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A Shift from Gender Centric to Gender Neutral Criminal Laws Precepts of Equality and Justice

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ABSTRACT

In words of American political activist, Gloria Steinem – “A gender- equal society would be one where the word ‘gender’ does not exist where everyone can be themselves.” The binary understanding of the word ‘gender’ is deeply rooted in the mindset of the society but indeed the essence of the term lies in the fact that it comprises of male, female and transgender. Gender neutral laws seek to grant equal sanction and opportunity to all the genders without negative discrimination. Since the medieval period in Indian history, vulnerable women were tyrannized and exploited and thus special protection by laws were given to them. Due to the pious efforts of law makers, now women are at par with men in education, employment and status but now in the era of post globalization, the concept of feminism has been completely misinterpreted. The author does not deny the bitter reality that women are still the target of violence and cruelty but on the other side, almost the whole transgender population and certain men are also subject to brutishness. The rights of these other communities have to be also recognised with the progressive evolution in socio legal framework. This paper focuses on various gender specific criminal laws in India especially comprising of sexual offences and cruelty as well as the imbalances drawn between these gender centric legislations and the elements guaranteed by our Constitution in the form of justice, liberty, equality and dignity. Modification of gender biased criminal laws is essential as strengthening the status of women does not mean ignoring the victims from other communities. This paper also enumerates that certain issues relating to sexual orientation, marginalization based on gender and gender identity are in need to be addressed and resolved before stepping into the gender-neutral laws shell.

The method of research followed is doctrinal research based on primary as well as secondary sources. The analysis of various legislations and judicial verdicts, along with books and research articles has been done to add credibility to the assertions made in the paper.

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I. INTRODUCTION

In simple terms, “Gender neutrality is 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.” There is a flawed misunderstanding of the role of gender in our country as stereotypical ideas such as only men can be protectors or breadwinners and women can be nurturers and homemakers and transgenders are have-nots etc. Due to such beliefs most of Indian legislations are gender specific, for example, family laws are based on patriarchal, patrilineal and patrilocal society. While the criminal laws in the country has assigned the role of preparator to men and role of victim to women and transgenders are not kept in the vicinity of any role with special reference to sexual offences and cruelty. Whenever the gender-neutral laws have knocked the door of law makers, they have been never entertained because according to them, the sexual offences against women only covers majority. Morally or legally, justice is shattered when on the pretext of preserving majority rights, the other minority class’ rights are disregarded.

II. CONSTITUTIONAL PROVISIONS

Our Constitution opens up with the Preamble which promises its citizens to secure their social, economic and political justice along with equality of status and opportunity. This assurance has been turned into guarantee in the form of Fundamental Rights. Articles 14, 15 and 16 bestows equality to all in one form or the other. In other words, Article 14 can be considered as genus and Articles 15 and 16 acts like species. Article 14 enumerates that the State shall not deny to any person equality before law and equal protection of laws. The concept of reasonable classification or ‘equality among equals’ is also embedded in a hidden way in this provision. Article 15 of the Constitution protects the citizens from discrimination on various grounds, including sex. Article 15(3) acts as an exception to Article 14 and 15(1) and (2) under which state is not prevented from making any special provision for betterment of women and children. The basic objective was to empower women and to reduce the gap of inequality between men and women.

Besides, India is a signatory to several international covenants on the rights of individuals, such as The Universal Declaration of Human Rights, 1948, The International Covenant on Civil and Political Rights, 1966 and The International Covenant on Economic, Social and Cultural Rights, 1966, all of which upholds the inalienable right of every person to equality and human dignity. So taking into account Article 253 Parliament should give effect to these

international agreements by substitution of the old gender sensitive laws into gender neutral laws.

