

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 4

2022

© 2022 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

Sex Laws and Constitutional Rights in India: A Quintessential Paradox Concerning Gender Neutrality

DESIKAN GV¹

ABSTRACT

The Constitution of India guarantees certain rights as innate and inalienable that include the Right to Equality (Art. 14-18). However, the sex laws in the Country are prejudiced, lacking gender-neutral language. For example, Section 375 of the Indian Penal Code 1860 defines 'Rape' as an act, as if, committed only by men and only against women. Such disproportionate articulations in the sexual offence related provisions, principally ignores the possibility of men and transgender being a victim and precludes the possibility of women being in the place of an offender. This paper in its introduction, explores the concept of gender neutrality and reviews various instances of gender bias and inequality present in the Indian legal system particularly relating to sexual offences. Due to lack of statistics in India on the subject of sexual offences against men and transgender, this paper presents a comparison based review of similar laws in few other Countries. Referring to a few cases filed in the Supreme Court and High Courts in India, this paper provides the views of the respective Judges and the Central Government on matters concerning gender neutrality in the sex laws. Exploring further, this paper details around the voids, perceptions and contemporary inclinations towards gender neutrality in the country. The paper concludes with a suggestion to reassess the sex laws in India through categorization of variable degrees of offences and clearing the existing gender bias to ensure equal justice.

I. INTRODUCTION

Sexual violence against genders other than female are either subdued or softly dealt with and in most occasions the law seems to be insensitive particularly when it concerns male victims². Though there are provisions protecting the transgender facing sexual abuse, yet they are not as conclusive or as protective as they are in the case of female victims³. For example, the highest punishment under the Transgender Act against sexual abuse is much lighter than the nethermost

¹ Author is a Research Scholar at Alliance School of Law, Alliance University, Bengaluru, India,

² Jahnavi Mehta, *Sexual Violence against Men in India*, LEGAL SERVICES INDIA (Apr. 29, 2022, 11:44 AM), <https://www.legalserviceindia.com/legal/article-4685-sexual-violence-against-men-in-india.html>

³ *Id.at 1*

punishment prescribed for certain offences against a woman⁴. The society's discriminative consideration of sexual violence against men to that of women acts as a further block to men reporting such violence against them⁵. The custodial staff and other inmates of a prison often justify the rape and other sexual assaults against male prisoners of sexual offences, by stating that those criminals should also suffer the way the victims had suffered and consider rape accused as demons and claim themselves to be a noble executor⁶.

According to Udry J. Richard, "Gender Neutrality also known as gender-neutralism or the gender neutrality movement, is the idea that policies, language, and other social institutions (social structures or gender roles) should avoid distinguishing roles according to people's sex or gender"⁷. According to European Institute for Gender Equality, "The term 'gender-neutral' means that something is not associated with either women or men. It may refer to various aspects such as concepts or style of language. However, what is often perceived to be gender-neutral, including in areas of statistics or dissemination of data collected in reference to a population, often reflects gender blindness in practice (a failure to recognize gender specificities)"⁸.

In India, the Supreme Court dismissed the Public Interest Litigation filed by Rishi Malhotra seeking gender neutrality in rape laws and termed the petition as an 'imaginative petition' and noted that the Parliament can deal with it as per social needs⁹. However, the Central Government, formed by any of the political party(ies) since Independence, have either not shown any interest or have not been in favour of gender neutral sex laws stating that certain sections are required to be gender specific to restrict and restrain violence against women. The objections, outcry, outrage, condemnation and antipathy that followed the implementation of Gender Neutrality in sex laws through the Criminal Law (Amendment) Bill 2012 (the bill was later withdrawn), could also be one of the reasons behind the Central Government's disregard to such gender neutrality prerogatives.

⁴ Jelsyna Chacko, *Towards a gender-inclusive future: Judicial developments recognising rights of the transgender community in India*, BAR AND BENCH (Mar. 17, 2022 03:40 PM), <https://www.barandbench.com/columns/towards-a-gender-inclusive-future-judicial-developments-recognising-the-rights-of-the-transgender-community-in-india-and-the-road-ahead>.

