



Hetero-normativity and Rape: Mapping the Construction of Gender and Sexuality in the Rape Legislations in India¹

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Abstract

Drawing from discourse on gender, sex and sexuality, this paper analyses the presence of certain unproblematised assumptions of gender in law on rape today that have a tendency to marginalize and suppress the voice of the 'third sex'. I have tried to evaluate the rape legislation in India and ask the question – is there room for the queer? The aim is not just to problematise the hetero-normative assumptions behind rape legislation and practice as it stands today but also to explore the possibility of a more inclusive legal policy on rape and its possible repercussions. Using a socio-legal framework of analysis, this paper shows how and why rape legislation in India is still exclusionary and imbued with sexual bias. The existence of a law that deems homosexuality a criminal offence creates more ripples in the water than is often anticipated. Until the assumptions of gender and sexuality are not problematised and addressed in rape legislation in India, the dream of inclusive and fair rape legislation is a long shot.

Keywords: Rape, Gender, Sexuality, Queer, Agency, Rights, Indian Penal Code.

Introduction

The terms 'gender', 'sex' and 'sexuality' are used interchangeably more often than not. Despite the theoretical advancement in academia with regard to the conceptual differences between gender and sex, the reflection of this nuance is rarely seen in social policy and law. With popular opinion becoming more vocal in contemporary times, there is an increasing demand for a more inclusive policy by governments with regard to sexuality. For instance, Section 377 of the Indian Penal Code which criminalizes homosexuality is being condemned in popular media and is shaking up the content of conversations on sexuality at a household level. Even though there is still a lot of opposition for the scrapping of Section 377, the point I am trying to emphasize is that there is a growing recognition and acknowledgment of multiple sexualities. As of today, India is still lagging behind in making its socio-legal policy inclusive in this regard.

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From my preliminary analysis of the legislation in India, I observe two things: i) that it rests on an utter confusion of gender, sex and sexuality; ii) that this confusion stems from a deep marriage with hetero-normativity in the Indian society which is reflected in Indian law. What I problematize is that this reflection is a distorted one and that in the face of growing evidence of homosexuality, unless the law is amended to take into account empirical reality, social policy is going to be as exclusionary as ever. Here, I have analysed the dire consequences of hetero-normativity when it comes to the rape legislation. This paper also aims to explore whether there is a scope for widening the rape legislation in India to be accommodative of multiple sexual identities and how that inclusion might affect social policy at large. I am using a socio-legal lens for analysis and have drawn on heavy theoretical work done by scholars of gender studies and feminism.

The paper is structured as follows: Section I provides a theoretical review of gender, sex and sexuality. The historical and evolving conceptualization of these three oft-used terms is explored here. I have also elaborated on the concepts of hetero-normativity, power and discourse in this section. Section II delves into the finer points of the discourse on rape and the role both penetration and consent play in the consolidation of rape as a gendered crime in society. Section III discusses the general stand of law when it comes to rape. This is a general exploration of how policy works when it comes to criminalizing rape. Section IV provides a brief introduction to the impact of legislation on rape in India today and asks the question: can a female rape another? Section V highlights the need for an inclusive legal policy. This section assesses the pros and cons of making the rape legislation in India sensitive to queer crimes and queer issues.

I. Gender, Sex and Sexuality

“Sex, we told students, was what was ascribed by biology: anatomy, hormones, and physiology. Gender, we said, was an achieved status: that which is constructed through physical, cultural and social means” (West & Zimmerman, 1987, p. 125). The difference between sex and gender until the publication of “Doing Gender” by West and Zimmerman (1987), *Gender Trouble* (1990) and *Bodies That Matter* (1993) and “Rethinking Sex and Gender” by Christine Delphy (1993) was a relatively uncontested ‘fact’. For example, in Ann Oakley’s *Sex, Gender and Society*, she defines sex as ‘a word that refers to the biological differences between male and female: the visible difference in genitalia, the related difference in procreative function’ while defining gender as a ‘matter of culture, referring to the social classification into masculine and feminine’ (Oakley, 1972, p. 16).

That sex is biological while gender is socially constructed was the popular understanding of the difference between sex and gender until the publication of these works. Poststructuralist critiques and postmodernist exhortations of gender and sex resulted in a crisis in the complacency erstwhile enjoyed in the conflation of sex and gender and ushered in questions of epistemology, discourse, and power (Salih, 2002) in the academia. Until then, major scholars resorted to dichotomous notions of understanding gender and sex in society.

