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Gender Bias in the Indian Penal Code

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ABSTRACT

The Indian Penal Code gives the substantive aspects that would guide the criminal law in the country. It provides a general penal code for India . Looking back at 1860, the society was very distinct from what we see today. The Indian society has been largely patriarchal and various laws in the IPC have been made in the favour of women. Further amendments have also been appreciated in the context of ensuring that women get proper protection from the judicial system. However, we come across bias in the code, where the provisions are gender specific, and thus, these provisions have failed to adapt and function at par with how the circumstances of the society have changed . In this article, we discuss the gender bias in the provisions of IPC, the principle of gender neutrality and what repercussions do we face today.

I. INTRODUCTION

The Indian Penal Code gives the substantive aspects that would guide the criminal law in the country. It provides a general penal code for India². Looking back at 1860, the society was very distinct from what we see today. The Indian society has been largely patriarchal and various laws in the IPC have been made in the favour of women. Further amendments have also been appreciated in the context of ensuring that women get proper protection from the judicial system. However, we come across bias in the code, where the provisions are gender specific, and thus, these provisions have failed to adapt and function at par with how the circumstances of the society have changed³. In this article, we discuss the gender bias in the provisions of IPC, the principle of gender neutrality and what repercussions do we face today.

II. EQUALITY

Equality is a concept that becomes crucial in light of the well being of the society. The longest constitution that is the Constitution of India enshrines in its preamble. Equality before law and the people being protected by the law equally⁴ is guaranteed by the constitution. This provision

¹ Author is a Student at University of Petroleum and Energy Studies, Dehradun, India.

² Preamble, Indian Penal Code (45 of 1860).

³ Mayank Barman, *Gender Biases in the Indian Penal Code: A look at the provisions*, YOUNG BHARTIYA (Feb 11, 2019), <https://www.youngbhartiya.com/article/gender-biases-in-the-indian-penal-code-a-look-at-the-provisions>.

⁴ INDIA CONST. art. 14

has ensured that the citizens of the country shall be treated fairly by the legal system, by the very laws that guide them. Discrimination is another aspect that is addressed and prohibited on the grounds of religion, race, caste, sex or place of birth⁵.

Equality with respect to this article concerns with the various provisions of the IPC. Gender bias as seen in various provisions is now being discussed as reality unfolds. The cultural context of the times today is very different from when the code was drafted and enacted. Various activist groups and NGOs are raising their voice against such bias.

The law guiding the people therefore cannot be rhetoric. It has to change with the changing times. A basic blueprint of the cultural context when the IPC was drafted consists of prevalent patriarchy and power distance between men and women. A reading of the provisions of the IPC provides for a binary idea attached to the gender of an individual. Men are seen to be in power, or seen as the stronger sex than women. Women are seen as vulnerable and weak. Certain rights have been recognized that pertain to only women, where women only can be the victims. This has to be rightly recognized as the crimes as listed in the IPC, against women are more frequently seen now. Horrific cases such as the Nirbhaya gang rape case haunts this society. However, the other spectrum of these crimes, the other victims, or a different reality cannot be ignored. This ignorance and rigidity defeats the purpose of justice.

The victimization of one gender and the alleged guilt attached to the other becomes a problem in today's times. The third sex is also under radar, where gender bias towards any one of the binary genders constraints their access to justice. Here, due to the gender bias of our provisions, the basic human rights of the third gender are also in jeopardy.

Another perspective to consider here is the intersectional perspective. It becomes crucial to acknowledge that men and women do not have homogenous experiences or life circumstances. Situations and power dynamics differ. And hence, in a given situation, it becomes crucial to inspect the various power configurations that interact⁶.

The article aims to examine the said provisions of the IPC that highlight gender bias. We also examine gender neutrality, the idea that advocates that our laws must not be inclined to favour any one gender while accusing or ignoring any other.

