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COVER STORY

Gender Neutrality and Sexual Violence Laws

Introduction

On February 2, the Supreme Court (SC) dismissed a Public Interest Litigation (PIL) that sought to make laws pertaining to rape, sexual harassment, stalking, voyeurism, outraging modesty, etc. as gender neutral. The petition challenged the constitutional validity of Sections 354 (assault or criminal force to woman with intent to outrage her modesty), 354A (sexual harassment), 354B (assault or use of criminal force to woman with intent to disrobe), 354C (voyeurism), 354D (stalking) and 375 (rape) of the Indian Penal Code (IPC), arguing that since these sections do not stipulate any provisions to protect men from sexual violence and in many cases allow the female perpetrator to go unprosecuted, they are in violation of Articles 14 (right to equality) and 15 (prohibition of discrimination on grounds of sex) of the Constitution. However, terming it as an “imaginative petition,” a bench headed by Chief Justice Dipak Misra noted that these Sections of the IPC are affirmative provisions for the protection of women and the classifications in the Sections are valid.ⁱ

A similar PIL was filed last year in the Delhi High Court. In September 2017, the Delhi High Court sought the government’s response in this matter. The case will be coming up once again before the bench on 5th March, 2018.ⁱⁱ

Gender neutrality in sexual violence laws has been a long-standing demand of men’s rights activists. The argument against gendered laws is that in a number of cases, men are at the receiving end of sexual violence which the IPC does not recognise. Sections 354, 354A, 354B, 354C, 354D and 375, all define the perpetrator of sexual violence as a man who engages in a non-consensual sexual activity with a woman. Women and other civil society activists, however, argue that in the face of lack of substantial evidence of female perpetrators of sexual violence against men, a male-dominated legal system and police machinery, and cultural impunity for sexual violence, gender neutrality of accused in sexual violence laws will not only have an effect on women’s ability to file complaints, but will also make it likely that complaints by women are met with counter-complaints to get them to withdraw.

Secondly, not only men’s rights activists, but many LGBTQ+ rights activists have also advocated for gender neutral provisions of the IPC, noting that the law does not recognise sexual assault on the body of a transgender person. This takes us back to the Criminal Law (Amendment) Bill, 2012, which proposed a gender neutral definition of rape – following the recommendations of the Law Commission’s 172nd report on ‘Review of Rape Laws’ – by replacing the term ‘rape’ in the IPC with the words ‘sexual assault.’ⁱⁱⁱ Following the December 16 gang-rape incident in Delhi, and the recommendation of the Justice Verma Committee to use the word “person” in place of “woman” to cover all victims of sexual violence, the government notified the Criminal Law (Amendment) Ordinance, 2013 in February 2013 which adopted a gender-neutral definition of rape, a move which

was met with significant criticism by a number of women and other civil society activists. Following this, the Criminal Law (Amendment) Act, 2013 passed by the Lok Sabha on 19 March 2013 and the Rajya Sabha on 21 March 2013, reverted to the gender-specific definition of rape. Lawyer and queer rights activist Arvind Narrain wrote that the reversion “betrayed the hopes and aspirations of the transgender community to a life free from sexual violence,” since the 2013 Act, defining the victim of sexual violence as being only a “woman,” excluded the transgender community from the scope of legal protection.^{iv} The debate on gender neutrality in rape laws, as Narrain pointed out, should not be viewed solely as a binary struggle between the misogynistic/patriarchal viewpoint and the women fighting sexual oppression. The struggle also constitutes of the LGBTQ+ community as the “third” stakeholder.

It is thus important that in the light of the two PILs in the Delhi HC and the SC, we explore the arguments for and against gender neutrality in sexual violence laws from different vantage points and arrive at a holistic understanding of the issue.

Is Crime/Rape Gender-neutral?