For instance, Mead (1935) had observed through extensive fieldwork and analyses that most societies have a tendency to divide human characteristics into two and attribute one half to men and the other to women. She argued, that this distinction is, in fact, arbitrary. However, she does – as West and Zimmerman argue with regard to most ‘classical’ Western scholars – assert that reproductive functions were the *defining* factor in the division of labour and ‘social roles’ (1987, p. 128). The causality was such that the division

between men and women was rooted in biology and had strong repercussions in psychological, behavioural and social spheres of activity. The hierarchical arrangement of this dichotomy also went unquestioned for a long time (Delphy, 1993, p. 2). The concept of 'sex roles' was deeply imbued with the notion of *status* in feminist literature, such as in the writings of Linton (1936, cited in West & Zimmerman, 1987), Parsons (as cited in West & Zimmerman, 1987), Komarovsky (1946; 1950), Michel and Klein and Myrdal (as cited in Delphy, 1993, p.2). This had an impact on understanding not just sex, but also gender and sexuality. Sex roles, it was constantly argued, emphasize the social and dynamic aspect of role construction and enactment *which are situated and specific* to context and spatio-temporal specifics rather than universal and categorical such as 'sex category'.

Kessler and McKenna (1978) argue that it is a "gender attribution" process that, dictated by cultural events that not only affixes nominations of gender onto humans but *also presupposes the sexuality of a person*. They contend that certain insignia are loaded with connotations of sex which goes on to imply that if X is dressed in a way that men are supposed to dress, X is a man. They argue that it is not the sex assignment done at neither birth nor the possession of sexed genitalia that modifies our day-to-day interaction with each other but it is the repeated use of *symbolic insignia* that dictates the understanding of gender in daily lives.

Taking the literature on sex and gender into more exciting domains, West and Zimmerman (1987) propose a triadic understanding of sex and gender in terms of the differentiation between sex, sex category and gender. They argue that while sex 'is a determination made through the application of socially agreed upon biological criteria for classifying persons females or males' (1987, p. 127), sex category is achieved through the application of the socially accepted identificatory displays associated with the previously established sex. This 'sex category' presumes one's sex and even stands as a proxy for it in many situations. However, they argue, that these terms are not synonymous. One can claim membership in a sex category even while the sex criteria is arguably lacking. This theorization can then be juxtaposed with gender as an activity of 'managing situated conduct in light of *normative* prescriptions and conceptions of attitudes and activities appropriate for one's sex category' (1987, p. 127-128). For instance, if X is born with male genitalia (sex), his sexual conduct is that of ejaculation (sex category) but that he is expected to copulate with Y who is born with female genitalia is *doing gender*. Gender, then, becomes a performance. In this situation, X is doing gender in a hetero-normative context. If in a culture, he is expected to engage in sexual activity with Z, a person possessing male genitalia, he would still be *doing gender*. Therefore, gender is the application of sex and sex category within the normative claims of the society he or she is embedded within. In arguing that gender is neither a role, nor a set of traits, nor a variable – but an activity, a product of social doings – West and Zimmerman made an indelible mark in the field of gender studies.

A very similar causality can be observed in most public policy today and it is precisely these unproblematized assumptions about gender, sex and sexuality that make law and policy exclusionary when it comes to acknowledging and protecting the interests of multiple sexual identities, as I will substantiate in the case of anti-rape legislation in India. In an age of increasing demand for what I would call a 'fluid identities' approach in public policy, there is a dearth of research in the practical repercussions of making policy more inclusive in terms of sexuality. This has repercussions on the normative aspects of legislation which culminates in the power relations in society today.

Hetero-normativity, Power and Discourse

The dominant assumption in most works of social theory until recently was that of hetero-normativity (Butler, 1990) or what Rich terms ‘compulsory heterosexuality’ (Rich, 1980). This has seamlessly translated into policy and law across societies, nations and continents. A modern conception of binary identities based on sex³ has become the *norm*, the standard by which society learns to discriminate and exclude.

The central idea behind the notion of hetero-normativity is that heterosexuality is the *norm* and that a norm is something by which the individuals of the society have to comply with not just to be accepted in the society but also to be not discriminated against. Butler argues that a hetero-normative culture establishes the coherence and validity social order in order to perpetuate the norm of heterosexuality (Salih, 2002, p. 49). Butler argues that most theorization on gender and sexuality relies on an assumption of pre-discursive *dispositions* of individuals determined by their sex which is yet another manifestation of the heterosexual ‘norm’ that societies propagate through discourse and reinforcement (1989, 1990, and 1993). Rossi, for instance, had famously proclaimed that women are “innately sexually oriented” toward men (as cited in Rich, 1980, p. 632).

MacKinnon (1982) makes a wide claim when she posits that “sexuality is the lynchpin of gender inequality” (p. 533) which, when neatly summed up by Rich (1980) sheds light on heterosexuality being a systematic matrix of power/discourse that perpetuates gender inequality. Queer Theory has made important contributions to the exploration of hetero-normativity by shifting the object of analysis from the focus on homosexuality or ‘deviance’ to unravelling the concept of ‘hetero-normativity’ (Schilt & Westbrook, 2009, pp. 441-442) to understand the genealogies of power/discourse therein.⁴

Using West and Zimmerman’s (1987) understanding of the sex, sex category and gender, one can analyze how hetero-normativity works in its skeletal mechanics: one’s biological endowments are used to put one in a sex category which then determines his/her behaviour *within a system of norms of ‘expected behaviour’*. It can then be logically argued that people who make the transition of ‘disruption’ by living their lives in a ‘social gender’ which is not commensurate with their ‘biological’ sex dismantle the very notion that gender identity is an ‘*immutable derivation of biology*’:

