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CRITICAL ANALYSIS OF NEED FOR GENDER NEUTRAL LAWS IN INDIA

AUTHORED BY - HIMANSHU KUMAR

& DR. ANNIRUDH VASHISHTHA

CHAPTER- 1

INTRODUCTION

1.1. OVERVIEW

The Indian Penal Code 1860 was drafted in the colonial era with a view to penalise certain conducts or activities which were both socially and morally wrong and illegal and hence were included in the term 'offence'. Although, most of the provisions under the Code punish both men and women for an offence committed by them, there are certain offences which are deemed and presumed to be committed by a man upon a woman.

Considering the time when the penal code was drafted, it seems justifiable to presume that certain offences can be committed by only men upon women. However, taking into account that the code is now more than 150 years old and the society has drastically changed over the period especially in the last 2-3 decades. Hence, a change in the law of the land and a change in the mindset of the society is the need of the hour.

However, the society has always expected masculinity from men and the society's definition of being a 'man' has in many cases curbed the reporting of offences against men especially sexual offences. Social stigmas and societal expectations more often than not result in many of the offences being not reported and 'compromise' being made between the accused and the victim, victim being a man or a woman. Through various judgments recently, the Supreme Court has tried to make the definition of offences under the umbrella of gender-neutrality.

However, the reach and interpretation of judgments of the courts has always been limited by lack of education among the masses.

The Indian law denies to acknowledge that men can be casualties of sexual brutality.

Noticeable instance of this is The Indian Penal Code. Section 354 of the Penal Code which deals with assault or criminal force to outrage modesty, though include men and women both as perpetrators, only provides woman as a victim and entirely denies men or the transgender equal rights. "The IPC Sections 354A, 354B, 354C and 354D, dealing with sexual harassment,

disrobing, stalking and voyeurism, explicitly refer to men as the perpetrators of these crimes and women as victims".

Also, Section 366 dealing with kidnapping, abduction, etc. of a woman to compel her marriage against her will is only gender specific and fails to acknowledge that even men can be kidnapped or abducted or compelled to marry against their wish wherein perpetrator could be a man or a woman or both. The only remedy available to a man under such a situation would be nullification of marriage through a civil court and no criminal remedy is available to him.

Sections 366A and 366B which were legislated with the intention to curb illegal procurement or importation of minors, either within India or from foreign, the said sections fail to take into account procurement and importation of minor boys.

Similarly, Section 375, IPC, defines rape and legal provisions against it and Section 376 containing its punishment thereof, has no mention of rapes against men. Not only an offence against a person's body to whom the perpetrator may be known or not, the Penal Code also contains such discrimination under Chapters XX and XXA related to offences relating to marriage. Section 493 which deals with cohabitation deceitfully caused by a man to the any woman who is not lawfully married to him, under a belief that she is lawfully married to him or have sexual intercourse with him under that belief. However, the section does not deal with a situation where such an offence is committed by a woman towards a man. Section 498 which deal with enticing or taking away or detaining a married woman with criminal intent is although gender-neutral with regards to the perpetrator but considers only women as victims and does not include men as victims. It fails to acknowledge that in any case a woman can induce or entice or take away a man with criminal intent to have illicit intercourse with her or any other person. Similarly, Section 498-A contained in Chapter XX-A which was inserted in the Indian Penal Code through amendment of 1983, provides that if 'husband' or 'relative of the husband' subjects a woman to cruelty shall be punished as per the punishment prescribed.

The said section acknowledges the perpetrator or accused could be any person be it male or female, of the family of the husband, however, the victim of such an offence can only be committed against the wife or the woman being wife of a person.

At the very outset of this dissertation, the Author would like to clarify and declare that the intention of the Author is not to undermine the experiences of women subjected to rape and other sexual offences and discrimination and the Author is also aware of the fact that many of such offences are not even reported to police or other public law enforcement authorities due to societal pressures and interference of family members due to common notion of "what will the society think" largely prevalent in India. However, as society matures, we must develop

empathy for all alike, be it man, woman or recently legally recognised third gender and this includes male and transgender assault and harassment victims.

