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Towards Gender-Neutrality in Indian Family and Criminal Laws: A Constitutional and Comparative Critique

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Abstract

This article critically evaluates the gendered architecture of Indian family and criminal laws, arguing that many statutory provisions and their interpretations exhibit a patriarchal bias, contravening the constitutional guarantees of equality under Articles 14, 15, and 21 of the Constitution of India.¹ The study adopts a doctrinal and comparative legal methodology to assess the evolution, impact, and judicial interpretation of gendered laws in India, and proposes a roadmap toward inclusive, gender-neutral reforms. Historically, Indian legal frameworks have institutionalized gender norms influenced by religious doctrines and colonial codification.² Despite post-independence reforms, personal laws governing marriage, divorce, inheritance, and guardianship across religious communities continue to reflect systemic biases, particularly disadvantaging men and queer individuals.³ For instance, Section 125 of the Code of Criminal Procedure⁴ and provisions under the Hindu Marriage Act, 1955⁵ are critiqued for assuming male obligation and female dependency. In criminal law, provisions like Section 375 of the Indian Penal Code and the Protection of Women from Domestic Violence Act, 2005, adopt a gender-specific

¹ India Const. arts. 14, 15, 21.

² Ratna Kapur, *Gender, Sovereignty and the Rise of a Sexual Security Regime in International Law and Postcolonial India*, 14 Melbourne J. Int'l L. 317 (2013).

³ Flavia Agnes, *Family Law: Volume I: Family Law and Constitutional Claims* (OUP 2011).

⁴ Code of Criminal Procedure, 1973, § 125, No. 2, Acts of Parliament, 1974 (India).

⁵ Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (India)

victim-perpetrator binary that excludes male and LGBTQ+ survivors. Judicial trends reveal a fragmented approach—while progressive verdicts such as NALSA v. Union of India and Navtej Singh Johar v. Union of India embrace gender identity rights, others like Armesh Kumar v. State of Bihar reflect ambivalence in safeguarding against misuse and ensuring equitable access to justice.

Keywords: *gender bias, criminal justice, Indian law, constitutional equality, legal reform*

Gender Bias in Family Laws – A Critical Analysis

Indian personal laws, though varying across religious communities, exhibit a consistent gender asymmetry that disadvantages men and excludes non-binary and LGBTQ+ persons.⁶In matters of marriage, divorce, maintenance, and guardianship, the legal framework tends to presume male obligation and female dependency. For instance, under Section 125 of the CrPC, only wives (not husbands) are entitled to maintenance, reflecting a gendered assumption of economic vulnerability⁷. Similarly, custody disputes often favor mothers, reinforcing maternal preference over objective assessments of a child's best interests.⁸

Hindu personal laws, while reformed post-independence, still retain biases—for example, in guardianship provisions where the father is the ‘natural guardian’ despite the child’s welfare being paramount.⁹ Muslim personal laws permit unilateral divorce (talaq) by men and restrict women’s rights to maintenance beyond the iddat period¹⁰. Moreover, family law offers no remedies to queer or transgender persons who are excluded from its ambit entirely¹¹.

Such statutory and interpretive biases reflect a paternalistic legal culture that often overlooks the emotional and financial harms faced by men and gender minorities in matrimonial disputes¹². While protective laws for women were historically necessary, the absence of reciprocal legal safeguards and recognition for other genders now raises serious constitutional concerns under Articles 14 and 15.¹³

Gender Bias in Criminal Laws

⁶ Flavia Agnes, Family Law and Gender Justice in India, in *ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SARKAR* 106–23 (Amita Dhanda & Archana Parashar eds., Eastern Book Co. 1999).

⁷ The Code of Criminal Procedure, No. 2 of 1974, § 125, INDIA CODE (1974).

⁸ Ruma Pal, Gender and the Judiciary, (2007) 14 *SACR* 1, 6–7.

