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RETHINKING RAPE: SHOULD THE LAW STILL CONFINE TO THE PARADIGM?

JOSHITA JOTHI, KESHAVDEV JS*

From the available statistics, it has come to light that in about 10% of rape and sexual assault cases that occur, the victims are men. In such cases, the perpetrator could be a man, woman or a transgender. However, this is not recognised by the law as it exists today, even after the Criminal Law (Amendment) Act, 2013. It typecasts men in the role of the offender and women in the role of the victim. The Justice Verma Committee, which was formed pursuant to the brutal gang rape of a 23-year-old student in Delhi, in its recommendations, has suggested that rape and sexual assault laws should be made gender neutral. However, ignoring these recommendations and bowing down to the pressure from activists, the Government passed the Act without these much-needed reforms. In this paper, we attempt to bring to light the immediate necessity for a change in these laws. By analysing the international scenario and the reasons for this phenomenon, we seek to show that the reasons that are usually put forward by feminists and activists do not hold ground anymore. Women can and do rape men and this must be given legal recognition, as it would serve as a precursor to societal recognition. The Indian perspective that this would make women even more vulnerable cannot be accepted as well, as safeguards can be put in place to deter the misuse of such laws. Equality, being a fundamental principle embodied in the Constitution, must be given effect to, in order to ensure justice to all.

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* Joshita Jothi and Keshavdev J S are students of third year, pursuing B.A. LL.B. (Hons.) at the National University of Advanced Legal Studies.

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I. INTRODUCTION

*"I was thrown face down onto the floor....He punched me twice in the head and said:
"shut up queer -- you get what you deserve".... [and then he raped me]....I wanted to
die."*¹

¹ Stephanie Allen, *Male Victims of Rape: Responses to a Perceived Threat to Masculinity*, NEW VISIONS OF CRIME VICTIMS, 38 (Carolyn Hoyle, Richard Young, Richard P Young eds.), (Portland, Oregon: Hart Publishing, 2002), available at http://books.google.co.in/books?id=tYWmgPIG9noC&pg=PA23&lpg=PA23&dq=Male+Victims+of+Rape:+Responses+to+a+Perceived+Threat+to+Masculinity&source=bl&ots=zppVNku8Zg&sig=kO5C0d3q3yrv7Pz7rZBmUa2J3Qk&hl=en&sa=X&ei=rQX_UeGEMM2FrQf3lIG4BA&ved=0CC0Q6AEw

This was the rant of a male victim of rape, as quoted by Stephanie Allen. Yet, male rape is, to this day, considered a societal taboo and a psychological abhorrence. It remains a social stigma, stifled by preconceived notions of men as symbols of power and dominance. It is indeed a concern that how many more of these victims must fall prey to crimes of such a nature until the patriarchal society that we live in takes cognizance of such events. One may say, in opposition, that the concept of feminism as it exists today is in favour of this discrimination, which is gender specificity in rape law. However, a more realistic approach to this problem is, indeed, proving to be necessary.

This can only be described as a narrow and disappointing way of thinking. It is appalling that the discussion on the issue of rape outside the male-on-female paradigm is negligible. Gender neutrality in sexual assault law has come to be accepted in a few jurisdictions over time; yet, the awareness of the same is minuscule. Not only is India not an exception to this general rule, the situation here is even worse. Even in light of the recommendations of the Justice Verma Committee and many protests regarding the same, the Criminal Law Amendment Act 2013 still enforces a gender specific approach to the offences of rape and sexual assault.

II. BACKGROUND

The Criminal Law (Amendment) Act, 2013 was passed by the Lok Sabha on 19th March, 2013 and by the Rajya Sabha on 21st March, 2013. It received the assent of the President on 2nd April, 2013 and was deemed to have come into force on the 3rd of February, 2013.² The Act coming into force has dashed the hopes of millions of Indians of who had fervently desired truly progressive and comprehensive laws on sexual offences. Though the Act has implemented several much-needed measures, it has ignored several more.

The brutal gang-rape of a 23 year old Physiotherapy student,³ was the catalyst that resulted in the passing of the Criminal Law (Amendment) Act, 2013. There was public outcry after the incident as thousands took to the streets, protesting against the apathy of the

AA#v=onepage&q=Male%20Victims%20of%20Rape%3A%20Responses%20to%20a%20Perceived%20Threat%20to%20Masculinity&f=false (Last visited on July 18, 2013).

² Sandeep Joshi, *Stringent anti-rape laws get President's nod*, THE HINDU, (April 3, 2013).

³ Harmeet Shah Singh, *India gang-rape victim in Singapore for treatment; new protests hit New Delhi*, CNN, (January 3, 2013), available at <http://edition.cnn.com/2012/12/27/world/asia/india-rape-protests/index.html> (Last visited on July 23, 2013).

state structures towards sexual crimes, and demanding that changes be brought about in the existing laws.⁴

In response to this gang rape, a Committee was set up on December 24th 2012, under the chairmanship of Justice (Retired) J.S.Verma, former Chief Justice of India. The purpose of this Committee was to review the laws dealing with sexual assault against women. The other two members of the Committee were Justice (Retired) Leila Seth and former Solicitor General Gopal Subramaniam. It received over 70,000 responses from the general public within a fortnight and came up with its report in a month's time.⁵ The Committee came up with several recommendations. However, only those that are relevant to the topic at hand have been analysed.

