



BEYOND THE BINARIES: THE NEED FOR GENDER NEUTRAL LAWS AND POLICIES IN INDIA

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Abstract-- The Constitution of India encourages equality and forbids discrimination on the basis of gender; yet, the reality frequently falls short of this ideal. There are still many aspects of life in which discrimination on the basis of gender are prevalent, which results in inequality and impedes growth. In recent years, there has been a growing recognition of the significance of gender-neutral laws and policies in the fight against systemic prejudices while simultaneously encouraging real equality. An investigation into the significance of gender-neutral legal frameworks in India is presented in this article, together with an analysis of the challenges and opportunities for reform. The research uses legal analysis, empirical evidence, and case studies to highlight the value of gender-neutral laws in advancing gender equality, protecting human rights, and cultivating a society that is more accepting of people of different gender identities and expressions. In addition to this, it identifies critical areas that require reform and provides strategies that policymakers, lawmakers, and participants from civil society may use to campaign for gender-neutral legislation and effectively implement it. Through the promotion of gender-neutral legislation and policies, India has the potential to reaffirm its dedication to the principles of universal equality and justice.

Keywords: *Equality, Gender Neutrality, Legal Framework, Policies, Systemic Prejudices.*

INTRODUCTION

The effort to legally establish gender distinctions has proved to be a challenging problem with the presence of individuals who classify or are identified as intersex, third gender, transgender and more specifically genderqueer or non-binary among some. In the dictionary of Merriam Webster, "gender-neutral" is defined as not referring to either sex but only to people in general. In the Cambridge Dictionary, "gender-neutral" is defined as relating neither especially to men nor to women. Therefore, the term "Gender Neutral" refers to a person and not specifically to man, woman or third-gender.

Since the gender inequalities in our legal system are a harsh yet apparent reality, legal safeguards were introduced to protect women's rights. Although these laws have been crucial in addressing several issues, they frequently reinforce gender stereotypes and, at times, are inadequate for effectively protecting the rights of other genders. For instance, most provisions often neglect gender diversity and assume women are victims and men are perpetrators. In this regard, formulating and implementing gender-neutral laws are essential in addressing inequality. Briefly, gender-neutral laws envisage treating people equally and not discriminating based on gender, regardless of how they identify.

DECODING GENDER AND SEX

Although the terms "gender" and "sex" are sometimes used interchangeably, they have distinct meanings. Socialization is the process through which gender is formed. Gender refers to the complex social, psychological, and cultural constructs that surround it. Traits, duties, actions, identities, and expressions associated with being male or female, as well as connections between them. It affects how individuals view and understand themselves (Canadian Institutes of Health Research, 2023). Gender identity is not static or binary (girl/woman, boy/man); rather, it is a process that is fluid and subject to change throughout time. Gender appears natural to a person because it is so deeply ingrained in our customs,



behaviors, beliefs, and goals. Gender characteristics are not innate to us; rather, they are acquired through membership in a specific sex group. It is anything we do or connected to something we do, according to what society or the community in which a person resides tells us¹. Society has created certain norms, behavior and it expects people to behave and act in that manner. Gender is something which one expresses by the way of speaking, dressing, walking, behaving and while interacting with others. Every person has a dual binary version of themselves: an external societal and public gender identity and an interior personal sexual identity. Postnatal experiences shape one's gender distinctiveness and awareness of how that individual is perceived in front of public. It arises from observing society's norms and expectations in general, as well as comparing oneself to others. Gender may not at all time match with the biological sex of a person. There may not reconciliation between the sexual identity and gender i.e. there may be genitals of one sex in the body (male) and brain and the essence of the other (female). Gender is very personal in nature and comes naturally to oneself.

Sex is a phrase used to refer to a group of biological traits. Biology and physical characteristics include chromosomes, gene expression, hormone levels and functions, and the procreative/sexual framework all influence sex. There are variations in the genetic qualities that constitute sex, and how those qualities are displayed. It is determined at birth based on the external makeup, though this can also be altered. Sex reassignment procedures are performed on transsexual individuals, who have the characteristics of one sex but the gender identification of another (Medical News Today, 2023). The penis, scrotum, testes, and accessory glands that enable a man to transfer sperm are the main features of a human male, whereas the ovaries, uterus, ovarian tubes, vagina, fallopian tubes, cervix, and the capacity for reproduction are the main features of a female. Secondary characteristics of male human body include facial hair, chest hair, more body hair, a built-in pelvis, developed upper body muscles, and the ability to gain muscle mass more quickly, while less body hair, denser hair on the head, curved hips/figure, decreased upper body strength, breasts, the ability to nurture children, the ability to breastfeed, menstrual cycle, and an increase in body fat composition are secondary characteristics of a female human body. An intersexed person is said to have a mix of these characteristics (Diamond, 2000).

