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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **THE SOCIETAL AND LEGAL CHALLENGES THAT CONTRIBUTED TO THE OMISSION OF BHARTIYA NYAYA SANHITA, 2023, TO ACCOMMODATE GENDER-NEUTRAL RAPE LAW- AN ANALYTICAL STUDY.**

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## **Abstract-**

*The Indian Penal Code, 1860, was repealed, and Bhartiya Nyaya Sanhita, 2023, was introduced to upgrade the previous code and several offences in it. The paper examines the history of gender-specified rape law in India. The legal scholars, advocates, and policymakers are split between the idea of making the existing law gender-neutral especially as the new law has been passed replacing the penal code. Various law commission reports and scholars have advised for gender-neutral rape law, but the same remains unchanged due to several challenges faced in doing so. This paper examines the legal and societal challenges that can be faced if the rape law is made gender-neutral. It also addresses the increasing number of sexual offences against men and transgender victims and recognizes the existence and prevalence of societal factors that are against it and their effect on policy decisions. The paper examines the issue based on secondary data on societal perspective and the increase of sexual violations against men and transgender individuals, the possible ways to address the same, and how other countries have implemented the same. Certain Judicial decisions have also upheld the validity of current rape law and some have advised for inclusive laws. The paper explains the need for changing societal perspectives, training the judicial and law enforcement agencies and suggests some measures to overcome the same, as it is essential to bring gender inclusive laws into the current society.*

**Key words-** Gender-neutral, rape law, sexual violence, IPC, BNS



## **Introduction-**

The provision which surrounds the rape law in India has always been gender-specific and viewed women as the victims and male as the perpetrators. This narrow scope of the provision fails to address the sexual violations faced by other genders, especially male and transgender victims. The scholars, academicians and legal practitioners have divided between the necessity of gender-neutral provision for rape law, especially in Bharatiya Nyaya Sanhita (hereinafter referred to as BNS) as it does not address the un-nature non-consensual sexual intercourse between adults, which was the only provision that protected the sexual violation of people irrespective of what their gender is in Section 377 of the Indian Penal Code (hereinafter referred to as IPC). Though the thought process of the people is developing, the majority of India still believes in the patriarchal ideas. This leads to the marginalization of male and transgender victims who do not have any redress mechanisms or legal protection. Further, the legal system in India is still not ready to accommodate the gender-neutral rape laws, even if they have been recommended by various committees and reports. The challenges involved in making the rape provision gender-neutral with respect to socio-legal field are elaborated in the further research.

## **Literature review-**

*Philip Rumney & M.M.Taylor (1997)* have taken a critical approach and established how law has always failed to address the male victims, but also analyzed the challenges involved in implementation of gender-neutral laws.

*The 172<sup>nd</sup> report of the Law Commission (2000)* has recommended a gender-neutral definition while substituting the definition of 'rape' with the definition of 'sexual assault'.

*Flavia Agnes (2002)* has provided a feminist perspective of the importance of laws being gender-neutral, but also recognizes the plights of the other genders going through the violations.

*Jai Vipra (2013)* has discussed the societal perceptions which believe in the misconception that men cannot be the victims of sexual violations.

*Usha Tandon & Siddharth Luthra (2016)* has highlighted the patriarchal mindset of the society which believes that rape is a damage to the family's honor and not the dignity of the woman.

*Sumita B. Ade & Dr. M.B. Jameel (2018)* has highlighted the societal stigma and perception, underreporting that may occur, the psychological trauma faced by victims of sexual assault irrespective of their gender.

*Seelinger et al. (2010)* has examined the challenges in the procedures and prosecution of sexual



violence of men and transgenders globally.

*Nikunj Kulshreshtha (2020)* has made a critical analysis the need of gender-neutral rape law through comparative analysis and has highlighted that the patriarchal challenges, the victim blaming, possibility of misuse are the most common challenges faced.

*Shiva Prakash Srinivasan & Sruti Chandrasekaran (2020)* has explored the noticeable transsexualism in the mythologies belonging to Hindu religion, which acknowledged such identities.

*M. Alipour (2016)* has addressed the opinion of transgenders and their rights like sex-reassignment surgery held by Islamic scholars.

