

## THE (NOT-SO) PROTECTIONIST CRIMINAL PROCEDURE CODE OF 1973.

*Tanisha Choudhary*

IV Year, B.A., LL.B. (Hons.), Jindal Global Law School.  
17jgls-tchoudhary@jgu.edu.in

### Abstract

*Women have always been treated as inferior to men and the law has implicitly played a vital role in the manifestation and enforcement of this inferiority. This creates a lacuna in the law-one that is generally overlooked. In this paper, the author begins by attempting to identify the roots of this inequality. They then try to highlight the loopholes that exist in the law and can be used to the misuse and advantage of women. It is an attempt to move away from the general conception that laws are meant for the benefit of women, and to highlight the inherently patriarchal nature of the state. Lastly, the author concludes with a discussion on Article 15, its misinterpretation, and its original aims.*

Key Words: Women, patriarchy, Criminal Procedure Code, Constitutional Law, phallocentrism, Article 15.

### 1. Introduction

In the initial moments of identifying and describing where male domination fits in the puzzle of women's oppression, one cannot help but attribute this overarching facet to history. As Winston Churchill once claimed – "history is written by the victors."<sup>1</sup> *Victors* here indicates the seeming 'win' that men have acquired over women and their sexuality. A sense of loss of identity that has taken place over time and can be traced to events and discourses in history where women have been at the centre of debate but have never actually been a part of it.<sup>2</sup> Where women's voices either don't exist or have been drowned out. Although the origins of patriarchy are generally traced back to the advent of farming, it was in the 19<sup>th</sup> and 20<sup>th</sup> centuries that the idea of women being inherently *fragile*<sup>3</sup> manifested itself greatly.<sup>4</sup> It is this

---

<sup>1</sup> MICHAEL W. ROBBINS, 'Letter From Military History - January 2013 | Historynet' (HistoryNet, 2012) available at <https://www.historynet.com/letter-from-military-history-january-2013.htm>.

<sup>2</sup> Lata Mani, *Recasting Women, Essays In Colonial History* (Rutgers University Press 1989).

<sup>3</sup> *Air India versus Nergesh Meerza*, 1981 AIR 1829.

manifestation of inherent incapacitation and power dynamics between both the sexes that can be seen to this date in the Criminal Procedure Code of 1973<sup>5</sup>. Therefore, the aim of the paper is to depict that while women need to be provided protection in light of the socio-legal requirements posed by the society, women cannot be assumed to be ‘weak’, and the law needs to be made in light of equity and in order to be able to make women empowerment a reality.

The laws of any country are paramount and the legislation that is at the head of all is the Constitution. *And it is the same in India, to quote Justice V.N. Khare, “the beauty of the Indian Constitution is that the entire structure of the country is based thereupon. It is the very pillar upon which the democracy of India stands.”*<sup>6</sup> More than laying down provisions and guidelines, it confers fundamental rights to the citizens of the country. Rights that cannot be tampered with by the state and can be enforced against the state in certain scenarios. One such right is that of equality and non-discrimination; conferred to the citizens of India through articles 14, 15, and 16 of the Constitution.<sup>7</sup> Although these articles have been helpful in achieving the ends of justice, a vital aspect of society and the law itself is being overlooked. The aspect is that of phallogocentrism and following it: phallogocentrism. Phallogocentrism is the ideology that the phallus, or the male sexual organ, is the central element in the organisation of the social world.<sup>8</sup> Further, phallogocentrism builds on phallogocentrism to mean that the phallus<sup>9</sup> is privileged and is at the heart of understanding or providing meaning to social relations. The differences between men and women is not just seen as a differentiation based on gender that still makes them equal but instead thinks of them as subversive to men. An ‘article’ that has no agency and needs a man to protect her. Whereas, the idea of equality “presupposes a degree of similarity between the sexes that is untenable in a society where they have been constructed so differently.”<sup>10</sup> These are the grounds or the basis on which 19<sup>th</sup> century laws were formulated and have unfortunately not evolved with the changing times.

---

<sup>4</sup> Susan S. M Edwards, *Female Sexuality And The Law* (Robertson 1981).

<sup>5</sup> Criminal Procedure Code, 1973.

<sup>6</sup> Justice V. N. Khare, CJI, *Union of India versus Naveen Jindal*, 2004 2 SCC 510 paragraph 27.

<sup>7</sup> Constitution of India 1950.