In the Chapter dealing with Conclusions and Recommendations, the Committee has categorically stated that, "Since the possibility of sexual assault on men, as well as homosexual, transgender and transsexual rape, is a reality, the provisions have to be cognizant of the same."⁶ Furthermore, it was also stated that unless the recommendations given by them were implemented urgently, it would result in the entire exercise being futile. The Committee has clearly acknowledged the existence and prevalence of male, homosexual, transgender and transsexual rape and the need for reforms in this area. However, the Parliament chose to ignore this suggestion and did not provide for the same in the Criminal Law (Amendment) Act, 2013.⁷

In the light of the above facts, it becomes clear that this issue is one of imminent importance and that it needs to be thoroughly analysed. In order to fully comprehend the various aspects involved, it becomes pertinent to delve into the global scenario.

⁴ Maithili Pradhan, *Featured Comment: Gang Rape in India Must Catalyze a Comprehensive and Sustained Effort to Combat Violence Against Women*, available at <http://www.lawschool.cornell.edu/womenandjustice/Comment-Gang-Rape-in-India.cfm> (Last visited on July 27, 2013).

⁵ T. K. Rajalakshmi, *An Action Plan*, FRONTLINE, (February 9-22, 2013) available at <http://www.frontline.in/navigation/?type=static&page=flonnet&rdurl=fl3003/stories/20130222300303000.htm> (Last visited on July 28, 2013).

⁶ Justice J.S.Verma, Justice Leila Seth and Gopal Subramaniam, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW, 416, (2013) available at <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>.

⁷ T. K. Rajalakshmi, *Piecemeal Approach*, FRONTLINE, (March 8, 2013), available at <http://www.frontline.in/social-issues/general-issues/piecemeal-approach/article4431434.ece> (Last visited on July 28, 2013).

III. INTERNATIONAL SCENARIO

For the purpose of our study, the definition of sexual aggression as “behaviour with the intention of making another person engage in sexual activity despite his or her unwillingness to do so”⁸ has been adopted. As the sexual assault of males is a poorly understood phenomenon, the prevalent belief is that a ‘real’ man cannot be raped. Therefore, if an instance of male sexual abuse is reported, a fear of being labelled a “homosexual” has been generated. Consequently, it happens to be a vastly underreported phenomenon.⁹ Data collected from the government statistical reports of the United Kingdom and the United States have been relied upon to examine the prevalence of sexual assault on men, and also, have been used to touch upon the aspects of lesbian partner violence and female sex offenders. Data collected by organisations such as the RAINN (Rape, Abuse and Incest National Network) and also, various academic initiatives, have been used to supplement the submission that as opposed to the general notion, unwanted sexual contact among males, irrespective of the sexual orientation of the victim, can cause lasting psychological trauma.

A. SOUTH AFRICA

A population-based research using a sample of adult men in South Africa revealed that 9.6% of men reported male-on-male sexual violence victimization and 3.0% of them reported rape perpetration; 3.3% had been raped by another man, and 1.2% of them were perpetrators of male-on-male rape. It was also found that homosexual men were over nine times more likely to have been raped and are four times more likely to report the crime as opposed to heterosexual males.¹⁰

⁸ Barbara Krahè, Renate Scheinberger and Steffen Bieneck, *Men's Reports of Non-Consensual Sexual Interactions with Women: Prevalence and Impact*, 32(2) *ARCHIVES OF SEXUAL BEHAVIOUR* 165, available at <http://www.psych.uni-potsdam.de/social/projects/files/nonconsensual-sex-interact.pdf> (Last visited on July 15, 2013).

⁹ RJ Hillman, D Tomlinson, A McMillan, PD French and JRW Harris, *Sexual Assault on men: A series*, 66 *GENITOURIN MED* 247 (2007), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1194522/pdf/genitmed00046-0019.pdf> (Last visited July 15, 2013).

¹⁰ KL Dunkle, R Jewkes, *Consensual male-male sexual activity and male-male sexual violence: prevalence and associations with HIV infection from a population-based household survey in South Africa*, 10(6) *PLOS MED*, (2013), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3708702/> (Last visited on July 15, 2013).

