

Gender neutral criminal laws – is India ready?

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Abstract

Peeping into the pages of the history, it is inevitably found that women were considered as a symbol of beauty and love, thus, making them most vulnerable to exploitation at the hands of lustful people. A need was felt to enact laws in order to make offences against women punishable severely to deter criminals and create a sense of terror. After the infamous Delhi gang rape incident that took place in the country in the year 2012, there was a dire need to condemn and make stricter laws against such crimes against women. With the increasing toll of cases of violence against women in the form of dowry deaths, sexual harassment, rape, sexual assault and the like, there has been a shift towards women-centric criminal laws as a means to protect their dignity. Since all across the world at present, the concept of egalitarian society is gaining its pace, equality is desired in every field, let it be job opportunities or the case of treating women as an abettor in the offence of adultery. However, under Section 375 and 376 of the Indian Penal Code, only a man can be convicted of committing rape and the victim can only be a woman. Many a times the judiciary as well as the legislature forget that equality is not a women empowerment concept but that of gender equality. The paper explains the meaning of gender neutral laws. The author delves into analyzing the current protective legislations in India in the light of gender neutral laws and conclude by suggesting the necessary changes- a midway- that can be implemented so as to protect all the genders equally under the law and not protecting only a single class at the cost of the other.

Keyword- Adultery, Assault, Egalitarian, Exploitation, Vulnerable

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Introduction

The Constitution of India guarantees the right to equality to all under Article 14 which reads as “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”. It has been not a new concept that we are talking about equality. It has been a topic of the town since the very commencement of the Constitution as equality has been demanded in all the fields irrespective of their sex, caste, race, religion or the place of birth. Electronic media and print media have been flooded with the word equality. In this era of equality, one of the noteworthy cases of inequality has been GENDER INEQUALITY. Women are synonymous to love, affection and beauty. Looking back to the ancient period, it has always been presumed that women are weaker as compared to men so a need for their protection was felt. This necessitated the enactment of laws with feminist approach. The Constitution of India, being the source of all the laws in India, provides the backbone to feminine centric laws by incorporating exceptions to the right of equality.² The laws that favored women absolutely fitted the situation of the past, but with changing time, women have started misusing these laws in such a way that men are being victimized at the hands of women. This situation now demands the formation of gender neutral law as it is the time when even men needs protection. In the light of this hypothesis, the paper explains the requirement of gender neutral laws to put to an end this gender inequality.

Gender neutrality- what it is?

Gender neutrality describes the idea that policies, language, and other social institutions should avoid distinguishing roles according to people's sex or gender, in order to avoid discrimination arising from the impression that there are social roles for which one gender is more suited than another. The Oxford Dictionary³ describes “Gender Neutrality” as an adjective that is suitable for, applicable to, or common to, both male and female genders. Gender neutrality conceptualizes equal treatment of people without demarcating on the basis of their sex or gender. It avoids drawing a line among the genders to prefer one over the other. Here, attention is sought towards departure from the feminist attitude to putting the genders at the same footing without any difference. With augmentation of false cases against men, gender neutral laws are the most desirous.

²INDIA CONST. art.15, cl. 3.

³“Gender Neutrality” Oxford Dictionary.

However, the feminist groups resist the development of gender neutral laws as they contend that it would be of no value to the society and only harm the women victims. According to the author and advocate Flavia Agnes, “gender neutrality lies on the presumption that by neutralizing the law to be victim and perpetrator neutral the offence of rape will be desexualized and the stigma attached to the offence will vanish and if the reforms take place they will be injurious to women and that the basic and primary problems will not be highlighted.”⁴

Indian penal code- unjust towards men

Section 2 of the Indian Penal Code states that every person shall be liable to be punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India. It is thus evident that the Code does not make any differentiation between men and women. However, there seems a diversion from this rule and there are some crimes for which only men could be held guilty.

