

Maiden Issue

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Editor

Prof. M. Afzal Wani



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EDITORIAL

It is a matter of immense pleasure to put the maiden issue of the *IILM Law Journal*, April 2023 in the hands of our respectful and responsive members of the legal Fraternity. As a new initiative, it is to provide opportunity to law researchers and those who are doing research in allied subjects, to publish their research, after *peer reviewing*, for the benefit of people interested in legal studies, social studies, legislation, judicial decisions and working of the law. The journal is expected to emerge as a vehicle for thought transmission in multiple dimensions across disciplines and sharing of concerns with critical thinking. Original focused studies with purpose, after appropriate choice of methodology, in preference to stereotypes, will be highly appreciated.

Researches for exploring traditional wisdom and historical context, scientific enquiry, apposite scrutiny and futuristic outlook will be a priority for this journal. Case comments, research notes, review articles, rejoinders and book reviews will be highly appreciated.

This maiden issue covers entries on the themes: Indian Constitutional Stance and Achievements on United Nations Sustainable Development Goals of Equality And Justice; Indian Approach to International Arbitration; India's Target to be a Carbo-Free Country; Data Protection vis-a-vis Right to Privacy In India; Medical Tourism and the Law in India; Collective Investment Scheme; Role of Judiciary in Prevention of Custodial Death with Special Reference to Human Right Jurisprudence; Enforceability of Non-Compete Covenants in Employment Contracts vis-a-vis Judicial Pronouncements in India, and the Movement of Criminal Law towards Equality and Justice for All Regardless of Gender. These are providing ideas for national development, international understanding, working of law in society, policy framing, legislation, judging, public administration, diplomacy, system-

management, regulation of technology and social reform. I wish the journal to contribute to Indian Jurisprudence as a rich platform for projection of well researched factual situations and viable ideas and suggestions.

I am grateful to the contributors, advisors, reviewers and the members of the editorial committee of the journal for their efforts cooperation in bringing out this issue of the journal in a shortest possible period of time. Further, critical comments and constructive suggestions from any one for improvement are most welcome.

Thanks.

Prof. M. Afzal Wani
Editor

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LAW & JUSTICE IN GLOBALIZING WORLD THE MOVEMENT OF CRIMINAL LAW TOWARDS EQUALITY AND JUSTICE FOR ALL REGARDLESS OF GENDER

Megha Chadha*

Abstract

The binary notion of the term “gender” is strongly ingrained in society’s mentality, however the term’s true meaning is that it encompasses male, female, and transgender people. Laws that are gender-neutral aim to treat all genders equally and without harmful prejudice in terms of punishment and opportunity. Since the mediaeval era in Indian history, weak women have been oppressed and exploited; as a result, laws have been passed to grant them specific protection. Women are now on a level with men in terms of status, education, and employment thanks to the sincere efforts of legislators, But since the advent of globalisation, the term feminism is misunderstood. With the ongoing development of the socio-legal system, the rights of these other communities must also be acknowledged. This essay focuses on the disparities between India’s many gender-specific criminal laws, particularly those that pertain to sexual offences and cruelty, and the rights to justice, liberty, equality, and dignity that our Constitution guarantees. Changing gender-biased criminal legislation is necessary because to focus on uplifting women is not to discount the plight of other marginalised people. Concerns about sexual orientation, gender identity, and gender-based discrimination are only some of the issues that are raised in this article and need to be handled before gender-neutral legislation may be implemented.

I. INTRODUCTION

We have a skewed picture of gender roles because of harmful

stereotypes, such as the idea transgender people are the impoverished, women can only be carers, and males can only provide for their families. As a result of these ideologies, the bulk of Indian law is biased toward one gender or the other; for example, Indian family law is based on patriarchal, patrilineal, and patrilocal values.¹ When it comes to “sexual offences” and “cruelty”, the criminal laws of the country assign males the position of offender and females the role of victim, but transgender persons are not assigned to either role. Legislators have never considered enacting gender-neutral laws since, in their view, sexual assaults on women are by far the most common type of sexual crime. When the rights of one minority group are disregarded in order to ostensibly protect the rights of another minority group, a violation of justice occurs on both a moral and legal level.

II. PROVISION OF CONSTITUTION

The Preamble of our Constitution states that its inhabitants would be guaranteed “social, economic, and political justice” as well as “equality of position and opportunity.”² Fundamental Rights have transformed this promise into a guarantee. All people are granted equality in one way or another under Articles 14, 15, and 16³. This means that Article 14 may be compared to a genus, while Articles 15 and 16 can be compared to species. According to Article 14, “the State shall not deny anybody equality before the law or the equal protection of the laws” and This rule also subtly incorporates the idea of “equality among equals” or justifiable categorisation. Citizens are protected from discrimination under Article 15 of the Constitution, including sex-based discrimination. As an exception

¹ Flavia Agnes, *India's Family Laws Are Discriminatory. That's Why Judges Shouldn't Be "Neutral" on Gender.*, THE WIRE, <https://thewire.in/women/indias-family-laws-are-gender-blind-judges-shouldnt-be-afraid-to-question-them> (last visited Jan 22, 2023).