B. UNITED KINGDOM

The Ministry of Justice, Home Office, and the Office for National Statistics of the United Kingdom recently revealed in its report that 0.4% of all males in England & Wales had been a victim of at least an attempted sexual offence.¹¹ This roughly rounds up to a figure of 72,000 males. These experiences of sexual abuse include the entire spectrum of sexual offences, ranging from rape and sexual assault to indecent exposure and unwanted touching. Among these, 12,000 related to offences such as rape or sexual assault by penetration.¹² The study also analysed the prevalence of subjection to sexual assault since the age of sixteen. This showed that 2.7% males had been a victim of at least an attempted sexual offence. Roughly 20% of these males were victims of rape or assault by penetration.¹³ The report further indicates that between the years of 2005-2011, there was an aggregate of 1141 cases per year recorded by the Police.¹⁴

C. UNITED STATES OF AMERICA

The situation in the United States is no better. 2.78 million males in the United States are victims of sexual assault or rape.¹⁵ In 2003, 1 out of every 33 men had experienced at least an attempted sexual abuse.¹⁶ Approximately 25,000 males in the United States were subjected to an aggravated form of sexual abuse or rape in the year 2009.¹⁷ A rate of 4% of homosexuals experiencing forced sex within their intimate relationships was reported by MSM in a study undertaken in the US.¹⁸

¹¹ Ministry of Justice, Home Office and the Office for National Statistics, *An Overview of Sexual Offending in England and Wales*, 11 (January 10, 2013), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214970/sexual-offending-overview-jan-2013.pdf (Last visited on July 15, 2013).

¹² *Id.*

¹³ *Id.*, at 18

¹⁴ *Id.*, at 21

¹⁵ National Institute of Justice & Centers for Disease Control & Prevention, *Prevalence, Incidence and Consequences of Violence Against Women Survey* (1998), available at <http://rainn.org/get-information/statistics/sexual-assault-victims> (Last visited on July 16, 2013).

¹⁶ U.S. Department of Justice, *National Crime Victimization Survey*, 7 (September 2004), available at <http://www.bjs.gov/content/pub/pdf/cv03.pdf> (Last visited on July 16, 2013).

¹⁷ *Id.*, at 5

¹⁸ R Stephenson, C Khosropour, et al., *Reporting of Intimate Partner Violence among Men Who Have Sex with Men in an Online Survey*, 11(3) *WESTERN JOURNAL OF EMERGENCY MEDICINE* 242, (2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2941360/> (Last visited on July 15, 2013).

D. QUESTIONS APLENTY

The array of questions that obviously follows is: What constitutes male rape? How are males victimised? Is it homosexual men or heterosexual women? Can there be female sex offenders? If so, can a heterosexual male be sexually abused by a female? Can male rape or sexual assault be considered equivalent to similar acts of sexual aggression on females?

Male victimisation was recognised by Susan Brownmiller, in her ground-breaking study of female rape, wherein she said: “While the penis may remain the rapist’s favourite weapon, his prime instrument of vengeance, his triumphant display of power, it is not in fact his only tool. Sticks, bottles and even fingers are often substituted for the “natural” thing. And as men may invade women through their orifices, so, too, do they invade other men. Who is to say that the sexual humiliation suffered through forced oral sex or rectal penetration is a lesser violation of the personal, private inner space, a lesser injury to mind, spirit and sense of self?”¹⁹

In a study of male rape victims, Stephanie Allen explains: “(...) both men and women describe how sexual victimisation undermines their sense of autonomy. For men, this acts as a direct challenge to the control they exert in the social and sexual arena, and therefore to their identity as men.”²⁰ Men are considered to be people who are able to defend themselves from sexual attacks, and those who are attacked fear that their claim that the sexual contact was forced would not be believed.²¹

In *People v. Yates*,²² the reason for the underreporting of male rape was discussed. It was said that “heterosexual male victims may feel that their sexual orientation is called into question and homosexual male victims fear that their sexual preference may be revealed.” As with most other sexual crimes, since there is a stigma attached to male same-sex rape,²³ men rarely report the crime and are rarely involved in subsequent prosecution efforts. However, this does not undermine the prevalence of male rape and its need to be recognised globally.

¹⁹Susan Brownmiller, *Against Our will: Men, Women and Rape*, quoted in *infra* n.34, 491

²⁰ Allen, *supra* note 1, at 36.

²¹ Center for Sex Offender Management, *Female Sex Offenders* 3 (March 2007), available at http://www.csom.org/pubs/female_sex_offenders_brief.pdf (Last visited on July 21, 2013).

²² 637 N.Y.S.2d 625 (1995).

²³ Elizabeth Kramer, 73 *When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, *NEW YORK UNIVERSITY LAW REVIEW* 295 (1994), available at <http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-73-1-Kramer.pdf> (Last visited on July 26, 2013).

E. THE ZIMBABWEAN SITUATION

To further this submission, we would like to address a certain issue in Zimbabwe, where, in 2011, there was a nationwide syndicate of women raping men.²⁴ The motive of these women was to use the semen of these men for health-related rituals. Reports suggest that a handful of hitch-hikers were drugged, threatened with knives, and even live snakes and were forced into sex before being dumped on the roadside.²⁵ As the Zimbabwean law does not recognize rape on males, those accused had to be charged on seventeen counts of indecent assault. However, the point that is to be noted here is that none of these counts amounted to rape. This substantiates the argument that the offence of rape on males needs to be recognised globally.

IV. NATURE OF THE OFFENCE

There exists a general notion that the offence of rape is committed so as to gratify carnal needs. However, many studies on the behavioural characteristics of rapists suggest otherwise. Holmstrom and Burgess, for example, reported that although rape always included power, anger, and sexuality, sexuality was never the dominant theme. The conclusion was that rape was used as a weapon to express anger or power.²⁶ Sexual humiliation may also be the motive of a rapist.²⁷ Of course, there is the aspect of sadistic sexual satisfaction inherent in almost every rape case; but in most cases, it is not the primary object.

