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GENDER NEUTRAL LAWS: A CRITICAL STUDY

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ABSTRACT

Following the infamous Delhi Gang Rape incident in 2012 and the much-talked case of Triple Talaq, there was an urgent need to condemn and make stricter laws against such crimes against women. The government in gang rape case formed a committee, chaired by former Chief Justice of India Justice J.S.Varma, to suggest guidelines for women's protection, which was to take the form of the Criminal Law (Amendment) Act 2013, and gender-sensitive or gender-specific laws were framed as a result of giving in to feminist pressures opposing gender neutral laws recommended by the committee. The author scrabbles around and analyses the current protective legislation in India considering gender-neutral laws and concludes by suggesting the necessary changes that can be implemented so that all genders are protected equally under the law.

KEYWORDS: Delhi Gang Rape case, Triple Talaq, Chief justice of India, Criminal Law (Amendment act), Gender-Sensitive, Legislation

ABBREVIATIONS: Sec: Section, IPC: Indian Penal Code, M.P: Madhya Pradesh, S.C: Supreme Court of India, Art.: Article, I.E.A: Indian Evidence Act, LGBTQI: Lesbian, gay, bisexual, transgender, queer, intersex.

INTRODUCTION

1.1 OVERVIEW

According to our Indian legal system, only men can be found guilty of rape under Indian Penal Code Sec. 375 and 376, and only women can be the victim. The laws governing stalking, being voyeuristic, and sexual harassment are also gender-specific, meaning that only women may be the victim and only men may commit the offenses. But the law governing acid attacks is gender neutral as it involves the word “whoever.” The idea that a rape victim

can only be a woman is the foundation of Indian law. This results from the presumption that rape is a solely sexual act performed to satiate the sexual desire of the offender/perpetrator. It is a common misconception that women are always the victims and men are always the perpetrators, but the reality is that males are also victims of sexual offenses and false allegations. India's antiquated rules regarding sexual offenses and how they deny males and transgender people access to justice is a genuine issue that needs to be taken into consideration.

As we all know, Justice, Liberty, and Equality in areas of status and opportunity are guaranteed to all people by the Preamble. Every person is accorded equal protection under the law by the state within Indian Territory, according to Article 14 of the Constitution. States cannot discriminate only based on sex, according to Art. 15.

It goes beyond equality and gives women more power through positive discrimination in accordance with Article 15(3), which grants the state the right to enact any special law or regulation for the advantage of women. By giving all people the same opportunities in terms of employment, Article 16 furthers the Preamble's mission. The 73rd constitutional amendment mandated that women must hold a minimum of one-third of the elected seats. *“But is this the actual situation on the ground level? Are all these laws being put into practice, or are they only being employed as a tactic to quiet women who speak out in support of their rights?”*

But State has disregarded and ignored the issue of male/transgender sexual victimization in institutional settings like jails, juvenile detention facilities, etc., which has caused the nature, dynamics, and effects of male and transgender victimization to worsen. Modern scholarly and judicial debates have ignored, and frequently criticise, the idea of male and transgender sexual victimization. Even though men are typically thought of as sexual aggressors, there has been an increase in the experience of male victims with the penal system. Aggravated rape is a crime under Section 376 of the IPC when the perpetrator is in a position of authority or dominance. If the woman in her testimony asserts that she did not agree in such a case of aggravated rape, Section 114A of the IEA of 1872, as amended, has changed the presumption to that of guilt. Again, it is wrong to assume that only women and no other identities may be dominated by those in positions of power. We are aware that coercive sexual activity with men by males is illegal under Section 377 of the IPC since it violates nature's order. A gender-neutral rape law has been advocated by the Law Commission of India in its 172nd report. According to others, this scenario also requires adherence to the fundamental rights of

equality before the law and equal protection of the rights that are enshrined in our Constitution. One could argue that all identities would be equally protected only if there were gender-neutral rape laws. The reality of the culture we live in must not be forgotten as unquestionably; women are the group in society that is most at risk.