⁵ Lupri Eugene & Grandin Elaine, *Intimate Partner Abuse Against Men*, National Clearinghouse of Family Violence (Jun. 21, 2022 09:35 AM), https://web.archive.org/web/20090104074211/http://www.phac-aspc.gc.ca/nctv-cnivf/familyviolence/pdfs/Intimate_Partner.pdf.

⁶ Mohd. Umar, *Rape and Sexual Violence: inside prisons*, IPLEADERS (Mar. 19, 2022 12:30 PM), <https://blog.ipleaders.in/rape-sexual-violence-inside-prisons/>.

⁷ Udry. J. Richard, *The nature of gender*, 31 SpringerLink 561-573 (1994).

⁸ *Gender-Neutral*, EUROPEAN INSTITUTE FOR GENDER EQUALITY (Jul. 28, 2022 08:45 PM), <https://eige.europa.eu/thesaurus/terms/1190>.

⁹ ANI, *Should rape law be gender-neutral? SC says 'no'*, THE WEEK (Feb. 02, 2018), <https://www.theweek.in/news/india/sc-rejects-plea-for-gender-neutral-rape-law.html>.

The data related to sexual harassment of Men in India is almost inexistent as such acts are neither reported nor documented due to various reasons like Masculine Gender Socialization, negative connotation among heterosexual and homosexual men, social stigma, etc. As a substituting reference the data from US Equal Employment Opportunity Commission is given below which shows that the Commission receives about 16.5% of complaints from Men of being sexually harassed¹⁰.

Description/FY	2015	2016	2017	2018	2019
Complaints Received	6,822	6,758	6,696	7,609	7,514
% of Charges Filed By Males	17.10%	16.60%	16.50%	15.90%	16.80%

Table.1 – Year-wise percentage and number of sexual harassment complaints received from men¹¹

II. GENDER NEUTRALITY AND GENDER EQUALITY

According to Constanza Toro¹², “Gender neutrality seeks to avoid gender bias while gender inclusion attempts to consider each and every gender”. Neutrality is a principle that lays the foundation of an infallible system that aims at achieving equality. In other words, recognizing gender neutrality is the first step for achieving gender equality in the society. If gender neutrality is adopted as a legally settled socio-legal principle, only then gender equality shall be achieved through such principally enshrined legal codes¹³. Gender equality in India is the equality between the men and women related to health, education, economic, political and legal framework in the country¹⁴. India is being ranked differently based on various factors and on composite basis in a number of international gender inequality indices that are also quite controversial in their own way¹⁵.

With the expansion of the scope through the inclusion of those elements that comprises the classifications related to gender neutrality, the Indian laws have been successful to certain extent

¹⁰ Seema Sundd & Davesh Bhatia, et.al., Gender Neutrality & Sexual Harassment Laws In India: An Overview, MONDAQ (July 29, 2022 02:54 PM), <https://www.mondaq.com/india/employee-rights-labour-relations/988146/gender-neutrality-sexual-harassment-laws-in-india-an-overview>.

¹¹ *Id.* at 2.

¹² 5 CONSTANZO TORO, GENDER NEUTRAL DRAFTING: GENDER EQUALITY OR AN UNNECESSARY BURDEN 7 (Issue 1, Spring 2018, IALS Student Law Review, University of London, 2018).

¹³ Arora, *GENDER INEQUALITY, ECONOMIC DEVELOPMENT, AND GLOBALIZATION: A STATE LEVEL ANALYSIS OF INDIA*, 46(1) THE JOURNAL OF DEVELOPING AREAS 147-164 (2012).

¹⁴ *The Global Gender Gap Report*, WORLD ECONOMIC FORUM (2013).

