

Written Submission to United Nations Special Rapporteur on Violence Against Women

For

Thematic Report on Rape as a Grave and Systematic Human Rights Violation and Gender-based Violence Against Women

By

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Introduction (today)

Asia Pacific Transgender Network (APTN) has made this written submission in response to a call for inputs by the UN SRVAW, Ms. Dubravka Šimonović, for her thematic report to be presented to the UN General Assembly in September 2020 to address States' responsibility to criminalize and prosecute rape as a grave and systematic human rights violation and gender based violence against women, in line with international human rights standards. Our written submission provides an overview of current laws that criminalise rape in two countries (India and Thailand) in an attempt to answer two questions:

- a. How does the current penal laws address rape against transgender persons?
- b. What are the current discourses around legal reform to provide effective protection to transgender persons against rape?

Our submission is divided into **four sections**. **First** section provides a brief situational analysis of prevalence of rape against transgender persons and conceptual framework for limitations in binary gendered laws against rape. **Second** section provides an overview of international human rights standards and legal precedence on bodily integrity and protection against rape for transgender persons. **Third** section looks at the current legal framework around criminalisation of rape against transgender people in India and Thailand as case studies for discussion. **Fourth and final** section provides key recommendations to address the invisibility of trans identities in the legislative framework around rape.

A note on terminologies: We have used the umbrella term trans/transgender to refer to individuals who identify themselves in a different gender than that assigned to them at birth. They may express their identity differently to that expected of the gender role assigned to them at birth. Trans/transgender persons often identify themselves in ways that are locally, socially, culturally, religiously, or spiritually defined. This document also uses the umbrella term trans/ transgender to encompass many culturally specific identities. In the Asia Pacific region, some culturally specific terms have very long histories and are best understood within their evolving cultural context. They should

not simply be translated as trans women or trans men and, in some cases, the term “third gender” is a closer translation. The majority of the older culturally or linguistically specific terms apply to people whose sex was assigned male at birth but who do not identify with that sex or gender. Further, due to the general invisibility of trans men in discourses on gender identities and sexualities, we decided to include trans people across the spectrum and not just trans women. Hence, the focus is on people assigned female identity at birth who now identify as men; and people assigned male identity at birth who now identify as women; and other trans identities.

01. Understanding the limitations of a heteronormative and binary gendered paradigm in the rape law - A conceptual framework

“It’s a clear way of telling us that we’re less than women, or sub-human in the country. It’s legally writing in the constitution that we’re not legally human”¹

- a. The traditional notion of rape usually refers to penile-vaginal penetration and is rooted in the archaic, predetermined and rigid heteronormative male-on-female paradigm. Such a notion exclusively understands rape as an act of sexual assault carried out by a *man* on any part of the body of a *woman* using either his penis or any other object, and therefore, disregards sexual assault carried out by or against individuals who do not fit in the male-on-female paradigm. Gendered rape laws restrict the definition of a victim of a rape to be a cis woman and the perpetrator to be a cis man, and does not view instances of sexual assault on the body of a transgender person, or where the perpetrator is a cis woman or a transgender person, as constituting an act of rape; thus failing to acknowledge acts of sexual assaults against transgender persons which are already profoundly under-recognised and exclude transgender people from enjoying protection and receiving remedies on an equal basis.² Frequently, it is unclear whether transgender people can seek redress under such rape or sexual violence laws, as it often depends on the person’s gender marker on an official identification document and/or their physical anatomy.³
- b. The trans rights movement calls for recognition before the law based on self-determination without any conditions and invasive, lengthy and degrading medical and administrative procedures, and for **treatment of trans and gender diverse individuals as equals before the law**. The heteronormative dichotomy of male and female in rape laws hence invisibilises trans identities in the legal definitions and

¹ Pundir, Pallavi. “Transgender People Tell Us Why India’s Newly Proposed Rape Laws Are Discriminatory.” *Vice*, 11 Sept. 2019, www.vice.com/en_in/article/bjwjbtd/transgender-queer-people-tell-us-why-indias-newly-proposed-rape-laws-lgbt-are-discriminatory.

² UNDP & APTN (2017). *Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia*. Retrieved from, https://www.weareaptn.org/wp-content/uploads/2019/05/UPDATED-ACKNOWLEDGMENTS-2019_rbap-hhd-2017-legal-gender-recognition-1.pdf

³ *Ibid.*

does not offer any protection to trans people, becoming an obstruction to the very spirit of the trans rights movement.