The fundamental premise on which both petitioners frame their arguments for gender neutral laws is that crime per se has no gender. Rishi Malhotra, the lawyer who filed the plea in the SC, argues that criminal law should be gender neutral as “crime has no gender,” and that “crimes like rape and murder do not see age, caste or even gender or sexual orientation.”^v Sanjiv Kkumaar, the petitioner in the Delhi HC argues in his PIL that a “few men and women organizations, for their own vested interest, are creating a rift between male and females” by not recognising that “crime is a crime and always a crime” and should not be seen “through the prism of male and female and whether perpetrator/victim is male or female.” Going by this logic, not only rape, but all crimes, the victims and the perpetrators are supposed to be viewed as gender-less, caste-less, race-less, class-less, etc., stripped off their social and political contexts. This view presents a problematic understanding of crime itself. As Sacco and Kennedy argue, understanding crime requires consideration of offenders, victims and the social context within which the criminal activity occurs.^{vi} This implies that the criminal act of rape needs to be understood – especially in countries like India – in the context of an intrinsically patriarchal and gendered society where sexual violence evidently acts as a medium to exercise power over the female/non-male body. Writing about horrific rape incidents in Bolivia and India, Jill Filipovic explains that rapists “are particularly abetted by cultures in which women are second-class citizens, where women’s bodies are intensely politicized, where social hierarchies outlandishly privilege certain members and where there’s a presumption of male authority and righteousness.”^{vii}

Crime and Social Positions

Rape, thus, is an intrinsically gendered crime and, contrary to the arguments in the PILs, needs to be necessarily viewed through a gender lens. In addition to gender, we also need to recognise the class, caste and racial dynamics of sexual violence. As Dorothy Roberts argues in the context of the US, “race and class shape women’s confrontation with criminal law as much as gender,” since both have a bearing on the ways in which criminal law treats female victims of crime.^{viii} Roberts gives an example of how Black women have been mythologised in the American imagination as sexual objects, which in turn shapes the social meaning of rape in the United States. Back home, writing in the context of the December 16 gang-rape in Delhi, Dutta and Sircar (2013) argue that the identity criteria of

previous victims/survivors of rape in Delhi could not outrage the middle-class as much as the Nirbhaya case did. The authors give the example of the 2005 gang-rape of a twenty year-old Delhi University student from Mizoram, a case which saw only some university students and women from the north-eastern community protesting for a few days. The level of media attention and the middle-class's response was negligible, the authors note, perhaps because of the woman's identity lying on the fringes of the patriarchal "mainstream" consciousness which racially stereotypes the north-eastern woman in Delhi as "sexually aggressive, available, and thus violable" (Dutta and Sircar, 2013, p. 298).

These arguments problematise not only the claim that when it comes to sexual violence, women – at least in societies like India – can be placed on an equal footing with men, but also the notion that women themselves can be placed on an equal footing with each other regardless of their social positions – owing to a "commonality" Robin Morgan called 'global sisterhood,' a concept later critiqued by Third World feminists who argued that it "ignores all of the differences, inconsistencies and histories which make up the notion of womanhood in different places" (Sharp, 2003, p. 479).^{ix}

Thus, the argument that both men and women should be treated similarly by law, since the experience of a crime like rape would entail similar experiences for both men and women irrespective of gender, does not hold water, more so in the absence of any empirical evidence to suggest that cases of women committing sexual assault against men in India are substantial in number – as was argued by many women's organisations and civil society activists in their submissions to the Justice Verma Commission.^x Interestingly, out of all the cases of male rape quoted in the Delhi HC PIL to corroborate the petitioner's argument, none is from India.

The 'Third Way'

As noted, the enactment of the Criminal Law (Amendment) Act, 2013, which adopted the gender-specific definition of rape, received significant criticism from several LGBTQ+ rights activists. Arvind Narrain noted that while the broadening of the definition of rape under Section 375 of the IPC beyond peno-vaginal intercourse must be welcomed, we cannot ignore the repercussions the Act would have on the transgender community. In the current laws, transgender people have no categorical legal recourse in cases of sexual violence. A case in point was an incident from Pune in 2017, where a 19-year old transgender person was beaten and gang-raped by four men. Since the IPC does not recognise the transgender as being a victim of sexual violence, the men were held in police custody under Sections 377 (unnatural offences), 323 (punishment for voluntarily causing hurt), 504 (intentional insult with intent to provoke breach of peace) and 506 (punishment for criminal intimidation) of the IPC.^{xi} A few weeks later, a court let all four accused walk free, since Section 377 does not have any mention of the third gender.^{xii} What is worse is that transgender people remain at risk of arrest and prosecution under this provision. According to media reports, when a transgender woman in Chennai approached the police to file a complaint of sexual assault against a man, she was told that a complaint could also be filed against her under Section 377.^{xiii}

