



GENDER INEQUALITY IN CRIMINAL LAWS: A DENIAL OF RIGHTS TO MEN AND TRANSGENDER

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“Injustice anywhere is threat to justice everywhere.”

- Martin Luther King (King 1992)

INTRODUCTION:

Most of the Indian Criminal laws have been drafted in the 19th century and in this 21st century these laws have undergone a massive change to bring them in lines with the existing social, economic and political environment. One such concept that requires an overhaul is that relating to the gender inequality in criminal laws. The current definition of “gender”¹ in Indian Penal Code applies to male and female only which means transgender are not covered under this definition of gender. Similarly in the current definition clause there is definition of “Man and woman”² but in IPC nowhere the term “transgender” is defined. All people are born free and equal in dignity and rights including LGBT people. If we go through the sexual offenses in IPC we will find that there is specific provision for women, specially when we see the definition of *rape*³, *voyeurism*, *sexual harassment and stalking* these are gender specific in nature. The framers did not even mention the punishments for women and transgender. In these cases, women and transgender are not punished. In earlier days only women are considered as victims. Even

here the perpetrators are always male and the victims are always female. . From this arises the assumption that the Offence of rape is merely an act of sex, for instant gratification of the sexual desire of the person committing it. But there has been another point of view attached to it that reflects that the act not only comprises of just lust but is also a way of asserting and includes acts of humiliation and acts of power. And if this point of view stands or hold any good, then there is absolutely no reason why the males and transgender are being excluded from being a victim of rape in India. Sexual introduction and sex personality are necessary to each individual's respect and should not be the reason for separation or mishandle Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity The Principles affirm binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfill that precious birthright⁴.

All human rights are all inclusive, reliant and inseparable. Another important issue of actually comprises of gender neutrality is whether gender only includes the female body and the male body. If we assume that gender only comprises of these two, then we are clearly turning a blind eye to the plight and sufferings of the people and the section of the society that does not adhere to the gender binary⁵. In its 172nd report⁶, the Law Commission of India recommended that the rape law must be gender neutral, and also

¹Section 8 of IPC, 1860

²Section 10 of IPC, 1860

³Section 375 of IPC, 1860

⁴National Legal Service Authority v. Union of India & others (2014) 5 SCC 438, para. 21.

⁵Menon, N., *Seeing like a Feminist* (Zubaan and Penguin Books India Pvt. Ltd. 2013)

⁶2000.



opined⁷ that section 377 of IPC deserves to be deleted. It has also been argued that the principle enshrined and provided for under Article 14 of the Indian Constitution of that of equality before law and equal protection of law needs to be applied here as well⁸.

Research Problem –

The Section 8, 10, 354A, 354B, 354C, 354D, 375, 376 of IPC includes the person or he/she which is clearly defined that either the male or female. When given a plain and strict reading simply connotes that the sexual offenses can only be committed against the women and can only be committed by the men. Further Section 114A of the Indian Evidence Act has changed the presumption to that of guilt and shifted the burden of proof on the perpetrator if the woman testifies that there was absence of consent. Now the question arises that what about the transgender? The another point is what about the male victims or transgender victims and female offender /transgender offender? If the rest of sections is clearly defined the literal meaning of victim person / accused person then it should also include the meaning in the neutral sense. Through this research the researcher is aimed to analyse and give a liberal interpretation to these sections through various case laws, data, report and to further research about the societal need for gender neutrality in these laws.

Statement of Problem –

For the purpose of this study, the following statements of problem have been framed:

- Whether the specification of victim / accused on the basis of gender in sexual offenses deprive the neutrality of law or not ?

- Whether denial of gender neutrality in criminal laws leads to the violation of Indian Constitution?
- Is need of hour of Indian society is such as it demands the gender neutrality in criminal laws to the full extent?

Hypothesis –

In this era the gender neutrality in sexual offenses is still a hypothetical thinking.

Objective of the Study-

The objective of this study is to deeply analyze the sexual offenses in Indian Penal Code and to check whether there exist any situation with any probability that a man or a transgender can be also be a victim of the sexual offenses. The objective of this study is also to look for the situation or probability where a woman or a transgender can be a perpetrator of the sexual offence. Further, the objective of this study is also look for the need of the society with respect to the gender neutrality of criminal laws in India to full extent and to correlate the gender neutrality in criminal laws with the fundamental jurisprudence of the Indian Constitution.