III. GENDER SPECIFIC LAWS

Section 498-A IPC

Indian Parliament added section 498-A in Indian Penal Code in 1983 according to which woman can file criminal complaints against husband and husband's relatives for any kind of cruelty inflicted by them and the criminals are subject to imprisonment and fine. The offence committed under this provision is cognisable, non-bailable and non-compoundable. Thus, it established the guilt of the accused before it is proved thus violating the norms of natural justice which says that the accused is presumed innocent until proved. Section 41 of Criminal Procedure Code is providing wide powers to the police to arrest the accused without warrant. In cases of cognizable offences, mostly, the police being overwhelmed by the concept of women abuse is using its powers rashly without applying rationale. Abused women need protection, but placing unconditional faith in the statements of a woman and confining the accused husband and his family in police or judicial custody, until bail is granted by a court, is not the justified way to accord protection to women.² The misuse of the section has enhanced to the level of demanding of bribes by police from the husband or his relatives.

This section has been no doubt misused in enormous number of cases by women but it does not mean that it is deprived of constitutional validity. The word 'cruelty' in its fold covers physical, mental as well as emotional cruelty and thus, it is vehemently wrong to boost the opinion that such form of cruelty is only inherently vested in male gender. Any gender can be trapped in the web of victimization and equal protection is expected from our laws. Moreover, this particular provision also fails to provide Indian women with civil remedies such as injunctions, protective orders, interim relief, and other support services such as shelter and monetary relief.³ This section also has a lacuna that it has exempted the violence meted in non-matrimonial relations.

Protection of Women from Domestic Violence Act, 2005

In order to bridge the gaps in 498-A IPC, the Parliament enacted Protection of Women from Domestic Violence Act in 2005. The Act widened the scope of the definition of domestic violence and provides legal recourse both civil and criminal to female victims including

² Dr. Ashish Virk, Does Indian Law and Feminism Discriminate Against Men – A Comparative Study (USA, UK, Canada) in relation to domestic violence against men in India, *Bharati Law Review*. 52 (Oct-Dec., 2018).

³ Rehan Abeyratne & Dipika Jain, Domestic Violence Legislation in India: The Pitfalls of a Human Rights Approach to Gender Equality, 21 *Am. U. J. Gender Soc. Pol'y & L.* 333 (2012).

protective orders and injunctions in favour of them. Significantly, the PWDVA does not limit the remedy only to victims of matrimonial relationship but also covers "domestic relationships" which include "all relationships based on consanguinity, marriage, adoption and even relationships which were 'in the nature of marriage.'"

This Act is also disabled by gender sensitivity as it considers male are the main crime preparators and therefore it has been emphasized in PWDA that the 'aggrieved person' is specifically the 'woman' and a bitter truth as always there has been no mention about the tyranny of transgenders. Both PWDA and section 498A IPC has proved ineffective in most of the cases because of institutional deficiencies. This scenario of male domination and crimes against women that once existed has now changed over the years and we are at a point in time where such legislations are no longer serving the purpose but rather neglecting and harming the other gender against whom false allegations and false cases are being framed simply because the laws that are in place today protect only the women against such crimes and does not equally protect the men against such crimes bringing in the question of the violation of the principle of equal protection of all persons under law.⁴

Rape and sexual offences

The most infamous Nirbhaya case gave birth to plethora of new amendments in rape definition and addition of various sexual offences in Indian Penal Code. The definition of rape is now no more restricted to penile-vaginal penetration but also includes the penetration of the vagina, mouth, urethra, anus or any part of the body of a woman by a man using any object or part of his body.⁵ The idea of masculine power and feminine tenderness is so deeply embedded in the society that it can be crystal clear seen in our gender specific legislations. Unfortunately, judicial opinions on Indian rape law also reflect a rather traditional understanding, where rape is not only viewed as an assault on the body of a woman, but also her modesty, chastity, and honour and this view stands on patriarchal bedrock and undermines the sufficiency of arguments based on the victim's individual autonomy and bodily integrity.⁶ The concept of rape is now accompanied by right to dignified life including entitlement of one's own body. Rape is not confined to any particular age or sex. The law makers should infuse the logic in the laws pertaining to rape and other sexual offences that both preparators and victims can be either male, female or transgender. On one hand, under

⁴ Jaishankar K., & Ronel, N., Proceedings- Third International Conference of the South Asian Society Criminology and Victimology (SASCV) Tirunelveli, India: SASCV & Department of Criminology and Criminal Justice, Manonmaniam Sundaranar University (2016).