In 2014, the Supreme Court, in the landmark *National Legal Services Authority v. Union of India* judgment, gave the transgender people the right to be officially recognised as 'third gender,' reaffirming their fundamental rights under the Constitution. Pointing out the vulnerability of transgender people to sexual assault, the judgment highlighted:

Non-recognition of the identity of Hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police. Sexual assault, including molestation, rape, forced anal and oral sex, gang rape and stripping is being committed with impunity and there are reliable statistics and materials to support such activities.^{xiv}

Almost four years after the judgment, there is still a legal lacuna to protect transgender people from sexual violence. The latest intervention by the Government in the form of the Transgender Persons (Protection of Rights) Bill, 2016 has rightly been a subject of criticism from various quarters, including the Parliamentary Standing Committee via its report on the Bill. For instance, Section 19 of the Bill which deals with offences and penalties prescribes punishment for ‘sexual abuse’ – a term which the Bill does not even define – of a transgender person between six months to two years, treating sexual violence against a transgender person, at best, a “petty offence.”^{xv}

Way Forward

There is enough evidence to argue that the transgender community and women in India face the most alarming rates of sexual violence; and that their representation in the police, judiciary, and in other institutions of power is severely limited. The status quo thus makes it necessary for the law to provide women and the transgender community with preferential treatment by reserving gender specific definitions in sexual violence laws.

At the same time, it is important to recognise that resolving this conundrum does not necessarily entail a trade-off between legal protection to women and to the transgender community. Here, we can take recourse to some of the recommendations of the Justice Verma Committee which remain unimplemented. On the question of gender neutrality, the Committee had recommended that though the perpetrator should continue to be identified as a man, the victim be categorised as gender-neutral to cover sexual violence against men, women, and transgender people. However, ignoring the recommendations, the government promulgated the Criminal Law (Amendment) Ordinance, 2013 which kept the offence gender-neutral with regard to both perpetrator and the victim. Later, the Criminal Law (Amendment) Act, 2013 reverted to gender-specific for both the perpetrator and the victim. Leila Seth, one of the members of the JVC, noted that “this was a serious mistake, and Parliament failed to understand the injustice done thereby to so many men and transgender people.”^{xvi} Some other important recommendations which were overlooked included criminalising marital rape and taking away special powers of the army under the Armed Forces (Special Powers) Act to try armed forces guilty of sexual offences under the ordinary criminal law.

Another much-needed action is to repeal Section 377 in toto. Presently, a man who has raped a man can be punished under Section 377, but this law criminalises even consensual sex between two adults. Lawyer and human-rights activists Vrinda Grover argues that once the Section is repealed and consensual sex among adult men is allowed by the law, it would in effect necessitate a law which criminalizes non- consensual sex between two adult men, thus providing legal protection to men who are at the receiving end of sexual violence.^{xvii}

Further, the faulty Transgender Persons (Protection of Rights) Bill, 2016 needs revamp, as has been argued by the Parliamentary Standing Committee, via amending the definition of ‘transgender person’

to make it more inclusive; providing mechanisms under which cases of discrimination in relation to education, employment, healthcare, etc. be made liable; extending the IPC provisions for sexual violence against women to transgender persons (which can be done by redefining the victim as gender neutral); and provision for atrocities against transgender persons specifying the types of atrocities.

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ENDNOTES

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ⁱⁱ Ramgopal, A. (2018, February 7). Gender neutral rape laws- What about the Transgenders? *Lawyers Collective*. Retrieved from <http://www.lawyerscollective.org/the-invisible-lawyer/gender-neutral-rape-laws-way-forward> on February 19, 2018.