Nature and Scope of the Study –

As the issue of gender neutrality with respect to criminal laws is an emerging issue and there is very less chances of any reported case therefore the researcher has opted that the research should be carried out on various legal propositions by way of analysing the existing statutory provisions and cases by applying the reasoning power. Also, as it is one of the objectives of this research to analyze the need of society with respect to the gender neutrality with respect to criminal laws therefore the researcher of the view that

⁷172nd law commission report, 2000.

⁸Agnes, F. Law, Ideology and Female Sexuality. Economic and Political Weekly, 844-847 (2002)



a survey should be carried out for analysing the need of the society. Therefore the researcher has opted for doctrinal as well as non-doctrinal methods of research.

1. Legal Provisions and their loopholes.

With the changing times and the fluidity of gender roles in the modern society, it has been an often debated subject as to whether the Union of India requires a law governing the offence of rape that is gender neutral, which means allowing for men and women to be regarded to as both potential offenders and potential victims, and now after the consideration of transgender as a third gender, also regarding them as both potential offenders and potential victims.

Sexual violence is a serious violation of human rights. While it has many forms, sexual violence means that someone forces, manipulates, or harms someone else into unwanted sexual activity without their wilful agreement and informed consent. Sexual violence can affect people of all genders and ages.

The World Health Organisation defines it as “any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic a person’s sexuality, using coercion, threats of harm or physical force, by any person regardless of relationship to the victim, in any setting, including but not limited to home and work”⁹

The Indian Penal Code (IPC) defines several acts of sexual violence as crimes, names each

crime, describes the acts that make it a crime, and lays down its punishment. Remember that sexual activity between two wilfully consenting adults is new era crime.

Before 2013, the IPC contained only two sexual offences. Section 376 punished a limited definition of rape, and Section 354 punished “outraging the modesty of a woman” which applied only to routine incidents of molestation, which refers to acts of making unwanted sexual contact or advances. Until 2013, many kinds of sexual violence were entirely missing from the law, which meant survivors could not report them to the police. In 2013, the law was amended to bring in definitions of more sexual offences. The 2013 Amendment Act expanded the definition of rape and brought in other sexual offences including sexual harassment, forced disrobing, voyeurism, and stalking, among other forms of sexual violence. This table specifies the full range of sexual offences defined and added in the IPC in 2013 and the punishments they carry.

2. Law on gender neutrality in India¹⁰

The term Gender Neutral means the view where the policies, language, and other social institutions should avoid distinguishing roles according to people’s sex or gender, to avoid discrimination arising from the impression that there are social roles for which one gender is more suited than another. All genders should be respected. The bill was introduced in 2012 and they suspended it in 2013 when it was reported by the *Ministry of*

⁹World Health Organisation(2002), “*World report on violence and health*”, edited by Etienne G. Krug, Linda L. Dahlberg, James A. Mercy, Anthony B. Zwi and Rafael Lozano, page 149, https://www.who.int/violence_injury_prevention/viol

[ence/world_report/en/full_en.pdf](https://www.who.int/violence_injury_prevention/violence/world_report/en/full_en.pdf) as accessed on 27 November, 2020.

¹⁰Diva Rai ,What are the laws on gender neutrality in India, July 20, 2020.



Home Affairs in a PIL that only a man can be a violator and not a victim. The Indian Constitution under *Article 14 and 15* talks about equality.

2.1 Objectives of the Bill

- Protection from false accusation

This bill emphasizes various rights of a man protecting himself from False Accusation of Rape, Preventing the Male Child Abuse, Custodial Rape, Sexual abuse against youngsters, “*No one would believe that a man too can be raped and be sexually assaulted*”. Most of them claim that *Section 375 of IPC* is gender-biased since it does not identify where men too can be the victim. It just provides the right for a female to claim a rape suit. Few of the men’s rights groups, activists and lawyers believe that false accusation of Rape is found mostly in the cases of consensual relationships and a woman files a case where these relationships end. Certainly, a woman driven by revenge and self-interest is not making any false allegations when those relationships end.

- Change in recent scenario

The reason for introducing the bill to be gender-neutral because after the historic judgement where consensual sexual intercourse between the individuals of the same sex or transgenders under *Section 377* was decriminalised but *Section 375* which is co-related to *Section 377* recognizes only a woman can be a victim of rape and neither a transgender nor a man.

- Provisions for protection

A petition filed by an advocate *Sanjiv K Kumar* challenged the constitutional validity of **Section 375 and 376 IPC**. The predominance of a man has been shown in many sexual crimes such as *Rape, Stalking, Voyeurism and Sexual harassment*. The *FIR*

(*First Information Report*) for these sections can be filed only by a woman.