A. IRRELEVANCE OF ORIENTATION

Homosexual rape need not necessarily be the apt terminology for male same-sex rape. Groth and Burgess observed that only two of the sixteen men who confessed to sexually assaulting other men confined their consensual sexual activities to men, and only

²⁴ Vickers Steve, *Zimbabwe Women accused of raping men for 'rituals'*, BBC NEWS (November 28, 2011), available at <http://www.bbc.co.uk/news/world-africa-15876968> (Last accessed on July 21, 2013).

²⁵ Sara C Nelson, *Zimbabwe 'Sperm Hunters' Acquitted Of Raping 17 Men*, THE HUFFINGTON POST (May 8, 2013), available at http://www.huffingtonpost.co.uk/2012/05/08/zimbabwe-sperm-hunters-acquitted-of-raping-17-men_n_1499056.html (Last visted on July 22, 2013).

²⁶ Marita P. McCabe and Michele Wauchope, *Behavioural Characteristics of Rapists*, 11(3) JOURNAL OF SEXUAL AGGRESSION 235 (2005), available at http://www.hawaii.edu/hivandaids/Behavioural_Characteristics_of_Rapists.pdf (Last visted on July 22, 2013).

²⁷ *Id.*

two of six victims admitted to being homosexual or bisexual.²⁸ Therefore, it follows that neither the victims nor the perpetrators need necessarily be homosexual or bisexual. Sexual orientation is often an irrelevant consideration in this respect.

B. GENDER STEREOTYPES

At the macro level, sexual offences have long been seen as a male-only crime. This is, in part, because of pervasive gender-role stereotypes about women as nurturing, caretaking, individuals, who are incapable of such a crime.²⁹ However, the major reason for the under-awareness of female-perpetrated sexual offences may be said to be the sheer volume and imbalance of sexual offences involving males as the offenders.³⁰

Feminists Jeanne Gregory and Sue Lees, while recognising male victimisation in rape, say that both male and female rape can be seen as forms of promoting hegemonic heterosexuality.³¹ This, by implication, means that they recognised the existence of female rapists. The idea of male victimisation does not overthrow the notion of the dominant patriarchal character of the society; it cannot be seen as a move to further weaken the female sex, but should be seen as an anomaly, which, if not recognised, overrides the reality of sexual assault and rape outside the male-on-female paradigm. Rapes should be seen more as a display of power and domination rather than an act of sexual gratification.

The claim that a male cannot be raped by a female was rejected by the Court of Appeals of New York in the case of *People v. Liberta*,³² wherein the Court rejected the argument *in toto*. It said that the claim was ‘simply wrong’. In effect, the Court opined that even though forcible sexual assaults by females upon males are undoubtedly less common and vastly imbalanced with respect to forcible sexual assaults by males upon females, this numerical disparity cannot by itself make the gender discrimination justified. Women may well be responsible for a far lower number of all serious crimes than are men, but such disparity would not make it permissible for the state to punish only men who commit, for example, robbery.³³ However, this decision rested on the assumption that as rape involved penetration, penetration (however slight) could be achieved without arousal. In other words,

²⁸ Kramer, *supra* note 23, at 294.

²⁹ Center for Sex Offender Management, *supra* note 21

³⁰ *Ibid.*

³¹ Jeanne Gregory and Sue Lees, *Policing Sexual Assault* 131 (London: Psychology Press, 1999), available at http://books.google.co.in/books/about/Policing_Sexual_Assault.html?id=0I8K5x8oOJkC&redir_esc=y

³² 474 N.E.2d 567, 577 (N.Y. 1984).

³³ Philip Rumney, *In Defence of Gender Neutrality within Rape*, 6(1) *Seattle Journal for Social Justice* 526, (2007), available at <http://eprints.uwe.ac.uk/14750/1/RumneySJSJ.pdf> (Last visited on July 27, 2013).

if there happened to be an erection, it was so decided that it would amount to consent on the part of the male and it wouldn't be considered as rape.

C. IMPLIED CONSENT

This brings us to the bigger question that if the male 'victim' were to experience a penile erection and ejaculate during the act of 'rape', can it be considered as rape? Won't it imply that the male 'victim' experienced an orgasm, and that he actually enjoyed the act?

These questions are answered in the negative. Ejaculation or penile erection is only a physical response of the body and this does not amount to consent. Sarrel and Masters, in their study of eleven males sexually assaulted by females said that, "Men or boys have responded sexually to female assault or abuse even though the males' emotional state during the molestations has been overwhelmingly negative – embarrassment, humiliation, anxiety, fear, anger, or even terror."³⁴ These physical responses may be confused by the victim as indications of pleasure or unrecognised consent.³⁵

Furthermore, getting the victim to ejaculate is a tactic which most sex offenders use. In the case of male offenders, if the victim ejaculates, the victim himself may be bewildered by his physiological reaction to the act of rape, and, therefore, fail to report the act in fear that his sexuality may become suspect.³⁶ This, in turn, in trial testimony, may destroy the credibility of the victim's statement.³⁷ In the case of female sex offenders, the motivation for ejaculation might seem like a symbol of complete domination over the male body.