These schemas constitute and are constituted by our current gender order—the patterns of power relations between men and women that shape norms for

³ To even begin to understand the controversies surrounding the notions of sex and gender, one must trace the lineage of these terms from a pre-Enlightenment era. Prior to the eighteenth century the human body was predominantly conceptualized in terms of ambiguity, permeability and inherent fluidity. According to Ridway, ‘this is quite at odds with modern notions of absolute difference exemplified by sex and race. We have very rigid biological boundaries compared to this’ (1996). Ridgway thus concludes that “this disciplinisation of sexuality within the ‘natural sciences’, along with its relative absence in sociology and the social sciences generally, arises in part from the *conceptual distinction between nature and culture*. This distinction or what has recently been termed binary opposition between nature and culture - individual and society reside at the heart of classical modern sociological canons. They form part of much wider binary schema which is enshrined in modern thought, language, concepts and commonsense understandings since the 18th and 19th centuries.”

⁴ Please refer to Schilt and Westbrook (2009) for an illuminating analysis on the interaction between transgender and heterosexuals in public and private domains.

femininity and masculinity by defining what is gender-appropriate in arena such as romantic partner selection, occupational choice, and parental roles. The gender order is hierarchical, which means there is consistently a higher value on masculinity than on femininity (Schilt & Westbrook, 2009, p. 442).

What is important here is that expectations about 'natural' gender differences have the potential to translate into an 'unreflexive' production of inequality that reproduces the gender hierarchies and gender norms which are extremely viscous in nature (Fenstermaker, West, & Zimmerman, 2002). The agency of those who do not conform to these norms does not come to light because the 'invisibility' of certain genders also results in their muteness in social policy and law.

Butler articulates that sex and gender are in fact the results of discourse and law itself since law does not just produce but also represses the very identities and desires it produces in order to maintain more rigidly the justification of the sanctioned gender and sex identities (Salih, 2002). For instance, hetero-normativity produces the possibility of deviance (because it has rigid boundaries) and then prohibits these very possibilities in order to justify the 'naturalness' of the order (Salih, 2002, p. 59). It is a reinforcing cycle of power and discourse which makes a rigid ordering of society *appear* natural due to its consistent repetition of acts dubbed 'performativity' by Butler herself.

Heterosexuality presupposes a binary sex system in which the sexes are *constructed* as opposites and that heterosexuality and gender identity are the result of specific genitalia which is pre-discursive, natural and thus not susceptible to challenge. West and Zimmerman (1987) point out, ironically, that in most social interactions genitals are not actually visible. What this means is that 'people do not expect a mismatch between "biological" credentials and gender presentations but rather assume that gendered appearances reflect a biologically sexed reality' (Schilt & Westbrook, 2009, p. 443) which brings to light the fact that heterosexuality is so deeply entrenched in our societies today.

If gender is just a subset of sex, what happens to our clarion call for fluid identities? How do we incorporate this call for 'fluidity' in social policy? In analyzing rape legislation in India today and formulating prescriptions for reforms, I will be answering similar concerns. Before that, however, an understanding of the discourse on rape will be of utmost benefit.

II. Theories of Rape

The model of "penis-vagina" penetration undoubtedly informs the genital division of the male and the female (Bettcher, 2007). This pivot of 'penetration' has informed discourses surrounding sexual violence and rape. Brownmiller (1975) separates rape from the mainstream of daily life and argues that "rape is violence, intercourse is sexuality" which, MacKinnon (1979) removes rape from the sexual sphere altogether and does not raise questions on the institution of heterosexuality or the notion of 'consent' (Rich, 1980, p. 642). Foucault's suggestion that rape ought to be defined as merely another type of assault without any sexual specificity is an extension of his argument that the desexualization of rape will be 'a liberating blow against the disciplining discourse which constructed sexuality as a means of social and political power' (Cahill, 2000, p. 44). These discussions on rape and its sexual connotations have to be revisited in light of assumptions of hetero-normativity that underlie their construction itself.

While legal systems have punished rape for thousands of years, Dripps (1992) argues that the punitive measures have only further *reinforced the notion of males controlling sexual*

access to females (p. 1781, emphasis added). In an illustrative historical account of the treatment of rape in legal systems in the West, Dripps (1992) finds that the notion of sexual autonomy was missing in the legal treatment of rape till the 20th century (p. 1783). Defining ‘autonomy’ *ex negativo* would imply that autonomy is the freedom to *refuse* sex with anyone and *not* be subject to sex without consent. The point here is that instead of autonomy being a positive approach (which would imply the freedom to have sex with anyone), a negative approach to autonomy would draw the contours of my personal freedoms vis-à-vis the personal freedoms of other persons.