- Men also feel same emotions

The 3 out of 27 cases of sexual abuse were at its peak. The 3 children had a similar issue of irregularity in attending the school, constant fever, constipation, sleep disturbances, reduction in social interaction, academic decline, etc. Men also go through depression, trauma, psychological distress similar to women counterparts.

- Resistance to gain parental rights

There can be cases where a raped woman is married to the offender to protect her stigma towards society but is there any law which protects male resisting from gaining parental rights to the offence which is not committed by him. In such case, if he lacks in proving that he is not guilty of rape, to prevent social stigma they confide the matter.

- Custodial violence

Usually, there are chances that males might be tortured during police or under judicial custody when known they have committed a rape unless the same has been not proved that he is the offender of the rape. In such cases, the human and fundamental right of the male gender is violated.

- Breaking the stereotypes

Generally, it is assumed that a male cannot be raped and he is not a victim as an outcome of sexual intercourse. Mostly, males are being faced with anal and oral penetration in their daily lives. Secondly, if any of the aforementioned things happen to them, few of them there are no provisions for them to an enforcement authority, they are unable to conclude whether men can be a victim of rape.

2.2 The arguments in favour of Gender Neutrality Bill, 2019

The definition of rape has been changing from time to time. Before the December



Delhi's gang rape (Nirbhaya Rape) case, it simply included penile-vaginal penetration but after the Criminal (Amendment) 2013, it included all forms of penetration in vagina, mouth, urethra, anus, etc. but the definition is gender-specific as it considers rape can be committed only by a male and not a female. The arguments in favour of male rights in gender neutrality are:

- Recognizing male's human and gender rights

When referring to the protection given to them i.e., to a particular gender of the society, the other genders (Male & Transgenders) should also be given the same safety. The provisions of Article 14 and 15 of the Indian Constitution should be respected.

- Protecting a man from always not being a perpetrator

In the Indian context, it is seen that only a man possesses the ability to rape and not a female. That is why a man is always held as a perpetrator and not a victim in the eyes of law.

- Protects that male gender from being sexually assaulted

The landmark judgement of **Navtej Singh Johar v/s union of India**¹¹ recognized the rights of the transgenders and decriminalized consensual homosexuality. Before the insertion of Section 375A IPC, the sexual assault of males was not acknowledged which was one of the reasons why judiciary could not interpret sexual crimes as gender-neutral.

- Lack of provision under law

The reason behind males was not filing a suit for their sexual assault in the past might be of the fact that no one would believe a man being raped in a patriarchal society and lack of such laws had no grounds for protecting

themselves. But now, this law is going to create an impact when some population of men open up that they were sexually assaulted previously.

2.3 The arguments against the Gender Neutrality Bill, 2019

The offence of rape itself shows physicality in its definition which talks about the dominance of a specific gender and the aggrieved has an injury to her stigma. If these laws were made gender-neutral, then it would become difficult for the judges to interpret a particular case and the probability of seeking justice becomes less in number and a woman has to battle both social stigma and social mindset. The following are few of the reasons why this bill is being opposed to making the laws gender-neutral:

- Female on male rape is far away from the reality

As advocate Agnes said, there are no instances where a man is raped by a woman. The lack of female on male rape in the statistics and surveys depicts that a country with no such issue needs any law in advance.

- Anal and oral penetration cannot be considered rape

Most of the cases which include anal penetration are faced by children and youngsters but for them, the POCSO Act has already been made gender-neutral. Apart from that anal penetration is possible only if the offender is a male and there is it provides no ground for a female to be an offender in this situation.

- Men don't get pregnant

In a case law a boy who was performing fellatio on an elder boy who was known for his petty crimes in that area. The father refused to file a case under the POCSO Act

¹¹ W.P. (CrI.) No. 76 of 2016 D.No. 14961/2016



because they didn't have any forensic report nor they could get the video. The father has said that "*he neither lost a hymen nor will he get pregnant, he is a man and not a sissy*".

- Victimization of females is possible

There are chances that the offenders would easily set free rather than being put behind the bars. When a woman approaches a court, she always steps in with a mindset of how society will consider, how she is going to tackle all the situations and how she will prove her innocence to everyone.

- Practical aspects

It was difficult to even when the rape laws were not gender-neutral and if at all it is made, the sufferer would be females at most of the times. It is always possible for the offender to question a woman even if she has not committed anything. There are provisions according to which there is no arrest of the women after sunset and before sunrise. Such provisions will be challenged because of this decision.

