

**GENDER OF INDIAN CRIMINAL LAW- SEXUAL, ASEXUAL OR CONFUSION?****\* Parul Yadav**

From past generations to present of Human Race, everyone has heard and complied by law. It was made to control the social behaviour of Humans. But here lies the catch. In most of the Human clusters it had always been a Male, who had dominated the social plain of the Society. Any other Human whether it being a female or intersex, if presented themselves in public places were treated as outcasts or were neglected as if they do not even exist.

A lot of things like status, role, job etc depend upon this crucial, yet basic anatomy of human body.<sup>1</sup> Though person born with ambiguous sex is also a human but it cannot procreate, which is a very essential norm of human existence to ensure continuity and everyone is expected to contribute into it. Therefore, distinct sexes, that is, male and female sex who could contribute into this continuity were taken as normal sex categories, while the ambiguous ones as abnormal and were looked first with amusement followed by disgust and refutation by the society.<sup>2</sup> Things become scandalous when ambiguity about the sex of child steps in, because that is, not only the First step of the child in hierarchy of the society, it also become a “pass” for the child to have a standing in the society. And based on this pass society began to function and rule of law began to evolve.

This social trend of giving priorities and rights to those, who could be fruitful lead to serious power play in the society. Due to this, law began to favour who were influential and it was the male sex or gender which became favourite disciple of law. The biological grafting of male sex made them a preferable sex to collect food and other necessities, when life of the people were of nomadic pattern. Because of this important role played by male sex, all other work done by women became secondary in nature, because what the male sex was doing, was termed as providing resources to sustain life, while women were merely accumulating and disturbing it, which was considered as secondary task. Thus, the bias began on one pretext or other and the law which was supposed to protect all was now working to solve the disputes among the dominant classes, which was man and with time law became an object “for Men to control other deviant Men”. This resulted in having different set of laws for different set of

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<sup>1</sup> Amy S. Wharton, *The Sociology of Gender-An Introduction to theory and research* : United Kingdom: Blackwell publishing, 2005

<sup>2</sup> Asghar Ali Engineer(ed.), *Status of Women in Islam*, Delhi: Ajanta Publication, 1987

people which are divided initially on basis of their biological sex, which is male or female followed by social sex or gender and then religion, status, class for that matter.

However the scope of this article is to focus on effect of Sex and Gender on working of criminal law in India. When one hears the word “Criminal Law”, many pictures began to emerge in one’s mind and the strongest one is of a ‘criminal being punished by Law’. Here the focus is on the question that “Who is a Criminal?”. The word criminal, if taken in a generic sense pronounces that anyone can be a criminal, that is, any human irrespective of sex, age, class etc can be a criminal. But if that is to believe than the question which arises is “why then Codified criminal law<sup>3</sup> generically takes a Male to be criminal only and other gender and sexes inclusive part of it?”.<sup>4</sup> This notion of law is very loop-sided in nature and makes one wonder “What makes law to assume that it is only a Male Human Being who can be a trouble-maker?” and “What made such notions to come up?”.

Presence of Man has been taken for granted and many things have been assumed on the basis of physique of man like, it is not possible to outrage the modesty of a Man by a woman or for another example “Man cannot be stalked, because he is strong enough to take care of himself”. And for transgender and intersex etc.. there are strong assumptions like they being born criminals, not modest people so certainly there dignity cannot be offended etc...

The ultimate aim of this piece of work is to ascertain that whether working of Criminal law in India is gender based or it has taken a neutral approach in working. To achieve this purpose major laws resulting in criminal proceedings will be analysed based on their rough text. Beginning with INDIAN PENAL CODE, 1860 by the virtue of Section 8 and 10 defines what could possibly be a male and female and other derivatives use to define them. Nothing has been mentioned which anyway defines Third gender or sex even after coming up of *NALSA* Case. This division in IPC is further seen in provisions related to Dowry Death (Section 304-B), Wife – beating(Section 323 and 325), obscenity(Section 292-294), Sexual Assault(section 354, 375, 376, 377,509),kidnapping and abduction(Section 366,366-A,366-B), flesh trade(Section 372,373) , offences related to marriage(Section 493-498) , cruelty(Section 498-A) and insult(section 509), where either the language used is clearly defining woman as a

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<sup>3</sup> Criminal Procedure Code, 1978 and Indian Penal Code , 1860

<sup>4</sup> Section 8,IPC - The pronoun "he" and its derivatives are used of any person, whether male or female. Section 10,IPC -The word "man" denotes a male human being of any age; the word "woman" denotes a female human being of any age

victim like that of Section 304-B and that of sexual offences or it has been interpreted in such a way by the Courts which means that woman can only be the victim of such crimes like that of obscenity.