Whether rape is only an act of sexual aggression or not is contested in the literature on rape. However, there is scant problematization of whether rape is a physical act that relies on the discursive and/or symbolic signification of sexuality and if that is the case, why does social policy put its faith on a simplistic understanding of gender, sex and sexuality? The role of signification is of importance here since it reveals the dominant ethos of society as it were.

The notion of power is embedded within this discourse on hetero-normativity, which plays out in constructing rape as an act of sexual violence that men commit against women. Its very definition is, thus, imbued with a dichotomous understanding of gender and sex. The ‘power dynamic’ theory, for instance, proposes that there is a pecking order of control in society, with men at the top and women placed at the bottom. The peril of the existing power dynamic being reversed and those at the top losing their positions of power perhaps explains – to an extent – why those at the top of the hierarchy rape those lower down. Thus, MacKinnon (1991) has stated, “Rape is an act of dominance over women that works systematically to maintain a gender-stratified society in which women occupy a disadvantaged status as the appropriate victims and targets of sexual aggression” (cited in Sivakumaran, 2005, p. 1281).

With regard to signification and power, Marcus (1992) provides an expounding narrative of how rape is scripted as a ‘wounded’ inner space and how language, inscriptions and insignia can script victimization itself. The “entire female body comes to be symbolized by the vagina” (p. 398) and this indicates an inevitable potential for damage and pain. She asserts further that ‘we do not have to imagine the penis as an indestructible weapon which cannot help but rape; we can take the temporality of male sexuality into consideration and bear in mind the fragility of erections and the vulnerability of the male genitalia’ (p. 400). Arguing for an understanding of rape a *process* rather than an *act*, Marcus makes a very crucial contribution to the theories on rape. In her own words: rape does not happen to preconstituted victims; it momentarily makes victims (p. 391). In understanding rape as an act, the agency of the victim is either missing or accused of being compliant with the act of rape itself (challenged by Mardorossian, 2002). This not only takes credit away from the seriousness of rape but also uses trite notions of agency which are not in tandem with recent developments in agency theories. Viewing rape as a process gives space for understanding rape in terms of its signification.

A similar analysis made by Helliwell (2000) begs the question of how *sexualization* of violence is a process that reinforces the gendering of violence over and over again in a *stylized* manner. She shows how the penis is perceived to be lacking the power to harm when perceived by a Gerai tribal woman while a white woman like Helliwell herself feels threatened and vulnerable (p. 797). The socio-cultural signification of the process is a note that social policy has to strike a chord with.

In light of these discussions, Mardorossian (2002) calls for a new feminist politics which analyses the psychological and individual effects of ‘victimization’ in a wider social system instead of locating and evaluating individual narratives. While Mardorossian does analyse the discourse on rape using an interesting critique of ‘victimhood’, *the central tenets of a binary understanding of gender is not problematized*. The categories of man and woman remain sacrosanct. If the wider social system were to be considered, wider understandings of definitions in the social system need to emerge.

III. Rape: Penetration or Consent?

There are two concepts in rape theory that require due consideration before moving onto discussions on hetero-normativity: i) the concept of *consent*; ii), the concept of *penetration*. Is rape only a defiance of consent? If so, how is it any different from any other forced physical assault? Is rape only a matter of penetration? If so, is there an adherence to a heterosexual matrix here? Let us problematize these further.

As we had noted earlier, sexual autonomy is the freedom to refuse to engage in sexual activity. Does this activity have to be peno-vaginal alone? In recent court judgments in a lot of countries, this restriction has been broadened to include penetration that is not only vaginal but also anal and oral. Notably, Podhoretz (1992), asserts that “the definition of rape, which has in the past always been understood to mean the use of violence or threat of it to force sex upon an unwilling woman, is now being broadened to include a whole range of sexual relations that have never before in all of human experience been regarded as rape” (pp. 6-7). Further, penetration by external objects is also being considered serious sexual violence, as is espoused by the Criminal Amendment Bill 2013 in India.

However, as I see it, the fundamental question here should be *why* is penetration – whether through penis or through other objects – accorded the status of being the decider of what constitutes rape? Two reasons ring loud and clear in this regard: one, of course is the narrative of public health which argues that intercourse between man and woman without protection is a conduit for sexually transmitted diseases; and two, more relevant to my argument is the fact that the evolution of ‘rape’ as a concept is linear with its origin in a hetero-normative matrix where the *signification of maximum violence of a woman is through the phallus signifier*. I argue that the construction of sexuality in a heteronormative society is such that penetration by a phallus signifier carries with it the connotation of power, dominance and the most condemnable violence. This further sexualizes the construction of rape and constructs images that are embedded in a power/discourse matrix of sexuality.

Even if the possibility of rape through the anus or the mouth and by objects other than the penis is indeed considered, scholars argue that social policy tends to view sexuality “as mere –ism in social policy”; only nominal, not real (Carabine, 1996). The signification of penetration remains invincible. Thus, the ‘norm’ is still heterosexual with homosexual tendencies added to the definitions – there is *no redefinition* as such. If there are redefinitions, they surround the concept of sexualization and desexualization of rape as such (Brownmiller, 1975; Baron & Straus, 1987; Cahill, 2000; Jeffords, 1991; MacKinnon, 1979; Marcus, 1992; Mardorossian, 2002; Palmer, 1988).