2.4 Statistics

There are instances where every 1 out of 6 in the male's population faces sexual assault in America. John Kelly, who was a student of Tufts University was raped by his former male partner and therefore he raised the issue before the United States Congress on same-sex violence in 2014. In that case, it was questioned whether, before Criminal (Amendment), 2013 Justice Jaspal quoted the following passage from a California law review:

"Men who are sexually assaulted should have the same protection as female victims, and women who sexually assault men or other women should be as liable for conviction as conventional rapists". In a survey conducted

by the Ministry of Women and Child Welfare in 2007, it came to their notice that 53.22% of children faced one or more form of sexual abuse. Out of that, the no. of boys composed of 52.94%.

3 Right to equality before law.

The first expression with respect to equality before law is enumerated in Article 14 of Constitution of India. The Concept of equality we follow in article 14 is egalitarian equality. Egalitarian equality is based on the concept of "like should be treated alike" which means two different classes of people can be treated differently however two similar class of people cannot be treated differently. i.e. all convict in a prison should be treated equally. However an innocent person and a accused cannot be treated equally.

In the case of **W. kalyani v/s state**¹², the provision is currently under from criticism from certain quarters for showing a strong a 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 offences of adultery . indeed the section provides that the wife cannot be punished even as an abettor . thus the mere fact that the appellant is a women makes her completely immune to the charge of adultery and she can not be proceeded against for that offence.

Deeksha Dwivedi & 3 Others Petitioners v/s. Union Of India Thru Secy. & 2 Others

The court observed that the campus library would have to be on a gender neutral basis. A breach of gender neutrality would involve an infraction of constitutional norms in relation

¹² 2012, 1 SCC 358



to the guarantees of equality under Article 14 and of gender identity under Article 15 of the Constitution.

In the case **Ram Krishna Dalmia v. Justice Tendolkar**, The Hon'ble Supreme court of India laid down the famous "classification test". It promotes the state to make differential classification of subjects on the basis of intelligible differentia and it must have a rational nexus with the objective that is sought to be achieved by the classification¹³.

Further in the case of **NALSA v. UOI**, the Hon'ble Supreme court of India observed that **Article 14** of the Constitution of India states that 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 also ensures equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws and nobody is denied such protection¹⁴.

3.1 The Transgender Persons (Protection of Rights) Bill, 2019 was introduced in Lok Sabha on July 19, 2019 by the Minister for Social Justice and Empowerment, Mr. Thaawarchand Gehlot¹⁵.

- **Definition of a transgender person:** The Bill defines a transgender person as one whose gender does not match the gender assigned at birth. It includes trans-men and trans-women, persons with intersex variations, gender-queers, and persons with socio-cultural identities, such as kinnar and

hijra. Intersex variations is defined to mean a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes, or hormones from the normative standard of male or female body.

- **Prohibition against discrimination:** The Bill prohibits the discrimination against a transgender person, including denial of service or unfair treatment in relation to: (i) education; (ii) employment; (iii) healthcare; (iv) access to, or enjoyment of goods, facilities, opportunities available to the public; (v) right to movement; (vi) right to reside, rent, or otherwise occupy property; (vii) opportunity to hold public or private office; and (viii) access to a government or private establishment in whose care or custody a transgender person is.
- **Right of residence:** Every transgender person shall have a right to reside and be included in his household. If the immediate family is unable to care for the transgender person, the person may be placed in a rehabilitation centre, on the orders of a competent court.
- **Employment:** No government or private entity can discriminate against a transgender person in employment matters, including recruitment, and promotion. Every establishment is required to designate a person to be a complaint officer to deal with complaints in relation to the Act.
- **Education:** Educational institutions funded or recognised by the relevant government shall provide inclusive education, sports and recreational facilities for transgender

¹³AIR 1958 SC 538

¹⁴(2014) 5 SCC 438

¹⁵<https://www.prsindia.org/billtrack/transgender-persons-protection-rights-bill-2019>.



persons, without discrimination. two years, and a fine.

