

## GENDER EQUALITY AND GENDER NEUTRAL LAWS: THE FUTURE OF SOCIAL JUSTICE IN INDIA

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Rebecca Rajan<sup>1</sup>

### Abstract

*After the infamous Delhi gang rape incident that took place in the country in the year 2012, there was a dire need to condemn and make stricter laws against such crimes against women. The government constituted a committee under the chairmanship of the former Chief Justice of India, Justice J.S.Varma to suggest guidelines for the protection of women and this was due to take shape in the form of the Criminal Law (Amendment) Act 2013. The recommendations of the committee were however not taken into consideration as a whole and gender sensitive or gender specific laws were framed as a result of bowing down to feminist pressures opposing to gender neutral laws that were recommended by the committee. The author, in the light of the recent Judgments of the Supreme Court of India namely the Triple Talaq Judgment and the Section 498A Judgment (prevention of misuse of the section) tries to examine the loopholes in the Women Protection Laws in India that are gender specific and penalizes only the male gender and does not give equal protection to the male gender with respect to the same crimes being committed against them.. The author throughout this article shows forth how these recent judgments have set the ball rolling towards having laws that are gender neutral in India owing to bestowing equal rights on women which will pave way towards attaining equality and social justice. The author delves into analyzing the current protective legislations in India in the light of gender neutral laws and conclude by suggesting the necessary changes that can be implemented so as to protect all the genders equally under the law and not protecting only a single class at the cost of the other.*

### Introduction

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<sup>1</sup> Gujarat National Law University

**Special issues 2017**

The Delhi Gang rape and assault in the year 2012 which stunned the country gave rise to dissents and protests throughout the entire nation and around the world and this prompted the legislature constituting The Justice Verma Committee, to recommend rules for protection of women and these rules came to fruition as the Criminal Law (Amendment) Act, 2013. Although, the proposals included neutral and unbiased assault and rape laws, the weight from activists persuaded the parliament to not take this recommendation into consideration and these impartial laws were not executed. Many a times the judiciary as well as the legislature forget that equality is not a women empowerment concept but that of gender equality and while India is a signatory to several international covenants on the rights of individuals, such as The Universal Declaration of Human Rights, 1948, The International Covenant on Civil and Political Rights, 1966 and The International Covenant on Economic, Social and Cultural Rights, 1966, all of which upholds the inalienable right of every person to equality and human dignity<sup>2</sup>, yet when it comes to promulgated gender neutral laws, India has failed miserably.

It is with this backdrop in mind, the author takes a leap into examining the scope of gender neutral laws being in place instead of the existing system of laws particularly in the protection laws of the country considering the fact we are at a juncture wherein women are being given equal rights in the light of the recent Triple Talaq judgement and that the need of the hour is to have gender neutral laws which protect all persons equally and legislations should not make room for misuse so much so that the purpose of enacting the law is lost.

**The shackles of Equality, Gender and Social Justice in India and the Rise of Feminism**

The egalitarian social order mandates that social justice and equality be the two major components for achieving such social order in the society. This order was cherished and upheld even at the time of the formation of the states after the independence in the post-

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<sup>2</sup>PREAMBLE, UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948.

## Special issues 2017

colonial era in India. Dr. B. R. Ambedhkar affirmed these in the constituent assembly debates and discussions. According to the American philosopher John Rawls “social justice is the first virtue of social institution”<sup>3</sup> and this transformed and revived this discipline and provided a new insight into the idea of social justice. In the Indian context, social prejudice has taken the front seat owing to the practices in India wherein a few people or class of people were being favored over the others. This kind of social order was sanctioned by Brahminical Hinduism, which is of Aryan nature and origin that propagated unequal order. The socially disadvantaged and weaker sections of the society needed to be uplifted by bringing in measures and affirmative actions by the state coupled with constitutional safeguards. A balance of social justice and equality needed to be struck in order to truly establish an egalitarian social order. Post Colonial India needed to see social transformation so as to establish social justice but such transformation even after seventy years of independence in India has and still remains a major challenge before the government and the law makers. And the question that rings in our mind is if we were able to successfully socially transform the country. A social transformation can take place only if the traditional notions of the society which inherently result in creating prejudices in the economy, society and polity are broken. The Indian society is the perfect example of how social prejudices such as practices of caste, class biasness, gender inequality and ethnic conflicts are deeply grounded and therefore a social transformation based on these above mentioned aspects is the only way to see India as a progressive and forward society that achieves social justice and equality in its truest sense.<sup>4</sup>

