to disrobe or compel any woman to be naked such person shall be punished. According to the definition only a male can execute offence of disrobing and such can be executed on a female. Let us consider an example, 'A' a male forcefully strips another male 'B'. The above facts constitute disrobing except for the fact that it is directed towards a male. Similarly, if we substitute 'A' and 'B' to be female, still the facts constitute disrobing. However, above facts do not fulfill the *sine qua non* ingredient of male perpetrations and female victimization, saving fulfillment of other essential ingredients necessary for the offence of disrobing. In both the cases 'A' would not be punished as he has not committed any offence as per section 354-B. Thus once again, definitional rigidity lets 'A' escape liability.

Voyeurism is practice of attainment of sexual pleasure from watching others in naked state or when they are engaged in sexual activity. This act is punished by Indian Penal Code under section 354-C. Section 354-C provides if any man watches, captures image, disseminates image of any woman engaged in private act, shall be booked for voyeurism and punished accordingly. Essentially this section also recognizes that voyeurism can only be committed by a male towards a female. Now let us consider an example, 'A' and 'B' both being adult male are engaged in sexual activity in their bedroom, 'C' a female who lives next door, peeps into their private act through a opening in the door, she also makes a video of the same. According to section 354-C, 'C' falls short of a necessary ingredient, i.e. perpetrator must be male, to make her liable for voyeurism. In the above example if 'C' is substituted to be a male, still 'C' would not be liable, as the section requires watching a female in her private act. Therefore, in the above examples whether 'C' is a male or female, 'C' escapes liability due to definitional rigidity.

Stalking could be committed under section 354-D only if any man follows, contacts, monitors, watches, or spies any women in spite of her clear indication of disinterest. The Code recognizes stalking only from a male towards a female. Let us consider an example, 'A' a male is followed on social media, in person, and also spied upon by 'B' a female. These facts would not constitute the offence of stalking as per the definition, neither if in the above example 'B' is substituted to be a male. Further more in the aforesaid example if 'A' is substituted to be a female, in such case too 'B' would not be committing stalking according to the definition. Thus the definitional rigidity lets escape all permutation and combination other than male as stalker and female being stalked.

The definition of rape provided under section 375 of Indian Penal Code is quite illustrative. In order to constitute rape there must be penetration of penis, or object, or manipulation, or application of mouth to the private parts of woman, against her consent, or consent obtained under force, coercion, or fraud. The opening statement in definition of rape provides "a man is said to commit rape..." which denotes rape can only be committed by male. This kind of definition to rape is rather narrow as stated by Federal Bureau of Investigations Uniform Crime Report. United States of America relied on a similar narrow definition of rape until 2013. The new definition of rape in United States of America provides "the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." The updated definition denotes that the perpetrator and victim could belong from either gender. The social acceptance of LGBTQ has revealed their methods of gratifying their sexual needs. A female with homosexual orientation often uses external substances in commission of carnal intercourse. In view of those the possibility of a female committing a rape on a female cannot be ruled out. On the other hand, a male with homosexual orientation if forces another male to intercourse against his will it falls under the offence of sodomy. But if such male manipulates the body parts of other male or inserts any object into the private parts of such other male, such acts does not fall under sodomy. These acts fulfill the ingredients of offence of rape, but still such cases cannot be termed as rape as per the definition provided under section 375 of Indian Penal Code. The definitional rigidity of rape rules out scenarios mentioned above from the ambit of rape. The only recourse which remains to such victim under Penal Code is to lodge a complaint of assault.

III. PRACTICAL REALITY

The examples used above to establish arguments may seem wild fiction but unfortunately they are not completely mundane. In Pretoria, South Africa, 2017, police found a man of 23 dumped into a field in semi-naked state. What the victim had confessed was shocking. The victim stated that he was kidnaped after being injected with an unknown substance. He woke up to find himself in an unfamiliar place where he was forced to drink energy drinks and Viagra. He was raped numerous times in three days by three women, before being dumped.¹ Rebecca Twinley, a lecturer in University of Plymouth, was raped 18years ago by a woman. When she went on to describe the trauma to her partner, she was silenced by implying impossibility of the event. With the scar she continued in her life. At a later stage in her life she acknowledged her experience to BBC on an interview.² India too has some horrible stories. In 2019, a man aged 24 attended a party in South Delhi, which was attended by lesbian, gay, bisexual, transgender and queer members. The victim was sexually assaulted in that party by a man of age 57.³ Akram, was raped by his preacher multiple times in a period of one year. He could not reveal this to his parents and family, but after 14 years of silence he revealed his traumatic experience on a interview with BBC.⁴ In 2014, a Madrasa teacher was booked for sodomising a 12 year old student of Shamli district.⁵ In 2018, a 14 year old boy from Mumbai narrated his abuse to his mother from his death bed. He was lured into a room, where a man raped him. When he got free from his grasp, he ran for his life, being unable to bear the