- c. **Effective retribution and deterrence** can only take place via criminal justice. By restricting criminal law on rape to male-on-female paradigm, the criminal legal system denies justice in all instances that do not fit in the law's presupposed heteronormative paradigm.
- d. Finally, the traditional notion of rape negates the axes of intersectionalities that influence gender roles and expressions and sexualities and **fails to recognize that power can operate in a multiplicity of ways** and sometimes differently than the heteronormative male-on-female paradigm would predict. The intersectional feminist discourse hence calls on to treat an act of rape as a form of violence and a "rupture in the fabric of human recognition".⁴

02. Rape, bodily integrity and international human rights standards

- The *Universal Declaration of Human Rights* (UDHR), and the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Social, Economic and Cultural Rights* (ICESCR) call duty-bearers (State) to protect, promote and fulfil the right to life and dignity without discrimination on the basis of sex. Therefore, it is more appropriate to clarify the characterization of rape simply as a violation of the victims' bodily integrity and their right to life with dignity.
- The act of rape has been defined as a violation of an individual's bodily integrity in the international human rights framework. The *UN Handbook for Legislation on Violence Against Women*, for example, encourages countries to define sexual assault as a violation of bodily integrity and sexual autonomy.⁵
- In light of these international human rights instruments and standards:
 - i. The State is responsible for ensuring an environment that is supportive of all and not only some women's rights.
 - ii. The State must exercise due diligence in preventing violence and promoting the safety and dignity of all marginalized and vulnerable populations, including sexual minorities and non-conforming gender minorities.
 - iii. The State must comply with international treaties that it ratifies and remove obstacles from both the public and private spheres that prevent all women (female bodied, gender variant) and female-to-male transgender men from enjoying violence-free lives.

03. Trans Identities and Current Legislative Framework on Sexual Violence, Assault and Rape in India and Thailand

⁴ Alleta, Brenner, "Resisting Simple Dichotomies: Critiquing Narratives of Victims, Perpetrators, and Harm in Feminist Theories of Rape", *Harvard Journal of Law and Gender* 36 (2013): 503. Retrieved from, <https://harvardjlg.com/wp-content/uploads/sites/19/2012/01/2013-summer.6.pdf>

⁵ UN Women. (2012). Handbook for Legislation on Violence Against Women. Retrieved from, https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2012/12/unw_legislation-handbook%20pdf.pdf?la=en&vs=1502

a. India

- The current definition of rape is given under Section 375 of the Indian Penal Code (IPC), where rape can be committed by a *man* on a *woman*. Section 376 of the Indian Penal Code contains provisions of aggravated rape where the perpetrator is in a position of power over the victim, and these offences receive harsher punishments. Section 114A of the Indian Evidence Act, 1872, which was introduced after the Criminal Amendment Act, 2013, shifted presumption of an absence of consent in prosecution for rape where the woman in her evidence testifies that she did not consent in such situations of aggravated rape.⁶
- With the [NALSA judgement](#), the identity of the transgender community was recognised for the first time and it was held that their rights are safeguarded under Article 21 of the Constitution of India. It also provided clarity that the term “person” under Article 14 of the Indian Constitution is not restricted to only male and female, but that hijras and transgender persons also fall within the ambit of “person” and are entitled to legal protection of laws in all spheres of State activity.⁷
- The NALSA judgement identified the problem of the transgender community being subjected to sexual violence. It said, “Sexual assault, including molestation, rape, forced anal and oral sex, gang rape and stripping is being committed with impunity and there are reliable statistics and materials to support such activities.” It also outlined the judicial role of upholding the rule of law and ensuring access to justice to the marginalized communities of society.⁸
- The current legislative framework around rape in the IPC fails to recognize the right to life and bodily integrity for its transgender citizens. Even when the Lower House of the Indian Parliament/Lok Sabha passed the Transgender Persons (Protection of Rights) Bill in August 2019 (it has yet to be passed by the Upper House), it failed to recognize an act of rape against transgender people equally grave as an act of rape against a cis-gendered woman. Out of the many shortcomings of the bill was the provision around punishment for violence, abuse, and rape against transgender people which can be punishable with jail time from six months to two years, and a fine (compared to the IPC on rape where punishment can be from 7 years to lifetime imprisonment).⁹
- Article 14 of the Indian Constitution declares equality before law for all persons within the State territory. Similarly, Article 15(1) prescribes that State

⁶ Pathak, Harshad. “Beyond the Binary: Rethinking Gender Neutrality in Indian Rape Law.” *Asian Journal of Comparative Law*, vol. 11, no. 2, 2016, pp. 367–397., doi:10.1017/asjcl.2016.8.