Gender equality is the belief that the sexual differences have absolutely no significance either socially or politically. The feminist ideologies believe that gender differences do exist predominantly due to the differentiative social roles played by men and women in the society whereby men have a dominant position. But anti feminists deny this distinction that lies between gender and sex and imply that biology is destiny.<sup>5</sup> Gender divisions are an anecdote to egalitarian social order which will be an ideal society where no individual of the society would rank higher than the other in terms of gender or sex cast or religion. But social inequality will exist in all kinds of society and India being no different relates to one of the

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<sup>3</sup>John Rawls, *The Theory of Justice*(1971)

<sup>4</sup>Dr. Tapan Biswal, *Human Rights, Gender and Environment*, Viva Books Private Limited, (2006)

<sup>5</sup>B Suresh Kumar Shetty, P PJagadish Rao and Aditi Suresh Shetty ,*Legal Terrorism in Domestic Violence- An Indian Outlook*, , Medico-Legal Journal Vol.80 Part 1, 33-38(2012)

## Special issues 2017

most dominant forms of inequality between genders that are a result of the notions and structures set up by the practices in the society itself. This can be attributed to unequal distribution of power, status and property. Gender inequality is therefore a socially manufactured inequality.<sup>6</sup>Laws were enacted to eradicate this kind of inequality that existed in the society dominated by patriarchy which saw women always taking their position on a lower pedestal and subjected to inequalities and subordination due to the male dominance. To voice such injustice and throw light into these inequalities, feminist movements and women activists sprouted and grew stronger so as to wrestle for their equal rights as men. Such struggle against injustice led to the legislators opening doors to framing laws that were pro women so as to curb the unequal treatment given to women over men and also to curb the atrocities that women faced. Pro women legislations empowered and raised awareness about the rights of women in the country.

While the reality focuses on the increasing rate of crimes against women such as assaults, rape, domestic violence, sexual harassment etc. there is another blatant truth and reality that is often overshadowed by these pro women legislations and crimes and that is the crimes against men. In other words, due to the frenzy about women being victims to crimes, the assumption is that only women get abused and that men are not abused and hence accused of the crimes. This scenario of male domination and crimes against women that once existed has now changed over the years and we are at a point in time where such legislations are no longer serving the purpose but rather neglecting and harming the other gender against whom false allegations and false cases are being framed simply because the laws that are in place today protect only the women against such crimes and does not equally protect the men against such crimes bringing in the question of the violation of the principle of equal protection of all persons under law<sup>7</sup>. We have to understand the nuances and the consequence of such a law that is prevalent in the society at this present day. A law that consciously allows the society to think that a certain crime or set of crimes can only take place against a particular gender and that these crimes are committed only by a particular

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<sup>6</sup>Tila Kumar and Hemanta Kumar Bhattu ,*Caste, Class, Gender and Ethnicity as Distinct categories and their inter connections*, , *Human Rights, Gender and Environment*, (2007), pg 03-19

<sup>7</sup>Jaishankar K., &Ronel, N., *Proceedings- Third International Conference of the South Asian Society Criminology and Victimology (SASCV)* Tirunelveli, India: SASCV &Department of Criminology and Criminal Justice, Manonmaniam Sundaranar University.(2016)

gender. We have to take a step back in fact to see if the law is framed to take the society forward towards a progressively developing country that achieves the full essence of equality between the persons of the country or the law remains in a condition where the society itself is made to think that equality among the persons is merely reduced just to words because the actual implementation of the law serves only either of the persons and not both equally. It is in the light of these fundamental aspects of law and the consequences or results of such a law being in force we look at law from the perspective of gender neutrality.