¹⁵ A. Geske Dijkstra & Lucia C. Hanmer, Measuring Socio-Economic Gender Inequality: Toward an Alternative to the UNDP Gender-Related Development Index, TAYLOR & FRANCIS ONLINE (Jul. 29, 2022 03:29 PM), <https://www.tandfonline.com/doi/abs/10.1080/13545700050076106>.

in achieving gender equality in civil and criminal laws. However, the resolve to ensuring gender equality is marred by the exclusion of an all throughout gender neutral perception. The 172nd Law Commission Report and the report of Justice Verma Committee stands a beacon proving India lacked an outright gender neutrality in its legislative principles. Our Constitution provides equality in a broad-spectrum under Article 14, Article 15, Article 15(3), Article 16, Article 39(a), Article 39(b), Article 39(c) and Article 42. In *Re, Delhi laws Act* case the Supreme Court of India observed that “the Indian Constitution confers upon the legislature the power to make laws subject to certain restrictions. In case where the law made by the Parliament transgresses the limitations imposed by the Constitution then the judiciary can strike down such law as unconstitutional”¹⁶. Going by this precedent, the sex laws in India by not ensuring gender equality prescribed in various articles listed above, transgresses the limitations prescribed by the Constitution that resolved to ensure equality for all its Citizens.

III. GENDER NEUTRALITY AND SEX LAWS IN INDIA

Article 14 of the Constitution states that the right to equality before law or the equal protection of the law, within the territory of India, shall not be denied by the State¹⁷. *Article 15* of the Constitution prohibits discrimination on the grounds of religion, race, caste, sex, or place of birth¹⁸. The exception prescribed in *Article 15 (3)* that states, “Nothing in this article shall prevent the State from making any special provision for women and children”, doesn’t essentially exempt gender neutrality from the purview of sex laws¹⁹. Nevertheless, the current laws are considered to be far off from being gender neutral in all the aspects on matters concerning Sex laws and its related offences in India.

The need for gender neutrality in Sex Laws was first dealt with in *Smt. Sudesh Jhaku Vs. K.C.J and others* (1996)²⁰. While delivering the order in this case, the Honorable Judge Shri. J. Singh noted that, “Men who are sexually assaulted shall have the same protection as female victims, and women who sexually assault men or other women should be liable for conviction as conventional rapists”²¹. The Honorable Judge also noted that, “However, let not the Law Commission and the legislature be deterred by it. And, if they really decide to look into it, what about defining the offence in gender - neutral terms? I think law reform community will have

¹⁶ *In Re, Delhi laws Act* AIR 1951 SC 332 (India).

¹⁷ INDIA CONST. art. 14.

¹⁸ INDIA CONST. art 15.

¹⁹ INDIA CONST. art 15, cl. 3.

²⁰ *Smt. Sudesh Jhaku vs K.C.J. And Others*, 1998 CriLJ 2428, 62 (1996) DLT 563, 1996 (38) DRJ 22 (India).

²¹ *Id. at 3*.

no objection to it”²².

The 172nd Law Commission’s Report recommended an amendment to reflect gender neutrality in sex laws in India²³. The Law Commission forwarded the draft of the report to Sakshi NGO, Interventions for Support, Healing and Awareness (IFSHA), All India Democratic Women's Association (AIDWA) and the National Commission for Women (NCW) for their views and suggesting changes of a procedural nature, whether in the Criminal Procedure Code or the Evidence Act²⁴. Based on the views, and recommendations of these organizations, the Law Commission through its 172nd report on Review of Rape Laws in March 2000, recommended changes for widening the scope of the offence in section 375 and to make it gender neutral²⁵. The most important aspect concerning the gender neutrality recommendations as per the 172nd Law Commission Report is the use of the terms such as ‘Perpetrators’ and ‘Victims’ in the recommended replacement of the Section 375. Both these terms were specifically included by the Commission to ensure Gender Neutrality in the Sex Laws in India.

The Justice Verma Committee, though was constituted for suggesting the possible amendments to the Criminal Law so as to enable quicker trial and enhanced punishment for offenders in sexual assault of extreme nature against women, too made its recommendation providing gender neutral definition with respect to both victim and offender(s)²⁶. In its report, the Justice Verma Committee had noted that, “The proposed Criminal Law Amendment Act, 2012, should be modified as suggested, and to secure public confidence, be promulgated forthwith. Since the possibility of sexual assault on men, as well as homosexual, transgender and transsexual rape, is a reality the provisions have to be cognizant of the same”²⁷.