Thus, men, women, and the LGBTQI+ group are all considered to be human beings and as such, are the primary focus of the law. In addition, we currently *ipso facto* believe that all our laws are gender-neutral and do not distinguish between any genders as being special or the norm.

1.2 STATEMENT OF THE PROBLEM

Since gender neutrality in Indian culture has always been a problem, it is crucial that the appropriate legislation is passed and effectively implemented. Even though rape is a horrible crime in which the victim's gender is immaterial and hence the consequences for the same should be the same, India lacks adequate rape legislation for males and the transgender population as well as for women. In addition, there are other factors, such as differential remuneration for the same labor based on gender.

1.3 OBJECTIVE OF THE STUDY

This study's objective is to evaluate whether India's gender-specific rape statute needs to be changed to a gender-neutral one. In this regard, the following are some pressing issues that must be resolved:

- What comprises gender neutrality?
- Whether a gender-neutral legislation would be harmful to the population's most vulnerable group i.e., women?
- Whether the remedy is to make it gender inclusive for the perpetrator solely; power disparities developing in community, war, and custody circumstances.
- Draw attention to the fact that some current laws are not being implemented the way they are expected to be.

1.4 HYPOTHESIS

The issue of sexual assault against men and the transgender community must be addressed immediately.

1. It would be detrimental to the interests of female rape victims to make the legislation entirely gender neutral. Making the legislation gender specific for the offender and inclusive for the victim would thus be a solution.
2. There must be a different rule for caste-related, inter-communal, and war crime-related aggravating circumstances.

2. MEANING OF GENDER NEUTRALITY

The idea of gender neutrality underlines the equal protection of men, women, and persons of any other gender without prejudice. Three aspects of gender neutrality are provided by Arvind Narrain (2013).

- Respect for the victim's gender without discrimination
- Remaining impartial toward the offender
- Independence in war, conflict, and community settings.

2.1 GENDER NEUTRALITY (IN RELATION TO PERPETRATOR)

The issue of whether a woman may perpetrate a crime has been a subject of constant discussion. People who spoke in favour of the motion claimed that it is biologically impossible for women to rape males, especially in a patriarchal environment, as stated by Susan Brownmiller. Once more, those opposed to the motion argued that it was not physically impossible. In instances like *State Govt v. Sheodayal (1956.)*¹ Women-on-women rapes became known in which the MP HC stated that a woman's modesty might be violated by another woman under the authority of Section 354 of the IPC. The SC addressed the issue of whether a woman can engage in gang rape in the landmark case of *Priya Patel v. State of M. P.*²

The Supreme Court held in *Yusuf Abdul Aziz v. State of Bombay*³ that women may not be charged with adultery under IPC provisions by citing Article 15. The fact that the clause is

¹ 1956 CrLJ 83 M.P

² AIR 2006 SC 2639

³ 1954 AIR 321, 1954 SCR 930

founded on gender stereotypes, according to which women may only be victims and not offenders of sexual assaults, was not taken into consideration. In a later case, *Anuj Garg v. Hotel Association of India & Ors*⁴, a bench consisting of S.B. Sinha and Harjit S. Bedi J. declared that preconceptions of gender roles cannot be used as the foundation of the law, cannot bestow uneven advantages, and cannot burden any one gender.

As a result, a provision that had long been upheld as protected by Article 15(3) and forbade women from working as bartenders for their own gain was repealed.

2.1.1 GENDER NEUTRALITY (IN RELATION TO VICTIM)

It is disappointing that the way rape is seen by Indian law is predicated only on the idea that the victim of rape must be a woman. This assumption entirely ignores the fact that rapes and sexual assaults against males and transgender persons are just as common as crimes against other individuals and do not carry the same weight as assaults against women or rapes against men. As a result, gender neutrality is not present, and it should be underlined that the Punishment for such horrible acts should be similar regardless of the victim's gender.