To further complicate things THE INDECENT REPRESENTATION OF WOMEN (PROHIBITION) AMENDMENT BILL, 2012 under Section 2(c) have stated that it is the persona of women can be depicted as sexual object in writing.<sup>5</sup> But why is that so?. Male actors showing their bare chest and bottoms in movies and commercials are seen as icons of entertainment. Why this representation of human body is not offensive to society and even to legal authorities of the country.

The CRIMINAL LAW (AMENDMENT) ACT, 2013 which was supposed to neutralize the criminal law in terms of gender failed the test of ‘Gender Neutrality’ and legislation went by the patriarchal notion of penile-vaginal penetration and also that it is only the woman who can be a victim of sexual offence while man always be the predator. It failed to realise that woman also can very well victimize man when it comes to sexual offence. One more thing which was overlooked that in light of some same sex marriages and live-in relations approved by the judiciary, it will be difficult to prosecute when sexual violation is reported in same sex relations and now when third sex/ gender is also recognized by the Apex Court, how will the law answer the sexual violations of third gender by third gender itself or by male or female gender.

Than the CRIMINAL PROCEDURE CODE, 1976 which is supposedly a Neutral law and is merely prescribing the procedure to run the criminal proceedings on plain reading of the text is clearly bending towards the benefit of “Female” as gender or sex. Section 46(1), 46(4), 51(2) lay down special direction when a female offender has to be arrested. Also, Section 330 which gives benefit of probation to the offenders make a special category for woman due to which woman of any age is eligible to claim the benefit of probation while for male criteria is under 21 years of age provided that in both the categories offence is not punishable with death or life-imprisonment.

Than INDIAN EVIDENCE ACT, 1872 which is again a procedural law, demonstrate its bias by enacting Section 113-A and 113-B added after Amendment Act of 1983, which are biased

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<sup>5</sup> Section 2(c) “indecent representation of women” means— publication or distribution in any manner, of any material **depicting women as a sexual object** or which is lascivious or appeals to the prurient interests;

in favour of women in cases of abetment of suicide of married woman and dowry death respectively. though it is argued it is done to safeguard women who are victimized by the hands of in-laws badly. But now things are changing and Men too are equally victimized and drawn to suicide by the wife and her family.

THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005, is again protecting women only and is based on the patriarchal notion that it is the man who is perpetrator of violence and woman who is nothing but a submissive partner in marriage is victim. Even if this is accepted than how does this law helps when two women or men get married to each other? . Both the nuptials are lying outside the scope of the Act and hence without protection. And now with the recognition of third gender this Act is severely lacking in case of marriages between persons claiming themselves a s third gender or sex or their marriage to more recognized gender or sex, that is, male or female. Also, notion of the Act that it is only men who is the author of domestic is not logical. There are ample number of cases happening in the very neighbourhood's we reside, where Men are beaten by their wives and sometimes even thrown out of their houses and not to forget are further victimized by police and mocked by society. Hence this Act fails in its task of providing protection against domestic Violence and though greatly biased in favour of women, hence not a gender neutral law.

The Union Cabinet on 26 Feb 2013 approved the introduction of THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) BILL, 2012 in the Parliament to ensure a safe environment for women at work places, both in public and private sectors whether organized or unorganized. This will contribute to realization of their right to gender equality, life and liberty and equality in working conditions everywhere also granted as fundamental rights under Article 14, 19 and 21 of the Indian Constitution. The sense of security at the workplace will improve women's participation in work, resulting in their economic empowerment and inclusive growth. This Act imposes a special responsibility on employer to safeguard interest of his female employees by, formulating a panel of senior most employees preferably women, who are socially active. The main highlight of this Act, is the option available to women to get herself or the accused transferred to another branch of the company or get the accused suspended, by the time investigation is complete, if she apprehends a bias, due to presence of accused. However, it is also worthwhile to note that such provisions of this Act are not absolute in nature, because there are provisions which penalize false reports made of harassment.

However this Act targets only women as possible victim of sexual harassment, which is dangerously a wrong hypothesis assumed by legislature. There have been incidences where “masculine and patriarchal” men have been harassed by “feminine” females. However, these cases hardly get reported in police stations or to the concerned authorities at working places, due to high social stigma and notions about male power involved. Apart from this male and female ritual phenomenon, there have been incidences where, sexual harassment as defined by the law, have been conducted by members of same sexes towards each other. That is, passing of sexually coloured remarks or other pervert actions by female towards a female and by a male towards a male. It seems that despite of accepting presence of homosexual relations in society, legislature is still on the patriarchal concepts of man and woman relations and relations of men and women among them. Therefore this Act fails to serve the entire purpose of saving a person from discomfort of sexual harassment at work place, plainly because of patriarchal notions of sex and gender prevailing in Indian Society till date.

