

DE JURE NEXUS LAW JOURNAL

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GENDER BIASNESS IN THE INDIAN PENAL CODE**History of IPC:**

There was no systematic criminal law in uncivilized society. In the ancient era, each and every person was liable to be attacked at any time by anyone. The scenario was such that the person being attacked either surrendered or overpowered his opponent. "*A tooth for a tooth, an eye for an eye, a life for a life*" was the forerunner of criminal justice.

With the advancement of time, the disjointed or injured person began to agree for compensation rather than killing his opponent. Thereafter, with the passage of time, a change came into existence for satisfying normal or petty offences. Such a system gave birth to archaic legal code in the field of criminal law. For a protracted time, the applying of those principles remained with the parties themselves. However, with the passage of time, this function came to be performed by the State i.e., Sovereign.

Anciently, in India, the genesis of criminal jurisprudence may be traced to Smritis however came into existence significantly from the time of Manu. Within the various categories of 'crime', Manu had recognized theft, robbery, assault, slander, criminal breach of trust, cheating, adultery and rape. The king protected his subjects and therefore the subjects reciprocally owed him allegiance and paid him revenue. The king administered justice himself, and, in the absence of King, the matter was transferred or entrusted to a Judge. During that time, if a criminal was fined, the fine that accused or culprit paid was deposited to the king's treasury, and was not given as compensation to the victim.

In 1833, Lord Macaulay started to codify the whole criminal law in India in order to bring uniformity. Macaulay, while speaking on the Bill in the British Parliament, stated -- "*I believe that no country ever stood so much in need of a Code as India, and I believe also that there never was a country in which the want might be so easily supplied. Our principle is simply this -- uniformity when you can have it; diversity when you must have it; but in all cases, certainty.*"¹

The Indian Penal Code (IPC) is the official criminal code of India. It covers all substantive aspects of criminal law. The code came into force in British India during the early British Raj period in 1862. IPC is considered as one of the best legislations made so far as it has received least number of amendments since its enactment.

Few Provisions which depict gender biasness of IPC:

S. No.	Section #	Offence
1.	304 B	Dowry Death
2.	354 A	Sexual Harassment
3.	361	Kidnapping from lawful guardianship
4.	366	Kidnapping, abducting or inducing woman to compel her marriage etc.
5.	366A	Procuration of minor girl
6.	366B	Importation of minor girl from foreign country
7.	372 & 373	Selling & Buying of Minor
8.	375(4) & (6)	Rape
9.	497	Adultery
10.	498 (A)	Cruelty

¹ <https://indiankanoon.org/doc/113896726/>

Thorough Study of the Provisions:**(i). Section 304B: Dowry Death**Bare Provision

(1) *Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called “dowry death”, and such husband or relative shall be deemed to have caused her death.*

Explanation— *For the purpose of this sub-section, “dowry” shall have the same meaning as in section 2 of the Dowry Prohibition Act.*

(2) *Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.²*

Comment:

The section clearly states ‘*where the death of a woman*’ and thereby the provision is enacted in order to exclusively protect the ‘women section’ of the country. The problem does not lie that there is a provision in the code which protects the woman from any cruelty that she may suffer in her marital life due to unreasonable demands of ‘dowry’. The problem is that despite of a separate legislature (Dowry Prohibition Act, 1961) prohibiting ‘dowry’ in its all forms and dealing with its all aspects, the penal code of India by virtue of the abovementioned provision of IPC makes the situation quite vulnerable for men.

It is noteworthy to mention if the death of a woman is caused ‘*otherwise than the normal circumstances*’ within seven years of her marriage and is shown that she was subject to

² <https://indiankanoon.org/doc/653797/>

cruelty or any demand of 'dowry' by her husband and/or any relative of her husband, such death shall be called 'dowry death'.

- (a). Firstly, the words '*normal circumstances*' are subject to interpretation by the court and are nowhere defined in the code itself.
- (b). Secondly, it is not necessary to be proven that woman was subject to cruelty or dowry demands, the husband and/or his relatives shall be presumed to cause her 'dowry death'.
- (c). Thirdly, the use of word 'shall' in itself is completely antithesis of the legal principle on which criminal justice system.