assault and trauma he consumed rat poison to end his life. He was rushed to hospital where he narrated his abuse to his mother on verge of death.⁶ According to report published in Times of India, 2015, a prison inmate in Tihar jail was being sexually assaulted by rival inmates, this act was watched by others for pleasure, which multiplied victims humiliation. Some inmate stopped shaving to look old as sexual predators looks out for young inmates. Inmates experiencing such assaults maintains silence out of fear and pain. Some inmates often start trading their bodies to obtain cash, cigarettes or other valuables.⁷ Highly decorate Army Brigadier of 25 Infantry Division was accused of committing sodomy upon his '*Sahayak*'. Subsequently Brigadier resigned form his post.⁸ An 18 year old resident of Kashmir while narrating his trauma says "he was cruel, like a mad dog". In 2009, that boy was stripped in his cell and sodomised by 5 policemen in turns. After those policemen left, another policeman walked in who dragged him to the middle of cell and thrust his men parts inside him. Describing his pain, he states that he felt like flesh inside him was burning, his voice was choked and he blacked out. When he regained his conscious he felt blood coming out from his rectum.⁹

The National Crime Victimization Survey¹⁰ conducted by Bureau of Justice Statistics, USA reported 38 percent of sexual violence victims were male between year 2010 to 2013¹¹. The National Intimate Partner and Sexual Violence Survey¹² found for LBG people conducted by Centre for Disease Control and Prevention, USA, reported-

- 44 percent of lesbian's experience rape, physical violence or stalking by intimate partner
- 22 percent of bisexual women have been raped by intimate partner
- 40 percent of gay men experience sexual violence

U.S. Transgender Survey¹³ conducted in 2015 reveled that 47 percent of transgender experience sexual assault at any point in their life.

National Human Rights Commission Report 2007-11¹⁴ India, reports the reason for majority of suicides in jails are same sex rapes. According to Police data accessed by IANS seven cases male inmates being raped were registered in year 2014.¹⁵ Centre for Civil Society made a revelation that 18 percent adult male have been coerced or forced to have sex, shockingly of those 18 percent, 16 percent claims of being forced or coerced by female whole 2 percent claims to be forced or coerced by male¹⁶. A study conducted by Ministry of Women and Child Welfare, 2007¹⁷ found 53.22 percent children in India has faced one or other forms of abuse, out of which 52.94 percent were boys.

Aforementioned real life instances, reports and surveys clarifies that same sex rape, women being perpetrator of sexual offences are not mere fiction. These offences are not impractical anymore, they are as possible like any other form of sexual offence embedded in the penal code. Currently we lack data to reveal the exact number of commission of these offences. National Crime Record Bureau Reports commission of offence under section 377, which portrays only fraction of the whole genre of sexual offences possible. Government agencies does not conduct any survey to collect and ensure data on these issues as they do not constitute offence under penal code of the country. Without data in hand it is practically impossible to convince the legislation to bring about gender neutral change in the sexual offences under penal code.

No matter how much we try to close our eyes towards the fact, but that does not change the truth. Instances stated above are true and has been experienced by the victim. However, these came from those who dared to speak and share about their mental agony and physical pain. Our society teaches male to be masculine, tough, which in turn means not to shed tears even during the hardest of times. This teaching is so imbibed that any male facing victimization, does not dare to speak or share, as such would be considered cowardice or weak. Society teaches that male cannot be victim to sexual offences, such image restraints the victims from reporting their traumas. In case of woman things are quite opposite, where a woman suffers such victimization, she is silenced on the pretext of impossibility. Societies in India are nuclear and runs on the judgment that what others will think. This leads to burial of most of the instances, as leakage of the story will prove fatal for the image of family. It's a shame that family chooses their repute over trauma of victim. Often the victim is pushed down to more mental pain by statements of persons around him/her that this happened because of them or their choices. Victims undergoes fear to state their experiences as they imagine such would put a question on their sexual identity. Homosexual men and women often they try to rationalize their abuses to themselves as bad sexual experiences, or by consoling themselves about their bad choices. The stigma associated with homosexual rapes are so intense that it prevents victims from seeking any help or sharing their experience in order to obtain any

recourse. In most cases the sexual assaults is committed by some person who stands in a relation to the victim. Fear of not being believed by own family or friends prevents the victim from reporting their abuses. Victims of abuse are also terrorized by threats of blackmail, destruction of repute, grievous hurt which prevents them from reporting their abuse.

IV. CONCLUSION

The forgoing discussion establishes the definitional rigidity of sexual offences incorporated in our code which serves as the reason for escapade of sexual offences which are not heterosexual in nature. Through the means of examples, it has been established that sexual offences can be committed even against the natural order of sexes. The real life instances vouch for the possibility of commission of those offences. It has been established that sexual offences should incorporate homosexual abuses and women perpetrators of sexual offences. The current regime of the code lets the later categories unpunished. It is also evident that Government has been naïve to conduct studies on these topics. A study dating back to 2007 conducted by Ministry of Women and Child Welfare in collaboration with United Nations indicates enervative attitude towards these issues. Till date no survey has been conducted in the country homologous to the National Intimate Partner and Sexual Violence Survey conducted in United States of America. Poor measures of sex education and consideration of sex education as a taboo contributes more to silences of the victims of abuses. Glorifying masculinity and projection of ideal image of man further suppresses the male victims of sexual abuse from reporting their instances. Whereas women either opts out or silenced from reporting due the family repute. Common notion of physical impossibility of female being raped by female adds up to it.