### **Introducing Gender Neutrality in laws**

The Oxford Dictionary describes ‘Gender Neutrality’ as an adjective that is suitable for, applicable to, or common to, both male and female genders. It describes the idea that policies, language, and other social institutions should avoid distinguishing roles according to people's sex or gender, and emphasizes on the equal treatment of men and women legally with no discrimination<sup>8</sup>. Gender neutral laws redefine the definition of gender specific laws wherein the law is framed and broadened to include all persons equally to protect them without any difference. With the ever increasing crime rates of various types and nature increasing and men and women of the society being equally victimized, it is only fair that an all encompassing law that recognizes the crime and the person irrespective of the gender comes into existence. There has been strong objections raised against gender neutral laws coming into force by women movements and feminist groups on the ground that it will suddenly take away the focus lens off the women who are victims and that a gender neutral law will only do harm and not serve the purpose of protecting the victims. According to the author and advocate Flavia Agnes, “*gender neutrality lies on the presumption that by neutralizing the law to be victim and perpetrator neutral the offence of rape will be desexualized and the stigma attached to the offence will vanish and if the reforms take place they will be injurious to women and that the basic and primary problems will not be highlighted*”<sup>9</sup>. But this principle is argued on the ground that the feminists do acknowledge that there is a stigma to the offence attached and that making it gender neutral will not take it away but will normalize the fact that even men go through the same stigma just as women and that both men and

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<sup>8</sup> “Gender Neutrality” Oxford Dictionary

<sup>9</sup> Agnes, F. (2002). *Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law*, Economic and Political Weekly.

## Special issues 2017

women equally should be able to seek protection under the law. The taboos and stereotypical beliefs have to be broken so as to consider male victimization as equal to women victimization and that the crimes have to be fought against together by bridging the gap of inequality and it starts by having laws that are gender neutral in nature. Only by normalizing rape or sexual assault or harassment of males into the law can men come forward with complaints. To bring in such reforms in the law, a committee was constituted in December 2012 that was chaired by the Ex Chief Justice of India, Justice J.S. Verma. The committee had two other members who were retired Justice Leila Seth and Ex Solicitor General Sri. Gopal Subramaniam. A report that culminated various suggestions was made in a month and thus the 172<sup>nd</sup> Law Commission report presented its recommendations. This report came in as ray of hope into a society that was under the shackles of violence and dominance. The Commission report while stating its conclusions and recommendations stated that, “*Since the possibility of sexual assault on men, as well as homosexual, transgender and transsexual rape, is a reality, the provisions have to be cognizant of the same*”<sup>10</sup> The Committee for the first time, acknowledged that sexual assault of men is a reality and that there has to be provisions of the law that give protection to them against such offences. The committee took a big leap into seeing India as progressing and forward looking country wherein it realized that not only women but men too need to be afforded equal protection under the law. It further suggested for the offence of rape and sexual assault be gender neutral and not gender specific confined to only women being the victims. Gender neutrality in protection laws and criminal laws were for the first time recognized. But this hope of reforming the criminal justice system did not last for long until feminist groups who opposed to the recommendation came forward with futile reasons so as to not bring about such a law into the country and the Criminal Law (Amendment) Act 2013 was finally passed not taking into considerations these recommendations and also adding a few more sections to the Indian Penal Code, 1860 such as Section 354A<sup>11</sup>, 354B<sup>12</sup>, 354C<sup>13</sup>, 354D<sup>14</sup> to protect only women along with Sections 326A

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<sup>10</sup>Justice J.S.Verma, Justice Leila Seth and Gopal Subramaniam, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW 2013, 416.

<sup>11</sup> Section 354A Of the Indian Penal Code, 1860

<sup>12</sup>*Id* at Section 354B

<sup>13</sup>*Id* at Section 354C

<sup>14</sup>*Id* at Section 354D

and 326B which envisages acid attack and attempt of the same to be gender neutral. Sexual assault and violence against men is not sufficiently understood and thereby not given the importance it needs to get. There is a wide spread belief that a real man cannot be raped or sexually assaulted and because of this such instances are rarely reported fearing being tagged as a homosexual<sup>15</sup>. Because of the imbalance between male perpetrated crimes against women and female perpetrated crimes against men there is a under awareness of those crimes that are only male specific which can be committed by females also.