With respect to the physical consequences, those men who have been sexually assaulted since the age of sixteen, report poorer physical health statuses than men who have not been abused.³⁸ Research indicates that the sexual assault on men tends to be more violent and is often accompanied by more and greater corollary injuries than those committed on women.³⁹ In *People v. Yates*,⁴⁰ the existence of the 'male Rape Trauma Syndrome' was recognised. The Court said that, "A review of literature describing the effect

³⁴ *Id.* at 516.

³⁵ *Id.* at 517.

³⁶ *Ibid*

³⁷ *Ibid.*

³⁸ Richard Tewksbary, *Effects of Sexual Assaults on Men: Physical, Mental, and Sexual Consequences*, 6(1) *INTERNATIONAL JOURNAL OF MEN'S HEALTH* 26, available at <http://www.prearesourcecenter.org/sites/default/files/library/effectsofsexualassaultsonmen-physicalmentalandsexualconsequences.pdf> (Last visited on July 27, 2013).

³⁹ *Ibid.*

⁴⁰ N.Y.S. 2d 625 (N.Y. Sup. Ct, 1995)

of sexual assault on men reveals that male victims, both heterosexual and homosexual, exhibit a well-defined trauma syndrome parallel to that found in female victims of rape (. . .) Nothing in the peculiar reactions of male victims of sexual assault places them outside the medical definition of post-traumatic stress disorder [as recognized in cases involving female victims] or diminishes the validity of the conclusion that a syndrome of male sexual victimization is accepted in the scientific community.”

D. LESBIAN PARTNER VIOLENCE

Misconceptions about the “ability” of women to sexually victimise might suggest a narrow view that female sex offending is committed solely against the male sex.⁴¹ However, this is far from the truth. Research suggests that while there are cases of sexual offences on males committed by females, the cases of female-perpetrated male rape are rare. Usually, when female rape occurs, it is more likely to occur on the same sex.⁴² This brings us to the issue of lesbian partner violence, and female-on-female rape.

The myth is that a woman cannot really rape or sexually assault another woman. However, this is false. There exists a popular misconception that rape or sexual assault requires penile penetration, whether oral or vaginal. However, sexual assault between women can include:

- Forced vaginal/anal penetration with digits or objects;
- Forced oral sex; and
- Forced sexual touching.⁴³

The study conducted by Claire M. Renzetti suggested that 30% of the lesbians in the sample had been victims of sexual assault by their abusive partners.⁴⁴ Furthermore, literature on the impact of sexual assault between lesbians suggests that there are very pronounced similarities between the reactions of those women sexually assaulted by male dates or acquaintances and those sexually assaulted by lesbian partners or other females.⁴⁵

Recognition of same-sex violence and male rape is not an imputation to the general notions of the society; rather, it would only be the acknowledgement of a prevalent

⁴¹ Center for Sex Offender Management, *supra*, note 21 at 3

⁴² *Id.* at 7.

⁴³ Pandora’s Project, *Domestic Abuse in Lesbian Relationships*, available at <http://www.pandys.org/articles/lesbiandomesticviolence.html> (Last visted on July 17, 2013).

⁴⁴ *Id.* at 1.

⁴⁵ Lori Girshick, *Woman to Woman Sexual Violence: Does she call it rape?*, available at http://test31.biocom.arizona.edu/agency_updates/2004/06-Wingspan.pdf (Last visted on July 17, 2013).

underreported public secret. The next section gives a brief overview of a few jurisdictions which have adopted gender neutral rape-laws.

V. GENDER NEUTRALITY ACROSS VARIOUS JURISDICTIONS

Patricia Novotny refers to the definition of rape as “the carnal knowledge of a woman against her will”⁴⁶ as the ‘classic definition’ of rape.⁴⁷ However, in light of the vast revision of rape laws in the past few decades, the truth of this statement is in question.

A. THE AMERICAN SITUATION

Many jurisdictions have now adopted gender-neutral laws in rape, at least to the extent where they recognise the premise that men can also be victimised. It must be noted here that these gender-neutral laws are not uniform in nature.⁴⁸ For instance, Indiana has a very unusual gender neutral rape-law which only recognises rape among heterosexuals.⁴⁹ Ireland, Canada, all the Australian States, and most states of the United States of America have adopted gender neutrality in rape law. In fact, in the United States of America, all States except for Georgia, Maryland, Mississippi, North Carolina and Alabama have adopted gender neutral rape statutes. Interestingly, the Model Penal Code of the United States of America,⁵⁰ sticks to the ‘traditional’⁵¹ definition of rape.