The onus to prove that the woman was not subject to any cruelty or dowry demands completely lies upon the husband and/or his relatives in connection thereto and the 'presumption of innocence' which is the legal right of an accused in a criminal trial is infringed.

(ii). **Section 354A: Sexual harassment and punishment for sexual harassment**

Bare Provision

- (1) *A man committing any of the following acts—*
 - (i). *physical contact and advances involving unwelcome and explicit sexual overtures; or*
 - (ii). *a demand or request for sexual favours; or*
 - (iii). *showing pornography against the will of a woman; or*
 - (iv). *making sexually coloured remarks, shall be guilty of the offence of sexual harassment.*
- (2) *Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.*

- (3) *Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.*

Comment

- (a). Sexual harassment is an offence which is not gender based and can be suffered by any person be it a man or a woman. But sadly, Indian Penal Code does not recognise the offence of sexual harassment to be gender neutral.
- (b). As per the abovementioned provision, it can be interpreted that sexual harassment is a gender-based offence and can be committed by men only. As a result, men cannot be a victim of sexual harassment.
- (c). An offence which is so grave in nature that rigorous imprisonment for a term of 3 years is specified in the code is biased against men and presumes them to be culprits.
- (d). The acts that are mentioned in the provision pertaining to unwelcome and explicit overtures or any demand for sexual favours or showing pornography against the will of the victim shall be gender neutral offence as these offences are not restricted to be done against women only.
- (e). We are living in 21st century where women are empowered & they go hand in hand with men. We are not living in the primordial era when men used to dominate the entire society. Even the slightest possibility of any man being a victim shouldn't be ignored in the eyes of law. The words 'man' and 'woman' shall be amended with the word 'person' in order to make it gender-neutral.

(iii). Section: 361: Kidnapping from lawful guardianship

Bare Provision

Whoever takes or entices any minor under [sixteen] years of age if a male, or under [eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation — The words “lawful guardian” in this section include any person lawfully entrusted with the care or custody of such minor or other person.

(Exception) — This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

Comment

- (a). The provision pertaining to kidnapping from lawful guardianship is not gender neutral as the age limit specified for male i.e., 16 years varies from the age limited specified for females i.e., 18 years. The variation in the prescribed age limits for male and female depicts the ‘female’ section of society weaker than ‘male’ section. The provision shall be gender neutral and the age limit shall be 18 years for all the sections of society.
- (iv). **Section 366: Kidnapping, abducting or inducing woman to compel her marriage**

Bare Provision

Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Comment

- (a). In India, marriages can be registered either under the Hindu Marriage Act, 1955 or under the Special Marriage Act, 1954. As per the provisions of Hindu Law, marriage is a sacrament and a relationship between Husband and Wife. Thereby, in a marriage, involvement of both the parties is mandatory.

- (b). It is pertinent to note that when two parties are involved to solemnize a marriage, how can only one party (woman) may be compelled to marry against her will.
- (c). If a man gets kidnaped or abducted to marry against his will, it is not an offence in the eyes of law.
- (v). **Section 366A: Procurement of minor girl**

Bare Provision

Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.

Comment

- (a). The abovementioned provision intends to save the minor girl from illicit intercourse. However, while looking into the harsh reality of society, many cases can be seen when minor boys suffer through such illicit intercourse and trauma. Moreover, even they are compelled to change their sex to forcefully indulge into such illicit intercourse.
- (b). A recent case of 2021 can also be seen when a 13-year-old boy was forced to undergo sex change surgery. He was raped for 4 years by several men in Geeta Colony of Delhi. He somehow managed to escape during lockdown period and got saved. In such scenarios, the FIR is either registered as 'unnatural sex' under Section 377 of IPC or under *The Protection of Children from Sexual Offences (POCSO) Act, 2012* and because of lack of gender-neutral provisions.

(vi). **Section 366B: Importation of girl from foreign country**

Bare Provision

Whoever imports into [India] from any country outside India [or from the State of Jammu and Kashmir] any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

Comment

The abovementioned provision is similar to Section 366A of IPC. Similarly, even minor boys are imported from foreign countries in order to indulge them into illicit intercourse. Therefore, the need of the hour can be seen in an amendment to make the provisions of the penal code gender neutral with respect to the offences that are gender neutral in nature.

