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# A Critical Study of the Gender Neutral Rights in India

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## ABSTRACT

*"Gender neutrality" is a term that emphasizes on equal treatment of men, women and people of any other gender legally with no discrimination. India being a country with a huge population is also subjected to a huge number of crimes, as well as, mistreatment amongst each other. The Constitution being the law of the land ensures that equality is prevailed among the Indian citizens without any discriminations.*

*To prevail gender neutrality among the people in India, Article 14, Article 15 and Article 16 of the Constitution were given its due credit and secures its place as the fundamental rights of the citizens of the country.*

*It is not unknown to us that women are subjected to several crimes, may that be rape, domestic violence, or even discrimination on the basis of gender. In India, we have plenty of laws protecting women physically (for example, the rape laws under CrPC) but again, there are lack of laws in protecting the rights of women being paid equally for equal work. But gender neutrality is not really prevailed when there are enough laws to protect women physically, while, men and the transgender people has very few laws with minimal penalties when the abuse is of same stature. For instance, the rape laws under CrPC can be only referred to when the victim is a women and the abuser is a man, but there are several instances of men and transgender people being physically abused or even raped but the only Section covering these issues is Section 377 of the IPC. Under The Transgender Persons (Protection of Rights) Act, 2019, the penalties for raping or sexually abusing any transgender person is six month to two years of imprisonment along with a fine of ten thousand rupees whereas the punishments for raping a women is much more severe comparatively. It would be more appropriate to adopt a human-rights approach instead of a gender specific approach in defining the offence of recording. Thus, it is very important to have gender neutral rights to preserve the essence of equality of the Indian Constitution.*

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## **I. INTRODUCTION**

Prevailing gender neutrality in its true sense has always been an concern for all the countries across the globe. Although, several laws have been made to ensure that the rights are provided to all the citizens of the country irrespective of their gender, caste, creed and religion but the problem does not entirely depend upon having adequate laws, but the problem also lies with the implementation of the laws that fails to ensure equal rights are provided to all the citizens of the country. Every human being has the right to be treated equally with dignity, no matter what caste, gender, creed, religion that person belongs to. Thus, gender neutral rights are very important in every country as it gives all the citizens of the country the right to be treated equally with dignity. As *Ubi Jus Ibi Remedium* says, for every wrong, the law provides a remedy, hence in the Constitution of India there are several remedies or preventive guidelines for all the discriminations that the citizens of the country are subjected to. In a world where the dominance of men have been evident for a long period of time, there has to be some discriminations against other genders, finally giving rise to crimes against women such as rape, domestic violence, killing for dowry, etc. Thus, it has always been a tough job to ensure gender neutrality when the people themselves are discriminating against each other.

## **II. STATEMENT OF THE PROBLEM**

In India, gender neutrality in the society has always been a matter of concern hence proper laws along with proper implementation is very important. Specifically, India lacks proper rape laws for men and the transgender community, even though rape is an heinous act where the gender of the victim is irrelevant, hence the punishments for the same should be the same. As well as, there are many aspects, such as unequal pay for the same work on the basis of the gender.

## **III. OBJECTIVE OF THE PAPER**

The objective of this paper is to:-

- 1) Throw some light on the lack of rape laws for men and transgender people.
- 2) Point out the lack of implementations of certain prevailing laws.

## **IV. SCOPE OF THE PAPER**

In this paper, I would like to throw some light on the lack of gender neutrality in Indian Law, as well as, how there are certain laws that has the potential to maintain gender

neutrality and how there are needs to make and amend certain laws to prevail gender neutrality in its true sense within the society.

## V. MEANING OF GENDER NEUTRALITY

Gender Neutrality is a term that emphasizes on equal treatment of men, women and people of any other gender legally with no discrimination. Arvind Narrain (2013) gives three dimensions of gender neutrality-

1. Gender neutrality with respect to the victim
2. Neutrality with respect to the perpetrator
3. Neutrality in custodial, communal, war, and conflict situations

## VI. GENDER NEUTRALITY WITH RESPECT TO THE VICTIM

It is extremely unfortunate that the Indian Law's perception of rape is solely based on the belief that a victim of rape has to be a women. This belief completely chalks out the fact that men and transgender people are also subjected to rape, as well as, physical assault and does not give equal importance to the rapes and sexual assaults on men and transgender people compared to sexual assault or rape of a woman. Thus, the lack of gender neutrality is evident and it is to be noted that the punishment for such heinous crimes should be equal irrespective of the gender of the victim. Moreover, it is assumed that the rape is entirely an act of sex to satisfy the sexual desire of the perpetrator which has been contradicted with the growing awareness that sexual assault is not an act of lust but also an act of showcasing the dominance over one caste, community religion. Thus, there is no reason for which men or transgender people cannot be subjected to rape or sexual abuse. Similarly, the precedent from the landmark case, *Vishakha and others v. State of Rajasthan*<sup>2</sup> safeguarded the rights of the women facing sexual assault in the workplace but similar laws for men or transgender people has not yet been spoken about.