GENDER IDENTITY

An individual's unique type of gender is referred to as their "gender identity," which may or may not resemble with the sex they were given at birth. It also means person's sense of their own body, that may include actively choosing to have their bodily functions or appearance altered through surgery, medicine, or other means, as well as other gender-specific expressions like dress, speech, and mannerisms. If a person identifies as male and prefers to use masculine language to describe themselves, then their gender identity is masculine. But he can only be considered male if he behaves, presents himself, and/or dresses in a stereotypically masculine way. Since gender identity is inherent to nature, it is vital to one's existence. Natural impulse is linked to an individual's inherent, natural nature. Different gender identities can exist, such as butch, gender expansive, cisgender, androgyne, bigender, gender queer, non-binary, omnigender, transgender, and so on (Cartwright & Nancarrow, 2022).



Why is it needful to have Gender Neutral Laws?

Social Perspective: Since patriarchy is so ingrained in Indian culture, it is hard for us to accept that males can also be victims of abuse. Reports of cases involving male victims are sometimes met with suspicion, particularly when the perpetrator is a female. The problem of men being sexually assaulted or harassed is so poorly understood that even the victims themselves may not be aware of it. Let us assume a man gets harassed sexually by another male. When such occurs, it is frequently mistakenly interpreted as proof of his homosexuality, which causes the sufferer to be shunned and unjustly humiliated. On the other hand, because of the belief that women are incapable of being the ones who harass or abuse others, crimes like these are still ignored, even when both the victim and the offender are female. Men often face barriers when seeking help or disclosing their experiences, further perpetuating the silence surrounding this issue (Nadda, 2019).

Legal Perspective: There are still many problems that cannot be solved by focusing on protecting one gender, even if India has achieved great progress towards gender equality. Accordingly, we need to make strides towards gender equality by making legislative changes that are less biased towards either sex. When it comes to promoting and opposing gender neutrality, the Indian court has long been in the forefront. Cases like *Navtej Singh Johar v. Union of India* (2018), which led to the decriminalization of homosexuality in India, and *National Legal Services Authority v. Union of India* (2014), which recognised transgender rights as a distinct gender, have led to progressive readings of the Constitution and the passage of gender-neutral legislation.

One of the earliest decisions that addressed gender neutrality, the 1996 Delhi High Court decision in *Smt. Sudesh Jhaku v. K.C.J. & Ors.* emphasised the need for IPC protection for male rape victims. In a different case, *Sakshi v. Union of India* (1997), the Supreme Court directed the Law Commission examine the issue of male rape victims and how laws are applied gender-neutrally. The issue was eventually included in the 172nd Report of the Law Commission as a result of this examination. In 2012, the Lok Sabha introduced the Criminal Law Amendment Bill, which greatly advanced gender neutrality in India. Notwithstanding, it was halted at that point because of a number of issues.

The sociological and legal justification for gender-neutral legislation to combat domestic abuse in India is highlighted in a recent study that was published in the South Indian Journal of Social Sciences. The analysis revealed that 62% of respondents identified several key factors contributing to domestic violence against men: societal lack of awareness, stigma, traditional gender norms, cultural expectations, lack of support services, and challenges within the legal system. These social and legal barriers make it difficult for male victims to report abuse and access help. The study underscores the necessity of a legal framework that ensures equal protection and resources for all victims, regardless of gender, to create a more equitable and effective response to domestic violence (Navpreet Kour & Shobha Gulati, 2024).

DISSECTING THE RELATIONSHIP BETWEEN GENDER AND VIOLENCE

Discussions on gender-based violence now increasingly include men and transgender individuals, highlighting unique challenges they face. In India, laws typically exclude men as victims of domestic violence. A study in Haryana found that 52.4% of men experienced gender-based violence, with 51.5% facing spousal violence, mainly emotional, and 10.5% experiencing it in the past year (Domestic Violence against men in India, 2023).



