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Laws Biased against Men in the Indian Penal Code

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ABSTRACT

For far too long, men's rights have been brushed under the carpet and neglected owing to the social landscape of our country, where it is stereotyped that men are oppressors, and perpetrators of physical and sexual offences. They are depicted to be resilient and courageous persons, who cannot be subject to torture and oppression. This has led to stigmatization around male-centric crimes. Further, the media has predominantly focused on sensationalizing offences against women, which has positively contributed to reforms in this area. However, there is little to no media coverage when it comes to male victims and survivors of abuse; be it physical, mental, emotional, sexual or in any other form.

India's laws reflect the same ideology, as certain legislations are biased against men, putting them in a disadvantageous position. Majority of the cases go unreported owing to the lack of gender neutral laws. The Indian Penal Code (IPC) has undergone several amendments ever since its inception in 1860, to keep up with the changing demands of society. Yet, the archaic gender specific laws on domestic violence and rape, which have been challenged in Courts multiple times, have not been amended yet. This makes men vulnerable to wrongful accusations by women. All these issues clubbed together have created an unfavourable scenario for men, whose rights are not given the due importance that they deserve. This constitutes a grave miscarriage of justice, as men have no legal recourse in case their right to life and personal liberty get violated, owing to domestic violence or sexual abuse.

This paper delves into Section 375, 376 and 498A of the IPC, and highlights the need for gender neutral laws, by analyzing judicial rulings and amendments over time. Towards the end, a few suggestions to amend the deplorable laws have been provided.

I. SECTIONS 375 AND 376

A Section which prima facie is gender discriminatory is **Section 375** of the Indian Penal Code. Section 375 (1) lays down that a man is said to be guilty of rape if he commits sexual intercourse with a woman either against her will, without her consent, when her consent is

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obtained wrongfully, or when the woman is below sixteen years of age (with or without consent).² As per the Criminal Law (Amendment) Act, 2013, the definition of rape now includes penetration of the penis into the mouth, urethra and anus apart from the vagina. Insertion of any other object into the vagina, urethra and anus was included within the purview of rape too.

Section 376 lays down the punishment for rape. However, throughout the Section, only women have been attributed to be victims of rape, even though the amendments denote that sexual intercourse need not be essential for the act to qualify as rape.³ The said definition does not extend the purview of rape beyond the male-on-female paradigm. Although children of both sexes who are victims, are protected by the Protection of Children from Sexual Offences Act (POCSO) 2012, adult male victims have no legal recourse whatsoever.⁴ While this may originate from a push back against the law's tendency to disbelieve a female victim, it is under-inclusive.⁵ It is not a sufficient justification to say that rapes have historically been a tool for gender subordination. Instead, it is more appropriate to adopt a human-rights-based approach in defining the offence.

People who argue in favour of the laws in *status quo* contend that the lack of statistical data on male rapes weakens the other side's stance. However, the reason behind lack of cases being reported is the stigma surrounding this phenomenon. Predominantly, it has been expected of men to be strong and macho. The idea that they can be oppressed is a very alien concept. Such kind of a toxic reinforcement has various harmful impacts, the most significant one being lack of delivery of justice to the victim.

It is not biologically impossible for a woman to rape a man, as the definition of rape is no longer restricted to penile-vaginal penetration. It includes oral and anal penetration, besides insertion of objects. Even if it is penile-vaginal intercourse, arousal or an erection of the penis does not imply consent. Studies have shown that humiliation and anxiety can lead to an erection.⁶

Gender neutral laws imply identification of both sexes as victims as well as perpetrators. In

² KD Gaur, Textbook on Indian Penal Code (6th Edition, Lexis Nexis, 2016).

³ KD Gaur, Textbook on Indian Penal Code (6th Edition, Lexis Nexis, 2016).

⁴ "India's law should recognise that men can be raped too", Centre for Civil Society, <https://ccsindia.org/indias-law-should-recognise-men-can-be-raped-too>

⁵ Alletta Brenner, "Resisting Simple Dichotomies: Critiquing Narratives of Victims, Perpetrators, and Harm in Feminist Theories of Rape", 36 Harvard Journal of Law & Gender (2013).