The Raped, The Rapists and Policy

When Foucault called for a ‘desexualization’ of rape (cited in Cahill, 2000, p. 57), the idea was to question the context of sexuality juxtaposed with physical violence, brutality and disregard for the agency of the victim. Cahill (2000) argues, however, that equating

rape with other assaults would mask the connections (p. 58) of the discourse on masculinity, femininity and nuanced inscriptions of gendered power in the process of rape itself. The very fact that the *threat* of rape persists long before the actual act itself indicates the entrenchment of sexuality in the violence of rape. She brilliantly asserts that the implicit *womanizing* of a male victim in a male-male rape situation itself signifies the ‘social sexing’ of the man. Taking the premise that gendered identities are fluid and unstable, she cites Plaza (1981) in throwing light on this ‘social sexing’ and the social production of the feminine body – which is not a ‘natural’ extension of the possession of female genitalia. That victimization itself *produces a female body* is best understood in the case of anal penetration – even if the victim is a man. Though Graham (2006) points to the conceptual issues in equating anal penetration with vaginal penetration, Cahill (2000) sheds some bright light onto the aspect of social production (and repression) of agency during sexual victimization. Therefore, it is not the body parts involved in the process of rape that make it sexual but the effect of such an act on the sexualization of the feminine body and its construction vis-à-vis the benchmark of masculinity.

However, what if we look at this argument from the other side of the spectrum? Turning Cahill’s (2000) argument about social genders upside down, I assert that the corollary requires as much cogitation as her primary argument: in the act of constituting penetration as the pivot of rape, the victim might be a (social) woman but, by that logic, *the aggressor is as much a social man*. Therefore, even if it is a case of a woman ‘raping’ a woman, the idea of penetration even with an object (in lieu of a penis) will involve the production of a (social) man.

My academic curiosity regarding female-female rape peaks at this juncture: how would one characterize female-female rape? Is there a possibility of such inclusion in law? Should the law wait for a precedent before it makes its provisions more inclusive? More technically, does female-female rape also have to conform to the act of penetration using a device? Most importantly, does the aggressor have to be a social man? If so, doesn’t this conformity reflect a rigid entrenchment of hetero-normativity at the process of signification in the society today? Should policy fall prey to such signs or make an active effort at reformulating these signs itself?

Conceptualizing men as offenders and women as victims not only assumes a heterosexual matrix (Graham, 2006, p. 188) but also *reinforces* this very matrix (LeGrand, 1973). In law, we find this cyclical reinforcement at play – a trenchant insight that Butler had already theorized as keeping in tandem with the concept of ‘law’ itself (Salih, 2002, p. 59). If we take into account queer identities, how should the language of rape be reconstituted? That is the question. LeGrand (1973) has insightfully argued:

Consideration should also be given to whether it makes sense to limit rape to cases of penetration of the vagina by a penis. Since the offense actually consists of a sexual outrage to the person, that outrage should probably include a broader range of sexual contact. In any case, there is no sound reason for restricting rape to male offenders and female victims. Men who are sexually assaulted should have the same protection as female victims, and women who sexually assault men or other women should be as liable for conviction as conventional rapists (p. 941).

Graham (2006) takes the case of male-male rape and argues that key issues such as consent to sexual intercourse remain neglected in the discourse on male rape since the lack of evidence of physical brutality and force are implicitly – and erroneously – equated with consent (p. 190). While documenting the tendency of legal discourse and courtroom conversation to adhere to gender stereotypes and rigid sexual identities, Trinch (2010) has provided further evidence of the flimsy inclusion of sexuality in official discourse and social policy. The scant inclusion of sexuality in social policy was well illustrated by Carabine almost two decades ago (1996). The translation of this negligence of sexuality in the legal discourse on rape is most evident in terms of the complicity rape has with heteronormativity when it comes to notions of penetration.

As we can see, it is not very easy to purge rape of its sexual connotations in a bid to make it more inclusive. That would be pure neglect and avoidance of the *nature* of the crime and its context. What is required, instead, is a broader understanding of what sexuality is and how it might be incorporated into policy. Instead of ‘desexualizing’ rape, the need of the hour is to make it inclusive to a continuum of sexual identities instead of a heterosexual matrix. In the next section, I shall probe some aspects of the Indian Penal Code in order to deconstruct the heteronormative notions in theorizing sexual violence. In doing so, I shall also bring to the fore some alternative solutions and proposals for a more inclusive definition of ‘rape’ – one that acknowledges and pledges to account for all sorts of sexual identities.