⁹ The Hindu Minority and Guardianship Act, No. 32 of 1956, § 6, INDIA CODE (1956).

¹⁰ The Muslim Personal Law (Shariat) Application Act, No. 26 of 1937, INDIA CODE (1937); *Shah Bano Begum v. Union of India*, (1985) 2 SCC 556.

¹¹ Arvind Narrain, Queer Rights and the Law in India, in *HUMAN RIGHTS AND LAW: DISCOURSES ON SUSTAINABILITY* 178–96 (Ved P. Nanda & George (Rock) Pring eds., Oxford Univ. Press 2012).

¹² Malavika Rajkotia, Reverse Discrimination in Family Law? (2018) *India Law Journal*, available at <https://www.indialawjournal.org/reverse-discrimination.php>.

¹³ INDIA CONST. arts. 14 & 15.

India's criminal law framework reveals a gender-specific orientation, particularly in offences related to sexual violence and domestic abuse, which primarily define women as victims and men as perpetrators.¹⁴ For example, Section 375 of the Indian Penal Code (IPC), which defines rape, excludes the possibility of male or transgender victims and fails to account for female perpetrators, thus reinforcing a binary and heteronormative conception of victimhood.¹⁵ Similarly, the Protection of Women from Domestic Violence Act, 2005, applies exclusively to women, leaving men and LGBTQ+ individuals without statutory remedies for intimate partner violence.¹⁶

This gendered approach has been criticized for overlooking the experiences of male and queer survivors, leading to unequal access to justice.¹⁷ Moreover, the potential for misuse of provisions such as Section 498A IPC originally enacted to combat cruelty by husbands or their relatives has been acknowledged by the judiciary in cases like *Arnesh Kumar v. State of Bihar*, which highlighted the need to prevent arbitrary arrests and protect due process.¹⁸

Despite the original intent of such laws being protective, their continued gender-specific language and enforcement mechanisms have resulted in unintended forms of reverse discrimination, challenging the constitutional guarantees of equality under Articles 14 and 21.¹⁹ The absence of gender-neutral definitions and remedies in criminal law calls for urgent reform to align with principles of inclusivity and substantive justice.

Judicial Trends and Interpretations

Indian judiciary has played a pivotal role in interpreting gendered laws within constitutional frameworks. While courts have reaffirmed protections for women under statutes like Section 498A of the IPC and the PWDVA, they have also acknowledged the potential misuse of these provisions. In *Arnesh Kumar v. State of Bihar*, the Supreme Court emphasized procedural safeguards to prevent arbitrary arrests in dowry harassment cases, recognizing that such laws can be misused against innocent men and their families. Similarly, in *Rajesh Sharma v. State of U.P.*, the Court directed the constitution of Family Welfare Committees to examine complaints before coercive action is taken.²⁰

¹⁴ Usha Ramanathan, *Sexual Offences: How We Got to Where We Are*, (2013) 48(02) Econ. & Pol. Wkly. 58.

¹⁵ The Indian Penal Code, No. 45 of 1860, § 375, INDIA CODE (1860); See also Aparna Chandra, *The Rhetoric and Reality of Rape Law Reform*, (2016) 49(1) Indian Law Review 19, 23.

¹⁶ The Protection of Women from Domestic Violence Act, No. 43 of 2005, § 2(a), INDIA CODE (2005).

¹⁷ Alok Gupta, *Sexuality and the Law in India: The Struggles of the Transgender Community*, in *Sexuality, Gender and Rights: Exploring Theory and Practice in South and Southeast Asia* 96–101 (Geetanjali Misra & Radhika Chandiramani eds., SAGE 2005).

¹⁸ *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.

¹⁹ INDIA CONST. arts. 14 & 21; See also Nivedita Menon, *Recovering Subversion: Feminist Politics Beyond the Law* 124–27 (Permanent Black 2004).

²⁰ *Rajesh Sharma v. State of U.P.*, (2017) 8 SCC 746.