III. ADDRESSING GENDER BIAS

Gender bias or gender specificity in our laws leads us to think about the Justice that is

⁵ INDIA CONST. art. 15

⁶ *Gender equality*, INCLUDE GENDER (Oct 24, 2016), <https://www.includegender.org/facts/gender-equality/>

dispensed. Questions arise as to how fair a particular decision is or how fairly was the case dealt with. The roots of this gender bias, in the Indian Penal Code, lie in the norms established by the society and the assigning of roles to any member based on the identified gender of the child. The difference in their respective status has led us to think differently about the two genders.

A distinction must be drawn here as to the use of the word “he” in the IPC. At other places, words “man” and “woman” appear distinctly, thus highlighting the specificity of the provision. The word “he” on the other hand is used in a neutral sense, to refer to any, a male or a female of any age⁷.

Arvind Narrian (2012) talks about gender neutrality from 3 aspects⁸:

1. The victim
2. The perpetrator
3. In situations of communal riots, war and conflicts.

The Victim in this context is the “woman” and the perpetrator is the “man”. In situations of communal wars and conflicts, it may be widely noted that both men and women are largely subject to heinous crimes including abuse and rape. The same may be noted to be true during the communal riots in Gujarat. In *Prosecutor v. Dule*, the International Criminal Tribunal of Yugoslavia observed that “men were subject to the crime of rape” in times of war⁹. In this case, the non-Serbs faced the crimes. It was held that men were victims, and the same can be rightly applicable to men in any other country.

IV. AN ANALYSIS – SECTIONS AS STATED IN THE INDIAN PENAL CODE, 1860

Following are the provisions that have been briefly analysed to highlight and discuss the gender bias recurrent in the enforcement of criminal law in India:

- **SECTION 304B – DOWRY DEATH**

As per this section, **when a woman dies** as a result of burns or bodily injury within a period of 7 years of her marriage, and if it is established that there was cruelty or harassment that she **suffered from her husband or any relative of the husband**, or with respect to any demands

⁷ Indian Penal Code 1860, Section 8.

⁸ Arvind Narrian, *The Criminal (Amendment) Bill, 2012: Sexual Assault as a gender neutral offence*, 47 EPW (Sep 1, 2012), retrieved from <https://www.epw.in/journal/2012/35/web-exclusives/criminal-law-amendment-bill-2012-sexual-assault-gender-neutral>

⁹ *Prosecutor v. Dusko Tadic aka "Dule" (Opinion and Judgment)*, IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY) (1997), retrieved from <https://www.refworld.org/cases,ICTY,4027812b4.html>

for dowry, then such death will be called dowry death. In this case, the husband or the relative is said to have caused the death of the woman¹⁰.

In this context, we shall also consider Section 113B of the Indian Evidence Act. This provision provides for the presumption that the accused has caused the death of the woman if shown that soon before her death, she was a victim of cruelty and harassment¹¹ caused by him.

In this situation, the husband and his relatives tend to naturally become the guilty parties, wherein they may not have committed the said crime against her. This is a provision that is strictly inclined in the favour of women. Dowry deaths are a serious matter and a menace to the society. This fact is undisputable. However, the credibility of the charges has to be examined before establishing the guilt.

An article in “The Hindu” tells the tale of a case where the court identified the case as false and the reality as fabricated¹². Here, the victim had lodged a complaint that her husband and his relatives had made an attempt to cause her death by kerosene and then setting her body on fire for not meeting their demands for dowry. She later had burn injuries and the said persons were accused under Sections 302 and 304B. During cross examination, however, her parents, who had also previously alleged the crime, retracted from their previous statements. Following this, the court seized the proceedings and her parents were taken into custody for fabricating evidence in a judicial proceeding.

Another example to highlight the repercussions of the bias can be seen by the data from the National Crime Records Bureau (NCRB). Around 200,000 people were accused and arrested in relation with dowry offences in the year 2012. Of them, only about 14.4% were convicted¹³.