Anti-male provisions in the Indian penal code

DOWRY DEATH (SECTION 304B) AND CRUELTY AGAINST WOMEN (SECTION 498A)

Section 304B states that-

- If any death of a woman is caused by burns or bodily injury or occurs otherwise than under normal circumstances,
- Within seven years of her marriage,
- It is soon that she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry,

Then, such husband or relative shall be deemed to have cause dowry death and shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

Section 498A specifies-

⁴Agnes, F. (2002), *Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law*, Economic and Political Weekly.

- whoever, being the husband or relative of the husband of a woman
- subjects such woman to cruelty,

shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

The above two sections are non-bailable⁵, non-compoundable, and cognizable⁶ offences in India. The clear intention behind these sections is to fasten guilt on the husband, or in-laws, though they might not, in fact, have caused the death or injury. It has become a custom to claim that all the women have been “driven to suicide” due to dowry harassment. Under these sections, even if the allegation is false, there will be a trial and the husband is considered guilty until proven innocent. The Supreme Court of India has termed this misuse of the law “legal terrorism”.

Rape (Section 375)

According to S. 375, you have to be a man to officially rape, and a woman to officially get raped! The section does not recognize men as rape victims. India’s anti-sodomy law, Section 377, is the only resort for male victims of sexual offences. However, the law is fraught with challenges. Even in cases where a male victim is assaulted by a male attacker, it is not actually considered as rape. The law does not outline any difference between consensual and non-consensual sex between male adults. Moreover, if a female is the perpetrator, the victim is left with no option to seek justice.

It is interesting to note that in the Criminal Law (Amendment) Ordinance, 2013, the crimes of rape and sexual harassment were gender-neutral. The term “rape” was removed entirely and was substituted with “sexual assault”. However, strong objections were raised by women’s groups and the Act ended up making the offences of rape and sexual harassment gender-specific. There are various propositions put forth by feminists in support of this regard, such as, men not being as vulnerable, them always wanting sex,

⁵Section 2(a) of the Criminal Procedure Code, 1973, No. 32, Acts of Parliament, 1973.

⁶Section 2(c) of the Criminal Procedure Code, 1973, No. 32, Acts of Parliament, 1973.

⁷Section 375 of the Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.

⁸Section 377 of the Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.

women's incapability to rape men, men not being similarly affected by rape, so on and so forth.

Other aspects of rape laws:

- A man having sexual intercourse without a woman's will - No guideline as to prove a woman's will here. She might have had consensual sex and still allege rape with a vindictive attitude.
- IPC 376B/C/D – Public servants/higher-ups seducing a woman under their position and having sex with her are liable to imprisonment. No such punishment exists for when women seek sexual favors from men. Similarly, there are no protections for men from false and frivolous allegations by women made with malicious intentions.
- If a man has sex with a woman after promising marriage, he can't break up with the woman. If he does, according to the laws in India, he's a rapist. Reverse the genders and if a girl does the same, it will be labelled as 'women empowerment.'
- Age of consent: There is no age of consent for males. If a boy of 16 and a same-aged girl has consensual sex, the boy will be charged with rape.
- The facts highlighted above speak enough for them, and tell us how significant and urgent the need for gender-neutral rape laws in India is.

Adultery (section 497) and detaining with criminal intent married woman (section 498)

- Adultery can be committed only by a man, and not by a woman. If a man has sexual intercourse with a married woman, and he does not have the consent of the husband of the woman for the sexual activity, such husband can prosecute the man and the man only, for adultery. Further, Section 198 of the Code of Criminal Procedure, 1973 explicitly denies a husband the right to charge his wife with adultery and also denies a woman the right to charge her husband with adultery.
- This brings us to realize that the law is unfair to both the sexes, as here, the wife is denied of any agency, and she can take no action against her husband, or her husband's lover, for adultery, although the husband can prosecute his wife's lover, but not his wife. The consent of the man is given legal sanction as against the consent of the woman who obviously takes equal part in the sexual activity. The

rationale behind not punishing the woman seems to be a perspective of seeing the woman as infantile and incapable of making a decision about her sexual behavior, which seems to be a totally absurd concept in the present set of circumstances

- If the husband has an affair with an unmarried (or divorced, or widowed) woman, no one can initiate any action against anyone.
- Only a man can be a seducer and women are powerless victims. Hence, it is established that whether biased against men or women, India's adultery law is seriously messed up. The Supreme Court of India in 2011 observed that, "The provision (Section 497) is currently under criticism from certain quarters for showing a strong gender bias for it makes the position of a married woman almost as a property of her husband. But in terms of the law as it stands, it is evident from a plain reading of the section that only a man can be proceeded against and punished for the offence of adultery."