*Lesie T. Garfield Tenzer* had critiqued the gender-specific laws and how the me-too movement had affected the legal framework and the societal opinion of sexual harassment and rape law.

*Peter Nicholas* has examined the admissibility of the evidence with respect to sexual assault cases irrespective of the gender of the victim and the perpetrator.

*Jane Wiseman & Chris Lobanoc-Rostovsky* has shown a detailed victim demographics and the profiles of the offenders and has shown that irrespective of gender, everyone faces the sexual violence.

### **Research Question-**

What are the possible challenges to inclusion of male and transgender victims of sexual violation in BNS rape provision?

### **Research Methodology –**

The research engages an analytical research design to study the reasons behind which there has been an omission of gender-neutral laws in Bharatiya Nyaya Sanhita, 2023 (hereinafter called as BNS). The research emphasizes on the secondary data such as reports, journal articles and research papers, judgements etc. It includes records from various governmental and non-governmental organizations such as NCRB (National Crime Records Bureau), RAINN, etc. A short comparative analysis has been made by observation of the Canada's Criminal Code, UK's Sexual offences Act and other such legislations and their implementation has also been studied. Through this, the societal and legal challenges are deeply examined in the Indian society while effectively representing the issues and providing recommendations to overcome the same.

### **Research Objectives-**

- 1) To analyze the possible reasons for the legislature to omit the inclusion of the gender-neutral rape law when they had a chance to while drafting BNS.
- 2) To analyze the societal and legal perceptions towards such law.

### **Legal history of definition of Rape-**

The major change to the rape law came with the Nirbhaya gang rape case, where a young woman was raped brutally by 6 men very inhumanely. Objects were inserted into her private parts, interiors were pulled out, and the level of brutality was vicious.<sup>1</sup> But the then rape provision recognized for non-consensual penal-vaginal intercourse only. Insertion of objects, touching any private part of women, applying mouth, etc. were not considered in the provision. Within months, the Criminal Law Amendment was passed, which broadened the scope of what constitutes rape. The same was brought after the recommendation by the Justice Verma committee report. The report also recommended the Penal Code to include gender-neutral rape law, where the victim can be of any gender but the perpetrator remains gender-specific. However, the same was not amended considering the socio-legal dimensions in the society. Even before the Justice Verma Committee report, the 172<sup>nd</sup> Report on Review of Rape law in March, 2000 recommended a gender-neutral approach where both victim and perpetrator can be of any gender and also recommended the replacement of S. 375 with the definition of 'Sexual Assault' instead of 'Rape'. Further, the report also recommended amendments in the Indian Evidence Act in support of the gender-neutral provision and other changes. Responses were given by several national-level centres and organisations that were against the recommendations made by the report. They agreed to the rationale behind the recommendation, but at the same time they opposed the time that it was being brought into the system. They opined that there were no proper laws that explicitly governed the rights of men and LGBT+ and that they have not been recognised by society yet, and any law criminalising the same-sex violence would work against them.<sup>2</sup> To improve the situation, proper anti-discriminatory laws against them should be passed, and only after changing the societal perspective can such laws be enforced.

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<sup>1</sup> Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1

<sup>2</sup> Law Commission of India, 172nd Report on Review of Rape Laws 15 (2000).

## **The scope of changes that can be made to the existing rape provision-**

### **1) The scope of who can be the victim can be gender-neutralized, unchanging that only men can be perpetrator.**

The same was also recommended by the Justice Verma Committee, as found it difficult to prove that women can rape men. The UK Sexual Offences Act, 2003 Section 1<sup>3</sup> is gender neutral only with respect to victims, but the offender can only be a male. Though not rape, the sexual assault laws (Sections 2 and 3) in the UK are broader and provide protection for all, irrespective of their gender. In New Zealand, the rape law is genders-specific, as Section 128 (2) of the Crimes Act, 1961 defines rape as an act done by a man to another person's genitalia, but the sexual violation is gender-neutral and is covered under the same section (Sub-clause 3).<sup>4</sup>

### **2) The scope of who can be the perpetrator can be gender-neutralized unchanging that only women can be the victims-**

No jurisdiction has enforced such approach.