² INDIA CONST. Preamble.

³ INDIA CONST. Art. 14, 15, 16.

to Articles 14 and 15(1) and (2), Article 15(3)⁴ allows the state to make any exceptional provisions it sees fit for the “benefit of women and children.” The main goals were to increase women’s influence and close the gender inequity gap.

III. IMPORTANT LAWS THAT ARE GENDER-SPECIFIC

- **§ 498-A of “Indian Penal Code”⁵**

The violation of § 498-A is a cognizable offence that cannot be compounded or subject to bail. Thus, it established the accused’s guilt before it was proven, which goes against natural justice principles that state that an accused person is assumed innocent until proven guilty. The Criminal Procedure Code’s Section 41⁶ gives the police broad authority to detain the accused without a warrant. Most often, when a cognizable offence occurs, the police, paralysed by the idea of women’s maltreatment, act hastily and without consideration. Protection for abused women is necessary, but Putting the accused spouse and his family in detention facilities or keeping them there until a court gives them bail is not an acceptable way to provide them with such protection. The abuse of the section has progressed to the point where the police are even requesting payments from the spouse or his family members.

There is no question that women have abused this clause in a huge number of instances, but that does not imply it has lost its fundamental standing. It is categorically false to suggest that such forms of cruelty are only naturally associated with men because the word “abuse” encompasses physical, mental, as well as emotional cruelty. Any gender can become entangled in the victimisation web, and our laws must provide equal protection for everyone.

⁴ *INDIA CONST.* Art. 15, cl. 1, 2 and 3.

⁵ The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860, § 498A (India).

⁶ The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974, § 41 (India).

- **Provision under “Protection of Women from Domestic Violence Act, 2005”**

The legislature passed “the Protection of Women from Domestic Violence Act, 2005”⁷ to fill in the legal deficiencies in §498-A IPC. This Act expanded the definition of domestic violence and gives female victims of the crime access to both civil and criminal legal remedies, including protection orders and injunctions in their favour. An important distinction is that the PWDVA extends the remedy to victims of “domestic relationships,” which includes “any ties based on consanguinity, marriage, adoption, and even partnerships which were in the nature of marriage.”

Due to the assumption that men commit the majority of crimes, this Act is also hampered by gender sensitivity. Because of this, the persecution of transgender persons has not been acknowledged in PWDVA, and the “aggrieved person” is clearly the “woman.” Due to institutional shortcomings, both the PWDVA and section 498A of the IPC have shown to be ineffectual in the majority of instances.

- **Sexual offences such as rape**

The most infamous Nirbhaya case prompted significant changes to the definition of rape and the addition of multiple additional sexual offences to the Indian Penal Code. According to the idea of rape as it has developed, a man may penetrate a woman’s mouth, urethra, anus, or any other area of her body using any item or portion of his body. The only application used to be penile-vaginal penetration. Our gender-specific laws serve as the best illustration of how deeply ingrained the concepts of masculine dominance and feminine sensibility are in our culture. Unfortunately, court rulings on the rape laws in India also show a fairly traditional conception of the crime, where rape is seen as an assault on a woman’s body in addition to her modesty, chastity, and honour. The efficacy of

⁷ The Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India).

defences is weakened by this patriarchal perspective. The right to a dignified existence, which includes the right to one's own body, is becoming more and more linked to rape. Any age or sexual orientation can lead to a sexual assault. The rationale that male, female, or transgender criminals or victims may be involved in rape and other sexual offences should be included into the law. The lady in a rape case is deemed to not have provided permission if she declares as much in court, in accordance with section 114A of the Indian Evidence Act.⁸ On the other hand, other elements of society are not adequately protected by our laws against sexual offences. It flagrantly entails a grave infringement of the right to equality. Despite the fact that Indian law does not classify marital rape as rape, consensual sex that is performed when a couple is pretending to be married is frequently seen as rape. As a result, the legislation as a whole becomes highly lopsided.

- **Other Sexual Offences under IPC**

According to §354-A,⁹ males who violate any of the provisions of the law against women—including physical contact, the demand or solicitation for sexual favours, statements with sexual overtones, the exhibition of pornography without their will—are liable to fines and/or jail as punishment. Similar to this, it has been established that voyeurism and stalking are crimes committed by men against women under sections 354C and D¹⁰, respectively. This was made public after Vijay Nair, a music businessman, discovered he had no legal options after a lady pursued him repeatedly online. These discriminatory laws against women not only violate the standards of justice and equality but also make a mockery of human rights.