- **Health care:** The government must take steps to provide health facilities to transgender persons including separate HIV surveillance centres, and sex reassignment surgeries. The government shall review medical curriculum to address health issues of transgender persons, and provide comprehensive medical insurance schemes for them.
- **Certificate of identity for a transgender person:** A transgender person may make an application to the District Magistrate for a certificate of identity, indicating the gender as 'transgender'. A revised certificate may be obtained only if the individual undergoes surgery to change their gender either as a male or a female.
- **Welfare measures by the government:** The Bill states that the relevant government will take measures to ensure the full inclusion and participation of transgender persons in society. It must also take steps for their rescue and rehabilitation, vocational training and self-employment, create schemes that are transgender sensitive, and promote their participation in cultural activities.
- **Offences and penalties:** The Bill recognizes the following offences against transgender persons: (i) forced or bonded labour (excluding compulsory government service for public purposes), (ii) denial of use of public places, (iii) removal from household, and village, (iv) physical, sexual, verbal, emotional or economic abuse. Penalties for these offences vary between six months and
- **National Council for Transgender persons (NCT):** The NCT will consist of: (i) Union Minister for Social Justice (Chairperson); (ii) Minister of State for Social Justice (Vice-Chairperson); (iii) Secretary of the Ministry of Social Justice; (iv) one representative from ministries including Health, Home Affairs, and Human Resources Development. Other members include representatives of the NITI Aayog, and the National Human Rights Commission. State governments will also be represented. The Council will also consist of five members from the transgender community and five experts from non-governmental organisations.
- The Council will advise the central government as well as monitor the impact of policies, legislation and projects with respect to transgender persons. It will also redress the grievances of transgender persons. Most of the sexual offences are gender specific, so they apply only to women as victims and men as perpetrators. But some are gender neutral, for instance the offences of human trafficking and acid attack. When an offence is gender neutral, anyone – a man or a woman - can be a victim or a perpetrator. But what about the rest of the offences.

4. Rationality of society and relevant cases

As per the data released by the Center for Disease Control, in the year 2010, it was found that 93.3% male rape victims reported of their perpetrators being male, but 1 out of every 21 males that were subject to unwanted sexual contact reported that they were “made to penetrate”¹⁶ by women, by the use of

¹⁶Thomas R. Frieden et al., National Intimate Partner and Sexual Violence Survey: 2010 Summary Report (2011).



aggressive and coercive tactics, psychological pressure and coercion. The commission of such acts, against the will of the man causes the same psychological pressure that a female victim of rape faces¹⁷ and the absence of any legal remedy in this regard violates the rights of the men in the society.

The fixation of the paradigm to a male-on female perspective lead to the suppression of their true identities by the members of the transgender community to fit within the gender specific notion of the Offence of rape. As a result, certain offenders and victims are absent from the various theories of rape because they refuse to give up their respective gender identities. In 2015 a report shows fifteen instances of “corrective rapes” that were prevalent in Telengana over 5 years. The act of violence was committed by the family and was categorized as a hate crime, in order to correct their transgender children’s sexual preference. In these scenarios, the transgender individual is forced to have sex with their family members, maybe even a parent, in order to ‘cure’ them¹⁸.

In 2015, a 16-year-old boy was sexually assaulted by his friend’s mother. According to the report that followed, when the boy had gone to meet his friend on Chembur, Mumbai, the mother spiked his soft drink. When he lost consciousness, she stripped him and forced herself upon him and recorded the entire thing. She proceeded to blackmail him

and regularly summoned him to her house for the next three months. She threatened to accuse him of rape if he ever told anybody of what had taken place between them¹⁹.

A 19-year-old male student of BHU was gang raped by five men inside a car within the territory of the campus of the university. Despite filing a report, the police officers were lapsing in taking up the investigation.

4.1 Action required: This Criminal (Amendment) Bill, 2019 would make alterations in the Indian Penal Code, Code of Criminal Procedure and the Indian Evidence Act to amend the word “Man” or “Woman” to “Any person” or “other person”. It also proposes to replace the terms ‘penis’ and ‘vagina’ with “genitals”. Earlier, they held it that only a man can commit rape since they held it of the fact that only he can be the perpetrator and only the women being the victim.

5. Conclusion

When establishing a sexual crime to be gender-neutral, it implies that any gender of the society can have easy access to justice and the discrimination of any specific gender in respect of sexual crimes comes to an end. When everyone is treated equally, it satisfies the very basic nature of the Constitution. Isn’t this discrimination a challenge to the basic structure?

¹⁷Patricia Novotny, Rape Victims in the (Gender) Neutral Zone: The Assimilation of Resistance?, 1 SEATTLE JOURNAL FOR SOCIAL JUSTICE (2003).

¹⁸Rohini Chatterji, Parents in India are using ‘corrective rape’ to cure homosexual children, FIRSTPOST, June 1st, 2015.

¹⁹Nirmalya Dutta, 16-year-old boy raped by a woman in Mumbai – can men be sexually assaulted?, <http://www.india.com/news/india/16-year-old-boyraped-by-woman-in-mumbai-can-a-man-be-sexuallyassaulted-337583/>, Last accessed on 20th Feb., 2021.