### **3) Both can be gender neutralized-**

In Canada's Criminal Code, R.S.C., 1985, c. C-46, the offence of rape was repealed and replaced with 'Sexual Assault' in the year 1983 through the Sexual Assault provisions of Bill- C127.<sup>5</sup> The same provided a broad gender-neutral approach. When it comes to the United States, the new definition has included a gender-neutral approach to both victim and perpetrator. South Africa, Sweden and Germany have also taken a similar approach.<sup>6</sup>

## **The social challenges involved in making the provision of rape gender neutral-**

### **➤ Societal Perceptions about Gender-**

Studies done by the International Center for Research on Women show that in various Indian communities, the view that men are strong shall be emotionally and physically strong, and cannot be subjected to violence, and can only be the subjects is still

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<sup>3</sup> Sexual Offences Act 2003, § 1 (UK).

<sup>4</sup> Crimes Act 1961 § 128(2) (N.Z., 1961).

<sup>5</sup> Criminal Code, R.S.C., 1985, c. C-46 (Can.).

<sup>6</sup> Federal Bureau of Investigation, Uniform Crime Reporting (UCR) Program: Summary Reporting System (SRS) User Manual, at 126 (2013), available at <https://ucr.fbi.gov/nibrs/summary-reporting-system>



prevalent.<sup>7</sup> This mindset is still prominent in the country, contributing to the lack of acknowledgement that even men can be subjected to sexual violence. There is a lack of reporting of cases, especially of adult men who get sexually abused, due to such perceptions and stigma, as they consider reporting such violations as a loss of masculinity.

Further, a survey conducted by the International Institute for Population Sciences, clearly shows that violations, both physical and sexual, are initiated by men and not women. Only 4% of women have ever initiated violence against their husband, much because they have been previously subjected to it.<sup>8</sup>

Most of the data collected shows that women are chief victims, and the sexual violence against men, especially adults, goes unreported due to such stigma, making it challenging to implement gender-inclusive rape law.

When it comes to transgenders, sexual abuse against them is punished under Transgender Persons (Protection of Rights) Act, 2019. The societal perception towards transgenders is unclear. Hindu mythologies have always seen transgenders as in equal with respect to male and female. The Muslims, though only recognizes only two genders- Male and female, different schools have taken diverse opinions.<sup>9</sup> The Sunni and Shiya schools have previously considered transgenderism and operations as haram, but then the same was made halal in late 1980's.<sup>10</sup> Nevertheless, Hadith is against the concept of changing one's resemblance and behavior and is against Islam.<sup>11</sup>

Though the society recognizes and often accepts transgenders, it remains discriminatory. A recent report by the NHRC shows that the stereotypes against the transgenders still remains, and is negatively perceived as deviation from norm, influencing their reporting of violence against them.<sup>12</sup>

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<sup>7</sup> International Center for Research on Women, Men, Masculinity and Domestic Violence in India (2002), available at <https://www.icrw.org/wp-content/uploads/2016/10/Men-Masculinity-and-Domestic-Violence-in-India.pdf>.

<sup>8</sup> National Family Health Survey (NFHS-5), 2019-21: India Fact Sheet (International Institute for Population Sciences, 2021).

<sup>9</sup> Shiva Prakash Srinivasan & Sruti Chandrasekaran, Transsexualism in Hindu Mythology, 24 Indian J. Endocrinology & Metabolism 235, 235–36 (2020), [https://doi.org/10.4103/ijem.IJEM\\_152\\_20](https://doi.org/10.4103/ijem.IJEM_152_20).

<sup>10</sup> M. Alipour, Islamic Shari'a Law, Neotraditionalist Muslim Scholars and Transgender Sex-Reassignment Surgery: A Case Study of Ayatollah Khomeini's and Sheikh al-Tantawi's Fatwas, 18 Int'l J. Transgenderism 91, 91–103 (2016), <https://doi.org/10.1080/15532739.2016.1250239>.