Susan Estrich justifies the gender specific definition of the United States of America by suggesting that although males may experience the physical act of rape much the same way as women, in the case of males, there happens to be no risk of unwanted pregnancy.⁵² However, this argument stands refuted for pre-pubertal, menopausal, sterilized, and infertile women as well as women who practice contraception are also protected under gender neutral

⁴⁶ Patricia Novotny, *Rape Victims in the (Gender) Neutral Zone: The Assimilation of Resistance?*, 1(3) *SEATTLE JOURNAL FOR SOCIAL JUSTICE* 743 (2012), available at <http://digitalcommons.law.seattleu.edu/sjsj/vol1/iss3/62/> (Last visited on July 17, 2013).

⁴⁷ *Id.*

⁴⁸ Rumney, *supra* note 33.

⁴⁹ IND. CODE S. 35-42-4-1, available at <http://www.in.gov/legislative/ic/2010/title35/ar42/ch4.html> (Last visited on July 17, 2013).

⁵⁰ The American Law Institute, *Model Penal Code*, (1962), available at <http://www.utexas.edu/law/journals/tlr/sources/Issue%2087.3/Heinzerling/fn%2054%20-%20Model%20Penal%20Code.pdf> (Last visited on July 30, 2013).

⁵¹ *Id.* at 133

⁵² Rumney, *supra* note 33, at 486.

rape laws. Therefore, the risk of unwanted pregnancy cannot be an overriding consideration.⁵³

Also, as Jocelyne Scott noted, “It is not convincing to argue that a woman would necessarily be more damaged –physically or mentally– by penetration of vagina over penetration of anus, beyond the fact of loss of virginity in some cases, or the possible occurrence of pregnancy. Nor is it seemingly relevant in terms of damage that penetration is effected by penis or by artificial means. Further, although probably there are less men than women who are attacked by way of sexual advances leading to penetration, this does not appear to be a valid reason for assuming that penetration of a male anus is necessarily of less consequence to the criminal law than the classic rape situation.”⁵⁴

B. THE ENGLISH WAY

Some jurisdictions have accepted a definition of rape that is completely gender neutral in the sense that they recognise the possibility of males being victims of rape and also, females as potential perpetrators. On the other hand, many jurisdictions still consider rape as a male-only crime. England and Wales is one such example. Though the English law, by virtue of the 1994 amendment, recognises male rape as a crime, it fails to include females as potential principal offenders. However, before the Amendment of 1994, women could be convicted as accessories to a rape for which a man is the principal offender.⁵⁵

An important consideration is what would constitute male rape. Section 142 of the Criminal Justice and Public Order Act, 1994, which introduced male rape to English law by amending the Sexual Offences Act, 1956, states, “It is an offence for a man to rape a woman or another man”. For the purposes of rape, sexual intercourse included penetration of the anus or vagina. However, by way of the new Sexual Offences Act, 2003, it has been expanded to include penile penetration of the mouth.⁵⁶ However, the Act differentiates between the offences of rape and that of ‘sexual assault by penetration’. Females who force

⁵³*Id.* at 483

⁵⁴ *Id.* at 484.

⁵⁵ *Lord Baltimore’s Case*, 4 Burr 2179 (1768); *R. v. Ram and Ram Cox* (1893) 17 CC 609.

⁵⁶ The Home Office Review of Sexual Offences noted the argument of Cathy Halloran that the experiences of people who were victims of an oral sex assault “as degrading and traumatic and horrific as penetration of the vagina or of the anus.” Distinguishing it from rape would be downgraded the seriousness of this assault. House of Commons Home Affairs Committee, *Sexual Offences Bill: Fifth Report of Session 2002-2003* 7, (July 10, 2003), available at <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmhaff/639/639.pdf> (Last visited on July 30, 2013).

other men or women to engage in penetrative sex acts may also be convicted of the latter offence, which, incidentally, also carries a maximum punishment of life imprisonment similar to the offence of rape.

C. MISSING RATIONALE FOR DISTINCTION

The obvious question that arises is one regarding the rationale for labelling similar offences as different ones. Of course, there exists a need to differentiate between penile penetration and penetration by other objects. However, the subject of argument is when penile penetration of the anus or the mouth, is achieved by a woman raping a man, what is the rationale for discriminating based on the sex of the offender?

As Jocelyne Scott noted: “A principle of criminal law is, surely, that all persons should be protected equally from harm of like degree (...) The case for treating crimes of like heinousness similarly appears to be stronger than that calling for a distinction to be made between penetration of the female body and penetration of the male body, whatever the sex of the actor.”⁵⁷

D. THE CONSEQUENCES OF IGNORANCE

The importance of appropriate labelling of offences should not be underestimated. The lack of societal recognition of male rape and institutional neglect of the problem are only augmented by labelling an act which is similar to rape under a different head. As acknowledged by the Republic of Ireland Law Commission,⁵⁸ “(...) appropriate labelling of offences contributes to the victim’s sense of being vindicated and protected by the State and that any description which seems to understate the gravity of an offence or put it in a lesser category will be resented by the victim.” This would automatically imply that legal recognition of male rape or female same-sex rape for that matter, will only improve the chances of victims seeking legal or psychological redress, and will also strike down the societal notion that a ‘real’ man cannot be raped at all, let alone by a woman.