⁵ The Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 1992 (India).

⁶ Harshad Pathak, Beyond the Binary: Rethinking Gender Neutrality in Indian Rape Law, 11 AsJCL 367 (2016).

section 114A of Indian Evidence Act, in rape cases, the Court presumes that the woman has not given the consent if she says so while on the other hand, our laws are not providing basic protective rights against sexual offences to other sections of the society. It is *prima facie* gross violation of right to equality. There is a huge disbalance in the existing law itself as while consensual sex on the false promise of marriage is often seen as rape, marital rape itself does not account as rape under Indian law.

Other Sexual Offences in Indian Penal Code

Section 354-A specifically emphasises that if a man commits any of the offences such as physical contact, demand or request for sexual favours, making sexually coloured remarks, showing pornography without will etc against woman, he would be subjected to punishment comprising of imprisonment and fine. Similarly, under sections 354C and D while defining voyeurism and stalking respectively, it has been declared that these offences are inflicted by man upon woman. This came to public attention after Vijay Nair, a music entrepreneur, was serially cyber stalked by a woman – he learnt he had no recourse under Indian law.⁷ These gender biased laws are not only shattering equality and justice norms but are also making mockery of human rights. It has been already framed as to who is the inherited preparator and who comes under victim category.

Offences Against Married Women

Declaring adultery i.e. section 497 of Indian Penal Code and also section 198(2) of Criminal Procedure Code as violative of Articles 14, 15(1) and 21 of Constitution and thus unconstitutional was a welcomed gesture of the Supreme Court in the case of Joseph Shine v. Union of India⁸ in 2018. Adultery law is made gender neutral. This section has prescribed punishment only for man and also if the husband agrees, the act (adultery) is not a crime. A moral wrong cannot be taken as a legal right. Therefore, now there is a civil legal remedy for adultery i.e. divorce and criminalisation is removed.

Further section 498 provides that any man who entices or takes away any married woman with the intention and purpose of illicit intercourse with any person is an offender. Focussing on the word “entices away”, the section came into existence in 19th century when child marriage was prevalent in India and so at that time it might have been quite easier to lure or entice an immature girl child but now when a major married woman is enticed away, it means

⁷ Siddharth Sanghvi, Make laws gender neutral : Men too can become victims of sexual offences as well as false accusations (Sept. 26, 2019, 2:00 AM), <https://timesofindia.indiatimes.com/blogs/toi-edit-page/make-laws-gender-neutral-men-too-can-become-victims-of-sexual-offences-as-well-as-false-accusations/>

⁸ Joseph Shine v. Union of India, (2018) S.C.C. Online 1676 (India).

that she is at least having knowledge of the offence and thus she should be also held liable.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

The Preamble of the Act enumerates that “protection against sexual harassment and right to work with dignity are universally recognised human rights...”. The human rights stand for all human beings irrespective of gender but in today’s era at workplaces, laws are created and enforced only for shielding one particular gender. The Act defines “aggrieved women” as if it is certified that men and transgenders are devoid of any victimization. The author does not contradict the genuineness of legal necessity for eradicating all kinds of sexual abuse against women. But men and boys who have been sexually pester may have many of the identical feelings as other survivors of sexual assault, but they face many additional challenges because of ‘social ridicule’ and ‘stereotypes’ about men masculinity.⁹ The sexual harassment including rape at workplaces is generally done by other male colleagues or female bosses. Sexual harassment of men requires more intentness than any other climbing crime or issue because male suicides at workplaces are four times more than the female suicides at workplaces.¹⁰ The main reason is law has framed legislations for women but left men uncovered and with no access to any kind of justice.