(vii). **Section 372 & 373: Buying and Selling of Minor for purposes of prostitution etc.**

Although the provisions are meant to protect the minor children from buying and selling for the purposes of prostitution, the provisions are bit favourable with regards to minor girl.

In case, if a minor girl is sold, or let for hire, or otherwise disposed of to a prostitute, the person who is accused of doing so shall be under the obligation to prove himself innocent.

(viii). **Section 376: Rape**

Bare Provision

“A man is said to commit ‘rape’ who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions—

Clause 4: With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Clause 6: With or without her consent, when she is under sixteen years of age.”

Comment

- (i). According to the very first line of the provision women cannot commit “rape”. The current rape laws exclude a swathe of male victims of sexual assault and portrays them as ‘culprit’ in the eyes of law as well as in the eyes of society.
 - (ii). As per the author’s interpretation rape is not a gender-based offence. It is a form of sexual assault which usually involves sexual intercourse without the person’s consent.
 - (iii). It is pertinent to note that sexual intercourse is a natural phenomenon between opposite genders as per IPC. However, in case of a man being raped, the police register First Information Report under Section 377 (Unnatural sex) and not under Sections 375 and 376, which leads to them being reported less.
 - (iv). There is a perception in society that men only commit rape & they can’t be raped. Instead of showing empathy, society laughs at the men who gets raped which is shameless.
 - (v). Male victims refuse to go to the police because they think they will not be believed and the police are not even trained to be empathetic towards them, unlike the sensitivity they are tutored to show female victims. Victim could be men or women. Hence, law needs to be amended in order to make the provision ‘gender neutral’.
- (ix). **Section 497: Adultery**

Bare Provision

“Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for

a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.”

Comment

- (a). Even though the offence of ‘adultery’ has been struck down on 27th September 2018 in the case of *Joseph Shine v. Union of India*³, but it still holds a valid ground for divorce. Looking into the provision it can clearly be understood that only a man can commit the offence of adultery.
- (b). Despite of a woman fulfilling all the essentials of the aforesaid provision, such woman shall not be held liable by the virtue of her being a woman which clearly depicts gender biasness of IPC favouring women.
- (c). Moreover, a man holds no remedy if his wife commits the crime of adultery against his will.
- (x). **Section 498A: Husband or relative of husband of a woman subjecting her to cruelty.**

Bare Provision

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.

Explanation—For the purpose of this section, “cruelty” means—

- (a) *any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman;*
or

³ 2018 SCC OnLine SC 1676

- (b) *harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.*

Comment

Cruelty is a behaviour which causes physical or mental harm to the other person. It has nothing to do with the gender. In an old case of Russell Vs. Russell⁴ it has been held that it is a conduct of such character as to have caused danger to life, limb or health (bodily or mental) or as to give rise to reasonable apprehension of such danger.

As already mentioned, cruelty isn't restricted to any physical act; it may be physical or mental. Mental cruelty is more common in matrimonial cases. Moreover, the concept of cruelty in civil law is totally different from criminal law. The most basic difference between cruelty under section 498-A of IPC and cruelty as defined under Hindu Marriage Act is that under Hindu Marriage Act, the cruelty is irrespective of sex. But in the criminal law, as per abovementioned provision, the victim of cruelty in matrimonial cases can only be 'women'.

Conclusion:

IPC is considered to be one of the best legislations as it has received the least number of amendments so far. It was a definitely a master piece drafted by Sir Lord Macaulay foreseeing the probability of offences that people may commit in future. But with the change in time, there is a need to amend the penal provisions of IPC as well.

It has rightly been said that '*Law must be stable yet it cannot stand still*'. Therefore, it is high time that gender equality should be recognised. The laws must be gender neutral. Even if any provision favours a particular section of society it shouldn't do injustice to any other section.

⁴ 1924 [AC] 687

At the end of the journey, it can be concluded that the provisions which are made in order to protect or empower women in society often seems to be misused against men. It is so because of the stringent provisions and absence of golden rule of criminal law i.e., '*presumption of innocence*'.

Women are favoured in law because they have been victimized from a long period of time in the male dominated society. However, now time has changed, offences which are gender neutral in nature should also have provisions irrespective of the sex of any person. Otherwise, one section will always be victimized and laws will always be misused in the society.



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