The lack of acknowledgement of male rape victims may even affect their ability to realise their own victimisation.⁵⁹ In fact, an account of a victim has been provided by Stephanie Allen in *Male Victims of Rape: Responses to a Perceived Threat to Masculinity*, to substantiate this argument. A person who had been anally penetrated with a toilet brush

⁵⁷ *Supra* note 54.

⁵⁸ The Law Reform Commission, *Rape and Allied Offences* (LRC 24-1988, Dublin, 1988), available at http://www.lawreform.ie/_fileupload/Reports/rRape.pdf (Last visited on July 30, 2013).

⁵⁹ Allen, *supra* note 1, at 24.

initially felt that what he had encountered was an act of physical violence, as opposed to one of sexual assault. In his own words, “(...) I tried to convince myself that it was more violent than sexual, but, really, deep down, I knew it was more than that. Because, you know, I’ve been in plenty of fights and I’d never felt like that before. There was no getting away from it...”⁶⁰

Gender neutrality in rape law –though adopted in many nations– still is rejected as needless in many others. The issue of male rape or lesbian violence remains a hushed-up secret between victims and perpetrators. The situation in India offers a glaring example.

VI. POSITION IN INDIA

In India, neither sexual assault nor rape are identified as offences that can be committed against men. In fact, the definition is so narrow that only a man can commit these offences against a woman. From a plain reading of the Report of the Committee on Amendments to Criminal law, a few observations can be inferred.

The fundamental right of every person to life with human dignity,⁶¹ and equality,⁶² are to be made available to every citizen, including men. However, as pointed out earlier, this has not been implemented, as the Government has chosen to ignore the suggestions of the Justice Verma Committee in this regard.⁶³ The Committee in its report had categorically stated that, if the human right of freedom means anything, then India cannot deny its citizens the right to be different. Thus, the right to sexual orientation is a human right guaranteed by the fundamental principles of equality.⁶⁴ The Committee clearly endorsed the rights of homosexuals and transgenders, to not be excluded from the purview of the protection against offences such as sexual harassment and sexual assault.

India is a party to several international covenants on the rights of individuals, such as The Universal Declaration of Human Rights, 1948, The International Covenant on Civil and Political Rights, 1966 and The International Covenant on Economic, Social and Cultural Rights, 1966, all of which reaffirm the inalienable right of every person to equality and human dignity.⁶⁵ However, India has wilfully chosen to disregard its obligations under these

⁶⁰ *Id.*, at 31.

⁶¹ Article 21, Constitution of India, 1950

⁶² Article 14, Constitution of India, 1950.

⁶³ Rajalakshmi, *supra* note 7.

⁶⁴ Verma, Seth and Subramaniam, *supra* note 6, at 57.

⁶⁵ Preamble, Universal Declaration of Human Rights, 1948.

Covenants, and has continued to turn a blind eye to the woeful cries of the affected minorities.

Under Chapter Fourteen, where the Committee has discussed the role of education and perception, it has brought to light the various gender stereotypes that are hammered into Indian children at a very young and impressionable age.⁶⁶ These stereotypes play a major role in moulding the ideas of men and women in India. As this attitude can be traced as one of the reasons for the increasing incidents of rape of women, it can also be said to be the reason why Indian society is so reluctant to acknowledge the occurrences of male rape. The very notion of the masculinity and the strength of a man is threatened when he admits to having been raped. This serves as one of the major reasons most male rapes go unreported.

Furthermore, the Committee, in the preface to its report, has also acknowledged that the required changes in the law can be brought about only by a change in the social mind-set and cannot be achieved simply by legal norms. This argument is augmented by the stiff resistance that was put up by feminists and activists alike in condemning these reforms, and insisting that the rape and sexual assault laws remain biased.⁶⁷ The main contention put forward by these groups is that if the rape and sexual assault laws were made gender neutral, this would result in complaints of rape by women being met by counter-claims to build pressure on them to withdraw their complaints. They argued that this would increase the vulnerability of women.⁶⁸

It must be understood that gender neutral laws would not necessarily work to the disadvantage of women and the loopholes, if any, must be suitably dealt with. Holding on to archaic laws in an attempt to avoid these changes would result in gross injustice to those who are currently beyond the purview of the laws. Thus, it is of utmost importance to amend the existing laws and insert the words 'person' in the place of 'man' and 'woman' in order to ensure justice to all.

The most glaring example of the plight of male rape survivors is that of Vinodhan, a young man from Chennai. In the media frenzy that followed the brutal rape of the 23-year-old in Delhi, Vinodhan was moved to write about his traumatic gang rape incident at the age

⁶⁶ Verma, Seth and Subramaniam, *supra* note 6, at 383.

⁶⁷ TNN, *Activists join chorus against gender neutral rape laws*, THE TIMES OF INDIA, (March 9, 2013), available at http://articles.timesofindia.indiatimes.com/2013-03-09/india/37580560_1_gender-human-rights-groups-women-activists (Last visited on August 1, 2013).