ⁱⁱⁱ The Criminal Law (Amendment) Bill, 2012

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^v See note 1.

^{vi} Pg. 800, Sacco, Vincent F. & Leslie W. Kennedy. (2010). The Criminal Event Perspective. In Francis T. Cullen and Pamela Wilcox (Eds.), *Encyclopedia of Criminological Theory, Volume 1* (799-934). California: SAGE

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^x See <http://feministlawarchives.pldindia.org/wp-content/uploads/submissions-by-jagori.pdf> ; <http://feministlawarchives.pldindia.org/wp-content/uploads/submissions-by-pld-to-justice-verma-committee.pdf> ; <http://feministlawarchives.pldindia.org/wp-content/uploads/submissions-by-all-india-democratic-women.pdf> ; <http://feministlawarchives.pldindia.org/wp-content/uploads/submissions-by-vrinda-grover.pdf> ; and <http://feministlawarchives.pldindia.org/wp-content/uploads/submissions-by-wrag.pdf>

^{xi} Chatterjee, A. (2017, June 22). Transgender woman raped by four men, three nabbed. *Pune Mirror*. Retrieved from <http://punemirror.indiatimes.com/pune/crime/transgender-woman-raped-by-four-men-three-nabbed/articleshow/59259927.cms> on February 22, 2018.

^{xii} Chatterjee, A. (2017, August 8). Loopholes in third gender law aid 4 rapists to get bail. *Pune Mirror*. Retrieved from <http://punemirror.indiatimes.com/pune/civic/loopholes-in-third-gender-law-aid-4-rapists-to-get-bail/articleshow/59960595.cms> on February 22, 2018.

^{xiii} Das, M. (2018, February 3). Should rape laws in India be gender neutral? Experts weigh in. *The News Minute*. Retrieved from <https://www.thenewsminute.com/article/should-rape-laws-india-be-gender-neutral-experts-weigh-75834> on February 22, 2018.

^{xiv} National Legal Ser.Auth vs Union Of India & Ors on 15 April, 2014. Retrieved from <https://indiankanoon.org/doc/193543132/> on February 20, 2018.

^{xv} See note 2.

^{xvi} Seth, L. (2017, May 6). How Leila Seth co-wrote the law that convicted the Delhi gang rape and murder criminals. *Scroll*. Retrieved from <https://scroll.in/article/836802/how-leila-seth-co-wrote-the-law-that-convicted-the-delhi-gang-rape-and-murder-criminals> on February 25, 2018.

^{xvii} Danish. (2012, July 20). Rape law amendment: ‘Where are the cases of sexual violence against men?’ *Firstpost*. Retrieved from <http://www.firstpost.com/india/rape-law-amendment-where-are-the-cases-of-sexual-violence-against-men-384227.html> on February 19, 2018.

EQUALITY

Sex Ratio at Birth Dips in 17 Out of 21 States, Gujarat Records Fall of 53 Points

PTI, The Wire

The sex ratio at birth (SRB) saw a decline in 17 out of 21 large states of the country, with Gujarat recording an alarming dip of 53 points, a report released by the Niti Aayog stated. Gujarat indicated the worst performance with a drop of 53 points from 907 females per 1000 males in 2012-2014 to 854 females per 1000 males in 2013-2015. It is followed by Haryana, Rajasthan and Uttarakhand. This steady drop in SRB highlights the need to re-evaluate the implementation and effectiveness of the Pre conception and Pre Natal Diagnostic Techniques Act 1994.

Read more: <https://thewire.in/225053/sex-ratio-birth-dips-17-21-states-gujarat-records-fall-53-points/>

Date Accessed: 27.02.2018

India's gender inequality has led to millions of 'unwanted' girls

Euan McKirdy, CNN

According to the Economic Survey 2017-18 conducted by the Indian government, deeply-ingrained preference for boys has led to a massive gender gap in India. The report states that while progress had been made in some areas, the "deeper societal son-preference" was proving hard to shift. The tendency among couples to keep trying until a male child is born has led to millions of unwanted girls. This is the primary reason behind India's skewed sex ratio. While the natural sex ratio is 105 males per 100 females, in India it is 107 males per 100 females. Some of the ingrained preference is due to the norms governing inheritance, the continued practice of dowry and the tradition of patrilocality. The report also attempts to look at solutions and points to "growing evidence that there can also be significant gains in economic growth if women acquire greater personal agency, assume political power and attain public status, and participate equally in the labor force". It has also acknowledged the role played by the government through its schemes to protect the girl child.