Offences that take place against men sexually cannot be sidelined in the name of protecting women. Legislations that are enacted in India currently penalize only the male gender and not the female for crimes such as sexual assault, stalking, adultery, voyeurism, rape, domestic violence, dowry death, harassment at workplace etc. None of these pro women legislations are framed on the basis of scientific results as to why they are tilted to favour only a single gender. These came into force because of the socio legal environment and the inequality between the people who lived in the society during those times, but now the times have changed. There has been a shift in the way people think and how men and women have equally today gained accesses to everything as a measure of empowerment and upliftment.

### **A shift to Gender-neutral or Gender-specific Offence**

The recommendation called to make rape a gender neutral offence, while now after the passing of the Amendment Act this offence is women centric. Only a man is assumed to be capable of committing rape that too against a woman only. The aspect of gender neutrality is required in following aspects:

1. Neutrality with respect to the victim- Often the members of the marginalized sex like 'Transgender' are also fall victim to this offence and they cannot claim any protection because the crime of rape is not gender neutral and do not safeguard the rights of transgenders or male.

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<sup>15</sup>Barbara Krahe, Renate Scheinberger and Steffen Bieneck, *Men's Reports of Non-Consensual Sexual Interactions with Women: Prevalence and Impact*, 32(2) ARCHIVES OF SEXUAL BEHAVIOUR 165, available at <http://www.psych.uni-potsdam.de/social/projects/files/nonconsensual-sex-interact.pdf>

2. Neutrality with respect to the perpetrator- the reality that even women can be perpetrator of such crimes is bluntly ignored by the Indian society as well as the judiciary and executive.

In a common law country like India, where the legislature plays a predominant role in ensuring equality and justice for all, the primary step in safeguarding gender equality is through addressing the issue through the way of legislation. The legislature has the responsibility to enact laws which are rational which must protect the weaker section of the society and provide upliftment ensuring that it does not negatively cause harm or neglect the other section who are equally susceptible to the same harms and offences<sup>16</sup>. The downside of not having a gender neutral law is that men feel that the judiciary and legislature is impartial and do not safeguard their interest as prescribed in the Constitution of India and is unjust in its refusal to protect men. In a utopian civil society, activists groups must engage in a constructive dialogue to make suitable amendments to the law to safeguard the interests of men as well as women in order to ensure gender equality.

### **Suggested Reforms and Conclusions**

The violence against the women of our country has been one that has been fought against for decades and this has gained widespread protests across the country. We have been witness to some heinous and gruesome crimes and thus emphasizing much on the need for coming up with stringent laws of punishing men and enacting pro women legislations and implementing them to its fullest. One question still remains, have these legislations been able to curb such crimes and have the real offenders been punished at all? Several activists and organisations have tried to highlight the plight of men been victimised in the midst of such pro women protection laws. This brings in the necessity of framing gender neutral laws. Viewing it from this angle wherein it is unfortunate enough to be a victim of the crime, but worse to fall victim to something or a crime that is not recognized by the society or the law itself. Men should have the equal access to come into the open just like women and be not judged for their manhood for reporting crimes against them. The truest and fullest form of equality will be the time when we are standing at the doors of the law to seek justice and the law is

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<sup>16</sup>Nishant,L and Devanshi,D. *Critical Commentary on the Gender-Bias Route of Sexual Harassment Laws in India: Examining the Pro Female Tilt and its Consequences (with specific reference to Section 354C and 354D of the Indian Penal Code)*,International Journal of Technical Research and Application.(2015)

stringent enough to punish the offender based on the crime committed and not based on their gender. In the light of this, the author attempts to put forth the following suggestions-