- **SECTION 498A – HUSBAND OR RELATIVE OF HUSBAND OF A WOMAN SUBJECTING HER TO CRUELTY**

This section provides for the “cruelty” that a woman suffers, **as caused by her husband or his relatives**. This particular section inhibits a gender bias that makes it highly susceptible to misuse. Cruelty is an important factor that leads way to various other offences against women. However, the misuse defeats the purpose of justice. In the case *Sushil Kumar Sharma v. Union of India*, the Supreme Court observed that any misuse of the legal provision is in fact the unleashing of legal terrorism. The real intention of the said provision is that of a shield and not

¹⁰ Indian Penal Code, 1860, Section 304B

¹¹ Indian Evidence Act, 1872, Section 113B

¹² Nirimesh Kumar, *Dowry Death: parents found guilty of giving false evidence*, TH, Dec 5, 2017.

¹³ Avneet Arora, *80% of all dowry cases end in acquittal*, SBS PUNJABI, Feb 27, 2019,

<https://www.sbs.com.au/language/english/80-per-cent-of-all-dowry-cases-in-india-end-in-acquittal>

a weapon. It was also noted that as a consequence of misuse, the actual implementation of the provision would be deterred¹⁴.

A step towards gender neutrality in this aspect can be attributed to the interpretation of the word “cruelty” in various cases. The Supreme Court in a judgment for *Vinita Saxena v. Pankaj Pandit* opined that “cruelty” may vary with time and person and that it is dependable upon the lifestyle and conditions of the parties in question. It also depends on how much importance they attach to human and cultural values¹⁵. This encourages change and a wider interpretation. The concept of “mental cruelty” has also been discussed wherein it includes implicating false allegations against the husband¹⁶.

A welcome change may be noted in the case *Rajesh Kumar & Ors v. State of U.P.* where an appeal was raised for the need of directives which can help deter the misuse of this provision. In its decision, the Apex court laid down directives to prevent the misuse of section 498A¹⁷.

- **SECTION 375 – RAPE**

Reading this provision provides a clear indication as to who is the victim and who can be the perpetrator. A “man” is said to commit “rape”.....has sexual intercourse with any “woman”. Six descriptions have been provided in this regard¹⁸. The section further highlights the importance of consent and will for sexual intercourse. However, the fact that even a man’s consent and will, may be required has not been traditionally considered. This comes in the wake of various stereotypes attached to both the genders where the man is in a position of power over the woman, and only a woman can be a victim.

Another aspect to this is that the woman cannot be the perpetrator of this crime. This section, by being gender specific, also excludes the transgender community from being a victim of such offence as under the Penal laws of the country.

V. THE SAGA OF THE VICTIM’S AGE

- This section of the IPC is not only gender specific, but it also provides for the age of the victim. The clause *Sixthly* of this section puts an age cap of 16 years for the woman¹⁹, where even if sexual intercourse takes place with or without her consent, it will constitute rape. It victimizes the woman who may have in fact given her consent. This can also lead

¹⁴ *Sushil Kumar Sharma v. Union of India* (2005) 6 SCC 281

¹⁵ *Vinita Saxena v. Pankaj Pandit*, (2006) 3 SCC 778.

¹⁶ *S. Hanumantha Rao v. S. Ramani* AIR 1999 SC1318.

¹⁷ *Rajesh Kumar & Ors v. State of U.P.* (2007) SCC OnLine SC 821

¹⁸ Indian Penal Code 1860, Section 375

¹⁹ Indian Penal Code 1860, Section 375, *Sixthly*

to false implications against the man, and he may be penalized for a crime that was essentially not committed since the consent of the woman was obtained. Again, this part of the provision does not apply to the male gender.

- The age cap placed on what will constitute marital rape – an exception has been placed in the section wherein if a man has sexual intercourse with his wife, it will constitute rape only when she is below the age of 15 years. This creates the problem of marital rape not being recognized as a crime in our country. The punishment in the said case where the wife may be below the age of 15 years is also nominal. Within this exception, one can infer that marriage, as seen in India, provides consent to the husband for sexual intercourse and the same cannot be challenged.