Added to this is the domestic violence arising out of dowry cases. SBS Punjabi did an article “The Dowry Trap: The untold story of male victims” (2018). This article narrates the stories of many men who were falsely accused in dowry cases, using the Dowry Law and decimating the men’s lives. In this regard, the observation of the Supreme Court in *Sushil Kumar Sharma v. Union of India* (2005) holds special significance by highlighting the fact that the misuse of the provision (IPC 498A- Dowry and Cruelty Law) a new legal terrorism can be unleashed. The provision is intended to be used as a shield and not an assassin’s weapon.

Deepika Narayan Bhardwaj is a journalist, documentary filmmaker & a men’s rights activist from New Delhi, who makes a compelling case for protection of rights of men too whether it’s false accusations or domestic violence or sexual crimes. She has become a prominent voice for men’s rights in India with her documentary film “Martyrs of Marriage”, which is about abuse of section 498A (Anti-dowry law) of Indian Penal Code by brides and their families. Ms Bhardwaj is not alone in her criticism. Over the years, Section 498A has acquired the reputation of being the "most abused law in the history of Indian jurisprudence". With cases of divorce in India steadily rising, campaigners say that disgruntled women, aided by unscrupulous lawyers, routinely misuse the law to harass their husbands and their relatives. As the law prescribes the immediate arrest of those named in a complaint, 2.7 million people, including 650,000 women and 7,700 children, were arrested between 1998 and 2015. The accused in some of the cases were as young as two years old and, in a particularly bizarre case, a two-month-old baby was hauled into a police station. The fact that Section 498A is a cognizable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives," the two-judge bench of Justices CK Prasad and PC Ghose said in its order in famous *Armesh Kumar Case* (2014) on the misuse of Section 498-A. The simplest way to harass is to get the husband and his relatives arrested under this provision. In a quite number of cases, bed-ridden grandfathers and grandmothers of the husbands, their sisters living abroad for decades are arrested," it added. Thus, the Court laid down certain guidelines which the police officer must follow while arresting under Section 498A, IPC or Section 4 of the Dowry Prohibition Act, 1961 and that such arrest must be based on a reasonable satisfaction with respect to genuineness of the allegation. Moreover, even the Magistrates must be careful enough not to authorize detention casually and mechanically.

Judges across India have warned against its misuse (False rape cases a travesty of Justice, 2016), and the Delhi Commission for Women has said that 53.2% of the rape cases filed between April 2013 and July 2014 were found to be false (53.2% of the rape cases filed between April 2013 and July 2014 were false, says DCW, 2014).

A 2022 study by the National Commission for Women revealed that 3,000 cases of sexual assault against men were documented in India, and 1.4% of Indian men reported having experienced sexual harassment. This is a significant rise over the 2,500 cases that were reported in 2021. In 2023, the Centre for Civil Society carried out a poll in which over 18% of adult male Indian respondents said they had experienced coercion or compulsion to enter into marriage. Of those who reported a perpetrator, 16% named a woman and 2% named a man. Another poll, conducted by the Economic Times, discovered that 29 to 43 percent of respondents agreed that they were harassed by female coworkers (Juris Centre, 2024). It is imperative to bear in mind, nevertheless, that these numbers only encompass occurrences that were reported to the police. Experts claim that there are actually a lot more instances of male sexual harassment. For fear of embarrassment and consequences, a lot of men are reluctant to report instances of sexual harassment.



Health experts at the International Institute of Population Studies, Mumbai, have conducted a study that reveals surprising findings. The researchers note that working women, who earn cash and have access to mobile phones, perpetrate more spousal violence on husbands in India. The researchers also observed an increase in spousal violence against husbands as a wife's age increases, which contradicts the commonly held belief that spousal violence against women decreases with age. They noted that the prevalence of violence against husbands was higher in a nuclear family. As observed in the study published online by Cambridge University Press titled 'Prevalence and risk factors of physical violence against husbands: evidence from India' (Aparajita Chattopadhyay, 2023), the perpetration of spousal violence by cash-earning women could be for several reasons. For example, as women gain economic autonomy, men may feel that their masculinities are being challenged and may indulge in controlling wives or alcoholic behavior, leading to the experience of spousal violence by cash-earning women. Furthermore, women who earn cash may also enjoy a superior power hierarchy, which can lead to a tendency for husbands to control their wives, ultimately resulting in violence against them. Such experiences depend largely on social norms. Evidence from Bangladesh in the context of spousal violence on wives suggests that microcredit programmes are associated with increased spousal violence on women in more conservative settings but not in more progressive settings (Buller et. al., 2018; Gibbs et al., 2018). We can apply this same argument about social norms to wives who abuse their husbands. Interventions to empower women require a progressive social setting, and in the process of empowering women, society should not ignore men to broaden access to resources and opportunities. It is critical to understand that spousal violence is contextual and closely linked to behavioral factors.

