
GENDERED JUSTICE: AN EMPIRICAL STUDY ON CRIMINALIZATION OF RAPE OF MEN AND TRANSGENDER UNDER BNS, 2023

M.S. Yazhinee, B.A.LL.B. (Hons.), The Tamilnadu Dr. Ambedkar Law University, School of Excellence in Law.

Ms. T. Vaishali, B.S., B.L (Hons), LL.M., Department of Criminal Law and Criminal Justice Administration, The Tamilnadu Dr Ambedkar Law University, Chennai

ABSTRACT:

For many years rape has been viewed as a crime against women generally. The rape laws for women are developing from decades to decades. In camera proceedings, victim compensation are such developments. But this rape law in India holds gender specific protection and punishment. Section 377 of the IPC, i.e., unnatural sex, is decriminalised in Navtej Singh Johar vs Union of India. Even then cases of non-consensual intercourse of male with male are given justice under this section. Now, after the Bhartiya Nyaya Sanhita came, no such provision is there for male victims of rape. Socially marginalised transgender individuals who are raped have provisions under the Transgender Persons (Protection of Rights) Act, 2019, which provides a maximum of 2 years' imprisonment. This is comparatively very much lesser than that of punishment in female rape. This study intends to study this and how society views male rape and transgender rape. This study is conducted to collect data and analyse the societal perceptions towards rape of male and transgender victims and how law treats them.

Keywords: gender neutral rape laws, male rape, non-consensual intercourse, patriarchy, societal perceptions, transgender victims

INTRODUCTION:

Rape is viewed as a heinous and most gruesome violation against body of a woman. The purview that men and transgender are also victims of rape is overlooked by people because of societal stigma and conservative thinking. India is still progressing towards achieving feminism and extinguishing the fumes of patriarchy. Masculinity, male superiority, men are the protectors are some of the seeds that patriarchal society has sown in the minds of people. This thinking consecutively leads people in assuming that men cannot be victim. The law provides protection and punishment against rape of boys under the age of 18 which is administered by POCSO Act. But men who are more than age of 18 are not protected the same way. They became silent victims where there is no punishment of perpetrator. Law should punish those who defy it and help those who seek protection from it. Transgenders are subjugated to oppression not only historically but in the present also. Even if there are protections for transgenders, the inhumane conditions of Discrimination have not come to end. Even law prescribes lesser punishment of rape of transgenders than punishment for rape of women. So, this paper is going to discuss about laws and punishment related to rape of men and transgenders.

STATEMENT OF THE PROBLEM:

Bhartiya Nyaya Sanhita,2023 continues to hold gender specific rape law. Section 63 of bns,2023 is confined to rape against women exclusively. This excludes men from the ambit of protection the law provides. This exclusion is against harsh realities men face. Further, the statute legislated for protection of transgenders i.e., transgender persons (protection of rights), 2019 provides lesser quantum of punishment. Minimum 6 months to maximum 2 years punishment reflects the societal perception towards rape of transgender persons and creates hierarchy of victimhood based on gender identity.

OBJECTIVES OF THE STUDY:

1. To know about societal perceptions towards rape of men and transgender
2. To analyse whether rape of men is considered a myth or harsh reality
3. To examine whether societal perceptions towards rape is only focused towards women

4. To infer whether punishment for rape of transgender speaks equality
5. To rationalize societal opinions of rape of men by women
6. To find out whether people vote for law making regarding rape of men

NEED FOR THE STUDY:

India doesn't yet have gender neutral rape laws may sounds alarming but it is the harsh reality that male, transgender has to go through in their life. Centre for civil society conducted a survey where it is found that 16% men told that they were coerced by women and 2% were affected by penetrating sex by men. Statistics are not much available for rape against men and transgender. In a Delhi court case in 2018, court observed that sexual assault against male should have equal protection as female victims of sexual assault have. In criminal justice society of India v. union of India & ors¹ case filed by an NGO court stated that it was left to parliament to amend laws to make gender neutral laws but the case to claim gender neutral rape laws had merits. Former justice UU Lalit had criticized that Bhartiya Nyaya Sanhita, 2023 does not have rape laws for men, he stated that "men can be raped too". Justice Verma committee (2013) recommended that there should be gender neutral rape law terms should be used like sexual penetration rather than vaginal penetration and advocated for gender neutral rape laws.