Justice Verma Committee Report

After Nirbhaya Case, Justice Verma Committee Report was submitted to draft the possible amendments in rape laws in 2013. Considering right to sexual orientation as human right, the Committee in its report had categorically stated that, if the human right of freedom means anything, then India couldn’t deny its citizens the right to be different.¹¹ The Committee clearly endorsed the rights of homosexuals and transgenders, to not be excluded from the purview of the protection against offences such as sexual harassment and sexual assault.¹² The efforts of the Committee went in vain as these recommendations were ignored in the Criminal Law Amendment Act, 2013. The Committee also reported that children at their learning age are not aware of concepts such as ‘gender’, ‘masculinity’ and ‘feminism’, so it is the duty of adults to teach them different from ‘perceived notions’ such as “stripping out the language of sexism from books/materials, eliminating different lessons for girls and boys

⁹ Prashanti Upadhyay, Sexual Harassment of Men, <http://www.legalservicesindia.com/article/2039/Sexual-Harassment-of-Men.html>.

¹⁰ *id.* At 8.

¹¹ Sumita B. Ade and Dr. M.B. Jameel, Gender Equality: Constitutional Mandate With Reference to Justice Verma Committee Report on Criminal Law Amendments, 4 *The Lex Warriar: Online Law Journal*. 189 (April, 2018).

¹² *Id.* At 10.

(i.e. sewing v sports)".¹³ Thus, Committee demonstrated the role of personal and sexual education among children for better future social gender-neutral environment.

Bill on Gender Neutral Laws, 2019

In 2018, in the case of *Criminal Justice Society of India v. Union of India*¹⁴, the Apex Court dismissed the petition filed by NGO seeking to amend the rape laws and turning it gender neutral by stating that "The Parliament has to make a call in the issue." Then a bill to make sexual crime laws gender-neutral was introduced in Rajya Sabha on July 2019, by KTS Tulsi, a senior lawyer and parliamentarian. The bill proposed amendments in the Indian Penal Code, the Criminal procedure Code and the Indian Evidence Act to ensure that the words "any man" and "any woman" in the sections relating to sexual offences in the laws are changed to read as "any person".¹⁵ The Bill also calls for the insertion of Section 375A in the IPC, to punish "sexual assault" defined as "intentionally touches the genitals, anus or breast of the person or makes the person touch the vagina, penis, anus or breast of that person or any other person, without the other person's consent except where such touching is carried out for proper hygienic or medical purposes".¹⁶ The centre of attention of framing the bill was the atrocities, psychological trauma and suicide of persons due to offenders belonging to either gender or sex on account of various sexual offences and exploitation committed against them. These proposed amendments were aborted soon as it was heavily opposed by the central government on the ground that the statistics are heavily inclined towards justifying women-specific laws. Sexual assault of women is much more focused than sexual assault of men or transgender persons. Sexual assault of men is a topic that is rarely discussed, and whenever it is addressed or portrayed, it's with a fun connotation.¹⁷ The Supreme Court played the pro-active role towards bringing neutrality in gender sensitive laws by decriminalising adultery. But unfortunately, the tight roped stand of the government against gender neutrality seems to be antithetical to the pro-activeness of the Supreme court of India.¹⁸

¹³ Government of India, Report of the Committee on Amendments to Criminal Law. 401 (Jan. 23, 2013).

¹⁴ *Criminal Justice Society of India v. Union of India*, (2018), <https://indiankanoon.org/doc/164599854/>.

¹⁵ Aneesa Mathur, Bill to make sexual crimes gender neutral introduced in Parliament (July 13, 2019, 11:43 PM), <https://www.indiatoday.in/india/story/bill-to-make-sexual-crimes-gender-neutral-introduced-in-parliament-1568504-2019-07-13>.

¹⁶ Prasanti Upadhyay, *supra* note 8, at 6.

¹⁷ Debankita Saha, Reaching Out to Gender Neutrality in India (Aug. 31, 2019), <https://www.youngbhartiya.com/article/reaching-out-to-gender-neutrality-in-india>.

¹⁸ Women's Web, A Recent Bill in Parliament Tried to Make Sexual Crimes Gender Neutral. What is your opinion? (September 18, 2019), <https://www.womensweb.in/2019/09/gender-neutrality-gender-neutral-laws-needed-sexual-crimes-sept19wk4sr/>.