As a result of various recommendations, including the 172nd Law Commission Report and the JC Verma Committee report, to have gender neutral language in sex laws in India, the Criminal Law (Amendment) Ordinance 2013 was promulgated by the then Honorable President Shri. Pranab Mukherjee with prodigious changes to IPC, Cr.P.C. and Evidence Act to reflect gender neutrality and thereby extending the scope and coverage relating to the sex laws in the Country. The Criminal Law (Amendment) Ordinance, 2013 was promulgated by the President of India in the Sixty-fourth year of Republic. Though the Parliament was not in session, but since the

²² *Id. at 3.*

²³ Law Commission of India, 172nd Report on Review of Rape Laws, Chapter 1, Section 1.4.

²⁴ *Id. at 3.*

²⁵ *Id. at 3.*

²⁶ Sumita B. Ade & Dr. M. B Jameel, *Gender equality: Constitutional mandate with reference to Justice Verma Committee Report on criminal law amendments*, 4 *The LexWarrier: Online Law Journal* 189 – 194 (2018).

²⁷ JUSTICE JS VERMA, JUSTICE LEILA SETH, GOPAL SUBRAMANIAM, Part II (3) *REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW* 416 (2013).

President was satisfied that circumstances exist which render it necessary to take immediate action and by exercising the powers conferred under Clause (1) of Article 123 of the Constitution of India, the President promulgated the Ordinance²⁸. This Ordinance meant that Women could also be charged under sexual offences as perpetrators. Following the enactment of the Criminal Law (Amendment) Ordinance 2013, a large section of civil society expressed its distress, anger and discontent against these Gender-Neutral provision emphasizing that Women could further suffer double victimization as counter complaints of rape, sexual harassment and sexual assault could be slapped on as an intimidation tactic to have the victim withdraw their complaints²⁹. Consequently, the amendment ordinance that brought the gender neutrality in the sex laws short-lived, as it was repealed and replaced by the Criminal Law (Amendment) Act 2013 that reversed the definition of rape to view only female as victims and male as the assailants or offenders.

Other than a woman, the victim of a sexual violence can be a men or a transgender. Comparatively, a woman may have to endure a lot due to patriarchy, yet may affect the other genders equally and in a different way due to the stereotyped masculinity³⁰. The definition of Rape under section 375 of the IPC has excluded not only men but also the transgender who have been ignored, abused and discerned all along³¹. Transgender too are subjected to sexual assault, acid attacks and are defaced through various forms of physical and verbal violence³². As per a study of Kothi and Hijra sex workers in the Indian State of Bangalore conducted by the Peoples' Union for Civil Liberties, Karnataka (PUCL-K), the transgender community are subjected to cruel sexual harassments³³.

IV. GENDER NEUTRALITY AND ITS CHANGING PERCEPTIONS

In general, the term gender neutrality refers to the belief that all the socially common factors of life and survival (including but not limited to policies, language, system, institutions, framework, laws, codes, rules and regulations etc.) should avoid differentiating people based on their sex or gender to avoid discrimination on the belief that certain social roles suit a particular gender over the other. These explanations on Gender Neutrality ideally refers to a

²⁸ The Criminal Law (Amendment) Ordinance, 2013, Acts of Parliament, 2013 (India).

²⁹ Ankita Ramgopal, *Gender neutral rape laws - What about the Transgenders?*, THE LEAFLET (May 25, 2002 02:45 PM), <https://theleaflet.in/gender-neutral-rape-laws-what-about-the-transgenders/>.

³⁰ Anjitha Santosh, *Gender Neutral Rape Laws: A step towards equality*, PROBONO INDIA (Jul. 27, 2022 09:35 AM), <http://probono-india.in/blog-detail.php?id=178>.

³¹ Id. at 4.

³² Id. at 4.

³³ Human Rights violations against the transgender community, PUCL-K, (Jul. 28, 2002 10:20 AM), https://www.pucl.org/sites/default/files/reports/Human_Rights_Violations_against_the_Transgender_Community.pdf.

movement that begun in the late 18th century demanding economic and political equality among the genders and for social reforms. It transposed in the middle 19th century towards a demand relating to Women's suffrage seeking changes in the voting laws allowing the women to vote. A movement that begun in 1848 perceived its recognizable victory with the ratification of the 19th Amendment in 1920 by the United States which was followed by several world nations recognizing gender neutrality in their policy, language and political framework.