In *Sowmithri Vishnu v. Union of India*⁹, Sowmithri, whose lover was prosecuted for adultery, contended that the law was gender biased. Despite being an equal party in the offence, the woman was a 'victim' - she was exempt from punishment, as a child would be, suggesting that the woman committing adultery is incapable of rational thought and therefore has no agency! This view is re-affirmed by the next code in series, Section 498(Enticing or taking away or detaining with criminal intent a married woman)

Unlike India, adultery is not a crime in most European Union countries, like the UK, the Netherlands, Belgium, Finland and Sweden. Most developed countries hold adultery as a ground for divorce and do not criminalize the act (and this holds for the husband and the wife). Sections 497 and 498 of the IPC hold no relevance in the modern context, because, a) women are themselves responsible for their sexual conduct. b) The very foundation of the law is shaken because of the presumption that a man is always the adulterer, and woman, a hapless victim! When sexual intercourse by its very nature involves two partners, how is it logically fair to hold only one of them responsible? Also, can a woman not be an abettor? To protect her from prosecution altogether is a mockery of Articles 14 and 15 of the Constitution. We firmly believe that adultery should be de-criminalized, and if not, then the suggestion of Justice Malimath Committee to make Section 497 gender-

⁹ *Sowmithri Vishnu v. Union of India*, 1985 A.I.R. 1618.

neutral, thereby treating the infidel husband/wife alike, shall ensure great justice to both the sexes.

Laws relating to the modesty of a woman

Section 354 deals with assault or criminal force with the intent to outrage a woman's modesty. However, there is no such law made to protect the modesty of a man! There are cases where women bully men, and go unprosecuted, because the law of the country does not protect men from such crimes. The situation has become so adverse that if a man accidentally touches a woman in a crowded bus, and the woman protests even slightly, the man shall inevitably invite public outrage by fellow passengers, without even being given a chance to speak for himself!

Four new sub-sections are added to section 354¹⁰ -

- i. Section 354A: Lists out all the incidences of unwelcome advances, pornography, sexual remarks and favors which hurt the dignity of a woman, making them punishable with rigorous imprisonment and fine. And guess what, men's dignity holds no value in the eyes of the legislators, because yes, men are always the perpetrators!
- ii. Section 354B: Enlists any attempt to disrobe a woman against her wishes liable to punishment for at least 3 years. Is it impossible to imagine if such a crime can be committed against a man?
- iii. Section 354C: Enlists voyeurism i.e. filming or taking pictures of any woman involved in a private act as a crime with punishment of at least 1-year imprisonment. Yes, nobody thought of protecting men from a similar crime!
- iv. Section 354D: One of the most effective sections, which has criminalized stalking a woman against her will and made it severely punishable with at least 3 years of imprisonment. And men can never be stalked!

The water has literally touched the ceiling, and we urgently need a gender-neutral IPC to redress the aggrieved men in our society, and protect them from further victimization. Section 509 deals with words, gestures or acts intended to insult the modesty of a woman, and makes the perpetrator punishable with simple imprisonment for a term which may

¹⁰The Criminal Law (Amendment) Act, 2013.

extend to one year, or with fine, or with both. On the face of it, such legislation is gender-biased, and another instance of the numerous such 'women safeguarding' laws.