IV. SUGGESTIONS

Simple solution to scathing problem is to make sexual offences gender neutral. Gender neutrality of sexual offences will provide scope for addressing entire list of sexual offences through exact same provisions currently available in Indian Penal Code. Gender neutrality will save time and energy to amend each provisions or even enactment of new legislation in order to fit in the diverse range of sexual offences prevalent in todays dynamic society. However, gender neutrality may face strict criticism of feminism, as orthodoxly view of society associates victimization to female just like it associates perpetuation to male. Achieving gender neutrality to sexual offences is a battle of educating about the possibilities of offences of these nature rather than achieving equality. It is about punishing the perpetrators and redressing the victims. It is about assuring the victims of abuse about the fact that their abusers would be punished for their deeds and thereby establishing justice.

The Legislation should amend the current provisions of penal code related to sexual offences in order to bring it into consonance with dynamic society. Most of the sexual offences incorporated in the Code begins with the opening statement “Any man” which needs to be substituted by “Any person”. This amendment will equip the current sections with necessary means to curb any kind of sexual offence and will save the entire section from being reevaluated to the needs of society. Further more few amendments are necessary to shape gender neutral sexual offence. They are-

- Substituting the term “any woman” in section 354 by “anyone”.
- Substituting the term “any man” in section 354-A by “any person”
- Substituting the term “any man” in section 354-B by “any person” and “any woman” by “anyone”
- Substituting the term “any man” in section 354-C by “any person”, “a woman” by “anyone” and “her” by “their”
- Substituting the term “any man” in section 354-D by “any person” and “a woman” by “anyone”
- Substituting the term “any man” in section 375 by “any person” and “a woman” by “anyone”
- Substituting the term “woman” in section 376 by “anyone”
- Substituting “woman” in section 376-A by “that person”
- Substituting “any woman” in section 376-C by “anyone”
- Substituting “any woman” in section 376-D by “anyone”
- Substituting “woman” in section 164A Cr.P.C. by “anyone”
- Extending medical examination available to victim of rape under section 164A Cr.P.C. to victims of sexual abuse

Though these suggestions are incorporated under Criminal Law Amendment Bill 2019¹⁸, which was introduced in Rajya Sabha on July 12, 2019 but a year as been passed since their introduction, still these necessary changes have not been enforced yet. Penal laws bar retrospective application, therefore every single delay in enforcement of the amendment proves fatal to the victims of abuse by letting executioners of sexual offences escape law.

However, making sexual offences gender neutral is just one facet to. To achieve a full victory certain others operations needs to be executed. Some of them are-

- Government must conduct annual surveys to gather data on abuse faced, irrespective of gender and sexuality. These surveys would present the measurable figures of abuses faced, which are still beyond the ambit of sexual offences. For effective data surveys should cover rural *vis-a-vis* urban areas of the country. Data will help to ascertain the gravity of abuses faced by victims.
- Judicial recognition modesty of men ditching the established rule that modesty is attributed to women because of their sex. Criminal Law Amendment Bill, 2019 have made a try to define the term “modesty” and attributed the same to man, woman and transgender. It is a positive step, but its enforcement is still due since last year, therefore unpredictable. Judicial recognition of women perpetrator of sexual offences and withholding showcase of clemency in convictions because of their sex. Establishing a precedent of possible commission of rape without penetration. Extending the definition of rape to include manipulation of body parts saving penetration.
- Close monitoring on the correctional institutions and child rehabilitation centers for any uncertain instances of abuse. Educating authorities to identify signs of abuses. Establishment of a counselling Centre inside correctional homes where victims of abuse can seek redressal. Identification of perpetrators at the earnest and reporting their activities to nearest Magistrate for further course of action against them as per the penal code.
- Generating awareness about the possibility of homosexual abuses. Educating children to differentiate between good touch and bad touch. Incorporation of sex education in student’s curriculum.
- Encouraging victims to come forward and report their abuses. Standing by the victims in their hours of need. Avoid sensitizing victims of abuse during their course of reporting. Cessation of blame game or shame game upon the victims of abuse. Extension of moral support by family and friends.

To sum up, enforcement of engender neutral sexual offense would bring into light the victims who were bound to lurk in the shadow of their pain, agony without being able to express themselves. Categorization as sexual offences would encourage them to report and get redressed. They would no longer be chained by the thoughts of being ridiculed, ignored, or what others will think, from seeking help. Criminal Law Amendment Bill, 2019 is a positive step towards gender neutrality of sexual offences but unfortunately it is still a bill and not an Act.

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