Rights of Transgenders

The status of the third gender community started degrading when the British rolled out the Criminal Tribes Act in 1871 which particularly targeted them. This Act considered transgenders inherently as criminals subject to non bailable offences. The Act provided for the registration, surveillance and control of certain criminal tribes and eunuchs and had penalized eunuchs, who were registered, and appeared to be dressed or ornamented like a woman, in a public street or place, as well as those who danced or played music in a public place. They were subject to arrest without warrant and imprisonment up to two years or fine or both. The Act was repealed in 1952, but the damage it caused is still visible. Section 377 of Indian Penal Code is the very first provision which is indirectly criminalising the transgenders as the unnatural intercourse has been declared as a punishable offence with imprisonment up to ten years or life imprisonment.

In the landmark case of *National Legal Services Authority v. Union of India*¹⁹, the Supreme Court manifested compassion and empathy towards transgenders. Non-recognition of identity of Transgenders/Hijras in various legislations denies them equal protection of law and they face wide-spread discrimination. There is a need for recognition of transgenders as “third person”. Interpreting the law of the land, it was held that the third community gender also fits into the parameters of “persons” or “citizens” used in Constitution. Supreme Court has held that transgenders too shall have access to the rights guaranteed under Articles 14,15,16,19 and 21. Thus, there is a shift from charity or pity concerns to human rights approach. The Supreme Court also directed the Central and the State Governments to take initiatives for the reservation of third gender in educational institutions and public appointments and also to take proper measures to provide medical care to transgenders in the hospitals and also provide them separate public toilets and other facilities. The Court was cognizant of the linkage between the lack of public awareness about the gender fluidity and the issues of shame and the issues of shame experienced by transgender persons.²⁰ Both the Governments were also given the responsibility to create public awareness so that they are not secluded but they are considered as the part of the society and various measures should be taken by the Government for the welfare and betterment of third gender. Consequently, it had also directed that the Central and state governments to create public awareness campaigns and seriously address issues of fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. faced by transgender persons.

¹⁹ *National Legal Services Authority of India v. Union of India and Ors.*, MANU/SC0309/2014.

²⁰ Dipika Jain, Gauri Pillai, et.al., “Bureaucratisation of Transgender Rights: Perspective from the Ground” available at article section of www.manupatra.com.

In July, 2017, the Standing Committee on Social Justice and Empowerment was constituted to analyse the Transgender Bill and the report listed various shortcomings of the final draft and submitted its suggestions. In spite of many criticisms levelled in the Standing Committee Report, the Bill has been introduced in Parliament without incorporating any of the changes and the recommendations suggested by the Committee. The August 5, 2019, the day on which The Transgender Persons (Protection of Rights) Bill was passed by the Lok Sabha is termed as “*Gender Justice Murder Day*” by Transgender community. It is not even a toothless tiger, it is just a number of teeth scattered about with no power, reason or authority to take action on their own.²¹ The punishment prescribed for any kind of crime inflicted upon transgenders including sexual abuse and injury to life is maximum of two years. In comparison to Indian Penal Code, the trivial degree of sentences are sanctioned for the grave offences to offenders.

IV. COMPARATIVE STUDY WITH OTHER NATIONS

United States of America

U.S.A. does not use the term ‘rape’ in its legislation. Rape is presented in all forms of non-consensual sexual acts under Chapter 109 A of United States Code. The sexual abuse laws are non-gender specific as they use the term “whoever” in its provisions. In context of sexual harassment at workplaces, the Civil Rights Act of 1964 established statutes that make it unlawful for employers to discriminate on the basis of race, colour, religion, national origin or sex. Sexual harassment was included under the Act by precedent in 1986. Domestic violence legislation of various states such as California, New York and Washington DC enumerate about the violence inflicted against ‘intimate partner’ widening its scope to all the genders.