⁷ See the full judgement here: <https://indiankanoon.org/doc/193543132/>

⁸ *Ibid.*

⁹ Pathak, Harshad. “Beyond the Binary: Rethinking Gender Neutrality in Indian Rape Law.” *Asian Journal of Comparative Law*, vol. 11, no. 2, 2016, pp. 367–397., doi:10.1017/asjcl.2016.8.

shall not discriminate on “grounds only of religion, race, caste, sex, place of birth or any of them.” Thus, it could be argued that exclusion of a socially marginalized community like transgender persons from the Indian legislative framework on rape constitutes as State’s inadequacy to provide equal protection without discrimination on the basis of sex and is hence unconstitutional.¹⁰

b. Thailand

- Thailand amended its Criminal Code in 2007 and expanded the definition of rape to include sexual penetration and marital rape of *all people*, regardless of sex/gender. It also imposed stricter penalties on those who committed acts of rape or sexual abuse. As it stands, the law is applicable to any transgender person, regardless of whether they have or have not undergone gender-affirming surgeries i.e. transgender persons will be prosecuted if they commit rape, and are recognized as protected if they are raped.¹¹
- During the initial drafting of the 2007 Constitution, the Constitutional Drafting Assembly (CDA) recorded in “intentions” document that the Thai word ‘*phet*’ (sex) in Section 30 would be understood to mean the differences between men and women, and also “differences of individuals whose gender identity, gender and sexual diversity are different from their physical sex.” This provision in the “intentions” document of the Thai Constitution has been used as a key factor in legal interpretation around gender identity, although it is not written directly in the Constitution.¹²
- After the coup in 2014, the 2007 Constitution was abrogated. The Interim Constitution of the Kingdom of Thailand (2014), which was in force during the drafting process for the new Constitution of the Kingdom of Thailand (2017), retained Section 30 of the 2007 Constitution and included an additional section upholding the human dignity, rights, freedom and equality of the people of Thailand. A new Constitution was adopted after the public referendum in 2016. This draft Constitution was then signed into law by the King of Thailand and published in the Royal Gazette on 6 April 2017.
- In 2015, Thailand enacted the Gender Equality Act that currently serves as the strongest legal instrument in favor of legal gender recognition. The law is intended to protect all persons from discrimination and provide access to legal processes and remedies equally regardless of their gender identity/sex. Section 3 of the Act explicitly defines “gender discrimination” while clarifying

¹⁰ Pathak, Harshad. “Beyond the Binary: Rethinking Gender Neutrality in Indian Rape Law.” *Asian Journal of Comparative Law*, vol. 11, no. 2, 2016, pp. 367–397., doi:10.1017/asjcl.2016.8.

¹¹ UNDP, MSDHS (May 2018). *Legal Gender Recognition in Thailand: A Legal and Policy Review*.

¹² For instance, it was cited in a decision by the Administrative Court to revoke an order by the Governor of Chiang Mai prohibiting transgender participants from taking part in the procession during the province’s annual flower festival in 2009. See more here: UNDP, MSDHS (May 2018). *Legal Gender Recognition in Thailand: A Legal and Policy Review*.

that it is not limited to men and women, but also applies to persons who have “a different appearance from his/her own sex by birth”.¹³

04. Conclusion and Recommendations

While the constitutions often grant right to equality and non-discrimination to all persons, local laws tend to fail when it comes to translating the principle of equality and non-discrimination in criminal laws, especially around the act of rape against transgender persons. While legal gender recognition of trans identities should translate into equal treatment of transgender persons in the law, often it does not accomplish that and creates a vacuum in the legislative framework vis-a-vis the rights, especially the bodily rights, of transgender persons. The State must take responsibility to put in place an enabling environment that is supportive of all and not only some women’s rights. Legislation prohibiting particular kinds of gender-motivated violence (including rape) must extend protections and redress to transgender people, in order to fully and effectively fulfil the constitutional assurance of equal protection of the law for all and the human rights commitments with regards to right to life and bodily integrity. There are examples in the Asia Pacific region (such as Thailand) that can guide discourses around legal reforms in other countries in the region to make criminal legislation against rape more inclusive and nuanced and reflective of intersectional feminist approach.

In light of the discussions above, our specific recommendations to States are:

- a. Prohibit discrimination on the basis of sexual orientation, gender identity and gender expression.
- b. Decriminalize consensual, adult same-sex relations between women and between men.
- c. Remove laws that unfairly and disproportionately target people with non-conforming gender for criminal penalties (such laws against ‘cross-dressing’).
- d. Amend or adopt laws prohibiting rape to extend protections to transgender people.
- e. Legal and policy reform must be accompanied by State funding for awareness training (e.g., counselor training to assist transgender victims of sexual assaults, rape, teacher training for human rights instruction, police training, judicial training).
- f. Provide protections and remedies for transgender people under violence, sexual violence and rape laws, regardless of their gender identity, gender expression, legal gender marker or surgical status.
- g. Effectively investigate, prosecute, and punish all forms of violence based on someone’s gender identity or gender expression (as well as sexual orientation), ensuring that victims are provided with appropriate support, remedies and redress.

¹³ See more here: UNDP, MSDHS (May 2018). Legal Gender Recognition in Thailand: A Legal and Policy Review.