Courts have occasionally attempted a gender-neutral approach. For instance, in *Navtej Singh Johar v. Union of India*, the Supreme Court decriminalized consensual homosexual acts, thereby recognizing the constitutional rights of LGBTQ+ persons.²¹ However, such progressive steps remain limited, and many statutory provisions continue to reflect a binary gender perspective.

The judiciary's interpretative efforts reflect a cautious balancing between protecting historically oppressed groups and preventing misuse. Yet, the lack of consistent jurisprudential support for male and queer victims of domestic or sexual violence highlights the limitations of relying solely on interpretation without corresponding legislative reform.²²

International Perspectives and Comparative Analysis

Globally, several jurisdictions have progressively adopted gender-neutral frameworks in both family and criminal law, recognizing that vulnerability and victimhood are not exclusive to any one gender. Countries such as Canada, Australia, and the United Kingdom have reformed legal definitions of offences like domestic violence and sexual assault to include all genders.²³ For example, the Canadian Criminal Code uses gender-neutral language in defining sexual assault, and Australia's Family Law Act, 1975 equally considers the rights of both parents in custody and maintenance matters.²⁴

In the United Kingdom, the Domestic Abuse Act 2021 explicitly recognises abuse within all intimate relationships regardless of gender identity, and acknowledges psychological and financial abuse, thus offering comprehensive protection to a wider group of victims²⁵. These reforms stem from an understanding that effective legal protection must be inclusive and equitable, regardless of sex or gender identity.

India, while influenced by global human rights frameworks, has yet to internalise these inclusive approaches within its statutory structures. Comparative analysis reveals that incorporating gender-neutral legal language and protections not only enhances access to justice but also aligns domestic laws with international human rights norms, including obligations under CEDAW and the Universal Declaration of Human Rights.²⁶

²¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

²² K.D. Gaur, Textbook on Indian Penal Code 412–14 (Universal Law Publishing, 6th ed. 2016); *see also* Kirti Singh, Separation, Divorce and Gender Justice: A Study of Section 498A IPC, (2017) 5(1) *Indian J.L. & Soc. Just.* 39, 42.

²³ *Criminal Code*, R.S.C. 1985, c. C-46 (Can.); *Sexual Offences Act 2003*, c. 42 (U.K.).

²⁴ *Family Law Act 1975* (Cth) (Austl.)

²⁵ Domestic Abuse Act 2021, c. 17 (U.K.).

²⁶ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 13; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

Challenges in Implementing Gender-Neutral Laws

Despite the increasing call for inclusivity, implementing gender-neutral laws in India faces legal, social, and institutional hurdles. A primary challenge is the deep-rooted perception of women as the sole victims, especially in matters involving domestic violence and sexual offences.²⁷ This presumption often translates into resistance from policymakers and activists who fear that gender neutrality may dilute the protections currently afforded to women.²⁸

Another challenge lies in the lack of reliable data and empirical studies on male and LGBTQ+ victims of gender-based violence, which weakens the case for legislative reform.²⁹ Furthermore, law enforcement agencies often lack the training and sensitization necessary to handle complaints outside the traditional gender paradigm, leading to biased implementation even where gender-neutral provisions exist.³⁰

Additionally, the absence of a robust institutional framework to support non-female survivors, such as dedicated shelters, counselling services, or legal aid, impedes the meaningful enforcement of neutral laws. Legal reform also risks backlash from conservative social groups and may be construed as undermining women's rights, necessitating a balanced legislative approach that ensures protection without perpetuating exclusion.³¹

Recommendations for Gender-Neutral Reforms

To achieve gender justice and equality, it is crucial to amend existing laws to adopt gender-neutral definitions and frameworks. First, provisions under the Indian Penal Code (IPC) and Criminal Procedure Code (CrPC) should be reformed to include all genders as potential victims and perpetrators, particularly in cases of domestic violence and sexual assault. This can be achieved by revising provisions like Section 375 IPC to recognize that sexual violence is not exclusive to male perpetrators and female victims.³²