IV. Rape and Law in India: Can a female rape another?

The debate around definitions in legal discourse is one of utmost importance. To begin to understand the implications on widening the scope of ‘rape’ in India, let us first get familiar with the legal aspects of ‘rape’ as enshrined in the Indian Penal Code, 1860. Indian law treats rape as a criminal offence. It falls under criminal law in India. The Indian Penal Code (IPC) defines rape as intentional, unlawful sexual intercourse with a woman, without her permission. Section 375, of the Indian Penal Code provides that a man having sexual intercourse with a woman amounts to rape, in following circumstances, such as:

- Against her will (No consent)
- Without her permission or if the permission has been obtained forcefully or by putting her under fear.
- With her permission, when the man is aware that he is not the legal husband of the woman, but she believes that he is another man to whom she is legally wedded.
- With her consent, when she is not in proper state of mind, to judge the consequences of such an act.
- With or without her permission, when she is below sixteen years.

An offender is liable to be punished with an imprisonment of minimum 7 years to maximum 10 years and fine. Further, if the offence is committed in custody or on an expecting woman, or a woman below 12 years or gang rape, the punishment will be minimum 10 years of imprisonment.⁵

⁵ For more details, please visit www.indiankanoon.org/doc/1279834/

However, the definition of rape under the Indian laws does not cover forced oral sex or sodomy. These acts are separately covered under section 354, of IPC, which deals with criminal assault and outraging the modesty of a *woman* while Section 377 of IPC deals with ‘unnatural’ sexual acts, such as homosexuality. Why are punitive consequences important? This is so simply because they are indicative of the severity of the act in question. While ‘rape’ has a repercussion of a minimum of 7 years to maximum 10 years and fine, ‘forced sodomy’ – which is not recognized as rape yet – has consequences of shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

My argument essentially stems from the concern that just as the concentration of seriousness in rape law is required to be protected from dilution by including every sort of assault as rape, there is also an equally urgent need to expand the horizons of sexual assault to simultaneously avoid homophobia while increasing punitive consequences for that to be an effective deterrent or remedy.

On December 19, 2012, a national daily ‘*Times of India*’ (Singh, 2012) commented that the definition of rape under Section 375 of Indian Penal Code states that “penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape”. However, in just five days prior to that (on December 14, 2012), in an interesting judgment, Justices Swatanter Kumar and Gyan Sudha Mishra said that “Penetration itself proves the offence of rape, but the contrary is not true that is even if there is no penetration, it does not necessarily mean that there is no rape” (DNA, 2012). The apex court passed the judgment while upholding the conviction of a man for raping an 11-year-old girl in 1997 despite there being no evidence of penetration. “The explanation to section 375 (rape) of IPC has been worded by the legislature so as to presume that if there was penetration, it would be sufficient to constitute sexual intercourse necessary for the offence of rape. “Penetration may not always result in tearing of the hymen and the same will always depend upon the facts and circumstances of a given case,” the bench said.

The 2010 draft Criminal Laws Amendment Bill, released by the Ministry of Home Affairs, attempted to redefine rape. The draft provisions substitute the offence of rape with “sexual assault”. Sexual assault is defined as penetration of the vagina, the anus or urethra or mouth of *any woman, by a man*, with (i) any part of his body; or (ii) any object manipulated by such man under the following circumstances: (a) against the will of the woman; (b) without her consent; (c) under duress; (d) consent obtained by fraud; (e) consent obtained by reason of unsoundness of mind or intoxication; and (f) when the woman is below the age of 18.

The very fact that despite the attempt at redefining the boundaries of what constitutes rape and what does not, the popular discourse on ‘rape’ in India is regarding penetration being the pivot of what constitutes rape as espoused by the much literature online and in public forums. Burgess-Jackson contends that “rape” is a vague and ambiguous concept which requires theorizing and retheorizing of borderline cases (as cited in Reitan, 2001). I would not say that penetration is the only deciding factor but even taking the notion of consent into account, it still presupposes a *genital* brutality which, I argue, has strong hetero-normative assumptions underlying it. The phallus signifier that is associated with the act of penetration and the fact that it is this act that is considered with more severity than other sexual assaults is problematic if one is looking to expand the dimensions of social policy in compliance with multiple, hybrid sexualities that do not conform to the mainstream understandings of sexuality.

The narrow legal definition of rape, reiterated in the *Sakshi v. Union of India*,⁶ has been criticized by Indian and international women's and children's organizations, who insist that broader interpretations are needed to protect victims, and also to serve justice. Rape is defined in India as intentional, unlawful sexual intercourse with a woman without her consent. The essential elements of this definition under Section 375 of the Indian Penal Code are 'sexual intercourse with a woman' and the absence of consent. This definition therefore does not include acts of forced oral sex, or sodomy, or penetration by foreign objects; instead those actions are criminalized under Section 354 of the IPC, which deals with 'criminal assault on a woman with intent to outrage her modesty' and Section 377 IPC, covering 'carnal intercourse against the order of nature'.