Suggested reforms and conclusions

Legislative suggestions

1. Firstly, on the basis of changing laws so as to recognize offences of violence and abuse to include men also under its purview, the Protection of Children from Sexual Offences Act, 2012(POCSO Act)¹¹ which was an Act that came into force to protect children from offences of sexual assault, sexual harassment and pornography and also to provide for special courts for trial of such offences and any other matters incidental to this. This legislation recognizes that children irrespective of the gender can be subject to such offences but beyond the age of eighteen where the law terms him as adult he is no longer entitled to that protection under any law that is in force. This is what needs to be addressed, that such crimes can and are happening to men beyond the age limit of being a child and just as women are being offered protection under the law, men too should be given protection as mandated by the constitution of India. The Act includes Penetrative and aggravated penetrative sexual assault, sexual and aggravated sexual assault, sexual harassment, and using a child for pornographic purposes as the five offences against children. This act envisages punishing even abetment or an attempt to commit the offences defined in the act. It recognizes that the intent to commit an offence, even when unsuccessful needs to be penalized. The punishment for the attempt to commit is up to half the punishment prescribed for the commission of the offence. The legislature has taken a step forward in enacting gender neutral laws with respect to children and any person who commits the same will be punished and for once it is the crime that is focused and not the gender.
2. Secondly, with respect to Sexual Harassment at workplace and the Act is the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 that is gender specific to protecting only the women from sexual harassment, taking into consideration the nuances of reforming the law, the various institutions and organizations at the grass root level should take into consideration that even women employees or women superiors can sexually harass

¹¹Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012.

men employees. Taking into consideration the current employment opportunities and women reaching at top positions over men, the redressal of sexual harassment of at workplace should be made gender neutral. Men workers or employees must be able to raise complaints without the fear of ridicule. Only once there is effective mechanisms of redressal in place will more cases can be reported and only then justice can be served to the working class leading to more productivity and economy development of the country. Gender neutral laws with respect to sexual harassment have been recognized and accepted in most countries in the world such as UK, Denmark, Australia and USA. Sexual harassment can be perpetrated by both males and females against both males and females as a matter of power and upon those who have an advantageous position over the other and the societal belief along with the law must make a transformation to be gender neutral towards such offences.

3. With the issue of domestic violence and dowry death, there has to be a law that comes into force so as to curb the ever growing issue of “legal terrorism” wherein Section 498A and 304B of the Indian Penal Code, 1860 has been misused and used as weapon to pin liability on even innocent men who go through mental torture and trauma within the four walls of the home. These sections are non-bailable, non-compoundable and cognizable and directly assume guilt on part of the husband and his family members. This leads to fastening guilt even on innocent citizens even if the case is falsely charged and the husband has to go through the trial procedure and court ordeals and is publicly shamed in the society. The law uses the word “husband” instead of it being “spouse” to make it gender neutral. The provisions contain a principle violation of the criminal justice system wherein all accused are innocent before proven guilty, but in such cases the husband is considered to be guilty until proven innocent. The law here takes a reverse action which is unjustified. A stringent provision which is gender neutral must come into the frame so as to punish false accusers. The burden of proof must lie on the complainant and not in the accused. This being stated, it is also admitted that women go through such torture every day, but making the law gender specific is not helping to curb such menace and a social change along with a legislative change has to happen in India
4. Fourthly with respect to rape reforms, the recommendations of the Verma Committee need to be re - analyzed and gender neutrality of rape and sexual

assault as given in the recommendation must be put forth as law. Only by normalizing the rape of males into the law can men come forward with complaints. This also has a psychological impact, that is if men too are included under the definition of rape, they too will realize that such a heinous crime can be committed even against himself by another person a male or female and that, the same pain and agony will be faced by him too and thus if it deters a male from committing such an act, we can curb this offence. Male rapes happen to show forth domination and not always sexual pleasure seeking. Crimes like rape and murder happen irrespective of gender, caste, color of skin, nationality etc. and most importantly irrespective of sexual orientation. These crimes must be reported and an environment where the plight of men too are heard without the fear of being labeled as losing his manliness if such cases are reported. The current definition of rape as envisaged under the Indian Penal Code is unable to protect male rape. An all-encompassing definition of rape and sexual assault must be brought in as the need of the hour. Such a change is long overdue as the law has to be in tune with the current need of the society and this is the need of the major segment of the society.