⁶ Shweta Kabra, "Gender neutral laws in India- How needful in India?", Manupatra

<http://docs.manupatra.in/newsline/articles/Upload/3FE150D0-E784-49BD-8328-4134C0E87955.pdf>

the *Sudesh Jhaku v KC Jhaku*⁷ case, Singh J. articulated his preference for the offence of rape to be redefined in gender-neutral terms and noted that the offence of rape as defined under Section 375 is the sole avenue as defined under criminal law for dealing with heinous acts of sexual assault.⁸

Further, in *Sakshi v Union of India*⁹, the SC directed the Law Commission to deal with the issue of gender neutral rape laws. Consequentially, the 172nd Report of the Law Commission of India recommended that the offence of rape be substituted by a completely gender-neutral offence of “sexual assault”.¹⁰

These suggestions took the shape of legislation in Criminal Law Amendment Bill, 2012. However, before the Bill could have become an Act, the nation’s conscience was shaken by the Nirbhaya rape case. Post this, the Government constituted the Justice Verma Committee (JVC) and entrusted it with the task of submitting a report on the reforms it deems necessary with regard to rape laws. The report, among other points, recommended that rape laws be made gender-neutral. This attracted a lot of criticism from numerous women groups as they were of the opinion that it intensified women’s vulnerability. Such provisions, according to them, would give more power to the already strong male community. This criticism led the Government to revert to its stance on gender-specific nature of rape laws. Thus, the same was kept intact in the Criminal Law Amendment Act, 2013.¹¹

In July 2019, the Central Government vehemently opposed a Public Interest Litigation (PIL) which sought introduction of gender neutrality in rape laws. Their affidavit stated that Sections 375 and 376 had been enacted to keep in check the alarmingly high rate of sexual offences against women in India. It justified its stance of leaving the above mentioned Sections untouched by referring to the wide ambit of the POCSO Act which covers all forms of sexual offences against minors and Section 377 of the IPC.¹²

However, neutral rape laws are not meant to desexualize rape or abolish the construct of gender from rape law jurisprudence, as opposed to common belief. They are only to limit its influence in identifying the victims and perpetrators of rape. If a law discriminates against a

⁷ 1998 Cri LJ 2428.

⁸ Jocelyne A Scutt, “Reforming the Law of Rape: The Michigan Example” 50 Australian Law Journal (1976)

⁹ 1999 CriLJ 5025.

¹⁰ Law Commission of India, 172nd Report: Review of Rape Laws, New Delhi: Ministry of Law and Justice, Government of India (2000).

¹¹ Arjit Mishra, “Gender Neutral Rape Laws: Need of the Hour”, The Criminal Law Blog, National Law University Jodhpur (May 01, 2020) <https://criminallawstudiesnluj.wordpress.com/2020/05/01/gender-neutral-rape-laws-need-of-the-hour/>

¹² Pallavi Pundir, “Indian Rape Laws Cannot Be Gender-Neutral, Says Central Government”, The Vice (July 4, 2019) https://www.vice.com/en_in/article/mb8dey/rape-laws-in-india-cannot-be-gender-neutral-says-ministry-of-home-affairs

group of citizens by not granting them full and equal participation as citizens; rights and liberties guaranteed by the Constitution, it would not enjoy immunity from challenge.¹³

Recognition of women as perpetrators of rape must take place, as women can commit gang rape (by abetting the act). Therefore, 'a man' must be replaced by 'a person' while determining who can commit the offence. Explanation 1 to Section 376(2) (g) of the IPC places equal liability upon women for abetting the act of gang rape. It uses the word 'persons' instead of 'men'. It reads, "Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section."¹⁴ Thus, it is conceivable that women can have the intention to outrage the modesty of another person, and commit rape, unlike the judgement in *Priya Patel v State of MP*¹⁵. In this case, the perpetrator's wife reached the incidence of crime, where her husband was raping the prosecutrix. Upon hearing the victim's cry for help, she slapped the victim, closed the door of the house and left. This clearly proves *mens rea* on her part. However, the Court reasoned that owing to the fact that she was a woman, she could not be convicted of rape.

II. SECTION 498A

Section 498A of the IPC states that, "Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine."¹⁶ A person held guilty under this law faces up to 3 years in prison.