The transgender persons (protection of rights) act,2019 provides punishment for rape against transgender minimum 6 months to maximum of 2 years. Transgenders are historically and even now oppressed just because of the way they chose to live. The fact that most of the transgenders are sexually exploited should not normalize the crime. One of India's third and Assam's first transgender judge Swati bidhan baruah stated that this difference in punishment in rape laws shows that their lives didn't matter. In pinki pramanik vs state of west Bengal, court held that rape of transgender does not amounts to rape, since she is not capable of being raped. This creates disparity in punishments legislated or sentence awarded for rape of female and rape of male and transgender.

Thus, this study is needed to critically analyses the societal perceptions towards male rape, i.e., rape of male by male or female and rape of transgender and criminal jurisprudence around it. This study focuses on whether the law or absence of law and punishments regarding

¹ W.P. (C) NO. 1262/2018

this is prudent in the eyes of society. This study also recommends some suggestions from public in equality and justice. The rape of male and transgender and law around it violates equality in its core and this study is needed to evaluate it with eyes of public too.

REVIEW OF LITERATURE:

Susan, brown miller (1975) in her book *against our will: men, women, and rape* men anatomical capacity and women's anatomical vulnerability leads to an act of rape. She wrote about men began to rape and how it became lawful crime and unlawful crime according to laws evolving along the time legislated by men and patriarchy.²

Sarrel and masters (1982) stated that by evaluating interviews with male victims that men are also capable of being raped, forced to have sex by women.³

Nicholas groth (men who rape) (1979)⁴ gave an insight into psychologists of rapists noted on how male-male rapes happen on prisons.

Richie McMullen (1990) is also a major breakthrough in researching about male rape voicing out for the male victims of sexual assault in his book *male rape: breaking the silence on the last taboo*.⁵

A report by human rights watch titled *no escape: male rape in U.S. prisons* (2001) also talks about rape that happen in prisons with actual accounts of sexual assault, rape explained.⁶

UN security council resolution 2106 (2013) emphasizes the need for accountability worldwide urging countries to legislate laws that give justice to men and boys who are victims of sexual offences. It recognizes that men and boys are also on the suffering end of rape and sexual assault.⁷

Another report by human rights watch titled *sexual violence against men, transwomen in Syria conflict* speaks as the voices of survivors stating the sexual offences committed against

² Susan brown miller, *against our will: men, women and rape*, 14-15 (1975)

³ Sarrel & masters (1982) Philip M sarrel & William h. masters, *sexual molestation of men by women*, 117, 128 (1982)

⁴ A. Nicholas groth, *men who rape: the psychology of the offender* (1979)

⁵ Richie McMullen, *male rape: breaking the silence on the last taboo* (1990)

⁶ Human rights watch, *no escape: male rape in u.s prisons* (2001)

⁷ S.c. res. 2016, 1,7, U.N.DOC.S/RES/2106 (June 24,2013)

men, transgender solely because of the gender identity and sexual orientation some of them have.⁸

National level consultation on transgender persons issues – a report (2019) highlights the torment faced by transmen and transwomen in various public spaces including staying hostels, etc.,⁹

Ms. x vs state of Uttarakhand court held that if a transgender identifies themselves as women, then law should treat them as such and significantly treated the rape of victim in this case as offence giving importance to psyche i.e., how the victim felt herself.¹⁰

Transforming lives transgender inclusive India – a report by UNDP and Humsafar accentuates on opposition against the disparity in punishment of rape of female and transgender.¹¹ It calls attention to a report by national AIDS control organization that nearly one fifth of 5000 participants said they were victims of sexual violence.¹²

QUESTIONNAIRE:

1. Do you believe that men can be victims of rape?
2. If a woman or a man forces a man into non-consensual intercourse, how do you think the law currently treats it?
3. Do you think rape of a man by a woman is less serious than rape of a woman by a Man?
4. Do you agree with the argument that “a man cannot be raped by a woman” by some People?
5. Are you aware that under the new Bhartiya Nyaya Sanhita (BNS 2023), the legal Definition of “Rape” only recognizes a man as the perpetrator and a woman as the Victim?