The section definitely covers the circumstances wherein this heinous crime may be committed by a man against a woman. Underage women have also been protected under the IPC. However, the same is not true for men. No such protection has been provided to men, not even to underage men (They do get protection under the POCSO Act, 2012. However, no such provision has been provided under the IPC). In fact, the very idea of male inflicted rape on male, or female inflicted rape on male has been kept at bay. The idea of female on female rape is similarly discarded since a woman cannot be the perpetrator.

The **Criminal Law (Amendment) Ordinance** which was brought up by the centre constituting UPA, was signed by the then President Pranab Mukherjee on Feb 3, **2013**. However owing to the pressure from various women's groups and activists, it was withdrawn. Recommendations from the Justice J.S. Verma panel were adopted in this ordinance. As a result, the term "rape" was replaced with the term "sexual assault", thus stating that "any person" could commit the offence²⁰. It was then argued that such offences against men come under unnatural offence in accordance with section 377, but with this provision struck down comes the complete absence of any legal recourse to men who are victims of sexual assault, or rape, in contrast to the narrow definition provided in the IPC.

False rape cases have caused deep distress and the same cannot be overlooked. In the case *Atender Yadav v. State Govt. of NCT of Delhi* (2013), the court recognized that it must examine all circumstances and search for reliable evidence to determine whether the accused is guilty or not. In this case, the court came across circumstances where there was hostility between the spouses and the daughter had claimed that her father had raped her. The court later

²⁰ Nagendar Sharman, *Only Men can be booked for rape*, HUNDUSTAN TIMES, (Mar 06, 2013, 01:26 IST), <https://www.hindustantimes.com/delhi/only-men-can-be-booked-for-rape/story-qQnSnT8lzd1QOCsansK1H.html>

found that the said rape charges were false. It was noted that false rape cases are not uncommon and the parent may in fact persuade the daughter to make rape charges against the man in the heat of vengeance²¹. This case also highlights that the convention cannot always be true with regard to the father being in a position of dominance or power, as here the contrary is true, with the mother being in dominance.

VI. CAN A FEMALE COMMIT RAPE?

This question had come up in *Priya Patel v. State of M.P.* The issue that came before the court was whether the female could be prosecuted for the offence of gang rape, citing common intention for this offence. The woman involved was charged under Section 376(2)(g) of IPC. The court however contended that the charges against the woman shall be dropped. Abetment for this crime as done by the woman was also not accepted. Supreme Court opined that the woman cannot be said to have the intention to commit rape²².

It can, however, be argued that Section 376(2)(g) does not expressly specify “man” to be the perpetrator. This provision is inclined towards being more gender neutral. But rape is seen, in all certainty, as a male perpetrated crime

Is rape against a man even possible?

Yes it is. The example of Reynhard Sinaga provides the proof here. He was one of the most prolific rapists in Britain, with sexual offences that count up to 159, against 48 men and many more yet to be identified²³. The Indonesian student who lived in the UK would intoxicate men and then rape them. For his crimes, he was sentenced to life imprisonment. This brings us to the conclusion as to the reality and that the social stigma attached to rape against men must be addressed. This may further lead to many cases going unreported. Studies done by the Centre for Disease Control and Prevention (CDC) in the United States found that men reported having been forced into sexual intercourse at some point in their life.

VII. HOW IS THE PROBLEM ADDRESSED

Situations where it is acknowledged that such crimes are committed against men, the terminology changes. The same is not penalized as per the penal laws of the country, but what is said to have taken place is termed as “sodomy”. In an incident at Muzaffarnagar, a teacher was booked for sodomy²⁴. The concern that arises here is that men are subject to sodomy, and

²¹ *Atender Yadav v. State Govt. of NCT of Delhi* (2013) 4 JCC2962

²² *Priya Patel v. State of M.P* (2006) 6 SCC 263

²³ Athira Nortajuddin, *Taking male rape seriously*, THE ASEAN POST (Feb 6, 2020), <https://theaseanpost.com/article/taking-male-rape-seriously>

²⁴ *Teacher among 4 booked for Sodomy in Muzaffarnagar*, INDIA TODAY (Aug 19, 2014, 15:02 IST),

not rape²⁵.