## VII. NEUTRALITY WITH RESPECT TO THE PERPETRATOR

There has been an ongoing debate on the topic whether a woman can be a perpetrator or not. There has been people speaking for the motion, saying it is impossible for women to rape men, specially in a patriarchal society as it was stated by Susan Brownmiller ,” It is a biological impossibility.” (Moore. S1975)<sup>3</sup>. Again, there were people saying against the motion that it is not physically impossible. Even women on women rapes has been brought

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<sup>2</sup>AIR 1997 SC 3011

<sup>3</sup>Moore. S 1975; Rape is not a crime but an act of lust argues Susan Brownmiller.

into the light in cases like, in *State Govt. v. Sheodayal (1956)*, Madhya Pradesh (M.P.) High court opined that modesty of a woman can be outraged by another woman under the purview of Section 354 of IPC.<sup>4</sup> The question whether a woman can commit gang rape was dealt by the Supreme Court in the case of *Priya Patel v. State of M.P.*<sup>5</sup>

## VIII. NEUTRALITY IN CUSTODIAL, COMMUNAL, WAR, AND CONFLICT SITUATIONS

Rape has often been used as a tool of fear and domination in situations of caste, class and communal conflicts, and custodial. It is important to know why these special situations must not be equated with the normal situation. Apart from being a male, female, or a queer, he/she is also a part of a particular religion, race, and a certain caste or community. In a normal situation, or a non-aggravated act, gender is the identity on the basis of which the perpetrator and the victim is determined. However, in the extraordinary situations of war, conflicts and custodial, the gender of the perpetrator becomes irrelevant as the caste, race, or religious identity becomes the dominant identity. In the recent times, the *Kathua rape case*<sup>6</sup> has turned many heads due to its severity implying that rape is becoming a tool to implant fear and portray ones superiority over the others. In this heinous crime, Asifa Bano, an eight year old girl fell prey to a communal grudge and was raped by the priest of Devasthan along with his son and juvenile nephew. Eight men were accused of involving in some or the other malpractices which led to the murder of the child after being raped. Three of the accused were public servants who were accused of trying to destroy the evidences. Hence, rape being a tool to gain superiority in the communal conflicts is undeniable.

## IX. ROLE OF THE CONSTITUTION IN PREVAILING GENDER NEUTRALITY IN INDIA

The Constitution of India is the law of the land hence it has been constituted with the responsibility to ensure the safety and security of the citizens of the country.

As **Article 14**<sup>7</sup> of the Constitution, “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 means the state shall

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<sup>3</sup>Annavarapu, S. (2013). Heteronormativity and Rape: Mapping the construction of gender and sexuality in the rape legislations in India. *International Journal of Criminal Justice Sciences (IJCJS) Official Journal of the South Asian Society of Criminology and Victimology (SASCV)*, ISSN: 0973-5089, 8 (2), 248-264. Retrieved from <http://www.sascv.org/ijcjs/pdfs/snehaijcjs2013vol8issue2.pdf> on January 12, 2014.

<sup>4</sup>Priya Patel v. State of Madhya Pradesh, (2006) 6 SCC 263. Retrieved from <http://www.manupatrafast.com/pers/Personalized.aspx> on January 12, 2014.

<sup>6</sup><https://www.google.com/amp/s/www.indiatoday.in/amp/india/story/kathua-rape-case-verdict-pathankot-court-update-1545751-2019-06-10>

<sup>7</sup>Constitution of India

give equal rights to everyone irrespective of their gender, caste, creed and religion. No matter which gender the person belongs to or whether the person is a man, woman or transgender the state has to provide them equal opportunities in seeking redressal before the court.

**Article 15<sup>8</sup>** of the Constitution states, “Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

(a) access to shops, public restaurants, hotels and palaces of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public

(3) Nothing in this article shall prevent the State from making any special provision for women and children

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.”