⁸ Human rights watch, they treated us in monstrous ways: sexual violence against men, rape and transgender women in the Syrian conflict (2020)

⁹ National consultation on transgender persons (India, 2019), ministry of social justice and empowerment, government of India, report of the national consultation on issues relating to transgender persons 21-28 (2019)

¹⁰ Writ petition (criminal) no. 28 of 2019

¹¹ UNDP & Humsafar trust report, transforming lives towards transgender- inclusive India 43-46 (2017)

¹² http://naco.gov.in/sites/default/files/TG-IBBS%20ReportPrint%20text_Edited.pdf

6. In your opinion, if a man is sexually assaulted by another man, how serious is the Crime compared to a man assaulting a woman?

7. What do you believe is the primary reason men do not report sexual violence Committed by other men?

8. Are you aware that the punishment for raping a Transgender person (under the Transgender Persons Act, 2019) is a maximum of 2 years, whereas raping a cis-gender woman carries a minimum of 10 years?

9. Do you agree with the point of view of some people that the trauma suffered by a Transgender victim of rape is less than that of a cis-female victim?

10. Should the sexual assault of a Transgender person be included under the general Rape laws (BNS) with equal punishment (10+ years)?

11. Do you think the police are sensitive enough to handle rape complaints filed by Transgender individuals?

12. One argument against Gender-Neutral rape laws are that men will file false counter-cases against women. Do you consider this a valid concern?

13. Do you support the “Gender Neutrality” of rape laws, where the perpetrator and victim can be of any gender (Male, Female, or Transgender)?

14. Please suggest what the government should do to protect male and transgender victims of sexual violence.

HYPOTHESIS:

Conservative social attitudes towards gender and sexuality continue to influence the formulation of rape laws in India. This consecutively leads to gender specific rape statutory framework. While women are recognized as victims, men and transgender become socially vulnerable and invisible in this arena. There exists a significant relationship between societal perceptions regarding gender and sexual victimization of men and transgender and still prevailing gender-neutral rape laws, which results in unequal protection from law to victims, thereby denying them justice.

RESEARCH METHODOLOGY:

The research methodology that is employed is non doctrinal research. It is otherwise known as empirical research. This study uses data collected by researchers to interpret the findings and test the hypothesis.

Primary data:

Data collected by survey with questionnaire (both open ended and close ended questions).

Secondary data:

Books, united nations report, international reports, research, news are used as secondary data to interpret the study.

SCOPE OF THE STUDY:

The study is conducted in both online and offline interviews. The questionnaire is used to ask questions in person and call. Google forms are also used to collect the data. Most of the respondents are from Chennai and other districts from Tamil Nadu. Nearly half of the respondents are from law background. In person interview method and call us used to collect data truly since we intend to collect societal perceptions. Online method is used to collect data from more respondents in limited period and analyse them.

SIGNIFICANCE OF THE STUDY:

1. the study provides insights on disparity of punishment in laws and justice.
2. The study helps analyse the societal perceptions towards rape of men
3. The study assists in understanding the level of forward-thinking people have
4. The study guides in improving the law for betterment of society
5. The study emphasises the criminal liability of offender and help those who seek aid in justice
6. The study helps evaluate the rape myths around rape of men and transgender

7. The study highlights on justice for silent victims of the nation who suffers from one of the most gruesome crime

LIMITATIONS OF THE STUDY:

1. The study confines only to crime of rape against men and transgender and no other queer people

2. The study only focuses on societal perceptions and policy change but not on the interviews with victims

3. The veracity of the results might be influenced by researcher's personal bias whilst the interpretation of data

4. The study provides opinion of people residing in Chennai, Kanchipuram Ramanthapuram, Villupuram, Trichy, Tirunelveli only

5. The study is not interpreted with views of any officials of law and order

DATA INTERPRETATION OF THE STUDY:

The study is conducted with help of 75 respondents. The age group of the respondent varies from 18 to 60 (mostly law students). The research data is collected by interview method i.e., in person and also by online methods (phone calls and google forms). The study is conducted with both open ended and closed ended questions, which in result gives both qualitative and quantitative aspects to this research.