EXISTING GENDER NEUTRAL PROVISIONS

Gender-neutral laws in India pertain to laws and policies that do not discriminate against individuals based on gender. These regulations ensure that all individuals, regardless of gender identity, are granted equal rights and opportunities. Article 39(a) of the Constitution states that every citizen of India, regardless of gender or sex, has the right to adequate means of livelihood. Fundamental rights and Directive Principles of State Policy aim to guarantee equal treatment and legal protection for all individuals, irrespective of their gender identity. Some examples of gender-neutral laws in India include:

- a. *POSCO Act, 2012*: The Protection of Children from Sexual Offences Act, 2012, is a legislation enacted to protect children under the age of majority from sexual abuse and harassment, including offences such as rape, pornography, harassment, and assault. As held by the Delhi High Court in the case of *Rakesh v. State of NCT of Delhi (2023)*, the POSCO Act applies to children of all genders.
- b. *Hindu Marriage Act, 1955*:
The Hindu Marriage Act, 1955, which governs the marriage and divorce of Hindus in India, contains several provisions that are gender-neutral.
 - Restitution of Conjugal Rights (Section 9):
 - Either party to the marriage may apply for restitution of conjugal rights if the other party has withdrawn from the society of the petitioner without reasonable excuse.
 - Judicial Separation (Section 10):
 - Either party can seek judicial separation on various grounds such as adultery, cruelty, desertion, conversion, unsoundness of mind, etc.



- Nullity of Marriage and Divorce (Sections 11-13):
 - Grounds for declaring a marriage null and void and for obtaining a divorce are available to both spouses equally.
- Maintenance Pendente Lite and Expenses of Proceedings (Section 24):
 - Either spouse can claim maintenance during the pendency of legal proceedings and for the expenses of the proceedings.
- Permanent Alimony and Maintenance (Section 25):
 - Either spouse can be ordered to pay alimony to the other spouse.

While the Hindu Marriage Act, 1955, includes several provisions that are explicitly gender-neutral, some aspects have been applied in a gendered manner historically. However, judicial trends indicate a movement towards more gender-neutral interpretations in line with contemporary understandings of equality. For instance in the case of *K. Srinivas v. K. Sunita (2014)* and *Mamta v. Pradeep Kumar (2023)*, the wife harassed the husband and his family with false domestic abuse charges without evidence. After such harassment, the husband sought for divorce on the grounds of mental cruelty under Section 13(1)(ia) of the Act, which was granted in both cases.

c. *The Transgender Persons (Protection of Rights) Act, 2019*: The Transgender Act recognizes the rights of transgender persons and prohibits discrimination against them in accessing education, jobs, and health care services. In the cases of sexual offences against transgender persons, the punishment is imprisonment for a minimum of six months, with the possibility of a maximum two-year sentence. This sentence is much lower than the IPC's for sexual assault against women. Section 375 of the IPC lays down the penalty for rape in the form of imprisonment for no less than seven years, which could extend to life imprisonment along with a hefty fine.

The Act has failed to address the socio-legal issues faced by transgender persons. The Act mandates transgender people to register proof of gender reassignment surgery before they can officially change their identity, which can be difficult for those without adequate resources. It also ignores the fact that not all transgender people seek such invasive surgery.

Even though this law is gender-specific, it is significant in addressing the issue of transgender persons, especially when concerning cases of physical abuse, laying out a path for gender inclusivity, and further discussion on gender neutrality in our legal system.

d. *The Bharatiya Nyaya Sanhita Bill, 2023*: It has been introduced to replace the century-old IPC. One of the objectives of the BNS is to ensure gender neutrality; however, the law adopts a very inconsistent approach. While the offence of 'Procuration of Child' under clause 94 has been made completely gender neutral; few offences such as 'Voyeurism' (Clause 76) and 'Assault to disrobe a woman' (Clause 75) have been made gender neutral only in respect of the offender and the victim can still only be a woman.