While the actuality that men can be sexually abused may delight a few, or appear to be inconsequential to the majority, this detachment towards sexual violence against men is a noticeable example of how genuine this issue is. Unfortunately, absence of legal provisions and social acknowledgment of men being raped by men or women, or men being forced to bear any type of sexual violence, is a reinforcement of the orthodox and patriarchal gender stereotypes. Popular culture doesn't burden from portraying a man less 'manly' or 'masculine' image of a male who refuses to simply accept female sexual advances. The concept of 'consent' from a man's side is sometimes considered, and is assumed to be a positive 'given'. A man being compelled into sexual activities is frequently depicted as a positive encounter for them, asserting their 'masculinity'. Along these lines, most men wouldn't have the option to perceive an action as abusive or without consent.

A majority of the Indian society is disinclined to even the thought of homosexuality, including its acceptance in lifestyle.

CHAPTER – 2

CURRENT ENTITIES WITHIN INDIAN LAWS

Sexual offenses against women are among the most horrifying crimes against human decency and conscience, and they are heavily penalized in every nation. Even though women are susceptible to all kinds of crimes, some crimes, like rape, molestation, sexual harassment, and immoral trafficking, are unique to women. Of them, rape is arguably the most harmful and a grave violation of women's dignity.

The intentional use of sexual approaches as a tool to assert dominance over another person and to cause them pain or shame is known as sexual harassment. Any act—physical or psychological—that targets a person's sexuality or is performed through sexual methods is considered sexual harassment. Sexual assault has been really harsh.

The penal laws in India, primarily the Indian Penal Code of 1860, provides for such acts and their respective punishments which are not only considered to be committed against a particular individual, but are considered to be committed against the entire society and hence such acts must be punished accordingly. The penal code contains such offences under various chapters which might be against an individual, a group or class of individual, property or State, etc.

However, the discussion in this Dissertation will be restricted to the relevant Chapters and provisions. The penal laws in India though recognise and punish certain acts committed on a

woman in various situations under Chapter XVI of the Penal Code. The said Chapter can be classified as following:-

2.1. Offences involving Criminal Force and Assault

Under Chapter XVI the offences involving criminal force and assault are specifically provided under sections 354, 354-A, 354-B, 354-C and 354-D. For convenience, the sections are reproduced below:-

354. Assault or criminal violence against a woman intended to shock her modesty. - Whoever attacks a woman or uses criminal force against her, intending to outrage or knowing that he can outrage her modesty, [is punished by imprisonment for each category which will not be less than one year but which can extend up to five years and must; shall also be fined].

(354-A. Sexual harassment and punishment for sexual harassment-

(1)) A person who commits any of the following acts –

(i) physical contact and advances involving unwanted and explicit sexual overtures or

(ii) a demand or requesting for sexual favors

(iii) showing pornography against the will of a woman or

(iv) making sexually coloured remarks

(2) Any man who has an offense referred to in subsection (1)(i) or (ii) or (i) shall be punished with rigorous imprisonment which may extend to three years or with fine or with both.

(3) A man who commits an offense referred to in clause (iv) of subsection (1) (iv) shall be punished with imprisonment which may extend to may extend to one year, or with fine, or with both.

354-B. Assaulting a woman or using criminal force with intent to disrobe - Any man who attacks a woman or uses criminal force against her or instigates such an act with the intention of undressing or exposing her, shall be punished by imprisonment. a term which must be at least three years but may extend up to seven years and shall also be punished with a fine.

354-C. Voyeurism - Any man who looks at or photographs a woman in private life in circumstances in which he would ordinarily expect that he would not be observed by the criminal or by any other person at the order of the criminal, or who distributes such a photograph. sentenced to prison on first conviction for a term of office which must not be less than one year but which may extend up to three years and shall also be punished with a fine and on a second or subsequent conviction with imprisonment for a term which must not be less than three years but which may extend up to seven years and also with a fine.