- **Justice Verma Committee Report**

A report by the Justice Verma Committee was released in 2013 in

⁸ The Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872, § 114A (India).

⁹ The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860, § 354A (India).¹⁰ Ibid, § 354B, 354C (India)

response to the Nirbhaya Case, making recommendations for reforms to existing rape legislation. The Committee has recognised “the right to sexual orientation” as human right, i.e., India cannot deny its inhabitants the “right to be different.” Without a doubt, the Committee was in favour of homosexual and transgender people’s rights being covered by laws that protect individuals from crimes like “sexual assault and harassment.” The Criminal Law Amendment Act, 2013,¹¹ disregarded these suggestions, rendering the Committee’s work useless. The Committee further stated that since children at this age do not understand concepts like “gender,” “masculinity,” “feminism,” it is the responsibility of adults to educate them about concepts other than “perceived notions” by, for example, “stripping out the language of sexism from books/materials, eliminating different lessons for girls and boys (i.e. sewing vs. sports)”. As a result, the Committee illustrated how important personal and sexual education is for fostering a more gender-neutral social environment in youngsters.

- **Bill on Gender Neutral Laws, 2019**

In the matter of “Criminal Justice Society of India v. Union of India”¹², the Apex Court dismissed the plea made by an NGO stating that, “The Parliament has to make a call on the subject.” Then, in July 2019, the bill was proposed to “make sexual offence legislation gender-neutral” by prominent attorney and legislator KTS Tulsi in the Rajya Sabha. To guarantee that the phrases “any man” and “any woman” in the portions of the laws dealing to sexual offences be modified to read “any person,” the bill suggested amending “the Indian Penal Code,” “the Criminal Procedure Code,” and “the Indian Evidence Act.” The bill also requests that Section 375A of the IPC be included to criminalise “sexual assault,” which is defined as “intentionally touching the genitals,

¹¹ The Criminal Law Amendment Act, 2013, No. 13, Acts of Parliament, 2013 (India).

¹² AIR 2010 Del 194.

anus, or breast of the person” or “forcing the person to intentionally touch the vagina, penis, anus, or breast of that person or any other person without that person’s consent, except where such touching is done for proper hygienic or medical purposes.” These planned revisions were quickly abandoned because of the central government’s strong opposition on the grounds that the statistics significantly favour the justification of regulations that only apply to women. Compared to sexual assault against males or transgender people, sexual assault against women is significantly more targeted. Men’s sexual assault is a subject that is rarely mentioned, and when it is, it usually has a humorous undertone. By decriminalising adultery, the Supreme Court took the initiative to introduce neutrality to laws that are gender sensitive. Unfortunately, the government’s precarious stance against gender equality appears to run counter to the Supreme Court of India’s proactive approach.

- **Rights of Transgenders**

When the British implemented “the Criminal Tribes Act, 1871”¹³ which was specifically directed towards them, the standing of the community of third gender people began to decline. Transgender people were treated as felons under this law and could not be released on bond. They might be detained without a warrant, sentenced to up to two years in jail, fined, or both. Even though the Act was abolished in 1952, the harm it did is still evident. The first law to specifically criminalise transgender people is §377 of the IPC¹⁴, which defines unnatural sexual activity as a crime punishable by up to 10 years in jail or life in prison.

The Supreme Court demonstrated tolerance and compassion for transgender people in the precedent-setting case of “National Legal

¹³ Criminal Tribes Act, 1871, No. 27, Acts of Parliament, 1871 (India).

¹⁴ The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860, § 377 (India).

Services Authority v. Union of India”¹⁵. Since transgender people & Hijras are not given equal legal protection under the law, they frequently experience prejudice. Transgender people must be acknowledged as “third persons.” The third community gender is included in the definition of “persons” or “citizens” as specified in the Constitution, according to the country’s legal interpretation. According to the SC, transgender people also have the right to the protections provided by Articles 14, 15, 16, 19, and 21¹⁶. As a result, the focus has shifted from worries about charity or sympathy to human rights. The Supreme Court also gave orders to take steps to reserve seats for people of the third gender in educational institutions and public employment, as well as to take appropriate action to ensure that transgender patients receive proper medical care in hospitals and have access to “separate public restrooms” and other facilities. The Court understood that transgender people’s fears of public humiliation are linked to the general public’s failure to grasp the concept of gender fluidity. Both Governments have been tasked with raising public knowledge of third gender people so that they are not seen as an isolated group but rather as an integral part of society. As a result, different government actions should be done for the welfare and advancement of third gender people. Thus, it had ordered national and state governments to conduct education and outreach initiatives and take transgender people’s fears, embarrassment, gender dysphoria, peer pressure, depression, suicide thoughts, and other difficulties seriously.