The purpose behind THE IMMORAL TRAFFIC (PREVENTION) ACT, 1956 is to stop trafficking of child below 18 years<sup>6</sup> and prostitution<sup>7</sup>. On looking at the definitions given of child and prostitution under Section 2(aa) and Section 2(f), individual which has been mentioned there is person, rather than being mentioned as female or male. These sections talks on abuse of person who are either below age of 18 years or are sexually exploited for commercial purposes. Hence this is gender neutral law, however the fact cannot be denied, that the major advantage of this Act had been to save women, who have been forced into prostitution or slavery of other forms.

THE INDECENT REPRESENTATION OF WOMEN (PROHIBITION) AMENDMENT BILL, 2012 is an advancement done to the Act of 1986. The primary purpose of the proposed Bill is same as that of present running Act. However this Act is response to the advanced technology which has developed power and circulation of print media<sup>8</sup> both in physical and electronic format. Advancement of pornographic material through internet and other

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<sup>6</sup> Section 2(aa) “child“ means a person who has not completed the age of eighteen years;

<sup>7</sup> Section 2(f) “prostitution“ means the sexual exploitation or abuse of persons for commercial purposes or for consideration in money or in any other kind, and the expression “prostitute” shall be construed accordingly

<sup>8</sup> Section 2(aa) “electronic form” shall have the same meaning as assigned to it in clause (r) of section 2 of the Information Technology Act, 2000 of The Indecent Representation Of Women(Prohibition) Amendment Bill, 2012

technological mediums lead to havoc in the society. Circulation of MMS of school children and women in private like their own homes, gym's , clinics, public washrooms or changing rooms demanded such advance Act as the current Act has become outdated in light of today's technological developments. Again the subject of this Act is woman. What legislature has fail to understand here is that male nakedness, which is allured by the media and society has same crippling effect on mind of a child, which female nudity is blamed to sponsor on young minds. And no thought has been spared by the legislature on the presentation of third sex and gender, which is always predicted as one begging, running prostitution rackets and wearing skimpy cloth.

Law keeps dilly dangling from powerful to weak and vice-versa but gets silent on the question of equal application. However, this can be said as a dilemma or beauty of law that though Law expressly makes provision for powerful but this silence sometimes take a protectionist approach which becomes a guard for the oppressed section to save themselves from the law which is tilted in the favour of the affluent sections of the society. This is a very simple logic, because one who make law, is already powerful and it will make law to safeguard its interest first and latter that of others.

What law we have now in India to control crime or for that matter anywhere in world has been formulated to bar Men exclusively from fighting against other men and resolve conflict among them by rules set by them only. Women and other sex and gender are absent from this law making process. It was assumed or taken for granted, that women are passive creatures while men are aggressive beings as they are the hunters and the protectors of the property, which require strength, and which is out of bounds for females and third sex. However, Men's requirement of being aggressive for social reason of food and property accumulation, allowed him to be aggressive but only to an extent, movement the line is crossed law comes running to bar his antics. Thus, in words of Lombroso, aggressiveness which is the social quality (quality because it increases level and spirit to accumulate more and more and of best quality), of male was linked to cause of crime and termed that a criminal has to be a man since crime requires aggressiveness. And since women had nothing to compete for so they were not required to be aggressive. This became a negative trait of women and still it is, so they are considered to be non-criminal as such , but if a women does poses this aggressiveness then though she was termed as a criminal but was treated as a "Woman with male hormones" .

This tendency itself question the basic identity of this questioned female that whether she is a female or male?. However the number of such women was so few that law hardly took any troubles to control them. This is true even in case of penal laws of India, which were formulated to control deviant man, but never said so expressly, but choose to say that word 'man' as a usage here includes 'woman' but this caused lot of inconvenience to woman, as they argued that there reason of playing with law are different than those of men, while third sex and transgender argue that law doesnot even take them into consideration while formulating law. And notion of law is nothing but confusing, that women since not aggressive , cannot be criminals, but even if they are shall be treated differently since they are women??. Female criminal behaviour has been commonly perceived as a less serious problem than male criminal behaviour. Historically, women are presumed to commit minor offenses and have made up only a small proportion of the offender population. But, these presumptions have concealed a trend in the rising percentage of female offenders, their participation in violent crime as harsh as that of throwing young girls in prostitution, murder, terrorist activities or duping people of crores of money. But still crime committed by women becomes an act of sympathy towards her both by society and judiciary and becomes a mitigating factor of crime. In *Rukmini Devi v. State of Uttar Pradesh*<sup>9</sup>, a teenage mother killed her infant son without any motive and showed no remorse on it. But this behaviour of hers became a mitigating factor and Court stated that she has already been punished by her act as she lost her child as well as trust of her and in-laws family sanctioned her case for remittance under section 432 of Cr.P.C to state government. But surprisingly picture changes when she faces a sexual assault. Over here when a crime is done against her but she is held responsible for it, because she provoked it and man, who is naturally aggressive, cannot be completely blamed.<sup>10</sup>