The problem stays largely unaddressed when the subject of sexual offences arises with respect to Prisons. The People's Union of Civil Liberties has remarked that in the year 1981, in Tihar, when a young boy would enter the prisons, prisoners would place bids on him. The competition is about who will have the young boy²⁶.

This situation goes unaddressed. The young boy grows up with no justice, and possibly resorts to the same. The figures from Tihar Jail are worrisome. 6-8 per cent of the prisoners tested HIV positive in contrast to the national average of 1 per cent²⁷. This is a socio-economic issue, and one that questions the scope of our penal laws.

- **SECTION 376 B/C/D**

These sections list out offences committed by public servants wherein a woman is seduced. Such intercourse is punishable under the penal code. However, the bias does not advocate the fact that a woman in a similar position of power can also commit the same offence on a man or a woman. This provision therefore not only highlights the abuse of power, but also a bias and the stereotype of women not having the guilty mind to commit sexual offences.

- **SECTION 354 – ASSUALT OR CRIMINAL FORCE TO WOMAN WITH INTENT TO OUTRAGE HER MODESTY**

The modesty of a woman in our society holds a sacred idea. And thus when violated, the same is penalized by this section. However, the very idea of the modesty of a man is not taken into consideration. Men may be bullied. And one may never deal with these cases formally. These are not within the purview of the IPC. This makes it hard for men to speak up when they face abuse or outrage. This aspect needs a more vocal idea where victimization of men and their vulnerability is also seen acknowledged and dealt with. This again comes from the concept that all men and women cannot have homogenous experiences in life and they may differently be vulnerable to certain conditions.

Another problem that arises from the gender specificity of this section is the use of the word

<https://www.indiatoday.in/india/north/story/sodomy-in-muzaffarnagar-government-run-protection-home-teacher-booked-204666-2014-08-19#:~:text=The%20teacher%20was%20arrested%20on,August%2016%2C%20the%20police%20said.>

²⁵ John Stokes, *India's law should recognize that men can be raped too*, SCROLL.IN (Sep 11, 2014, 01:30 am)

²⁶ Ayeshea Perera, *Why a gender neutral anti-rape law isn't anti-women*, FIRSTPOST (Mar 12, 2013, 17:48:03 IST), https://www.firstpost.com/living/why-a-gender-neutral-anti-rape-law-isnt-anti-women-657065.html?utm_source=ref_article

²⁷ G Pramod Kumar, *Ram Singh's death: Rape and ugly Sexual violence in Indian Jails*, FIRSTPOST (March 12, 2013, 14:58:51IST), <https://www.firstpost.com/india/ram-singhs-death-rape-and-ugly-sexual-violence-in-indian-jails-657071.html>

“modesty”. Modesty has been said to mean the sexual virtue that differentiates a woman and a man. A woman’s sexual virtue is sacred and this highlights how a woman’s virtue is defined by her sexuality. It comes in times where we are aspiring to be more autonomous and individualistic. This societal norm further leads way for all other sexual offences, which according to the Indian Penal Code; find only the woman to be a vulnerable party.

- **SECTION 493 –**

This section deals with situations where a “**man**” **has deceitfully induced a belief of lawful marriage and cohabits with the woman**²⁸. This is a crime that only a man can commit. The law does not take into consideration that a woman can similarly induce the belief of marriage leading to cohabitation and the man having sexual intercourse with her. The law may further believe that men will not suffer due to such endeavours of inducement. It concludes that men can look after themselves²⁹.