Through an order in 1999, the Supreme Court had directed the Law Commission to review the law on rape. The Law Commission had in its 172nd Report, dated March 25, 2000 made recommendations to amend the law to widen the definition of rape. In its report, the Commission had recommended that rape be substituted by sexual assault as an offence. Such assault included the use of any object for penetration. It further recognized that there was an increase in the incidence of sexual assaults against boys. The Report recommended the widening of the definition of rape to include circumstances where both men and women could be perpetrators and victims of sexual assault. Agnes (2002) has critiqued this motion by expressing severe doubt on whether the 'desexualization' of rape and the adoption of gender-neutrality in the law is really the right way to go. I will discuss this argument a bit later in the paper.

In *State Govt. v. Sheodayal* (1956), Madhya Pradesh (M.P.) High court opined that modesty⁷ of a woman can be outraged by another woman under the purview of Section 354 of IPC. But apex court recently in *Priya Patel v. State of M.P.* (JT 2006 (6) SC 303⁸) held that it is inconceivable that women can rape another woman. The apex court held that, after a reading of Section 375 of the IPC, rape may be committed only by man. The explanation to Section 376 (2) merely indicates that that when one or more persons act in furtherance of their common intention to rape a woman, each person of the group must be deemed to have committed gang rape. The rule is based on the principle of common intention as provided in section 34 of the IPC. Common Intention denotes acts done in postulation as per a pre arranged plan or in pursuance of prior meeting of minds. *Since such intention may not exist with a woman, as given in the definition, a woman may not be held liable for gang rape as well.* Such is the understanding of law today and it requires more nuances and lesser adherence to stereotypical assumptions.

The aspect of consent as being conflated with the lack of evidence of physical injuries is yet another problematic assumption made. In *Tukaram v. State of Maharashtra* (1978), the

⁶ *Sakshi versus Union of India* was a Public Interest Litigation brought before the Supreme Court of India in 2000. The intent was to expand the existing perception of rape from a narrow "penile-vaginal" approach to a broader understanding which encompassed women's lived experience of rape as a human rights abuse.

⁷ The idea of 'modesty' as being attributed only when it comes to women is yet another problematic definition. However, this paper does not cover this aspect.

⁸ The present case holds its importance for being the only celebrated case in which the question whether a lady may be prosecuted for gang rape has been taken up. It is an appeal filed against the decision of the High court of Madhya Pradesh. The rationale given by the High court was that though a woman could not commit rape, but if a woman facilitated the act of rape, she could be prosecuted for gang rape.

court held that the absence of injuries implies consent. Shifting the burden of proof from the victim to the accused was one step taken after this iconic case.⁹ However, what was not challenged was the idea of ‘physical injuries’ and their severity. If we consider queer identities in this context, as Waldner-Haugard (1998, pp. 140-141) points out, male-male rape is clubbed with homosexuality and assumptions regarding the ‘overtly sexual’ nature of gay men is used as an assumption to deny the violation of sexual autonomy and disregard of consent. Similarly, female-female rape or female-male rape is rendered invisible by either ignoring the possibility for women to inflict physical injuries or using the lack of severe injuries as reason to deny the violation of consent at all.

I believe that, under the premise of protecting the interests of women, there is a severe distortion of gender, sexuality and individual agency. The sex of an individual seems to be deterministic of his sexuality, gender and, arbitrarily, *agency* in the case of rape law in India. This agential capacity is not extended to those who do not conform as they are either criminalized (under Section 377) which justifies the fact that same-sex rape is subsumed under this category. However, what I am arguing for is the deletion of Section 377, *but the addition of a section that criminalizes homosexual rape and women raping men with the same intensity as heterosexual rape.*

The assumptions of legal discourse and law in India are quite clearly reluctant to depart from hetero-normative assumptions of sexuality. The definitive boundaries in terminology make for just that – easier definitions. The fluidity of gender and sexuality is not acknowledged; the fixity of genders is not problematized; there is no space given to agential reasoning. Even while expanding the concept of ‘penetration’, the idea behind penetration as emerging from a hetero-normative one is not problematized or even acknowledged.

V. The call for a ‘Queering of the Pitch’¹⁰

The call for a ‘queering of the pitch’ when it comes to social policy in India has one most fundamental hurdle – Section 377 of the Indian Penal Code, 1860. Section 377 states the following:

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine.

This section, as is obvious, is the most pertinent example of hetero-normativity. Carabine (1996) has argued that Fabianism and Welfarism are two state models that propagated the idea of ‘compulsory heterosexuality’ using the defence of reproduction of the human race and have further fostered liberal feminist policies that deal with practical interests such as maternity leave, childcare, healthcare for women, etc. The role of the state is to be the provider of resources which continue to foster and actively promote

⁹ As Agnes (2002, p. 844) points out, this itself raised a lot of conversation between human rights activists on one stand and women’s rights activists on the other.