This article does not only talk about the rights of the backward classes but also talks about prohibiting any discriminations on basis of sex, caste, creed and religion. Thus, gender neutrality is prevailed with a right that has been accepted as a fundamental right and also gives the right to the citizens of the country to seek remedy if they face any discriminations on the basis of their gender. There are some exceptions such as Reservation of seats for women in the local bodies and provision of free education to children, reservation of seats with concession of fees in public educational institutions.

**Article 16<sup>9</sup>** of the Constitution states, “Equality of opportunity in matters of public employment

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State

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<sup>8</sup>Constitution of India

<sup>9</sup>Constitution of India

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination”

This Article talks about providing equal opportunities to everyone in case of employment irrespective of their gender. No man or woman or a transgender person shall be restricted from being an employee in any public employment sector on the basis of their gender.

These articles been a part of the Fundamental Rights has huge potential and violation of which can lead to serious repercussions. Furthermore, no laws can be passed that defies these articles as per Article 32<sup>10</sup> of the constitution.

## **X. LACK OF GENDER NEUTRALITY IN INDIAN RAPE LAWS**

According to India, Section 375 of the IPC, as amended by the *Criminal Law (Amendment) Act, 2013* states that:

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<sup>10</sup>Remedies for enforcement of rights conferred by this Part

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part

(3) Without prejudice to the powers conferred on the Supreme Court by clause ( 1 ) and ( 2 ), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause ( 2 )

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution

[a] man is said to commit rape if he—

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

Section 375 of the IPC solely talks about what is considered to be rape and it is specified that it is considered to rape only when the victim is a woman.

But it is not possible that women are the only ones who are subjected to rape.

It has been seen on the night of 23<sup>rd</sup> February, 1991, the twin villages, Kunan and Poshpora in Kashmir witnessed the unthinkable. Indian army personnel were accused of village multiple women. This incident garnered a lot of political and attention at that time but the horrendous part of it that no one talked about was the sexual violence that the men of the villages went through. As historian Uma Chakravarti<sup>11</sup> stated, "Sexual violence against men has been almost completely undocumented or at the very least under documented.

Thus, it is pretty evident that men and transgender people do witness sexual abuse and it is not any less traumatic for any human being to face such an event.

Section 377 of the IPC states. "*Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*"

Section 377 talks about any unnatural intercourse with any man, woman or animals is punishable upto ten years of imprisonment along with fines. Thus, no separate defined laws for has been created for men or even transgender people.

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<sup>11</sup>Do you Remember Kunan Poshpora?. Sexual violence against men (p.56)



Under The Transgender Persons (Protection of Rights) Act, 2019, the penalties for raping or sexually abusing any transgender person is six month to two years of imprisonment along with a fine of ten thousand rupees whereas the penalties for raping a woman extends from 10 years to even death sentence along with a fine.

Thus, the Indian Law is lacking behind when it comes to rape laws as they are more focused on a specific gender rather than focusing on the trauma caused to any human being from the events.

## **XI. LACK OF PROPER IMPLEMENTATION OF ARTICLE 16**

The State shall direct its policy towards securing equal right of men and women to adequate means of livelihood under Article 39(a) and equal pay for equal work for both men and women Article 39 (d).

The Directive Principles of State Policy though unenforceable in a Court of law, direct the State to make laws in the country. Even though the right of equal work and equal pay finds a place in Article 39, it is supplementary to the equality clause provided in Articles 14 and 16 of the Constitution.

These rights are adequate to safeguard any kind of discriminations but again due to lack of implementation of the law, in some industries, the pay for the same amount of work becomes variable depending upon the gender. For example, the film industry has always been very much vocal about the difference in pay, even though, they are the leads. The main loophole of this right is that it does not specify the amount of work, hence there is always a getaway. With proper rights, proper implementation is also required.

## **XII. CONCLUSION**

Gender neutral rights are not only important to prevail equality in the society but also it gives all the human beings a sense of security. Gender neutrality when practiced in its true sense, helps to create a balance in the society and demolishes the sense of superiority that generally gives rise to crimes. It is the sense of superiority that makes a man commit the murder of his own wife for dowries or even raping minors to take out the grudges that the perpetrator might have on the minor's family, as we have seen in the *Kathua Rape Case*. Thus, to eradicate such vague sense of power and superiority, gender neutrality should be prevailed through the laws and the rights to be enjoyed by all should be truly enjoyed by all the citizens irrespective of their gender.

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