354-D. Stalking-

- (1) Any man who follows a woman and contacts her or attempts to contact her to repeatedly promote personal contact despite her apparent indifference
 - (2) monitors a woman's use of the Internet, e-mail or other electronic communications, commits the crime of stalking Provided that such behavior does not constitute stalking, if the man engaged in it shows that-
 1. it was done for the prevention or detection of crimes, and the State believed in the prevention and detection of crimes for the accused; or
 2. It is made under any law or to comply with a condition or requirement imposed by any person under any law; or
 3. in the given circumstances, such behavior was reasonable and justified.
2. A person convicted of the crime of stalking must be punished with imprisonment for up to three years, and will also be punished with fine; and shall be punished by imprisonment on a second or subsequent conviction of either description for a term which may extend to five years, and shall also be liable to fine On the other hand, the Penal Code in India does not contain any provision for protection or punishment of any form of harassment, be it sexual or otherwise, towards men or transgender. On perusal of Sec. 354 as above stated, the essential ingredients of section 354 can be culled out as:-
1. That the assault must be on a woman;
 2. That the accused must have used criminal force on her;
 3. That the criminal force must have been used on the woman intending thereby to outrage her modesty.

It is clear from above that the offence under section 354 can be committed only when an assault or criminal force is asserted to a woman with the intent to outrage her modesty. Under this section, a perpetrator could be any person, i.e., a man or even a woman as the section uses the term 'whoever' rather than 'aman who assaults or uses criminal force..' and therefore, anyone who commits the offence under the said section is liable to be punished as per the punishment provided. However, it is to be noted that the offence under section 354 can be committed only against a woman and the Penal Code makes no reference or provides any situation or prescribes punishment in a case where any assault or criminal force is used, either by a man or a woman

towards another man or transgender with the intent of outraging his modesty.

Whereas, on perusal of Section 354-A following acts constitutes the offence of Sexual Harassment as provided in the Act-

- (i) Physical contact and advances involving unwelcome and explicit sexual overtures; or
- (ii) A demand or request for sexual favours; or
- (iii) Showing pornography against the will of a woman; or
- (iv) Making sexually coloured remarks.

Under Section 354-B, an assault or use of criminal force to any woman or abetment of such act with the intention of disrobing or such compulsion constitutes an offence under the said section.

Under Section 354-C, watching or capturing the image of a woman engaged in a private act where she would usually expect privacy or any act not of a kind ordinarily done in public; or dissemination or circulation of such image either by the perpetrator or any other person on his behalf is an offence.

Under Section 354-D, following acts constitutes the offence of Stalking as provided in the Act-

- (i) Following a woman and contact, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or
- (ii) Monitoring the use by a woman of the internet, email or any other form of electronic communication.

However, following exceptions are provided in the section itself. The following acts do not constitute the offence of stalking as provided in the abovementioned section –

1. It was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or
2. It was pursued under any law or to comply with any condition or requirement imposed

by any person under any law; or

3. In the particular circumstances such conduct was reasonable and justified.

2.2. Sexual offences

The most grievous sexual offences against women, that is, of rape and its other aggravated forms are given under the head "Of Sexual Offences" in Chapter XVI under sections 375 to 376-E. These sections have been amended from time to time to include the variety of acts through which these offences are committed in today's ever changing dynamic society, enhancing its scope and ambit and the ambit was recently broadened vide amendment of 2018.

The said sections provides as follows:-

375. Rape —A man is said to commit "rape" if he—

- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person ;or
- c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.

The definition of rape as provided under Section 375 and its punishment thereof under Section 376 is self explanatory and therefore all the ingredients need not be explained individually. Such vast ambit of a penal provision is very much appreciable since it enables to cover and punish an offence both in present and in future and harshest punishment should be implicated upon the perpetrator because an offence like rape is not only against the body but also affects the soul of the victim. However, the section only suffers from one infirmity, i.e., the offence of rape can only be committed by a man against a woman. It squarely excludes a situation where a man could be a victim of forced sexual act by a woman. It also excludes the situation where a transgender is involved either as a perpetrator or as a victim. As of now, both of these situations are covered under Sec. 377, i.e., unnatural offences. In India, various studies have documented the sexual and physical violence against transgender persons.

The last concrete step towards making rape a gender neutral crime was by the Justice Verma Committee in 2013. "However, even The Verma Committee proposed that the perpetrator in

rape be recognised in law as 'male', writes Albeena Shakeel in EPW, "and the victim be "persons" (including females, males, transgenders). This was an acceptable proposal in law. However, the government's 'Criminal Law (Amendment) Ordinance, 2013' is distinguished by its thrust on viewing women as potential rapists.