1. Men can be victims of rape

Nearly 96 % of the respondents i.e., 72 respondents said that men can also be victims of the rape. This shows the society's understanding that rape can be rape too which aligns with news around the country and world.

2. Law regarding Man forced by man or woman into nonconsensual intercourse

40 percent of people have answered that they think law considers rape of man by man or woman is not considered as rape. 32 percent of people i.e., 24 people have answered

that they think law considers rape of man is considered as crime in law. 20 percent have answers that it is considered as minor offence whereas left 8 percent have answered that they are not aware.

3. Rape of man by a woman is not less serious

Nearly 68 percent have answered that rape of a man by a woman is not less serious than rape of a woman by a man. 34 percent have answered that rape of a woman by a man is less serious than that of woman by man.

4. “A man cannot be raped by a woman”

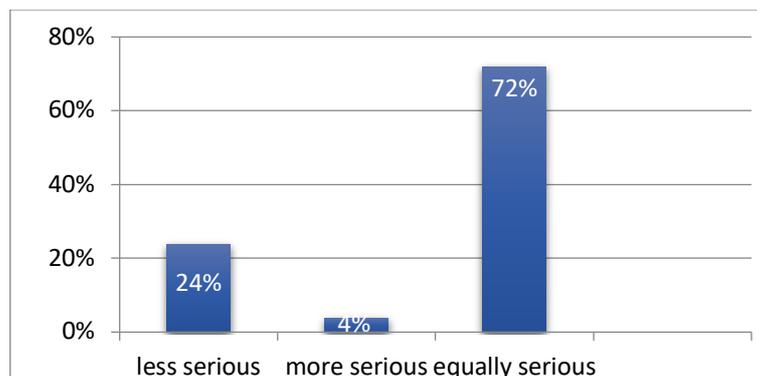
It is strongly disagreed by 36 percent of respondents, and disagreed by 48 percent of respondents. 12 percent people neither agree or disagree and left 4 percent people have agreed.

5. Under BNS- rape is an offence against women

68% people said that they are aware that under BNS rape is an offence against woman. 16% respondents said that they are not aware and another 16% said that they are not sure.

6. Man, sexually assaulted by man is as serious as woman assaulted by man

72 % respondents have said that it is equally serious as women sexually assaulted by a man. 24% respondents have said that is it less serious than woman sexually assaulted by a man. Left 4% have said that it is more serious than woman sexually assaulted by a man.



Rape of a male

1. Primary reason men do not report sexual violence committed by other men

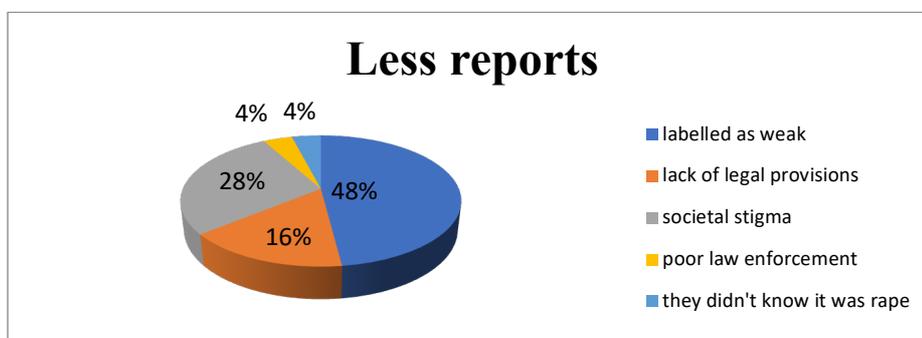
48% voted that reason is fear of being labelled as weak

16% voted that reason is lack of legal provisions

28% voted that reason is fear of societal stigma

4% voted that reason is fear of law enforcement mechanism

4% said that reason is at early age they didn't know it was rape.



2. Punishment for rape of transgender person is maximum 2 years

48% respondents have voted that they are aware that punishment for rape of transgender persons have a maximum of 2 years. 40% respondents voted that they didn't know about it. 12% people have answered that they are not sure about it

3. Trauma suffered by a transgender victim of rape is not less than that of cis-female victim

60% respondents have answered that the trauma suffered by a transgender victim is not less than that of a female victim. 12% respondents have answered that trauma suffered by a transgender victim is less than that of a female victim. 28% respondents have answered that they are not sure about it.