Gender neutrality in sex laws have been recognized by over seventy countries including the US, UK, Australia and Denmark. Among the 48 Countries in Asia only 4 Countries Bhutan, Kazakhstan, Kyrgyztan and South Korea have gender neutral sex laws. A vast majority of the Europe and North American Countries have recognized and enacted gender neutral sex laws³⁴.

The notion called gender neutrality arose for the purpose of providing feministic equality in the society. In the early days of the social transformational era, the term 'gender neutral' was interpreted to providing gender equality among the men and women³⁵. Following which world-wide movements started demanding gender equality through gender neutral policies³⁶. However, in the contemporary world the term gender neutrality is not limited to providing gender equality among the men and women as the society has started recognizing, and going beyond a mere recognition has started legalizing the uniqueness of Lesbian, Gay, Bisexual, Transgender and Queer (LGBTQ) communities. Certain social definitions as to the terms in the acronym LGBTQ have been deliberated and widely recognized by the world communities³⁷. There exists another classification beyond LGBTQ including several other sub-classification as "LGBTQQIAA" referred to popularly as LGBTQ2+. This is an abbreviation that stands for³⁸ "lesbian, gay, bisexual, transgender, queer (or sometimes questioning), and two-spirited. The plus-sign signifies a number of other identities, and is included to keep the abbreviation brief when written out". Absence of a globally recognized classification as to the gender of the person belonging to the LGBTQ and its extended communities is one of the reasons behind the inability for the nations to consider an all throughout gender-neutral laws.

In India, the decriminalization of consensual homosexual sex has had its roller coaster of a journey starting with the NAZ Foundation Vs. Government of NCT of Delhi (2009)³⁹ case in

34 Sonakshi Awasthi, Is India ready for gender-neutral laws?. INDIAN EXPRESS, October 18, 2017.

35 Akman, Kubilay, *Ambiguities of Social Transformation: A Critical Framework for the Concept*, 5 (6) Journal of US-China Public Administration 23-27 (2009).

36 Id at 4.

37 WHAT DOES 2SLGBTQIA+ MEAN?, OK2BME.CA (Jul. 27, 2022 03:50 PM), <https://ok2bme.ca/resources/kids-teens/what-does-lgbtq-mean/>.

38 What does LGBTQ@+ Mean?, LOYALIST COLLEGE (Jul. 25, 2022 05:34 PM), <https://loyalistlibrary.com/lgbtq2>

39 NAZ Foundation Vs. Government of NCT of Delhi, AIR 2009 Delhi High Court 160 of 277 (India).

which the Delhi High Court held that, considering homosexual sex acts as a crime under Section 377 of IPC is a violation of the fundamental rights guaranteed by the Constitution of India. This judgement by the Delhi High Court was overturned by a two Judge bench of the Supreme Court in the Suresh Kumar Koushal Vs. NAZ Foundation (2013)⁴⁰ in which the Court reinstated the criminalization of homosexual sex acts under Section 377 of the IPC. However, through its landmark judgement by a five Judge bench in the Navtej Singh Johar & Ors. versus Union of India (2018)⁴¹, the Supreme Court of India decriminalized homosexual sex and other sexual relationships among the adults that are consensual. Accordingly, a consensual same-sex activity and same-sex union are neither illegal nor punishable in India. Also any type of discrimination based on sexual orientation and gender identity are prohibited across the nation⁴². A third gender option (hijra) besides male and female is available and transgender people have a constitutional right to change gender⁴³. In National Legal Services Authority v Union of India and others (2014)⁴⁴, the Court held that the Constitutional right to live with dignity includes the right to self-identify one's gender embracing a new classification as "third gender".

V. THE VOID AND PERCEPTIONS

The terms men, women, male, female, adult, child or LGBTQ+ are not conclusively defined by the Indian laws. Section 10 of the Indian Penal Code, 1860 defines Man and Woman as, "The word "man" denotes a male human being of any age; the word "woman" denotes a female human being of any age". Regarding a reference to the terms "adult" Section 3 (1) of the Indian Majority Act 1975 defines, "Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before", however, the legal age of marriage differs for male and female.