It is time we stop trivializing sexual abuse against men. We need to start reflecting on the stereotypes that have led to a benighted approach towards sexual violence against half the population of our country.

The Indian law is based on the belief that a victim of rape can only be a woman. This arises from the assumption that rape is an act of sex alone to satisfy the sexual desire of the perpetrator. The argument against complete gender neutrality is that it is "physically" impossible for women to rape men. As Brownmiller argued in *Against Our Will* that only men can coerce women into having sex. Rape's critical function is nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear. ' This argument presumes that men are stronger, therefore they can commit rape and women cannot commit rape because it is physically and biologically impossible for a woman to commit rape.

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. Women can no longer rape or even sexually harass men. Thus only male-on-female rape is acknowledged and clearly defined under law in India.

death or resulting in persistent vegetative state of victim- Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.

376AB. Punishment for rape on woman under twelve years of age.- Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death

Provided that such fine shall be just and reasonable to meet the medical expenses and

rehabilitation of the victim

Provided further that any fine imposed under this section shall be paid to the victim.

376B. Sexual intercourse by husband upon his wife during separation.

—Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

376C. Sexual intercourse by a person in authority.—Whoever, being

- (a) in a position of authority or in a fiduciary relationship; or
- (b) a public servant; or
- (c) superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or
- (d) on the management of a hospital or being on the staff of a hospital, abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.

376D. Gang rape.—Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

Sections 376A, 376B, 376C and 376D were inserted in the Indian Penal Code through Amendment in the year 1983 after the highly criticised judgment of Supreme Court in 1979 which is commonly known as Mathura Rape Case in which two police officers were acquitted of allegation of rape as the court observed that the victim raised no alarm; and also that there

were no visible marks of injury on her body thereby suggesting no struggle and therefore no rape. Out of the above stated four sections, Section 376A and 376D are considered aggravated forms of rape as these offences have the excessive element of force or assault as compared to offence of rape under Section 376 alone, which is evident from reading the plain language of the sections. On the other hand, the offence under Section 376B and 376C particularly involves the element of 'trust' between the perpetrator and the victim. For example, under Section 376B the relation between the man and the woman is of husband and wife living separately and under Section 376C the man is in a position of authority as specified in the four clauses of the said section.

Also, Section 376AB was introduced recently through the amendment in the year 2018 to protect the sexual exploitation of a woman under the age of 12 years. It is to be noted here that as per the POCSO Act and the JJ Act, which are primarily Gender Neutral Legislations, any person below the age of 18 years is to be considered as a child, therefore through that interpretation this section provides protection against sexual exploitation of a girl child and does not include within its ambit the sexual exploitation of a boy under the age of 12 years, which would ultimately fall under the POCSO Act.

376DA. Punishment for gang rape on woman under sixteen years of age - Where a woman under sixteen years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim

Provided further that any fine imposed under this section shall be paid to the victim.

CHAPTER – 3 INTERNATIONAL PERSPECTIVE

Laws in Other Countries

In many countries other than India, gender neutral laws have already been enacted, mostly with respect of offences like rape. As much as

63 countries in the world have gender-neutral rape laws namely United Kingdom, United States of America, Republic of Ireland, Philippines, etc. to name a few.

1. United States of America

The FBI's Uniform Crime Report in 2013 redefined rape as: "The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of

another person, without the consent of the victim."16 The prior definition had not changed since 1927 and gained the attention of sexual assault awareness groups because it had alienated the victims who did not fit the definition - "the carnal knowledge of a female, forcibly and against her will". The former definition of "forcible rape" focused on vaginal penetration, but the newer definition includes forcible anal or oral penetration. The old definition, "the carnal knowledge of a female, forcibly and against her will", did not include forcible oral or anal penetration, the rape of women with other objects, or the rape of a man. This new definition encourages male rape victims to seek the help they need and also includes sexual assaults that previously were not covered by the definition of rape. The basis for changing this definition lies in the statistics provided by governmental institutions such as the U.S. Department of Justice and the CDC. A study done by the CDC found the following statistics :-

Intimate Partner Violence

- About 1 in 3 men experienced contact sexual violence, physical violence, and/or stalking by an intimate partner during their lifetime.
- Nearly 56% of men who were victims of contact sexual violence, physical violence, and/or stalking by an intimate partner first experienced these or other forms of violence by that partner before age 25.