4. Punishment for rape of transgender persons should become 10 years (equal to punishment under BNS for rape of female)

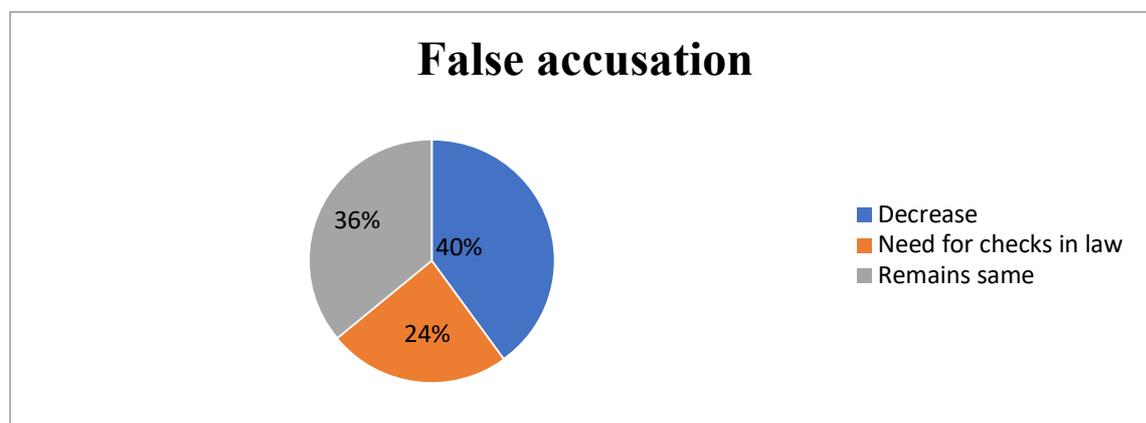
92% respondents have voted that it should become equal to punishment under s.63 under BNS. 4% respondents answered that they altogether want gender neutral rape provisions under law. 4% respondents have voted that it need not become equal to punishment under BNS.

5. Police are not sensitive enough to handle rape complaints filed by transgender individuals.

60% respondents have answered that police are not sensitive enough to handle complaints filed by transgender individuals regarding rape. 20% respondents answered that they are sensitive enough to handle cases like that. 20% respondents answered that some of the police officials are sensitive enough and some are not.

6. Gender neutral rape laws will lead to false counter cases against women regarding rape complaint by women.

40% respondents have answered that they consider this a valid concern. 24% respondents have answered that it can be managed to an extent with checks in laws. 36% respondents have answered that fear of misuse should not stop justice for male victims.



7. Support to gender neutral rape laws where perpetrator can be male, female, or transgender

84% respondents answered that they fully support this proposition. 8% respondents have answered that rape laws should only be for women. 8% respondents stated that they support only for transgender victims and that they don't want in male rape laws.

8. Suggestions for government from public

- Equalising laws will be the first initiative to protect rights of them and having conscience that they were also a human who has all privacy rights
- Implement strict order and rules for protection of victim
- Legislation for transgender is there but proper implementation is not there. for men I don't see any measures that govt took. The person includes men women and any kind of gender. rape is crime. so, punishment should be severe for all.
- Widen the scope of rape and other related provisions
- Revise the law to be inclusive. Have awareness camps. Sex ed in schools.
- Analysing other countries policies and laws would be helpful
- I think the press that is the fourth pillar of democracy has more role to play here. They can throw light on instances where men get raped and also highlight the trauma suffered by them. It is really pathetic that rape of men is trivialised and shown for humour in some movies.
- “neutral law would save” as well as setting up of awareness camp help to break social stigma.
- The government should enact laws for the protection of men and transgender victim and spread awareness among the society
- Everyone has to be treated equally in law regardless of anything
- Criminalise the offenders of all genders equally by bringing gender neutral laws
- Since majority of rape occur due to drug intake and alcoholism, govt should look into that. Also, transgender people should be given proper protection, though it's there in the law but not in practice. Punishment for rape of TG persons should be equal to that of cis. Awareness to erase the taboos surrounding men rape should be given so that more real victims will come out, rather than joking about it.
- By framing out the appropriate laws and enforcement mechanisms

- Law should be legislated for rape of men too. But punishment may be lesser than what is given for rape of women
- The legislators should come up with a new statute which deals with Gender Neutral Rape Victims
- Government should include laws to protect the victims and ensure the police to consider the complaint seriously.
- Providing them a better sex education.

