The new Bill proposes to make sexual assault a gender neutral offence. This move and many other flaws makes a more rigourous discussion of the provisions of the Bill an imperative before it is tabled in Parliament.

A frustration which any person engaging with the process of law reform invariably faces is trying to decipher the meaning of the legislation. The Criminal Law (Amendment) Bill, 2012 is no different. For example, there is nothing to guide the reader as to why the offence of marital rape still finds its place on the statute books or why the government sees it fit to make sexual assault gender neutral While we must definitely demand that legislative proposals be accompanied by a detailed discussion on the need for amendments (like the Law Commission of India attempts to do), in the meantime we are forced to respond to the policy shifts which can be gleaned from the proposed amendments.

The requires much more serious examination before it is tabled in Parliament. There are too many gaps which render it a deeply flawed exercise. This article does not purport to be a detailed analysis of the provisions of the Bill, but will focus rather on one aspect that has triggered the strongest response, namely, making sexual assault a gender neutral offence. The opposition to even the principle of gender neutrality has been most strongly argued by Flavia Agnes who says that

A gender-neutral rape law would open up avenues for inflicting even greater trauma and humiliation to an already marginalised section and hence defeat the very purpose of reform. This premise cannot be introduced on the pretext of safeguarding the rights of other marginalised segments.

The phrase ‘gender neutrality’ has become somewhat of a red flag and perhaps disguises more than it communicates. It might help to try and understand the three aspects of gender neutrality:

1) Neutrality with respect to the victim
2) Neutrality with respect to both the perpetrator and the victim in custodial situations

3) Neutrality with respect to the perpetrator

a) Neutrality with respect to victim

A starting point in responding to the question of why the rape law should be gender neutral at all emerges from the viewpoint of what Agnes calls ‘other marginalised segments’. While women have been victims of sexual assault, recent documentation indicates that sexual assault is not limited to the category of those born as women. The transgender community in particular has been subject to brutal assaults by goondas, policeman and other vigilante elements. The Peoples’ Union for Civil Liberties – Karnataka (PUCL-K) has graphically documented many cases of assaults.¹³

Based on shocking narratives cited in the report, the PUCL concludes that:

Sexual violence is a constant, pervasive theme in all these narratives. Along with subjection to physical violence such as beatings and threats of disfigurement with acid bulbs, the sexuality of the hijra also becomes a target of prurient curiosity, at the very least and brutal violence as its most extreme manifestation. As the narratives indicate, the police constantly degrade hijras by asking them sexual questions, feeling up their breasts, stripping them, and in some cases raping them. With or without the element of physical violence, such actions constitute a violation of the integrity and privacy of the very sexual being of the person. The police attitude seems to be that since kothis and hijras engage in sex work, they are not entitled to any rights of sexual citizenship.¹⁴

The transgender community includes hijras, kothis, female to male trans-sexuals and male to female trans-sexuals. It includes a diversity of identities which fall on a continuum of gender with some people having gone in for sex reassignment operations and hence considered to have transitioned to the opposite gender, while others have no intention of doing so, but perform the role of the opposite gender. As a result of this diverse range of visible gender identities, transgender persons become vulnerable to violence. The transgender category in particular throws into question the rigid categories of male and female and introduces a radical instability into the very heart of the category called gender.

What the transgender experience posits is that sexual violence is also perpetrated on
account of one's gender identity. Thus it is not only women, but all those who are perceived to be transgressing the boundaries of gender who can be subject to sexual assault. This includes female to male transexuals, hijras, kothis, effeminate gay men and all those who violate the social codes of gender. The transgender experience throws up the notion that gender needs to be plural and we need to move towards a feminist vision which understands gender non-conformity as being the very basis for violence.

If gender non-conformity is the basis for violence against the transgender community, surely the law should respond to it by abandoning the fixed category of man and women and include transgender people of all kinds. There is thus ample evidence of transgender persons suffering sexual assault in India and there is a strong case for making the victim of the offence of rape gender neutral.

b) Neutrality in custodial situations

Feminist literature in India has made a decisive break from the notion that women can never be perpetrators of serious assaults and violations. The pathbreaking collection by Tanika Sarkar and Urvashi Butalia titled *Women and the Hindu Right*, clearly posits that women have been perpetrators and active participants in communal pogroms. As the editors note:

Politically and methodologically this assertive participation of women in right wing campaigns, pulled many of our assumptions into a state of crisis for we have always seen women as victims of violence rather than its perpetrators and we have perceived their public political activity and interest as a positive liberating force. The strident words of hate uttered by a sanyasin that have led to so many deaths, the presence of thousands of kar sevikas from distant parts who came to witness and celebrate the demolition of an old mosque seemed to cruelly mock our convictions, tools of analysis.5

The pogrom approaching genocidal proportions against the Muslim community in 2002 in Gujarat, gave further credence to this theory of women's agency in often unspeakable crimes, as Hindu Gujarati women were accomplices in some of the serious crimes perpetrated against the Muslim community. While the role of woman as perpetrators of mass violence has been established, it is less clear if women have participated in sexual violence in the Indian context.

The fact that it is not unthinkable, particularly after the documentation of the conduct of US women soldiers in Iraq emerged. The person in charge of military prisons was the only female commander in the war zone, Janis Karpinski, an army reserve brigadier general in charge of the 800th Military Police Brigade. Under her watch according to an internal report by Major General Antonio M. Taguba the kinds of abuses perpetrated included:
Breaking chemical lights and pouring the phosphoric liquid on detainees; pouring cold water on naked detainees; beating detainees with a broom handle and a chair; threatening male detainees with rape; allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell; sodomizing a detainee with a chemical light and perhaps a broom stick, and using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee.  