Due to lack of gender equality among various personal laws in India, wherein a male attains legal age to marry at 21, but a female attains the legal age to marry at 18, the sex laws in India are pushed towards being gender biased due to these inequalities⁴⁵. In the Public Interest Litigation (PIL) filed by Mr. Sanjiv Kumar at the Delhi High Court, the petitioner noted that the boys under the age of 18 are protected under the Protection of Children from Sexual

40 Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors., AIR 2013 Civil Appeal No. 10972 (India).

41 Navtej Singh Johar & Ors. Vs. Union of India, AIR 2018 SC 4321 (India).

42 Avik Biswas & Savithran Ramesh, *India: Supreme Court Recognizes Rights Of The LGBT Community*, MONDAQ (Jul. 15, 2022 11:25 AM), <https://www.mondaq.com/india/human-rights/737300/supreme-court-recognizes-rights-of-the-lgbt-community>.

43 Deepshikha Ghosh, *Transgenders are the 'third gender', rules Supreme Court*, NDTV (Jul. 17, 2022 06: 12 PM), <https://www.ndtv.com/india-news/transgenders-are-the-third-gender-rules-supreme-court-557439>.

44 National Legal Services Authority Vs. Union of India and Other, AIR 2013.WP (civil) No. 604 of 2013 (India).

45 The Prohibition of Child Marriage Act, 2006, Section 2(a), (India).

Offences Act (POCSO), but are robbed off this protection the very moment they cross the age of 18⁴⁶. The petition containing 138 pages detailed the way how sixty-three nations in the world have drafted an all gender-neutral sex laws and pleaded that it is high time for India to join the league⁴⁷. The petition also had a detailed comparison of the sex laws of about ninety-three countries in a tabular form and stated that “63 were found to have rape or sexual assault laws written in gender-neutral language, 27 had rape laws that were completely gender-specific (i.e., the perpetrator was defined as male and the victim as female) and 6 had partly gender-neutral laws (the perpetrator was defined as male and the victims could be male or female)”⁴⁸.

Regarding a reference to the term “Child”, Section 2 (ii) of the Child Labour (Prohibition and Regulation) Act, 1986, states “Child means a person who has not completed his fourteenth year of age”. Contrarily, the Section 2 (d) of the POCSO Act 2012 defines a Child differently from the Child Labour Act stated above as, “child” means any person below the age of eighteen years that includes a male or a female Child”. As per Shubhomoy Sikdar (2012), “In India, different laws define the words ‘child’ and ‘minor’ differently. At the receiving end of this ambiguity are children between the ages of 15-18”⁴⁹.

Referencing those person who don’t fall completely under the classification of a male or a female, the Section 2 (k) of the Transgender Persons (Protection of Rights) Act 2019 states that, “transgender person means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta”. But, the Supreme Court in the National Legal Services Authority v Union of India and others (2014)⁵⁰ case pronounced the inclusion of “third gender” stating that the right to live with dignity includes right to self-identify one’s gender.

Due to the wide-spread ambiguities in the definitions of Men, Women, Male, Female, Adult, Child, Transgender, Third Genders and other combinations within the classifications of LGBTQ+, the dissemination of the due rights to these classifications are facing hurdles and in

⁴⁶ Will there ever be a right time to make rape laws gender-neutral: Delhi HC, HINDUSTAN TIMES (Jul. 11, 2018), <https://www.hindustantimes.com/india-news/will-there-ever-be-a-right-time-to-make-rape-laws-gender-neutral-delhi-hc/story-oHXrIzIINBUTFYAm8V4vK.html>.

⁴⁷ Debayan Roy, *Can Only Men Rape Women? Delhi HC Issues Notice to Centre on PIL Seeking Gender-Neutral Rape Laws*, NEWS 18 (Sep. 28, 2017 04:25 PM), <https://www.news18.com/news/india/can-only-men-rape-women-delhi-hc-issues-notice-to-centre-on-pil-seeking-gender-neutral-rape-laws-1529887.html>.

⁴⁸ *Id at 5*.