Second, family laws must be amended to remove the maternal bias in matters of child custody and maintenance and to ensure that both parents are equally considered in decisions regarding guardianship. Further, maintenance laws under Section 125 CrPC should be broadened to allow both men and women to claim maintenance in cases of need.³³

Third, the establishment of gender-neutral shelters and legal aid systems is essential to provide equal

²⁷ Jhuma Sen, Gender and the Indian Penal Code: A Feminist Critique, 10 NUJS L. Rev. 387, 392 (2017).

²⁸ Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* 201–203 (OUP 1999).

²⁹ Centre for Civil Society, *Making Laws Gender Neutral: A Case for Equality Before Law*, Policy Brief (2016).

³⁰ Aparna Chandra, Criminal Law, Gender, and Institutional Biases, 11 Indian J. Criminology & Crim. Just. 141, 145–46 (2020).

³¹ Madhavi Divan, *Facets of Media Law* 134–35 (2d ed. LexisNexis 2012).

³² Indian Penal Code, § 375 (1860) (India).

³³ Criminal Procedure Code, § 125 (1973) (India).

protection to men and members of the LGBTQ+ community. This would require collaboration between state agencies and civil society organisations to build infrastructure that caters to all survivors of gender-based violence.³⁴

Additionally, legislative amendments should ensure that the socio-cultural factors influencing gender-based biases are addressed through public awareness campaigns and training programs for law enforcement and the judiciary. This will enable more balanced and fair treatment of individuals irrespective of their gender.³⁵

Finally, aligning Indian laws with international standards, such as those prescribed by the CEDAW and Universal Declaration of Human Rights, will ensure compliance with global human rights obligations.³⁶

Conclusion

The analysis of gender bias in Indian family and criminal laws reveals deep-rooted issues of exclusion and imbalance that persist despite constitutional guarantees of equality. While India's legal framework has made strides towards addressing gender-based violence, the framework still reflects outdated patriarchal norms that fail to consider the experiences of men, transgender individuals, and non-binary persons. As evident from provisions like Section 375 IPC (rape), Section 498A IPC (dowry-related cruelty), and the Protection of Women from Domestic Violence Act, 2005, the legal system often operates under binary gender assumptions that exclude a significant portion of the population from adequate legal recourse.

The judicial approach, although evolving in some cases, has often been inconsistent, with courts vacillating between gendered perspectives and the pursuit of a more inclusive framework. While certain landmark judgments have moved toward more gender-neutral interpretations, the overall legal culture remains slow to embrace inclusivity, and numerous cases still highlight the discriminatory application of laws.

International practices, particularly from countries like Canada, Australia, and the United Kingdom, show that gender-neutral legislation can provide more inclusive and just outcomes. These countries have incorporated reforms that go beyond the binary gender model, ensuring equal protection for all victims of gender-based harm. India can draw valuable lessons from these models and adapt them to

³⁴ Aparna Chandra & Rishika Shah, Domestic Violence Law and Men: Gaps in the Legal Framework, 29 J. Indian L. Inst. 219, 223–25 (2021).

³⁵ Justice Verma Committee, Report of the Committee on Amendments to Criminal Law (2013).

³⁶ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 13; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

the socio-cultural realities of the country.

The implementation of gender-neutral reforms in India, however, will face substantial challenges due to cultural conservatism, political resistance, and institutional inertia. Nonetheless, with the right legal amendments, public education, and judicial training, India can move toward a more equitable and just legal framework.

The need for reforms is not just a matter of fairness but of constitutional integrity. The right to equality under Article 14 of the Constitution demands that laws should reflect the changing socio-cultural dynamics of society, ensuring protection for every individual, irrespective of gender identity. As India progresses, gender-neutral legal frameworks will be essential to meet global human rights standards and to uphold the dignity and equality of all citizens.

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