⁶⁸ *Ibid.*

of 18.⁶⁹ Many male rape survivors like Vinodhan have silently suffered for many years with no recourse to the law and nowhere to turn to for psychological relief. Several other victims have also come out with their stories such as Krishnan, who was raped in Kerala and was too ashamed to come out in the open.⁷⁰ It is time these victims were given access to justice and a platform to vent their grievances.

There have been cases,⁷¹ wherein the squeezing of testicles has been held to be an offence coming under the head of 'grievous hurt' under Section 320 of the Indian Penal Code. The courts have not examined this offence under sexual assault, nor have they explored the possibility of doing so. This is a clear illustration of the huge disparity in analysing rape and sexual assault committed against men as opposed to those committed against women. There is a pressing need to legislate on this aspect, with the judiciary and the general public lending a helping hand in the implementation of the same.

VII. CONCLUSION

A. PRINCIPLE NEED TO PROTECT

The existing pervasive gender-role stereotypes suggest a notion that males, and the idea of masculinity that they embody, cannot fall victim to an offence of rape or sexual assault. The veracity of this statement has now had reason to be doubted. The instances of male rape, as enunciated above, give a clear idea regarding its prevalence. However, questions regarding societal recognition and awareness of the same need to be advanced. As already noted, correct labelling of a crime gives the victim a sense of vindication which might encourage him to seek legal or psychological redress.⁷²

Gender neutrality has vastly been regarded as a coercive mechanism whereby scholars shift the attention from female victims of rape. However, it must be noted that the object of gender neutrality in sexual assault and rape law is very different and has a reasonable, independent standing. A change towards gender neutral laws brings forth the notion that the laws are not analysed in gender specific terms, but rather, gives emphasis to the act, irrespective of the gender of the perpetrator or the victim.

⁶⁹ Priya M. Menon, *Lacking support, male rape victims remain silent*, THE TIMES OF INDIA, (February 6, 2013).

⁷⁰ *Ibid.*

⁷¹ *State Of Karnataka v. Shivalingaiah Alias Handigidda*, AIR 1988 SC 115.

⁷² Rumney, *supra* note 33, at 485.

As has been observed previously in this article, the prevalence of such acts has increased considerably and the legislature cannot afford to turn a blind eye to the same. Criminal conduct should be appropriately labelled and legislation regarding the same should be sensitive to the experiences of the victim. Merely because there is a vast disparity between the number of rape and sexual assault cases against women as opposed to men and an even bigger disparity between the number of rape or sexual assault cases perpetrated by men as opposed to women, this by itself cannot be reason enough to ignore the problem and treat it as an exception or a mere anomaly. It is a principle of criminal law that the state will protect those individuals who are not able to protect themselves. It is indeed a discrimination that the gender of the victim is a precondition to such protection.

B. CONSTITUTIONAL MANDATE

This brings us to the issue of the right to equality as envisaged under the Indian Constitution and sexual assault. Article 14 guarantees to every person, equality before the law and the equal protection of laws.⁷³ The expression ‘equal protection under the laws’ has now come to be read as an obligation on the state to bring about the necessary social changes, so that everyone may enjoy equal protection of the laws.⁷⁴ This should be in consonance with the existing needs of society, and ensuring legal redress for instances of same-sex and male rape or sexual assault is the first step in bringing about social changes relevant to address such issues.

C. THE WAY FORWARD

It is said that the first step to the solution of any problem is in identifying it. This means that although the issue of sexual assault or rape outside the male-on-female paradigm has been largely overlooked by legislators till date, it is imperative that the flaws of the existing system come to the fore and be recognised. If rape outside the ‘typical’ definition,⁷⁵ must come to be recognised and acknowledged in society, it is crucial that the reporting of such crimes increases substantially. However, with the law remaining as it is, with its gender specific approach, which offers no hope for legal or psychological redress, and attracts social stigma, why would persons subjected to this crime want to report it?

⁷³ *Supra* note 62.

⁷⁴ V.N. Shukla, *CONSTITUTION OF INDIA*, 46 (Mahendra Pal Singh ed.), (Lucknow: Eastern Book Company Publishing, 2008).

⁷⁵ *Definition of “Rape”*, Oxford Dictionary U.S.A., available at http://oxforddictionaries.com/definition/american_english/rape (Last visited on August 1. 2013).

The answer to the problem that this question poses can only be the legal recognition of such offences. Gender specificity in sexual assault law can no longer be said to serve any purpose. The prevalence of rape outside the set paradigm has no reason to be doubted. It is only the development and application of a gender neutral law that will be effective in improving the reporting of such crimes. The definition of rape must be reconsidered, sexual assault must be classified in accordance with various degrees of harm caused by each, and each must be defined in a comprehensive manner.

Gender neutrality in sexual assault and rape law has long been an issue that legislators have been reluctant to address. However, the pressing need for its acceptance in the law cannot be ignored any longer. The Justice Verma Committee's recommendations indicate the same. Ultimately, it all boils down to a moralistic argument that every person deserves to have their rights protected, and that all persons subjected to the crimes of rape or sexual assault, irrespective of their gender, should have recourse to the law in order to achieve their well-deserved vindication. Only time will tell whether this will be achieved.