<sup>11</sup> Muh. Bahrul Afif, Islam and Transgender: A Study of Hadith About Transgender, 7 Int'l J. Nusantara Islam 185, 185–98 (2019), <https://doi.org/10.15575/ijni.v7i2.6138>

<sup>12</sup> National Human Rights Commission, Making India Transgender Inclusive: An In-Depth Analysis of the Educational Sector of India (Group 1), Online Short-Term Internship Programme, June 2022 (June 20, 2022–July 5, 2022).

➤ **Victim Blaming-**

The society usually focusses more on victim blaming than equality. The author clearly explains how, even if the rape law is gender-neutralized, the actual reporting shall be still low as the societal perception and stigma is still towards female being the victims of rape.<sup>13</sup>

Studies have observed that men, similar to women are prone to victim blaming and there is a high chance that they may face more stigma that is linked to them being masculine.<sup>14</sup>

A psychological study established that the majority of society still believes that men are physically stronger and, hence, end up blaming them for the sexual assault that they are.<sup>15</sup> This leaves the victims in a more vulnerable mental and physical state.

➤ **Presumption of consent-**

I When it comes to the argument of female sexually violating a man, people ignore the fact that coercion can be the case. Physical power will not play any role if the victim is disabled, under influence of drugs, intoxicated or if the person violating has a weapon. But the same is not considered.<sup>16</sup>

Reports in various news agencies have claimed that, male-on-male sexual violation occurs prominently and openly in jail. The same is also not being addressed by any of the authorities. Awareness about the same should be made to the society. All victims who come out of the jail do not share it out as they face societal stigma again on top of them being the convicts.

➤ **Lack of awareness-**

The society lacks awareness about the prevalent sexual violations of male and transgender victims, and even if some fragment of the society knows, they tend to ignore the same.<sup>17</sup> The lack of awareness in the society and the lack of acknowledgement by people who know that sexual violation can occur to anyone

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<sup>13</sup> Leslie Y. Garfield Tenzer, #MeToo, Statutory Rape law and the Persistence of Gender Stereotypes (Feb. 8, 2018), SSRN

<sup>14</sup> Harshad Pathak, Beyond the Binary: Rethinking Gender Neutrality in Indian Rape Law, 11 Asian J. Comp. L. 367, 367-397 (2016)

<sup>15</sup> Spiker, Randi, Male Rape Myth - The Role of Gender Role Conformity in Men's Perceptions of Male Rape, 26 MOD. PSYCHOL. STUD. 5, 5 (2022).

<sup>16</sup> Jai Vipra, A Case for Gender-Neutral Rape law in India, CCS Working Paper # 286 (July 2013)

<sup>17</sup> Thomas JC & Kopel J, Male Victims of Sexual Assault: A Review of the Literature, 13 BEHAV. SCI. (BASEL) 304, 304 (2023).

irrespective of their gender is the main cause why the victims are being denied justice, and the same should be addressed as soon as possible.<sup>18</sup>

### **Legal Challenges –**

➤ **Legal provisions which address un-natural non-consensual sexual intercourse and sexual assault of transgender-**

Section 377 of the IPC dealt with criminalization of sexual-intercourse against order of nature, irrespective of the gender and also criminalized bestiality.<sup>19</sup> But in Navtej Singh Johar case, the same was decriminalized with respect to the consensual acts of two adults.<sup>20</sup> There is no provision in BNS which address the un-natural non-consensual sexual intercourse.

The question of whether the new law is legalizing the male sexual assault is the question that has been aroused by various legal scholars, lawyers and academicians. In October this year, the Apex court rejected a petition for inclusion of laws in BNS which deal with the criminalization of non-consensual sexual activity between men, women. The SC rejected the petition stating that it does not have powers neither under writ petition nor under Article 142 of the Constitution to make an offence and the same is within the power of the legislature. But previously, in the case of *Gantavya Gulati v. Union of India*, 2024, the court directed the Centre to go through the provisions in BNS and add an amendment which addresses the non-consensual unnatural sex as an offence.<sup>21</sup>

Rishi Malhotra, an advocate had filed a PIL in 2018, seeking gender-neutral laws for rape, sexual harassment, stalking etc., but the same was rejected by the Apex court stating that it was an “imaginative petition”. This is one of the major challenges.<sup>22</sup>

When it comes to transgenders, their sexual assault is dealt under TPRA (Transgender Persons (Protection of Rights) Act, 2019), Section 18 provides the punishment of minimum 6 month and maximum of 2 years, which is very minimal. The same is against Article 14 of the Constitution.