1. Firstly, on the basis of changing laws so as to recognise offences of violence and abuse to include men also under its purview, the Protection of Children from Sexual Offences Act, 2012(POCSO Act)<sup>17</sup> which was an Act that came into force to protect children from offences of sexual assault, sexual harassment and pornography and also to provide for special courts for trial of such offences and any other matters incidental to this. This legislation recognizes that children irrespective of the gender can be subject to such offences but beyond the age of eighteen where the law terms him as adult he is no longer entitled to that protection under any law that is in force. This is what needs to be addressed, that such crimes can and are happening to men beyond the age limit of being a child and just as women are being offered protection under the law, men too should be given protection as mandated by the constitution of India. The Act includes Penetrative and aggravated penetrative sexual assault, sexual and aggravated sexual assault, sexual harassment, and using a child for pornographic purposes as the five offences against children. This act envisages punishing even abetment or an attempt to commit the offences defined in the act. It recognizes that the intent to commit an offence, even when unsuccessful needs to be penalized. The punishment for the attempt to commit is up to half the punishment prescribed for the commission of the offence. The legislature has taken a step forward in enacting gender neutral laws with respect to children and any person who commits the same will be punished and for once it is the crime that is focussed and not the gender.
2. Secondly, with respect to Sexual Harassment at workplace and the Act is the The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 that is gender specific to protecting only the women from sexual harassment, taking into consideration the nuances of reforming the law, the various institutions and organizations at the grass root level should take into consideration that even women employees or women superiors can sexually harass men employees. Taking into consideration the current employment opportunities and women reaching

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<sup>17</sup> Protection of Children from Sexual Offences Act, 2012

## Special issues 2017

at top positions over men, the redressal of sexual harassment of at workplace should be made gender neutral. Men workers or employees must be able to raise complaints without the fear of ridicule. Only once there is effective mechanisms of redressal in place will more cases can be reported and only then justice can be served to the working class leading to more productivity and economy development of the country. Gender neutral laws with respect to sexual harassment have been recognised and accepted in most countries in the world such as United Kingdom, Denmark, Australia and USA. Sexual harassment can be perpetrated by both males and females against both males and females as a matter of power and upon those who have an advantageous position over the other and the societal belief along with the law must make a transformation to be gender neutral towards such offences.

3. With the issue of domestic violence and dowry death, there has to be a law that comes into force so as to curb the ever growing issue of 'legal terrorism' wherein Section 498A and 304B of the Indian Penal Code, 1860 has been misused and used as weapon to pin liability on even innocent men who go through mental torture and trauma within the four walls of the home. These sections are non bailable, non compoundable and cognizable and directly assume guilt on part of the husband and his family members. This leads to fastening guilt even on innocent citizens even if the case is falsely charged and the husband has to go through the trial procedure and court ordeals and is publicly shamed in the society. The law uses the word 'husband' instead of it being 'spouse' to make it gender neutral. The provisions contain a principle violation of the criminal justice system wherein all accused are innocent before proven guilty, but in such cases the husband is considered to be guilty until proven innocent. The law here takes a reverse action which is unjustified. A stringent provision which is gender neutral must come into the frame so as to punish false accusers. The burden of proof must lie on the complainant and not in the accused. This being stated, it is also admitted that women go through such torture every day, but making the law gender specific is not helping to curb such menace and a social change along with a legislative change has to happen in India.
4. Fourthly with respect to rape reforms, the recommendations of the Verma Committee need to be re - analyzed and gender neutrality of rape and sexual assault as given in

## Special issues 2017

the recommendation must be put forth as law. Only by normalising the rape of males into the law can men come forward with complaints. This also has a psychological impact, that is if men too are included under the definition of rape, they too will realize that such a heinous crime can be committed even against himself by another person a male or female and that, the same pain and agony will be faced by him too and thus if it deters a male from committing such an act, we can curb this offence. Male rapes happen to show forth domination and not always sexual pleasure seeking. Crimes like rape and murder happen irrespective of gender, caste, colour of skin, nationality etc. and most importantly irrespective of sexual orientation. These crimes must be reported and an environment where the plight of men too are heard without the fear of being labelled as losing his manliness if such cases are reported. The current definition of rape as envisaged under the Indian Penal Code is unable to protect male rape. An all-encompassing definition of rape and sexual assault must be brought in as the need of the hour. Such a change is long overdue as the law has to be in tune with the current need of the society and this is the need of the major segment of the society.