Offences such as rape (Clause 63), sexual harassment (Clause 74) and stalking (Clause 77) continue to be completely gendered wherein only a man can be the perpetrator and a women the victim. This is in complete disregard of the fact that even men and sexual minorities can be victims of sexual offences. The BNS, therefore, does not account for the lived realities and vulnerabilities of the LGBTQIA+ community, and offers no legal protection to gender and sexual minorities (VIDHI Centre for Legal Policy, 2023).



e. University Grants Commission (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulations, 2015

The UGC (Prevention, Prohibition, and Redress of Sexual Harassment of Women Workers and Students in Higher Education Institutions) Regulation, 2015 is a federal law that outlaws sexual harassment of female employees and students in higher education institutions. It is worth noting that Regulation 2(1) gives a gender-neutral view when defining the term 'student'. The clause states that 'student' refers to an individual enrolled in a specified programme at a higher education institution, avoiding gender bias. When read in conjunction with the Saksham Committee Report on Measures for Ensuring the Safety of Women and Programmes for Gender Sensitization on Campuses, it provides a useful and comprehensive framework for tackling the major issues confronting the female student population (Oishika Banerji, 2021).

f. Juvenile Justice (Care and Protection of Children) Act, 2015

The Juvenile Justice Act, 2015 (herein after JJ Act) was passed by parliament and got assent on 13th of December, 2013. It was enforced on 15th January, 2016. It repealed Juvenile Justice (Care and Protection of Children) Act, 2000. The purpose is to punish the children for their wrongdoings, but to care for and protect the child or juvenile through institutionalization and rehabilitation, in order to shield them from future social evils and criminal tendencies. JJ Act, 2015 uses gender neutral terminologies thereby making it a gender neutral act. It does not differentiate between a male and a female child and keeps both on the same pedestal. Children in need of care and protection and children in conflict with law, whether male or female are treated equally. There happens to be no discrimination on the basis of gender. The definition clause uses gender neutral terms like abandoned child, best interest of child, child in need of care and protection, child in conflict with law, child friendly, child legally free for adoption, child welfare officer, children's court, child care institutions, child line services, orphan etc. Section 2(12) of JJ Act defines child and Section 2 (35) of JJ Act defines juvenile. Usage of gender neutral term leads to an acknowledgement that petty, serious and heinous offences can be committed by both young boys and girls.

It is not just males who fall under the classification of offender. The Act acknowledges that in distress and adversary situations both male and female children need care and protection. This Act is gender neutral in respect of both perpetrator and victim. It does not attach any gender specifications and perceives a fact that crime is a crime whether done by a male child or a female. Children, irrespective of gender have particular vulnerabilities owing to definite requirements and demands at various phases of development until they reach maturity. They are future of the country, while dealing with children of any gender, their age, and background, physical and mental conditions must be taken in account. To prevent crime by and against children we need to discover constructive solutions to children's engagement in illegal activities and involve them in the rehabilitation process rather than treating them as troublemakers or problem children who need to be punished. The Juvenile Justice Act, 2015 recognizes and respects human and child rights inclusive of all genders by adopting restorative justice process.

At this point, it's critical to emphasise that 77 nations—including Denmark, Australia, Switzerland, the United States, Singapore, the United Kingdom, Germany, and Italy—have accepted gender-neutral legislation prohibiting sexual harassment at work. Companies like Wipro Technologies, Infosys, Godrej, and the Taj Group of Hotels have gender-neutral sexual harassment policies and committees that apply to all employees and impartially investigate every allegation, even in India. Any "aggrieved person" should



be allowed to receive justice under India's workplace sexual harassment statute, not just "aggrieved women" (Ipsita Mishra & Vyom Tripathi Shivam, 2023). Therefore, it is long overdue for the workplace sexual harassment statute to be amended to make it more gender-neutral and gender-sensitive.

CONCLUSION

In conclusion, the adoption of laws that are not biased towards either gender is a step in the right direction for India's efforts to achieve social justice and equality between the sexes. By putting these into action, India will be able to combat long-standing injustices, bring down patriarchal systems, and make it possible for people of all genders to claim their rights and liberties without fear of retaliation or prejudice. However, in order to attain the dream of a society that is entirely gender-neutral, it is necessary to undergo a paradigm change in cultural attitudes, habits, and institutions. Improvements in legislation alone will not be sufficient. It is vital to take collective action and demonstrate solidarity in order to confront and overcome established prejudices, structural inequities, and cultural obstacles that encourage gender-based violence and discrimination. This is necessary in order to address and overcome these issues.

As India continues to progress forward, guided by the principles of justice, equality, and human decency, it is imperative that the country's commitment to gender neutrality remains constant. It is only through constantly promoting inclusivity, diversity, and respect for all genders that India will be able to transform into a progressive and inclusive democracy, one in which every individual has the opportunity to grow and contribute to the prosperity and well-being of the nation.

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