This Section was inserted in order to protect married women against any cruelty meted out by her husband or in-laws, which often led to dowry deaths. Thus, *prima facie*, this Section presumes that only men can be the perpetrators and women can be the victims. This unbalanced power is being abused by women to torture or harass her husband or his family members, by filing frivolous complaints.

In *Sushil Kumar Sharma v Union of India and Ors*¹⁷, the Petitioner sought to declare Section 498A of the IPC unconstitutional and ultra vires, since it was against the basic tenet of equality. Although the Supreme Court accepted the fact that "by misuse of the provision, a

¹³ Harshad Pathak, "Beyond the Binary: Rethinking Gender Neutrality in Indian Rape Law", *Asian Journal of Comparative Law* <https://www.cambridge.org/core/journals/asian-journal-of-comparative-law/article/beyond-the-binary-rethinking-gender-neutrality-in-indian-rape-law/9BC983FB009B7BBDEB78CED0BC51> (September 13, 2016).

¹⁴ KD Gaur, *Textbook on Indian Penal Code* (6th Edition, Lexis Nexis, 2016).

¹⁵ (2006) 6 SCC 263.

¹⁶ KD Gaur, *Textbook on Indian Penal Code* (6th Edition, Lexis Nexis, 2016).

¹⁷ (2005) 6 SCC 281.

new legal terrorism can be unleashed”, it observed that the provision was constitutionally valid since its main motive was to curb dowry deaths. It stated that the legislature was entrusted with the task of amending, modifying or repealing it.

However, the fact that a lot of complaints are filed with an ulterior motive to frame the husband cannot be ignored. In such cases, the law is used as a weapon instead of a shield which can be highly detrimental in various aspects. The mental trauma and suffering that the falsely accused has to go through, is insurmountable. It permanently dents the reputation of the accused and ruins the sanctity of marriage. Several other persons’ lives get disrupted in the process, as the children of such parents have to witness their family getting shattered; or the accused’s in-laws are hauled to courts or put behind bars, for no reason. In *Chandrabhan v. State*¹⁸, the Delhi HC concluded that most complaints are filed in the heat of the moment over trivial fights, and amidst the rift and hostility, the children suffer the most.

The 243rd Law Commission report (2012), upon evaluating the pros and cons, mentioned that arrests under this Section must fall within the precincts of Section 41 and 41A of the CrPC, and not be arbitrary.¹⁹ Thus, it had more to do with the procedural aspect of the law than substantial reforms in the favour of men.

In *Arnesh Kumar v State of Bihar and Ors.*²⁰, the SC, laid stress on the need for exercising caution while dealing with the arrest of an accused. For years, this power has been abused by police authorities since it is a non-bailable and cognizable offence. However, the Court cited statistics to reflect upon the gravity of the situation and set out certain objective criteria to be applied before making arrest under the CrPC. It held that “no arrest should be made in a routine, casual and cavalier manner or on a mere allegation of commission of an offence made against a person.” India’s law on arrest lacks the required clarity. The unparalleled rise in the cases of arrest coupled with high charge-sheeting rate on one hand and low conviction rate on the other, clearly denote that there is a need to ensure that this power is not misused by the authorities.²¹

In 2017, the Bench comprising Justices A.K. Goel and U.U. Lalit ordered that ‘family welfare committees’ be set up in districts, which would consist of choice citizens, who were supposed to act as a safeguard against “disgruntled wives” from using the anti-dowry

¹⁸ AIR 1954 All 39.

¹⁹ Report no. 243, Law Commission Report of India.

²⁰ Cri 449 : 2014 SCC OnLine SC 532.

²¹ Tanya Pahwa, Moazzam Khan, Vyapak Desai, “No Automatic Arrests, Due Process to be Followed: SC”, Nishith Desai and Associates (July 22, 2014), http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/no-automatic-arrests-due-process-to-be-followed-sc-1.html?no_cache=1&cHash=ee6cc543ff7304bac42a3a207dfae6bd

harassment provision of Section 498A. According to the ruling, the police could register an FIR only after the committee classified the complaint as valid and not trivial.²²

However, in 2018, a 3 Judge Supreme Court Bench led by CJI Mishra reversed its July 2017 judgment, and restored an immediate arrest provision in Section 498A of the IPC, with the rider that the persons arrested for alleged cruelty to a married woman over dowry can approach the Courts for bail. They held that the previous order, which was passed to prevent any arbitrary action by the authorities, was beyond the scope of the CrPC.²³ Further, the parties would now have to approach the High Court for quashing of the complaint; in contrast with Justice Goel's direction which would enable District judges to close dowry harassment cases if the parties settled out-of-Court.