Transgender's have to register themselves for certification of identity under the TPRA, and only then can they enforce the rights provided under the act, including sexual abuse.

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<sup>18</sup> Harish B, A Study on the Lesser-Known Issue of Sexual Violence Against Men and the Urgent Need for a Reform in India's Sexual-Crime Legislations, 3 INDIAN J. INTEGRATED RES. L. 1, 1 (2023).

<sup>19</sup> Indian Penal Code, § 377, No. 45 of 1860, India Code (1860).

<sup>20</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

<sup>21</sup> Gantavya Gulati v. Union of India, SCC OnLine Del 5990

<sup>22</sup> LiveLaw, <https://www.livelaw.in/sc-dismisses-pil-make-rape-sexual-harassment-stalking-outraging-modesty-gender-neutral/> (last visited Nov. 12, 2024)



According to the data from the National Portal for Transgender Persons, out of 9,064 applications which they received for transgender certificates and IDs, 22% of them are pending, and only 13% have been held as ineligible. Further, the delay period for 16.5% of the applications has exceeded 7-12 months, which is against the act as the respective authority has to issue the said certificate within 30 days from the date of application.<sup>23</sup> But according to the 2011 census, India has approximately 4,88,00 people from the transgender community. Very few people belonging to the community have applied for the certificate, but the same is essential to enforcing the rights. Research showed that most of the problems that the people from the transgender community has, is due to the police officers, i.e., 87.5%.<sup>24</sup>

To summarize, there are no existing legal provision under BNS to address un-natural non-consensual sexual intercourse, which is male rape and the punishment for sexual assault against the transgenders are very minimal.

➤ **Is there actually a difficulty in prosecution of gender-neutral rape cases, or is it just a myth?**

The main evidence to prove or disprove sexual assault is 'Consent', and proving that there was no consent is the challenge in sexual assault of other genders as it is presumed that there is consent. In such cases, researchers may have established that the physical evidence is either absent or destroyed. The same has been observed in countries that have made rape gender-neutral.<sup>25</sup> It is also the case that if a person reports a case against a person of the same gender, then it is assumed and contended by the opposite counsel that the victim is gay and that the intercourse was consented to.<sup>26</sup>

Nevertheless, there are forensic experts who consider that, it is possible to establish the guilt of the perpetrator. The forensic expert states that sexual violation can be established through Locard's exchange principle where it states that if one object comes in touch with another, they tend to always transfer some substance. The evidence can be collected through various means like buccal coitus, tribadism, seminal fluid, etc. but

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<sup>23</sup> National Portal for Transgender Persons, as of June 20, 2022, available at <https://transgender.dosje.gov.in>

<sup>24</sup> Anitha Chettiar, Problems Faced by Hijras (Male to Female Transgenders) in Mumbai with Reference to Their Health and Harassment by the Police, 5 Int'l J. Soc. Sci. & Human. 812, 812-16 (2015).

<sup>25</sup> Kim Thuy Seelinger, Helene Silverberg & Robin Mejia, The Investigation and Prosecution of Sexual Violence, SEXUAL VIOLENCE & ACCOUNTABILITY PROJECT WORKING PAPER SERIES, 1, 1 (Human Rights Ctr., Univ. of Cal. 2023).

<sup>26</sup> Peter Nicolas, "They Say He's Gay": The Admissibility of Evidence of Sexual Orientation, 37 GA. L. REV. 793, 793 (2003), <https://digitalcommons.law.uw.edu/faculty-articles/296>.

the same has to be collected without delay as it may be tampered easily. But due to stigmas faced by the victims, either it goes un-reported or delay in reporting.<sup>27</sup>

But the burden of proof remains on the prosecution to prove beyond reasonable doubt and hence there can be challenges in prosecution, considering the status of admissibility in India.