⁴⁹ Shubhmoy Sikdar, *Who is a Child?*, THE HINDU (Jul. 28, 2022 10:17 PM), <https://www.thehindu.com/news/national/who-is-a-child/article3528624.ece>.

⁵⁰ National Legal Services Authority Vs. Union of India and Others., AIR 2013 CWP 604 (India).

several occasions have been impossible. The most possible that can be drawn out of all the existing laws and provisions are certain general inferences concerning Male, female, adult, child, transgender, third gender and other combinations of LGBTQ+ communities. Ignoring gender neutrality, the Criminal Laws in India considers only Men as the perpetrators and women as the Victim of every sexual offence. The Transgender Persons (Protection of Rights) Act, 2019, penalizes a sexual abuse against transgender with imprisonment of six months which can extend up to 2 years. The laws prescribe a much lesser punishment for a person abusing a transgender compared to those abusing a woman. According to Rachel Thomas (2019)⁵¹, “The strictest punishment for abusing a transgender individual is lesser than the minimum punishment prescribed to a rapist of a women which shows the lack of parity in laws in terms of gender”.

It is quite heartening that the legal framework in our Country has duly recognized the mental maturity and various other factors of those below the age of eighteen and has made all the relevant sex related criminal provisions concerning them as gender neutral. However, the legal system in the country is yet to recognize the deprivation caused by the inequitable treatment of adult male and transgender that are created due to the paucity of gender neutral perceptions concerning the sex laws.

VI. CONTEMPORARY INCLINATIONS

In the *Karan Tripathi Vs. NCRB (2020)*⁵², the prayer before the Court was to consider the representation of transgender persons in the official documentation of the NCRB’s data and reports. The Delhi High Court disposed the matter as NCRB notified through a letter to all the states and union territories to include transgender as a classification from the next PSI report. Also the NCRB organized a two-day sensitivity workshop for the inclusion of transgender persons in the gender classification⁵³. This stands as a historical decision by the NCRB, as it will start releasing its annual reports on crime under Male, Female and Transgender Categories.

In the *National Legal Services Authority Vs. Union of India (2014)*⁵⁴, the Supreme Court held that those who fall outside the male or female gender binary can be legally recognized as “third genders”. The Court had referred the matter to an expert committee on issues relating to

⁵¹ Rachel Thomas, *Punishment For Sexual Offences Under The Transgender Persons (Protection Of Rights) Act, 2019: Are They Really Progressive?*, MEDIATION AND ARBITRATION CENTRE (Jun. 25, 2022 11:50 PM), <https://viamediationcentre.org/readnews/MTc=/Punishment-for-Sexual-Offences-under-the-Transgender-Persons-Protection-of-Rights-Act-2019-Are-they-really-Progressive>.

⁵² *Karan Tripathi Vs. NCRB*, AIR 2020 Cr.WP 9596 (India).

⁵³ *Transgender Prisoners Will Now Be Categorized Separately in NCRB Statistics*, THE WIRE (Apr. 12, 2022 10:20 AM), <https://thewire.in/lgbtqia/transgender-prisoners-will-now-be-categorised-separately-in-ncrb-statistics>.

⁵⁴ *NALSA Vs. UOI*, AIR 2014 SC 1863 (India).

transgender that was constituted under the Ministry of Social Justice and empowerment to develop its judgement. Recognizing that third gender persons were entitled to fundamental rights under the Constitution and under International laws, the Court directed the State Governments and Union Territories to develop mechanisms to realize the rights of third gender and transgender persons. The Court upholding the right of all persons to self-identify their gender, declared that hijras and eunuchs can legally identify them as third genders. Pronouncing that no third gender person shall be subjected to medical or biological gender identity examination invading their right to privacy, the Supreme Court clarified that gender identity is not a biological character but is an innate perception of one's gender.

Consequently, the Indian legal system has recognized the existence of Male, Female and a Third Gender from a gender representation perspective. However, the inclination towards gender neutral sex laws as advocated by the 172nd Law Commission Report, the report of the Justice Verma Committee and the repealed Criminal Law (Amendment) Ordinance 2012 are yet to be seen in reality to eradicate the socio-legal void engendered as a consequence of precluding an all throughout gender neutral sex laws.