¹⁰ Phrase borrowed from Carabine (1996).

heterosexual norms in society while excluding hindrances to this goal. Section 377 is one such example.¹¹

In an insightful analysis of gender neutrality in rape law, Agnes (2002, p. 847) clarifies, “penetration is sufficient to constitute the aforementioned “carnal intercourse” necessary to the offence described in this section.” She also points to the insufficiency of gender-neutrality to alter the positions of ‘victim’ and ‘perpetrator’. In the IPC, the unquestioned assumption of an adult victim being a ‘she’ and an adult perpetrator being a ‘he’ was glaringly evident – and jarring. Agnes (2002) is, I think, justified in criticizing a gender-neutral law which does not really question these assumptions but simply widens its scope – such an unquestioned and automated expansion is but an object of deserved criticism.

Similarly, the concern over Sexually Transmitted Diseases owing to rape assumes a heterosexual model of transmission. However, recent research has indicated rising levels of HIV-AIDS amongst male victims due to male-male rape both in India (Khan, 2004) and other countries (Pinkerton, Galletly, & Seal, 2007). Even so, the most dominant source for the data in those studies are from prison settings and incarcerations, it might not even be indicative of the magnitude of the problem.

Again, the role of law in this is crucial. If the law does criminalize homosexuality, what is its stand on homosexual rape? The deletion of Section 377, which criminalizes homosexuality, has ramifications that are of concern. While the deletion of Section 377 will decriminalize homosexuality, if the scope of rape law in India is not widened to ensure sufficient protection to males there will be no protection for males who are sexually assaulted by either other males or females. Even females sexually assaulting other females will remain an ambiguous area (Agnes, 2002, p. 847). The point is that with the present state of the IPC, the deletion of Section 377 will do as much harm as good. There is a dire need for a section that protects same-sex rape.

Regarding hetero-normative norms in legislation, I would challenge the notion of penetration simply because the idea of penetration itself involves an act that is constituted by a *performative* notion of the male genitalia. Thus, turning Cahill’s (2000) argument about social genders upside down, I assert that the corollary requires as much cogitation as her primary argument: in the act of constituting penetration as the pivot of rape, the victim might be a (social) woman, but the aggressor is as much a social man. Therefore, even if it is a case of a woman ‘raping’ a woman, the idea of penetration – for it be the decider – with even an object will involve the production of a (social) man. Similarly, just as MacKinnon asserts that in male-male rape, the victim is feminized, in female-female ‘rape’ the aggressor is masculinized.

The very fact that the genealogies of such assumptions and associations can be traced back to the underpinnings between sex, sexuality, sex category and gender makes for immense academic thrill and laborious policy. Waldner-Haugrud (1998) has problematized the concept of ‘coercion’ in lesbian and gay relationships and has also pointed out the methodological limitations in documenting and analyzing such coercion.

There are several arguments against the use of gender-neutral language in rape legislation. Most of these arguments are imbued with concern over the diversion of the focus on female victimization owing to gender-neutrality. Agnes (2002) and Mooney

¹¹ It is not in the purview of this paper, however, to delve into more detail on the ramifications of political philosophies on the discourse on gender and sexuality.

(2006) are two such arguments. My concern is with the fact *that gender-neutrality is conflated with desexualization*. There needs to be maintained a distinction between these two concepts. The point of widening the scope of rape and sexual assault is not to ‘desexualize’ these crimes but to add more scope for the sexual harassment of sexual minorities – something that is sorely missing from social policy today. It is almost imperative to start considering the possibilities of several sexual identities.

If we take *sexuality* to be more than a concern with genitalia, and view it in a sociological perspective, then every assault on a person’s sexuality warrants as much serious attention as the other. Such a wide scope for interpreting sexual assaults is not a call for relativism as much as a call for nuance. We need to seriously question the boundaries in a heterosexual matrix and look at the possibility of how to conceptualize the rape of a woman by another woman – or, for that matter, the rape of a man by a woman or a man by a man. What will be the scope of a law that can recognize and punish such a crime? What can constitute that pivot that characterizes – for the lack of a better word – homosexual rape in the case of women? The discourse on male-male rape has at least begun in terms of penetration and sodomy. For female-female rape, the slate is still rather blank.

The call for more research based on empirical facts, fieldwork and a reflection of the subjective experiences of individuals is the need of the hour. Even though I have not touched upon the issues of criminology in the transgender community, there is a dire need for research even in this area. Social policy in India is still silent on the issue of transgender. Where do they fit in? What about transgender rape? Such questions ought to be explored in light of designing inclusive social policies. The sexual violence faced by sexual minorities is not well-documented despite some amount of theorization taking place in academic circles.

Conclusion

This paper was an attempt to streamline the vast theorization behind gender and sexuality and indicate the scant application of such theorization in law in the case of India. I strongly believe that a more nuanced approach towards sexuality is required in order to make law and public policy dynamic enough to accommodate the interests of various sexual identities and be accountable and sensitive to their needs. By ignoring sexual minorities and the violence within that domain, policymakers and legislators are simply rendering their experiences invisible. Under the garb of gender-sensitivity, the modern binary understandings of man-woman are still strongly persistent. Under the cloak of gender-neutrality, gender and sex are conflated and in a way that discredits the seriousness of female victimization. Such misunderstandings are plenty in the Indian Penal Code, 1860 and need serious reconsideration.

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