The “Standing Committee on Social Justice and Empowerment” was established in July, 2017 to analyse the “Transgender Bill.” In its report, the committee noted a number of issues with the final text and made recommendations. Despite the numerous objections contained in the Standing Committee Report, the Committee’s amendments and suggestions were not included in the Bill when it

¹⁵ AIR 2015 SC 1863.

¹⁶ *INDIA CONST.* Art. 14, 15, 16, 19 & 21.

was tabled in Parliament. The transgender community refers to August 5, 2019, the day “The Transgender Persons (Protection of Rights) Bill” was approved by the Lok Sabha, as “Gender Justice Murder Day.”¹⁷ It’s not even a toothless tiger; there are just a few teeth, and they’re all over the place and lack the motivation, authority, or capability to act on their own. The maximum sentence for any offence committed against transgender people, including sexual assault and endangering life, is two years. In contrast to the Indian Penal Code, minor punishments are imposed on offenders who commit serious crimes.

IV. COMPARATIVE STUDY WITH OTHER NATIONS

- USA

In American law, the word “rape” is not used. According to Chapter 109 A of the United States Code, rape includes all non-consensual sexual activities. Since the term “anyone” is used in the terms of the sexual abuse legislation, they are not gender-specific. The definition of “intimate partner” is broadened to include both men and women in domestic violence laws from several states, including “California, New York, and Washington, D.C.”

- UK

The Sexual Offences Act, 2003, which governs rape legislation in the UK, provides a definition of rape that denotes a man as the preparator, but section 3’s term of “sexual assault” is gender-neutral and essentially embraces any touching that is sexual in nature. The 1997 Protection from Harassment Act is gender neutral since it states that “A person shall not pursue a code of behaviour which amounts to harassing the other.” Additionally, patterns of coercive or controlling behaviour when used against a family member or intimate partner are illegal.

¹⁷ Prachi Singh, *Why is transgender community unhappy with Trans Persons Bill?*, DOWN TO EARTH, <https://www.downtoearth.org.in/blog/governance/why-is-transgender-community-unhappy-with-trans-persons-bill—67158> (last visited Jan 22, 2023).

V. CONCLUSION AND SUGGESTIONS

The law must be steady but it must not stagnate, according to Roscoe Pound. As a result, the law need to be flexible and a model of equality and fairness. Improving women's status should not mean ignoring the plight of victims in other groups, hence gender-biased criminal legislation must be changed. The moment is right for Indian law to consider whether gender-specific laws are fostering gender inequality rather than promoting gender parity because so many developed and developing nations have adopted gender neutrality. People of all genders have the right to be free from sexual assault, and the phrase "human being" encompasses all individuals. The time has come to move away from gender-specific approaches and toward gender-neutral ones. Ultimately, the goal of gender neutrality is to build a society in which all people, regardless of their gender identity, are treated equally. Men are most definitely not the devilish figures and women are not the saintly beings who have the exclusive right to victimisation. The reality of male victimisation, female criminalization, and transgender inclusion must be examined, incorporated, and applied to our laws. It is also advised to use gender-neutral vocabulary, such as saying "any person" or "any spouse" instead of "any man" or "any woman," or "husband" and "wife," respectively. All offenders and victims should be treated equally under the Constitution's conception of equality. It is necessary to broaden the definition of rape in order to recognise both homosexual rape and marital rape. In circumstances involving rape by a group or the abetting of rape, the female member must also face consequences. Male and transgender victims of domestic violence should be included in the preparations for the "Protection of Women from Domestic Violence Act, 2005" and the "Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redress) Act, 2013," and the laws should be revised to provide clearer guidelines and procedures for conclusively determining the guilt of the accused.

Until profoundly rooted masculine domination is removed from

society, gender-neutral laws will not work. Children must also be raised in a gender-neutral atmosphere, free from gender preconceptions such as “boys don’t cry,” “women belong in the kitchen,” and others, taking into account the effect of education and perception. It may thus be claimed that gender neutrality and educational success are inextricably related, and that parents must initiate it at the family level in the home.

Before the lack of gender neutrality is addressed, more effective application of women’s protection legislation must be made so that women may genuinely stand on an equal footing with men. Finally, all genders must be socially and legally recognised before gender non-biasness is introduced. Even though The Transgender Persons (Protection of Rights) Act of 2019 gave transgender people legal recognition, they continue to be ridiculed and lack protection under our criminal laws. Finally, it’s important to keep in mind that true equality means holding everyone to the same standards of accountability.

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Original accounts of research in the form of articles, short articles, reports, notes, comments, review articles, book reviews and case comments shall be most appreciated.

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