RESULTS AND DISCUSSION:

- Most of the respondents believe that men also can be victims of rape. This reflects the society's progressive mindset.
- Some respondents who are not from law background, still thinks that rape provision is for all. But respondents from law background mostly knows that rape does not include male and transgender victims.
- Most people answering that rape of a man is equally serious shows society developing progressively. While some said that it is less serious reflects prejudiced purview towards victims.
- Most people agree that a man can also be raped. While some says it is not possible shows how patriarchy has deeply affected the society. This will also affect victims who will then fear to come forward and speak about the trauma they faced.
- Since more than half of the respondents are from law background, most of them are aware that under BNS rape provision is gender specific.
- The primary reason that sexual violence against male victims are not mostly reported as answered by most of the respondents is that the victims are afraid of being labelled as weak. Now this is stemmed from patriarchy and toxic masculinity that men should only be strong and should not ever be a victim.
- Nearly Half of the respondents answered that they are aware that offender of

transgender rape is only punishable to the maximum of 2 years.

- More than half respondents have answered that trauma of transgender victims is not less than that of female victims. This reflects sensitive attitude towards marginalized victims.
- Most respondents stated that police are not sensitive enough to handle sexual offend cases or complaints filed by transgender victims. This highlights the harsh reality and there should a change to this by policy and instructions.
- Some people said that they think false counter cases will be filed by men if there is gender neutral rape law. While some think justice should prevail for all victims.
- Most respondents want gender neutral rape laws. This reflects society's righteous connotation that lack of law will lead to injustice.

SUGGESTIONS:

- Government should amend the prevailing rape laws into gender neutral rape laws or make a provision for rape laws for male and transgender persons.
- Government, NGO and people should spread awareness to people about sexual assault faced by male and transgender persons.
- National crime record bureau should actively collect data regarding sexual assault faced by male and transgender persons and publish it.
- The punishment for rape of transgender persons should be as same as punishment for rape of female victims.
- Counselling cells, victim support cells should be set up for helping victims and work as support system.
- Policies should be made for police to handle cases regarding sexual assault of male or transgender sensitively.
- Procedural safeguards like in camera trials, victim compensation schemes should also

be made available for male and transgender victims too.

CONCLUSION:

This study partially accentuates the progressive and developing perspective on sexual offences and socially marginalised victims who are affected by that. Still some opinions reflect the ingrained patriarchy and toxic masculinity that is widespread in the society. Societal perceptions also make a way for the law to be legislated. A new Legislation or Judicial activism, if initiated on this arena will change India's another step towards gender inclusive justice. Equality or feminism in its crux needs equal law for violation against bodily integrity. Men who suffer from patriarchy should also be given recourse. Male rape exists from a very long period but still not recognised in law is concerning. Some countries like USA, UK, Australia, Denmark have adopted by gender neutral rape laws. Transgender people will not be different because of the gender identity they chose to own. This will not lead them to have lesser statutory protection than cis-female. Gender specific rape laws is pulling equality backwards and let the survivors suffer from masked faces. Optimistically, developing and progressing country India will have a promising gender-neutral rape laws or laws that will suffice and provide justice to every victim despite their sexuality or gender in future.

BIBLIOGRAPHY:

1. Susan brown miller, *against our will: men, women and rape, 14-15* (1975)
2. A. Nicholas Groth, *men who rape: the psychology of the offender* (1979)
3. Richie McMullen, *male rape: breaking the silence on the last taboo* (1990)
4. Sarrel, Philip M., & William H. Masters, *sexual molestation of men by women*, 117 (1982)

STATUTES REFERRED:

1. THE BHARATIYA NYAYA SANHITA, 2023
2. THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019