- **SECTION 497 OF THE IPC TAKEN DOWN, BUT WHAT WAS THE PROBLEM**

This section was scrapped in 2018. Section 497 dealt with adultery. This has been declared to be a matter that the spouses may deal with privately. However, this section had a gender specificity that came to be questioned:

- This provision allowed the husband file criminal charges against the wife’s lover. **The wife was not punished**, despite being a party to the act. This gave way to the presumption that only a man can have the intention of adultery.
- **The husband was said to be a victim of the sexual relationship** between his wife and another man since the same was carried **out without his consent**.
- **The wife has been given no protection if her husband resorts to the same act**. She cannot file the same criminal proceedings.
- It also talks about the **consent that the wife needs from her husband**, which is missing to establish the sexual relationship with another man.

This provision was thus detrimental to both the genders. The idea behind this was to preserve the institution of marriage which is seen as sacred. However, the progressive thinking adopted by the Supreme Court made way for this being considered a matter to be dealt privately by the

²⁸ Indian Penal Code 1860, Section 493

²⁹ AMITA DHANDA, ENGENDERING LAWS: ESSAYS IN HONOUR OF LOTIKA SARKAR 139-160 (Amita Dhanda, Archana Parashar, Ved Kumari)

spouses.

VIII. TRANSGENDER COMMUNITY – GENDER BIAS LEADING TO IGNORANCE

The third gender has seldom been overlooked. The various provisions of the IPC that provide gender specificity presume the binary concept of genders. And therefore, the penal provisions will not protect the transgender community.

National Legal Services Authority (NALSA) vs Union of India is a landmark case in this aspect. The court acknowledged the prejudice faced by them. It was noted that their gender identity should be respected and that they have equal rights as enshrined in the Constitution³⁰. Following this, the Transgender Persons (Protection of Rights) Bill 2019 was pushed further by the centre. However, this received strong resistance from the transgender community. **The bill required assigning of a certificate of transgender status to the person, and the power to do the same was vested in the government**³¹. This can be seen to be **exploitative** and the very principle of self-identity is in light to be “examined”. The Bill did recognize the offence of sexual abuse towards transgender persons, but the **penalties differ from when the same crime is committed against a woman**. The prescribed punishment ranges from 6 months to 2 years. This span is milder. Therefore, the **rules need a change owing to the crimes experienced by this community with barely any legal recourse**.

IX. REPURCUSSIONS

- It has been found that twice as many married men when compared to women commit suicide owing to abuse suffered at the hands of their wives and her relatives. The incident of Pushkar Singh in the year 2008 is one such incident where he committed suicide owing to the criminal cases that were filed against him and his family by his wife. The legal procedures had left him distraught, not only financially but also emotionally³². In such cases, however, it is widely said that the man has done the same owing to family issues and finances.
- The gender specificity in these sections glorifies the modesty and chastity of a woman. Assumptions are placed about the male sexuality, and the same is rigid. The female sexuality is seen as vulnerable. This is necessary since cases against women are high, but

³⁰ National Legal Services Authority (NALSA) v. Union of India (2014) 5 SCC 438

³¹ *New law that was to guarantee the rights of Transgender persons actually undermines these*, FINANCIAL EXPRESS (Nov 28, 2019, 1:48:47 AM), <https://www.financialexpress.com/opinion/new-law-that-was-to-guarantee-the-rights-of-transgender-persons-actually-undermines-these/1777397/>

³² Avrati Srivastava, *Gender-neutral Indian Penal Code*, LEGAL SERVICES INDIA, <http://www.legalservicesindia.com/article/2011/Gender-neutral-Indian-Penal-Code.html>

vulnerability of females, specially their sexuality is seen as the convention. She is seen to not possess the guilty mind to commit the same crimes that have been made gender specific.

X. CONCLUSION

Gender bias in our laws has long denied equal rights to one section. It is true that special provisions can be made for women and children, but such provisions cannot ignore the plight of the half of the society. Gender specificity is based on the long set rigid ideas of being a male or a female. In today's time, where the spectrum differs from 1860, we must work for greater equality. The bias thus is discriminatory in nature.

It can be rightly noted from the following words:

Gender equality is a goal. It is the pre-requisite to meet the challenge of reducing poverty, promoting sustainable development and building good governance. -Kofi Annan.