Further, it is often believed that rape is just an act of sex committed to gratifying the perpetrator's desire for sex, which is in direct opposition to the rising understanding that sexual assault is not only a manifestation of passion but also of domination over one caste or group religion. Therefore, there is no justification for why males or transgender individuals cannot be raped or otherwise abused. Corresponding to this, the precedent set by the historic case *Vishakha and others v. State of Rajasthan*⁵ protected the rights of women who had been sexually assaulted at work, but similar legislation for males or transgender individuals has not yet been discussed.

2.1.2 GENDER NEUTRALITY (IN RELATION TO CUSTODIAL, WAR, COMMUNAL AND CONFLICT SITUATIONS)

Rape has repeatedly been adopted as a method of fear and control in caste, class, and community conflicts as well as in custodial settings. It is crucial to understand why these unique circumstances should not be compared to everyday life. In addition to being a male, female, or gay person, he or she belongs to a certain ethnicity, caste, and/or religion. The

⁴ Appeal (civil) 5657 of 2007

⁵ AIR 1997 [SC](#) 3011

identification that distinguishes the perpetrator and the victim in a typical circumstance or non-aggravated crime is gender. The perpetrator's gender is irrelevant under extreme circumstances like war, violence, or captivity, where caste, race, or religious identity becomes dominant. Due to its severity, the *Kathua rape case*⁶ has garnered a lot of attention recently, suggesting that rape is becoming a tactic to create terror and demonstrate one's dominance over others. In this horrible act, the priest of Devasthan, together with his son and little nephew, raped Asifa Bano, an eight-year-old girl who became the victim of a community vendetta. Eight males were charged with participating in various illegal activities that resulted in the murder of a youngster who had just been the victim of a rape. Three of the accused were public employees who were charged with attempting to obliterate the evidence. As a result, it is obvious that rape has been used as a weapon in inter - communal disputes.

CONCLUSION

Law has a maleness to it, as has been clear from the legislative framework outlined above. It has ignored and neglected the suffering of women and sexual minorities for many years. It is clear from a careful reading of several statutes that women have historically been viewed as submissive and dependent. It is high time that the definitions of victim and perpetrator in Indian law should be changed to gender neutral. First, it must be recognized that gender neutrality would not mean that the law would be ignorant to any gender or that the difference would disappear, but rather that it would be more attentive to the requirements, functioning, and behaviour of all genders across spectrums and paradigms.

Second, the claim that the gender neutrality of rape and sexual abuse laws will allow males to abuse them by filing counter complaints, preventing women from reporting sexual crimes to the authorities more than before, is unfounded. The risk of legal misappropriation exists in every legislation, but this should not prevent the government from putting it into effect. They ought to advocate instead for a gradual approach to enacting gender-sensitive policies that get us closer to the equitable society envisioned in Article 14 of the constitution. By eliminating gender prejudices in law enforcement, expanding the definition of victim and perpetrator to include all genders would only broaden the scope of justice. Additionally, the idea of "Romantic Paternalism," which is present in the Constitution and Labour laws, should be rejected because it has shown itself to be consistently prejudiced towards one gender and

⁶ CRIMINAL APPEAL NO. 1928 OF 2022
(ARISING OUT OF S.L.P. (CRIMINAL) NO. 11220 OF 2019)

hindered its empowerment. To emphasize their perspective, there is an urgent need for more women and sexual minorities to serve as lawmakers, attorneys, judges, and politicians.

Finally, it is crucial to understand the gender neutrality purpose that attorneys alert the judiciary to any discriminatory laws. It is necessary to practice more feminist law, as was done in the cases of *Tukaram*, *Bodhisattva*, *Chandrima Dass*, and *Vishakha*. Incorporating the best aspects of each precedent should be the fundamental goal of both legislative bodies and the court.

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