5. Fifthly, with respect to Section 397 of the Indian Penal Code, 1860<sup>18</sup> wherein Adultery is punishable in India just like in other countries except that the difference in India is the current law punishes only the man or the husband if he commits adultery and the woman or the wife who might be an equal participant in the Act is only viewed as the victim, There is an irrational classification between man and woman here wherein it penalises only the man as being the offender. There is a prima facie violation of the right to equality and this is discriminatory in nature. For an act of Adultery which can be committed by both the man and wife, the man becomes a manifestation of evil and the woman is considered to be the hapless victim. Such presumption of men only being the offenders is the law that need to be changed and reformed. Criminalizing adultery protects the sanctity of the institution of marriage, but assuming that the woman who might be an abettor in the act as the victim and thus pinning no liability at all does not serve the purpose as in the well celebrated case of *K.M Nanavati v. State of Maharashtra*<sup>19</sup>. In 2003, the Justice Malimath Committee<sup>20</sup>

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<sup>18</sup>Section 397 of the Indian Penal Code, 1860

<sup>19</sup> *K.M. Nanavati v. State of Maharashtra*(1962)2 AIR 605; 1962 SCR Supl. (1) 567

## Special issues 2017

was tasked to make reforms in the criminal justice system and had suggested to make section 497 gender neutral and had gone on to state that marital infidelity must be taken seriously in the society and similar treatment to both the man and the woman should be taken into consideration. But this reformist position was not taken into consideration. The law makers need to come out with realistic laws that will serve the ends of justice and not penalise only men violating equality over and over again.

6. Lastly, the Criminal Law (Amendment) Act, 2013 brought in new sections among which Sections 354C and 354D – the offences of voyeurism and stalking were added to include only men being penalised for such offences making it gender specific while the same amendment brought about acid attack which was gender neutral. Recognizing a few offences to be gender neutral and others to be gender specific making only the man liable is what is contended to be unreasonable because the same acts can be done by women also. The law is suggestive of the fact that only men can commit these wrongs and assume that men can never be the victims of such acts. Stalking and Voyeurism can never implicate a woman, as such an act done by a woman is not constituted as an offence. If this is not declared as wrong, then men who are victims to this cannot seek remedy against it, questioning the reasoning behind this law, the law makers need to realize that crime is a crime and there are acts of crime just like other act like murder and homicide that can implicate women also. The legislature has to note that protection of one class of the society does not come at the cost of penalising or not protecting the other class of the society at all. The position in Canada, Australia and the United States deter each and every person carrying out such an act and does not differentiate within genders like in India. The situation wherein a woman committing the act of voyeurism thereby causing harm to another man or woman is completely outside the scope of the act itself. The Justice Varma report had proposed the term “whoever” to refer to the offenders, but this was not taken into consideration and thus giving a complete clean ticket to women who are capable of committing the same act is unjustified and unconstitutional.

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<sup>20</sup> The Justice Malimath Committee Report, 2013

The author is of the view that there is a growing need to bring in strong legislations that protect all the persons equally focusing on the nature of the crime as well as laws against false complaints and misuse of law causing unquantifiable miseries to innocent victims. Bringing in Gender Neutral laws would be paving way to make the society think in a forward looking manner so as to enable the society to think that men will not lose their masculinity if they bring out their instances of such abuse into the open. Feminist arguments about woman being vulnerable and attracting counter claims of such abuse if the laws are made gender neutral are to be shunned so as to make them realize and understand that like them, even men are equally vulnerable to such instances and it is the offender and the crime that has to be punished<sup>21</sup>. If the gender neutral laws come into force, they are carefully formulated and implemented it will not be disadvantageous to women. The time is now, the hour of need to reform old archaic law has come, wherein changes in the law has to be made so as to bring the society to change its thinking, into normalising male victimisation and insert words like “any person” or “any spouse” in the place of any man or wife or woman. And this will ensure equal accessibility of justice to all persons irrespective of the gender and irrespective of the crime and irrespective of its gravity or seriousness. The concept of equality as envisaged under the constitution of India must apply to all crimes and penalising all persons including protection of all persons. If the law fails to protect where will his remedy lie? The time has come for the banner of justice to be waved with the thread of equality and not gender targeting.

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<sup>21</sup> TNN, *Activists join chorus against gender neutral rape laws*, THE TIMES OF INDIA, (March 9, 2013), available at [http://articles.timesofindia.indiatimes.com/2013-03-09/india/37580560\\_1\\_gender-human-rights-groups-women-activists](http://articles.timesofindia.indiatimes.com/2013-03-09/india/37580560_1_gender-human-rights-groups-women-activists)