Read

more: <https://edition.cnn.com/2018/01/30/health/india-unwanted-girls-intl/index.html>

Date Accessed: 27.02.2018

Is Goa's Biggest Problem Really That Women Drink Beer?

Ira Anjali Anwar, The Wire

At the first edition of Goa's youth parliament, chief minister Manohar Parrikar spoke about his fear that women have 'begun' to drink beer and in doing so, women are crossing some invisible 'tolerance limit'. While in the past the ruling BJP party's comments displayed their alarming immaturity regarding women's behaviour, Mr Parrikar's fears around women consuming alcohol, leaders in the BJP seem to be on a drive to find innovative ways of passing sexist judgements. While Goa suffers from mining scams and subsequent bans, the state's growth and employment have suffered a blow especially the rural women's unemployment rate which is at 26.9%, significantly higher than the state-wide female unemployment rate of 17.2%, as per the 2015-16, according to the chief minister, the youth are 'shying away from hard work'.

Read More: <https://thewire.in/222909/mr-parrikar-weve-drinking-beer-long-can-get-back-actual-problems-now/>

Date Accessed: 24.02.2018

DEMOCRATIC PARTICIPATION

She is offline: India's digital gender divide

Sahil Kini, Livemint

According to a recent UNESCO report, even though India accounts for 12% of the world's internet usage, it accounts for almost half the digital gender gap. The report stated that over 70% of the country's internet users are men. This divide is worse than countries like Saudi Arabia and Iran. The author argues that this dismal number is reflective of India's deep rooted patriarchy which is also visible in India low women workforce participation and higher amounts of unpaid care work. This underrepresentation and under-compensation also harms India's economic growth as a Mckinsey report highlighted that India's GDP would increase by 16% if it can ensure equal women participation in the market. The author argues that helping girls get secondary and tertiary education, expanding skills training to boost employability and, improving access to financial and digital services can all be addressed in some form or the other by access to smartphones and other forms of digital media. Although this solution does not adequately address the deeper social issues which give rise to such problems, higher digital literacy amongst women along with government schemes to support them would act as big boost to the Digital India programme as well as the economy at large.

Read more: <http://www.livemint.com/Opinion/sD6mVqLAEa7cvfJtmdXXuO/She-is-offlineIndias-digital-gender-divide.html>

Date Accessed: 27.02.2018



Source: <http://www.livemint.com/Opinion/sD6mVqLAEa7cvfJtmdXXuO/She-is-offlineIndias-digital-gender-divide.html>

DEMOCRATIC PARTICIPATION

Women's Financial Inclusion Needs a Bigger Fix than Digital Ids

Debdatta Das, NewsDeeply

While India, with its well-known comparative advantage in I.T. services, has been attempting to boost financial inclusion by linking its digital unique identification (UID) scheme, Aadhar and bank accounts, the Global Findex Database by the World Bank shows the lower participation in formal banking among women relative to men, particularly in the South Asian region. This gap is as large as 18 percentage points for the region and compares unfavourably with the 7 percentage-point gender gap in account ownership worldwide. Some of the few obstacles highlighted in the report include lack of internet access, lack of documentation or proof of authenticity often acts as a barrier to bank account ownership particularly for women. As for women savings, they are often not large enough particularly of those engaged in the informal sectors. Hence, it is unclear how I.T.-enabled I.D. systems that improve documentation procedures for banking will yield higher financial inclusion when 48% of its population refrain from holding bank accounts.