Hersh goes on to note that:

The photographs tell it all. In one, Private England, a cigarette dangling from her mouth, is giving a jaunty thumbs-up sign and pointing at the genitals of a young Iraqi, who is naked except for a sandbag over his head, as he masturbates. Three other hooded and naked Iraqi prisoners are shown, hands reflexively crossed over their genitals. A fifth prisoner has his hands at his sides. In another, England stands arm in arm with Specialist Graner; both are grinning and giving the thumbs-up behind a cluster of perhaps seven naked Iraqis, knees bent, piled clumsily on top of each other in a pyramid.  

There was perfect gender neutrality with respect to the perpetrators of this abuse. with both men and women of the US army performing these acts of torture and sexual abuse.  

The proposal to make sexual assault gender neutral in custodial situations recognises that sex can be in Foucault’s words, 'a dense transfer point for the relations of power'. Sexual assault in the situations outlined above is an act of violence which is enmeshed in structures of race and religion and is a mode through which power is exercised against subordinate groups. As such the gender of the perpetrator becomes irrelevant, as it is the caste, race or religious identity that become paramount.

c) Neutrality with respect to perpetrators

This has perhaps been the most controversial limb of the debate on gender neutrality. There are no known instances in India where women have committed sexual assault upon men and the proposal to make sexual assault gender neutral in non-custodial situations is not based on any empirical evidence. There is no articulation of the fact of sexual assault by women on men and it is difficult to understand the motivation or the logic in extending the net of perpetrators to women in non-custodial situations.
The only possible logic might be that during a communal situation or during a caste atrocity, its possible that women could be at the least abettors of sexual assault. The other situation which arises is the articulation by women involved in sex work of the abuse they face including sexual abuse, particularly at the hands of women police officers. It should be noted that there is as of yet no documentation of sexual assault by women police officers, though there is some anecdotal evidence of it.

However, some of the complexities in this debate on gender neutrality with respect to perpetrators flow from the fact that gender today does not mean men or women alone. What does one do in the case when there is ambiguity as to whether the perpetrator is indeed a woman. The recent case of Pinki Pramanik, where her partner filed a case of rape against her stands testament to the emerging complexities in the area. Pinki’s case opens out the very real possibility of female to male transgender persons or male to female transgender persons (either pre- or post- transition) perpetrating sexual assault on a woman.

While these are indeed emerging complexities in the debate on gender neutrality with respect to the perpetrator, there are strong reservations on complete gender neutrality. There are so called ‘men’s groups’ or groups that want to ‘save the Indian family’ which are opposed to the very idea of women as full citizens entitled to exercise their rights as persons. Their demand is also that laws should be gender neutral. As such there is a deep suspicion of the logic and rationale of making women liable to criminal sanctions as perpetrators in non-custodial situations, especially when there is no evidence of sexual assault.

Taking on board all concerns, there appears to be a need for stronger empirical evidence to justify making the perpetrator gender neutral, and how this would serve the ends of justice. Since law reform should be based on strong and irrefutable evidence it would be fool hardy to embrace perpetrator gender neutrality when the case for it rests on a weak empirical base.

Conclusion

The debate on gender neutrality of the sexual assault law has many implications. The call for the repeal of Section 377 is premised in the least on making the sexual assault law neutral with respect to the victim. In particular, the proposed amendments by defining sexual intercourse so broadly as to include both oral sex as well as anal sex, have in effect covered the gap in the understanding of rape in the Indian Penal Code of 1860. This means that one of the reasons for retaining Section 377, namely that it is the only law making non-consensual sexual acts a criminal offence does not stand any more. Further, if the proposed amendment is read along with the criminalisation of penetrative sexual assault perpetrated on children under the Protection of Children From Sexual Offence Act 2002, then the logic of Section 377 being the only law to criminalize sexual assaults on children is also negated. Thus, the only remaining purpose the law serves is to persecute consensual intimate acts between adults in private. This remaining legislative rationale of Section 377 is contrary to a constitutional guarantee of equality, dignity and privacy for all and therefore the Criminal Law (Amendment) Act of 2012 should specifically include a provision which repeals Section 377.

Therefore, while some features of the Bill are welcome many others features suffer from serious defects. It is my submission that the Bill should go back to the drawing board and the concerns raised above should be addressed before
it is tabled in Parliament.

Notes

1. As an illustrative point, one should critically examine the expression ‘penetrate for a sexual purpose’ in Sec 375(a). By introducing this requirement, the amendment raises the threshold of proving sexual assault to an impossible level. Henceforth in all cases of sexual assault, the prosecution not only has to prove that the penetrative act took place without consent but also has to prove that the perpetrator committed the sexual assault with a sexual purpose in mind.


4. Ibid. p.40


6. Seymour Hersh, Torture at Abu Ghraib, [http://www.newyorker.com/archive/2004/05/10/040510fa_fact](http://www.newyorker.com/archive/2004/05/10/040510fa_fact) accessed on 25.12.10

7. Ibid.

8. The suspects were Staff Sergeant Ivan L. Frederick II, known as Chip, who was the senior enlisted man; Sergeant Charles A. Graner; Sergeant Javal Davis; Specialist Megan Ambuhl; Specialist Sabrina Harman; and Private Jeremy Sivits—are now facing prosecution in Iraq, on charges that include conspiracy, dereliction of duty, cruelty toward prisoners, maltreatment, assault, and indecent acts. A seventh suspect, Private Lynndie England, was reassigned to Fort Bragg, North Carolina, after becoming pregnant.

9. See Section 3. A person is said to commit "penetrative sexual assault" if—

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or
any other person.