This Section does not provide any remedy per se to the victim, therefore, the Domestic Violence Act, 2005, came into existence. However, the Act provides a very constricted approach to violence of this form, as it adopts a gender based approach in defining the victim-perpetrator framework, based on similar lines as Section 498A. Together, the two can prove to be a very dangerous concoction for men, as they are under- inclusive and do not recognize male victims who can be subject to torture, whether physical, sexual, verbal, emotional or in any other form. Moreover, the definition of abuse or cruelty is so expansive that it can be very easily misused. The burden of proof lies on the accused, as they are assumed to be guilty until proven innocent.²⁴

III. CONCLUSION AND SUGGESTIONS

Upliftment of human rights must be the foundation of laws which have been drafted to provide remedies to victims of criminal offences. Right to equality and right to life and personal liberty are Fundamental human rights which must be guaranteed to each citizen without any discrimination on the basis of sex. Every individual deserves to live a life of dignity, and the lawmakers and Constitution must uphold the same. Keeping the same in mind, it is high time that these obsolete laws be made gender neutral in order to serve justice to the aggrieved men.

Therefore, the current rape laws under Section 375 and 376 need to undergo a transformation

²² Krishnadas Rajagopal, "Panels of wives, retirees, volunteers will not evaluate dowry complaint filed by a married woman under 498-A: SC", *The Hindu* (September 14, 2018), <https://www.thehindu.com/news/national/sc-modifies-its-order-on-dowry-harassment/article24943895.ece>

²³ Samanway Rautray, "Supreme Court modifies its order on dowry harassment", *Economic Times* (September 15, 2018) <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-modifies-its-order-on-dowry-harassment/articleshow/65806068.cms>

²⁴ Vardaan Bajaj, "The Grey Areas of Domestic Violence Laws in India", *SCC Online* (July 21, 2016) <https://www.sconline.com/blog/post/2016/07/21/the-grey-areas-of-domestic-violence-laws-in-india/>

in order to guarantee men the rights that they deserve, and ensure that they feel safe and protected, be it within the confines of their homes or outside. Male victims of rape cannot be ignored simply owing to the fact that they are in minority. The test of popular acceptance does not provide sufficient justification to disregard rights which are conferred with the sanctity of constitutional protection.²⁵ The aim behind identifying men as victims is not to dilute the seriousness of crimes against women. If implemented, it would only ensure equality in its true sense. The language of these Sections must be altered in order to make them inclusive. The word 'she' in place of the victim should be replaced by a gender neutral term, such as 'they'. Female criminality in sexual assault cases must not be ignored.

Further, Courts have time and again, admitted the fact that women have falsely been framing their spouses and families to avenge their personal vendetta under Section 498A. Therefore, a few recommendations to prevent the abuse of Section 498A include:

1. Mediation and conciliation should be resorted to, between the aggrieved and accused parties. In case such mechanisms fail, and on the face of it, there appears to be a case under Section 498A, the victim must file complaint.
2. Family counseling centres must be given due, recognition and importance, in case of matrimonial disputes.
3. There must be speedy and time bound trials, so as to ensure that innocent victims of false accusations get the justice that they deserve.
4. This Section must classify the offence as bailable. A lot of complexities that arise are owing to its non-bailable nature.
5. The offence must be made compoundable, as even if there is reconciliation between the parties, the case against the formerly accused continues. The same was recommended by the SC in *Ram Gopal v State of MP*.²⁶

Strict penalties must be meted out in case of false accusations against an innocent person, as this will serve as a deterrent.²⁷

²⁵ *Ibid.*

²⁶ (2010) 13 SCC 540

²⁷ Aditya Tripathi, "Unbridled Power in Hands of Married Women: A Brief Analysis of Section 498A of IPC", Criminal Law Blog, NLU Jodhpur (October 11, 2019), <https://criminallawstudiesnluj.wordpress.com/2019/10/11/unbridled-power-in-hands-of-married-women-a-brief-analysis-of-section-498a-of-ipc/>