<https://www.newsdeeply.com/womensadvancement/community/2018/02/13/womens-financial-inclusion-needs-a-bigger-fix-than-digital-ids>

Date Accessed: 24.02.2018

India Recognised Third Gender Much Before the West, Says UK Professor

PTI, News18
A professor at UCL, while describing gender inequality as a global phenomenon, highlighted that Indian culture had recognised gender as a non binary concept much before the West accepted it. She stated that gender gap in education and employment in UK is reducing because of growing awareness among the younger generation along with stronger protection laws against harassment at workplaces. Gender inequality was related to a wide spectrum like expression and identity and was not just about male and female. To change the outlook of a society, the government and civil society should aim to frame policies and strengthen institutions to support the change.

Read more: <https://www.news18.com/news/india/india-recognised-third-gender-much-before-the-west-says-uk-professor-1657393.html>

Date Accessed: 27.02.2018



Source: Stock photo from Getty images

LEGAL DEVELOPMENTS

Women Born Before 2005 Have Equal Right on Ancestral Property: SC

News Desk, India.com

A bench of Justices AK Sikri and Ashok Bhushan of the Supreme Court, while passing the order on a plea filed by two sisters who seek share in their late father's property, underlined the fact that The Hindu Succession Act 2005, which gives equal rights to daughters on ancestral property, applies to all women including those born before the year. Therefore, their share in ancestral property stands undeniable. The sisters had approached the apex court after the trial court in 2007 dismissed their plea saying that they were not entitled to any share as they were born before 2005. The High Court too had rejected their plea. The Court also clarified the year of birth should not a criterion to decide whether a woman was covered under the amended law, as it makes a daughter a "coparcener" since birth and gives the same rights and liabilities as a son while asserting that it is applicable in all property disputes filed before 2005 too.

Read More: <http://www.india.com/news/india/hindu-succession-act-2005-applies-to-all-women-says-supreme-court-2876135/>

Date Accessed: 24.02.2018

SC dismisses plea to make sexual assault gender neutral: Move reflects court's reluctance to view rape cases as victim-centric

Deya Bhattacharya, Firstpost

On 2 February 2018, the Supreme Court of India dismissed public interest litigation (PIL) that prayed to make the nature of laws that pertain to rape, sexual harassment, stalking, voyeurism, and outraging the modesty etc gender-neutral. The Supreme Court, earlier, was asked to examine if laws criminalising adultery can be made gender-neutral. The apex court Bench, led by Chief Justice Dipak Misra and consisting of Justices AM Khanwilkar and DY Chandrachud, stated that these provisions are affirmative "for the protection of women and in their favour". "We are not saying a woman cannot rape a man but these come under a different offence under IPC. Even if we feel that the legislation should have been gender-neutral, what we feel is that the legislature would have acted as per what was the urgent requirement," Chief Justice Misra said.

Read More: <http://www.firstpost.com/india/sc-dismisses-plea-to-make-sexual-assault-gender-neutral-move-reflects-courts-reluctance-to-view-rape-cases-as-victim-centric-4337983.html>

Date Accessed: 24.02.2018

Centre opposes allegation of discrimination against women in army recruitment

PTI, Hindustan Times

Two PILs were filed by a lawyer Kush Kalra in the Delhi High Court that alleged discrimination against women in the Army's recruitment policy related to its engineering and education corps. According to him, "This discrimination on grounds of gender is violative of fundamental right of equality before law, the right not to be discriminated on the ground of sex, the equality of opportunity in the matters of public employment, the right to practice any profession and occupation and the human rights of the women." However, while the Centre has opposed both the PILs and stated that the allegation of discrimination against women in the Indian Army with respect to their recruitment in the force is "baseless, unfounded and devoid of merit", the Indian Army maintained that it has in "1992 introduced women special entry scheme (officers) for induction of short service commission (women officers)", under the appropriate provisions of the law. The petitioner has sought an order declaring the Indian Army's eligibility conditions which disentitle women from being recruited in the Army Educational Corps as void, since they are inconsistent with the fundamental rights of women.

Read More: <https://www.hindustantimes.com/india-news/centre-opposes-allegation-of-discrimination-against-women-in-army-recruitment/story-20HwkrGfp3XkjMhvrhlyJ.html>

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