United Kingdom

In U.K., the rape laws are governed by Sexual Offences Act, 2003 wherein the definition of rape suggests male as preparator but further the ‘sexual assault’ definition in section 3 is gender neutral which basically includes touching in a sexual way. It can be concluded that the sexual offences legislation is partially gender sensitive as the punishment for rape extends up to life imprisonment and sexual assault is confined to maximum punishment of ten years imprisonment. Protection from Harassment Act, 1997 is gender impartial as it explains prohibition of harassment by stating “A person must not pursue a code of conduct which

²¹ Rachna Mudraboyina, et al., A Critique of Transgender Persons (Protection of Rights Bill), 2019, Intersectional Feminism (May 7, 2020), <https://feminisminindia.com/2019/08/05/critique-transgender-persons-protection-of-rights-bill-2019/>.

amounts to harassment of the other....”. Further, section 76 of the Serious Crime Act 2015 criminalizes patterns of coercive or controlling behaviour where they are perpetrated against an intimate partner or family member.²²

South Africa

According to 2020 Statistics, South Africa is on the top list of maximum number of rape cases in whole world, but still the law makers dispensed justice to all in the form of gender-neutral laws so that even the minimum community strength is not left outside the equity circle. The Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007 has declared rape and sexual assault as act of ‘any person’ thus framing it as gender neutral. Labour laws of South Africa provides protection to all employees against sexual harassment irrespective of gender. Again, the Domestic Violence Act, 1998 defines complainant as “any person who is or has been in domestic relationship with the respondent...” which is a practical fairness approach.

V. CONCLUSION AND SUGGESTIONS

As stated by Roscoe Pound “*the law must be stable but it must not standstill.*” Thus, the law should be dynamic and an epitome of justice and equality norms. Modification of gender biased criminal laws is essential as strengthening the status of women does not mean ignoring the victims from other communities. So many developed as well as developing countries introduced gender neutrality, so the time is ripe enough for the Indian legislation to ponder that gender specific legislations are enhancing gender divide instead of gender parity. The right against sexual offences is an inevitable human right and ‘human being’ is a universal subject irrespective of any particular gender. The shift from gender specific approach to gender neutrality is the need of an hour. The overall objective of gender neutrality is a society where men, women and transgenders gain the same opportunities and rights as well as bear the common obligations. Men are certainly not the diabolic characters and women not the angelic creatures that hold the monopoly of victimhood.²³ Male victimization, female criminalisation and transgender inclusion are the realities which have to be analysed, inserted and implemented in our laws. The application of gender-neutral language such as use of the words “any person” or “any spouse” in place of any man and woman or husband and wife respectively is further suggested. The concept of equality as envisaged in Constitution should be applied upon all criminals and victims respectively. The definition of rape is required to be

²² Virk, *supra*, 1.

²³ Id. At 20.

widened such as recognition should be given also to homosexual rape and marital rape. In cases of abetment of rape and gang rape, the woman must be also held liable. The legislations like the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 and Protection of Women from Domestic Violence Act 2005 should be amended to include male and transgender victims and women as preparators as well with strict guidelines and procedures to help accurately determine the guilt of the accused.

Gender neutral laws will not find any practical approach unless the deep-rooted male superiority vanishes from the society. Considering the influence of education and perception, children also need to be brought up in a gender-neutral environment, without having gender stereotypes embedded into their minds such as ideas like “boys don’t cry”, “women belong in the kitchen” and various other gender roles.²⁴ Thus, it can be said that gender neutrality is intrinsically linked to educational attainment and thus it has to be started from family level at homes by parents.

More effective implementation of women protection laws is to be done so that women can actually stand at par with men before the dearth of gender neutrality is fulfilled. Lastly, before introducing gender non biasness, all the genders are not only to be legally but also socially recognised. Though transgenders have been given the status of legal recognition in The Transgender Persons (Protection of Rights) Act, 2019 but still they are treated as the subject of mockery and find vacuum in our criminal laws. It has to be remembered at last that true equality means holding everyone accountable in the same way regardless of any gender ideology.

²⁴ Ananya Raghavendra, Gender Neutral Criminal Laws: Is India Ready?, A Publication of Jus Dicere & Co. 166 (June, 2018).