Sexual Violence

- Nearly 1 in 4 men in the U.S. experienced some form of contact sexual violence in their lifetime.
- About 1 in 14 men in the U.S. were made to penetrate someone during their lifetime.
- More than 1 in 38 men in the U.S. experienced completed or attempted rape victimization in their lifetime.
- Among male victims of completed or attempted rape, about 71% first experienced such victimization prior to age 25.

2. Philippines

Prior to the 1997 amendment of Revised Penal Code of 1930, male victims of rape were not acknowledged under Philippine law. Article 266-A of the law defines rape by "an act of sexual assault" by any person either by "inserting his penis into another person's mouth or anal orifice" or inserting "any instrument or object, into the genital or anal orifice of another person". The 1997 amendment allowed the legal recognition of rape of males, both by other males and by females.

3. Republic of China

Until November 1, 2015, sexual offences against males above the age of 14 could not be prosecuted unless they also included a physical assault, in which case only the physical component was punishable. However, a revision of Article 237 of the Criminal Law of China which criminalises "forcible indecency," made that section of the law gender-neutral. Offences that constitute rape of males may be tried under this article, with offenders facing a maximum of five years in prison.

CHAPTER - 4

MISUSE OF WOMEN CENTRIC LAWS AND ITS REMEDIES

"Women commit crime for the same reasons that men do. Crime has no gender, and neither should our laws."

The Indian Penal code, in its basic form, is the main criminal code of India, which lists all the cases and punishments that a person committing any crimes is liable to be charged with, and covers any Indian citizen or a person of Indian origin.

It is a fact that the law all around the globe is misused by the people, either by the reason of poor drafting or by the reason of loopholes in the law which render a person to mold the law according to his or her personal needs and get away with it without any repercussions or punishment by the law. It is often seen that penal laws are misused by a person to settle personal scores with another or to take revenge. Considering this, the Chapter is divided into 2 parts, i.e., the misuse of the existing provisions of the law which were primarily meant for protection of women from an offence and what are the available remedies in the law in case a false case is filed by a person to harass another.

It is not just about crimes against men in the form of rape, violence or assassination. The worst is the false accusations of crimes against these innocent men by women. In the Indian legal system, a woman can accuse a man of rape, domestic violence or dowry harassment if there is little evidence and he can be caught in captivity. Today, tens of thousands of innocent Indian men are rotting in jail for crimes they did not commit thanks to fabricated claims by women. India's harsh laws are being abused left, right and center, and women are imprisoning men on false charges. From posing as personal agents to extorting money, women are blatantly manipulating Indian laws. From sour relationships to broken marriage vows, all the reasons are enough to falsely accuse men and put them behind bars. Girls who stay late in premarital affairs accuse their boyfriends of rape, regardless of the boys' reputation, future, career and life.

CHAPTER - 5 CONCLUSIONS

One of the most important manifestations of inequality worldwide is GENDER EQUALITY. When the very strong feminist movement that began in the middle of the 20th century sheds light on the great inequality and cruelty that women suffer every day, the law had to be changed so that women could be equal to men. The legislation we started with was quite, perhaps completely legal at the time, but the dawn of today has put men in such a naive position that they fall prey to so-called "women's empowerment" legislation. Much less has been said about how we have become a prison state, passing almost every draconian law imaginable to curb crimes against women and allowing ordinary citizens to be arbitrarily arrested and imprisoned in deplorable conditions. This decade proved that the need for a gender-neutral society. The Oxford Dictionary describes a gender-neutral adjective as suitable, proper or common to the male and female genders. or gender, and emphasizes the equal treatment of men and women under the law without discrimination. We see a society where equality is realized in its true sense, not at the expense of any gender. Through this research, an attempt has been made to highlight the history of our existing law and what changes are required in it because of the ever-changing dynamic society and mindset of the people. Though, no doubt that certain laws are necessary for protection of women, it cannot be denied that due to a drastic change in our society and the diversification of societal and sociological aspects of the people, certain laws which were earlier only applicable to one part of the society has broken its barriers and is now applicable to each and every individual without any prejudice to their sexuality. It has been observed by Perera that gender neutral law is not anti-women in nature.