VII. GENDER NEUTRALITY – MUDDLE OR AN ORDERLY

Article 14 of the Indian Constitution 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”, and ensures equality before law and equal protection of the laws for everyone in India⁵⁵. However, the extant sex laws in India recognizes only a particular gender as perpetrators and precludes the other. This perception of the legal system has created a socio-legal void in terms of gender justice, personal modesty, fake or fabricated allegations etc. According to Seema Sundd, Davesh Bhatia and Damini Bhatt (2020), “The society does not allow/ encourage male 'victims' to share stories of sexual harassment because it goes against the cultural idea of masculinity or the 'macho image' which society expects them to carry. This further perpetuates century's old cultural stereotype that portray at men as sexual harassers and women as sexual victims. The fact that talking openly about such incidents also have the potential of turning a male victim into a butt of joke among his colleagues, is another deterrent in exposing such incidents. The truth is India's sexual harassment laws hardly provide any protection for men. In the Public Interest Litigation filed by Mr. Sanjiv Kumar at the Delhi Court seeking necessary directions for ensuring gender neutral sex laws, a bench comprising of Justice Gita Mittal and Justice C Hari Shakar asked, questioning one of the amicus curiae, who stated that it might not be the right time for India to

⁵⁵ INDIA CONST. art. 14.

adopt such change, if will there ever be a right time to bring in such changes⁵⁶. The existing laws, promulgated on the principles of equality and justice, do little to protect the male gender from sexual harassment at workplace by female colleagues”⁵⁷.

Feminists quote the following as reasons for not hailing gender neutral sex laws. (1) Sexual Violence against women is unrestrained in India (2) A vast majority of the Countries recognize that there is a relative gender parity difference between male and female (3) Deep-seated patriarchy and hatred towards women (4) With gender neutral laws and prevalent power disparity, men will abuse these laws for sheer vengeance. According to Flavia Agnes⁵⁸, the Co-founder of Maljis Law Firm, “We are concerned that if there is gender neutrality regarding perpetrators, women will be caught in prosecution which they will find it difficult to deal with, their families will not financially support them to fight the litigation and they will be languishing in jails as undertrials for a very long time where their children will be neglected”.

The People’s Union of Civil Liberties in an article “Face of the State in Tihar” wrote this way back in 1981 that when a young male enter, the prisoners have been known to have bid a price for that new inmate⁵⁹. The price offered is in terms of ‘bidis’, soap or charas⁶⁰. Often prisoners have been divided into camps and the groups have fought each other on the issue of who shall have the new entrant⁶¹. And all of these fights are to set the stage for a new offence that has not been defined as a punishable offence under the sex laws due to the lack of a gender neutral sex laws in the country.

VIII. CONCLUSION

A legal system that has the most exhaustive coverage of procedural, substantive, punitive and reformatory provisions still have the connotation “He” even when referring to gender binaries. Although most of the laws in our Country refers to both male and female, but now it’s high time that the law makers should consider including transgender or the third gender in every aspect of gender inclusion not as a separate class or community but as an all-inclusive community or gender at par with male and female. Apart from gender exclusion the extant sex laws are criticized of being female-centric. Prejudiced arguments that female specific sex laws alone shall serve against deep-rooted patriarchy to restrict and restrain female sexual abuse are a mere nonsensical consternation without any significant empirical corroboration. Conscientious

⁵⁶ HINDUSTAN TIMES, *Supra note 45*.

⁵⁷ SUNDD, *Supra note 9*.

⁵⁸ Sonakshi Awasthi, *Supra note 33* at 4.

⁵⁹ *Face of the State in Tihar*, 47 (14) PEOPLE’S UNION FOR DEMOCRATIC RIGHTS 24-26, (2012).

⁶⁰ *Id at 7*.

⁶¹ *Id.at 7*.

construct and enforcement of gender neutral legislations would provide a much balanced system of justice by widening the scope of sexual offences. Its high-time for the legislators to reassess the sex laws, categorize the capricious degrees of crime and in an expansive manner define and deal with them to ensure social and legal justice.