➤ **Under reporting-**

One of the possible and obvious challenge is of under reporting. Reports from SMART, in US, where the sexual violation laws are gender-neutral observed that 52% of women and 9% of men went through sexual harassment, but only 4% of them had been investigated.<sup>28</sup>

RAINN is a support system in U.S. that stands up on behalf of the victims of sexual violence. It helps the survivors of sexual violence to access justice. A recent report has shown that the male victims of the sexual violence are questioned of their masculinity and face societal stigma leading them to not report it to the officials and only few cases being filed.<sup>29</sup> The justice and support mechanisms do not work in favor of them and hence face a lot of challenges with respect to reporting.

<sup>30</sup>According to the NCRB report of 2022, only 236 crimes were registered against the transgenders and none of them included Sexual abuse. It is clearly not because of the smaller number of crimes but the failure of the government officials and society to acknowledge that even they can be subjected to heinous crimes like sexual abuse.

➤ **No explicit anti-discriminatory laws-**

In the case of NALSA v. UOI, the court recognized transgenders as the third genders and acknowledged their rights in the constitution. But explicit anti-discriminatory laws that protects non -binary, genderqueer, homosexuals, are not passed.<sup>31</sup>

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<sup>27</sup> Dr. Pyali Chatterjee, Forensic Analysis in Homosexual Rape Cases: Need of Gender-Neutral Rape law in India, XIV ARMY INST. L.J. 2021.

<sup>28</sup> Jane Wiseman & Chris Lobanoc-Rostovsky, Incidence and Prevalence of Sexual Offending, in Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking: Chapter 1 (U.S. Dep't of Just. 2023).

<sup>29</sup> Rape, Abuse & Incest National Network (RAINN), Victims of Sexual Violence: Statistics, <https://www.rainn.org/statistics/victims-sexual-violence> (last visited Nov. 20, 2024).

<sup>30</sup> National Crime Records Bureau, Crime in India – 2022 (2023)

<sup>31</sup> National Legal Services Authority v. Union of India, (2014) 5 SCC 438

➤ **Possibility of misuse-**

A 2022 report by NCRB shows that out of 44,785 cases reported, 9.69% of them were fake.<sup>32</sup> There are high chances that if the rape provision is gender-neutralized, the same will lead to reporting of cases which are false. Further, it may also lead to problems in solving the rape cases involving women. It already a well-established fact that the judiciary is filled with pending cases and needs to urge solving them. Gender-neutralizing rape law may cause much serious issue to the judicial system, as they will be overburdened.

**Judicial decisions-**

There have been landmark judicial decisions both in India and other countries where the idea of gender-neutral rape provision has been encouraged and discouraged. For instance, in U.S. the court of appeals held in the case *People v. Liberta* that the exceptions of rape, like gender specificity should be removed as it is against the principle of equality and causes the provision unconstitutional. The court established that the cases where the men are raped by women may be less in number, but the same should not be ignored and does not meet the test of constitutionality. Further, the only class of people who benefit from gender-specific laws are the group of people who are allowed by law to sexually violate.<sup>33</sup>

In the case of *Orr v Orr*, the court held that a gender-specific provision that benefits for those who have no reason to be benefited from, is worse than a gender-neutral one as it violated the equality principle.<sup>34</sup>

When it comes to U.S., the challenge in changing the societal perspective is very minimal when compared to that of India. Hence, the process of making the provision of rape gender-neutral worked out better, but the same shall take time in India, as the society and the legal system is not yet ready to take in such changes. It can be observed in the decisions of the courts.

In the case of *Sakshi v. Union of India*, the court has held that the petitioner's arguments on the need of changing and updating rape law into more inclusive one was upheld.<sup>35</sup> The case

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<sup>32</sup> National Crime Records Bureau, Crime in India Report, 2022 231 (2022).

<sup>33</sup> *People v. Liberta*, 64 N.Y.2d 152

<sup>34</sup> *Orr v Orr*, 440 U.S. 268

<sup>35</sup> *Sakshi v. Union of India*, (2004) 5 SCC 518



was the reason due to which the term 'Rape' was replaced with the term 'Sexual assault'. The rape law was amended and made inclusive with respect to the scope constituting, but remained gender-specific.