5. Fifthly, with respect to Section 497¹² wherein Adultery is punishable in India just like in other countries except that the difference in India is the current law punishes only the man or the husband if he commits adultery and the woman or the wife who might be an equal participant in the Act is only viewed as the victim, There is an irrational classification between man and woman here wherein it penalizes only the man as being the offender. There is a prima facie violation of the right to equality and this is discriminatory in nature. For an act of Adultery which can be committed by both the man and wife, the man becomes a manifestation of evil and the woman is considered to be the hapless victim. Such presumption of men only being the offenders is the law that needs to be changed and reformed. Criminalizing adultery protects the sanctity of the institution of marriage, but assuming that the woman who might be an abettor in the act as the victim and thus pinning no liability at all does not serve the purpose as in the well celebrated case of *K.M Nanavati v. State of Maharashtra*¹³. In 2003, the Justice Malimath¹⁴ was

¹²Section 497 of the Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.

¹³*K.M. Nanavati v. State of Maharastra* (196)2 A.I.R. 605.

¹⁴The Justice Malimath Committee Report, 2013.

tasked to make reforms in the criminal justice system and had suggested to make section 497 gender neutral and had gone on to state that marital infidelity must be taken seriously in the society and similar treatment to both the man and the woman should be taken into consideration. But this reformist position was not taken into consideration. The law makers need to come out with realistic laws that will serve the ends of justice and not penalize only men violating equality over and over again.

6. Lastly, the Criminal Law (Amendment) Act, 2013 brought in new sections among which Sections 354C and 354D – the offences of voyeurism and stalking were added to include only men being penalized for such offences making it gender specific while the same amendment brought about acid attack which was gender neutral. Recognizing a few offences to be gender neutral and others to be gender specific making only the man liable is what is contended to be unreasonable because the same acts can be done by women also. The law is suggestive of the fact that only men can commit these wrongs and assume that men can never be the victims of such acts. Stalking¹⁵ and Voyeurism¹⁶ can never implicate a woman, as such an act done by a woman is not constituted as an offence. If this is not declared as wrong, then men who are victims to this cannot seek remedy against it, questioning the reasoning behind this law, the law makers need to realize that crime is a crime and there are acts of crime just like other act like murder and homicide that can implicate women also. The legislature has to note that protection of one class of the society does not come at the cost of penalizing or not protecting the other class of the society at all. The position in Canada, Australia and the United States deter each and every person carrying out such an act and does not differentiate within genders like in India. The situation wherein a woman committing the act of voyeurism thereby causing harm to another man or woman is completely outside the scope of the act itself. The Justice Varma report had proposed the term “whoever” to refer to the offenders, but this was not taken into consideration and thus giving a complete clean ticket to women who are capable of committing the same act is unjustified and unconstitutional.

General suggestions.

¹⁵Section 354B of The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.

¹⁶*Id.* at Section 354C.

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- We, as a society, really need to inculcate Gender-Sensitivity among ourselves, develop a feeling of respect and warmth towards the opposite sex, and understand that in order to uplift one section; we do not have to oppress the other! Wouldn't it be very hypocritical for us to proclaim equality as a fundamental right, and then deny the same to men, through such detrimental laws? The concept of 'AbalaNari', which is so deeply entrenched in the current scenario, holds no water, as women have travelled a remarkable journey forward, and are indeed, in the present set of circumstances, not lagging behind.
- If we really want to establish a gender-just society, we need to recognize LGBT rights as well, because that will ensure both legal justice, and societal inclusion of all communities.
- What we essentially require here is accepting the fact that there can be crimes against men, that men also suffer, and that women can be perpetrators as well! We are really required to change our mindset!
- There have been campaigns and movements worldwide for the cause of men. International Men's Day is celebrated on November 19 every year, from 2007, in response to International Women's Day¹⁷. We need to set up a dedicated ministry to safeguard men's rights and welfare or set up a men's commission, similar to those for the women. That would be equality!
- Lastly, we need to realize that crime has no gender.

¹⁷ March, 8.