It is this major gap of law here, which on the first notion do not consider crime by women as a crime. Even if it does, it takes it on the parallel ground of a man committing a crime. But, when it comes to sexual victimization, it is the women, who is responsible, despite the fact that crime happened against her. Her guilt is also held when it comes into domestic relationships and she refuses to comply with demands of husband and relatives. Though here law upholds it's protective approach towards her, but with a priority to the correct the social structure first and then her. Situation for intersex and transgender is much more disheartening

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<sup>9</sup> 1989 Cr LJ 548(All HC)

<sup>10</sup> Kristin L. Anderson and Debra Limberson, 'Masculinity And Power In Men's Account of Domestic Violence' in *The Kaleidoscope of Gender*, Joan Z. Spade: Sage Publications, 2011

as they are not even considered part of society and then, not its subject by law. Recently, Supreme Court has granted recognition to third gender, that is now they can have legal documents and identity to uphold there “Gender Identity”, but the question of their acceptance and of their status by the society needs to be studied in detail.

What legislature and judiciary in India are trying to achieve, is equality between its subjects, which are biological man and woman and now after coming of cases like Naaz Foundation v. NCT of Delhi<sup>11</sup> and National Legal Services Authority v. Union of India and others<sup>12</sup>, by granting a legal existence to Third sex or gender a tussle of superior existence is ensured. After considering this scenario one is forced to think that, why “law” and its enforcement agencies are bothered by the fact that a person seeking assistance of law is a male, female or intersex?. The much talked about ‘equality’ has failed to show any desired results. Equality which can be formal and substantive has been applied at same time in India. And formal equality has been used by judiciary in denying man and woman undue advantages in employment conditions, while substantive equality has been given to women, citing their special capability of child birth and victims of social oppression while the transgender and third sex are labelled as born criminals and sexual predators..

This bias and unregulated working of law is there even when THE CONSTITUTION OF INDIA is oozing with principles of equality and justice. As a matter of fact that remained concepts only to preached not practice. And more recently development of breakfast theory by justice katju...has indicated dual standards of society, legislature and by judiciary itself while implementing the equality. Society till date has not been able to free itself from the differences of sexes and social role they are supposed to play in the society. Therefore, to reach at the stage of gender neutrality, where a human is an individual, irrespective of his sex and gender and not only equality but equal opportunities are ensured, seems to be a distant dream. And in the light of Delhi rape case we cannot forget and shall not forget statements made by elite of our society despite the fact that whether they are spiritual leaders like Asharam babu, Rajendra Shaikhawat, Ex-president Ms. Pratibha Patil son, and so called our other representatives. This simply shows that law alone cannot change society no matter how neutral law it represents. Society has to be cleaned from within, it’s thought process, way of

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<sup>11</sup> (2009) 160 DLT 277

<sup>12</sup> WRIT PETITION (CIVIL) NO.400 OF 2012 along with WRIT PETITION (CIVIL) NO.604 OF 2013

working everything needs to be changed, so that everyone could decide their fate, rather than the “biologically few”.

Free thinking Indian Judiciary failed the test when Delhi High Court recently in *State v. Vikas*<sup>13</sup>, Court held that intercourse among marriage is not rape no matter how forceful it is. Now, what does this simply mean, that once marries a woman has no right over her body and should be available all time for sexual intercourse to her husband?. What judiciary is focusing on, is to have equality not neutrality in civil law but not in criminal law. It has been forgotten that criminal law and its functioning has same if not greater, effect on lives of ordinary citizen. And the principles of equality, be it formal or substantive which judiciary applies in civil law are not meeting the demands of justice in criminal branch of law.

To conclude, Gender of criminal law in India is in state of confusion where three pillars of democracy that is judiciary, legislation and executive and not to forget Indian Society are fighting with each other and among themselves to determine sex and gender of “Law”, which is formulated to control their affairs and controversies. But the patriarchal society every time makes law to look beneath the belt to ascertain its functioning in matters of conflict at every noted time. A more neutral and class less approach of law is seeked which takes a human as an individual and make laws ‘similar’ for all. To call for ‘same’ laws at this point of time will not be a sane attempt as law and society both need to come at terms to respect and grant existence for all, which is not based on one’s biological sex and social gender.

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<sup>13</sup> SC No.1/14. Unique case Id. No. 02405R0349722013