In the case of *Navtej Singh Johar v. Union of India*, the petitioners did not explicitly wish for gender-neutral rape laws, but have stressed on having equal rights under the constitution.<sup>36</sup> The case was only a landmark for having basic rights for individuals belonging to other genders, and did not delve into major rape provisions, as they were well aware of the fact that right now India is not socially and legally ready.

<sup>37</sup>In the case of *Priya Patel v. UOI*, the court held that a woman cannot be prosecuted for gang rape or rape as it is not possible for her to have common intention with the other men and only a male individual can be held liable for male.

In India, the societal and legal conditions prescribed above act as a major hinderance for the law to be gender neutral. No case, has explicitly provided for the gender-neutral rape law.

### **Recommendations to condition the societal and legal challenges-**

The society can contribute in three ways-

1. Measures that should be taken
2. Measures that should be taken by Legislature, Judiciary and law enforcement agencies
3. Measures to be taken by the organizations and NGO's

### **Measures that should be taken by individuals-**

Every individual can play their own role in conditioning the societal perspectives. Especially Generation Z is much aware about the problems faced by different genders, and can educate their families, friends and relatives about the sexual violations faced by other genders. Further, they can encourage others to participate in awareness programs and conduct the same in collaboration with NGO'S or organizations providing support. Researchers, scholars and academicians can write scholarly articles, papers and involve in activities contributing towards the awareness of sexual violence faced by other genders.

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<sup>36</sup> Johar, (2018) 10 SCC 1.

<sup>37</sup> Priya Patel v. State of M.P., (2006) 6 SCC 263

## **Measures That Can Be Taken By Legislature, Judiciary And Law Enforcement Agencies-**

Legislature can primarily create laws which provide basic rights to the people belonging to the other genders and also men. It can conduct surveys and data collection on the matters which deal with sexual violation of other genders. Laws addressing their sexual violation can be slowly and steadily addressed, when the societal and legal systems are ready. The judiciary can conduct training programs to train the judges, prosecutors, judicial clerks etc. dealing with the victimology, sensitivity of the victims etc. Law enforcement agencies can conduct programs, campaigns that are dedicated towards awareness. Specialized units can be established to provide support, create awareness, work on research etc.

### **Measures that can be taken by the organizations and NGO's-**

Government organizations and non-governmental organizations can collaborate with each other and also work individually towards spreading awareness about sexual violence that is faced by individuals irrespective of their gender and the need of laws punishing the same. Government organizations can work on policy recommendations to the legislature and NGO's can help with the advocacy. Support systems can be established and run in collaboration. Employers and organizations can create support systems in-house to services to ensure the violations and harassments irrespective of gender are being addressed.

Together, all can try their best to condition the societal perceptions and train the legal systems to accommodate the gender-neutral provisions and effectively implement the same.

### **Conclusion**

Various researchers, scholars, academicians have researched on whether India should or should not implement gender-neutral rape provision and have taken divergent provisions. But there are a lot of challenges including societal and legal which affect the implementation of the provision. The societal challenges include the negative perceptions about gender in the society, the victim blaming that they potentially may face, presumption of consent on behalf of men, the lack of awareness that the sexual violation can be faced by anyone irrespective of what their gender is. The legal challenges include that there is no legal provision that addresses un-natural non-consensual sexual intercourse in BNS, a very minimal punishment given under the TPRA for sexual assault of transgender, difficulty in prosecution of cases and the possibility of

overburden of cases, chances of under-reporting and decrease in psychological well-being of the victims and the possibility of misuse. Hence, the Indian legal system is not currently ready to accustom gender-neutral rape law provision. However, the provision which dealt with the un-natural non-consensual sexual intercourse, can be accommodated in the laws immediately. But provision regarding rape being made gender-neutral has to be done with enough care and consideration as the societal perception should be changed and legal systems should be trained for the effective implementation of such laws. Further, India can focus on making the rape gender-neutral only with respect to victims. Taking time is acceptable, but the implementation should be done effectively so as to not attract societal resistance and procedural chaos.