<sup>8</sup> Ariana Rubio, 'The Dangers Of The Male Gaze' (The Underpass, 2019) available at <https://underpassmag.wordpress.com/2019/03/03/the-dangers-of-male-gaze-theory/> (Last visited on July 13, 2020).

<sup>9</sup> A penis, especially when erect (typically used with reference to male potency or dominance).

<sup>10</sup> Christine A. Littleton, 'Reconstructing Sexual Equality' (1987) 75 *California Law Review* available at <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?Article=1925&context=california-law-review> (Last visited on July 15, 2020).

## 2. Current Framework and analysis

To begin with, the most rudimentary example of this can be seen in the General Clauses Act 1897, which states that ‘*words importing the masculine gender shall be taken to include females*’<sup>11</sup>. This act, acts as an umbrella for terminology that shall be used in various acts of general usage and immediately puts the masculine gender on a higher pedestal. Therefore, before legislations were even framed in ways that subvert women, the legislators erased the basic usage of the pronoun ‘she’ altogether.

In a like manner, multiple provisions in the Criminal Procedure Code, 1973 have an inherent bias towards women and treat them differently but three of the provisions that in my opinion are most problematic are Section 46(4), Section 437 proviso 1 and Section 273 proviso<sup>12</sup>:

*Section 46(4):*

*Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made.*

*Section 437 proviso 1:*

*Provided that the court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm.*

*Section 273 proviso:*

*Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.*

The crux of section 46(4) is that women cannot be arrested after sunset or before sunrise and prior permission needs to be taken by a woman police officer if it is essential for a person to be arrested. In section 437 proviso 1 means that if a woman has been arrested for any crime, she would *have to* be released on bail. Implicitly, it also equates a woman with a person who is *sick or infirm or less than 16 years of age*. Additionally, in the proviso to

---

<sup>11</sup> General Clauses Act, 1897.

<sup>12</sup> Criminal Procedure Code, 1973, §46(4), §437, §273.

Section 273 women alleged to have been victims of rape or sexual assault are to have their statements recorded in the absence of the accused. Therefore, it can be inferred that it sees only women as victims and negates the fact that even men can be sexually assaulted.

The first two sections seemingly provide leeway to women to commit whatever crimes they want without any immediate repercussions. Although the Indian Penal Code is the substantive legislation with respect to criminal offences, by making the corresponding procedural aspects diluted and extremely flexible, the offence loses its immediacy. While it would not absolve women of guilt or prevent them from becoming an accused or a convict, it would act as a buffer between the commission of the crime and the commencement of the judicial process. Thereby providing sufficient lapse of time if one wishes to escape legal liability. As opposed to men who would be more likely to be arrested at the time of the crime or at the time of discovery of the crime.

Although in the case of *Pramod Kumar Manglik vs Sadhna Rani*<sup>13</sup>, the court clarified that ‘may’ in the proviso to section 437 is not a mandatory provision, the following cases shall depict the fact that despite the clarification, in most instances ‘may’ has been treated as ‘shall’. Further, if a person is aware of the laws, she can circumvent the law with the help of these provisions. This was seen in the recent case of *Kavita Manikikar v. CBI*.<sup>14</sup> Manikikar had been arrested because she was allegedly the authorised signatory in three of fugitive diamond merchant Nirav Modi’s firms. She had been arrested at 10 pm on the 20<sup>th</sup> of February, in contravention of section 46(4), which is what she then makes use of and files a petition against. Manikikar had been arrested as there was a strong suspicion that she may abscond and in order to get to the bottom of the fraud, it was essential for the police to arrest her. In a bare reading of the section and bare perusal of the facts of the case, one would assume that the given circumstances would qualify as ‘exceptional’ but the court held otherwise. The court held that the arrest was in contravention to the fundamental right to life and liberty as conferred by Article 21 of the Indian Constitution. Although a person can be deprived of this right, it can only be through a procedure established by law, which had not been completely followed here. The High Court also declared all statements/actions following Manikikar’s arrest to be ‘null and void.’ Further, it held that the police officers who had arrested her were liable for disciplinary action and that the concerned police officers were liable to pay Rs. 50,000 to her as compensation. Consequently, her contentions were accepted and her arrest and remand in judicial custody were quashed. However, the court did clarify

---

<sup>13</sup> 1989 CriLJ 1772.

<sup>14</sup> Kavita Manikikar versus CBI, 2018 SCC OnLine Bom 1095.

that if the CBI's probe called for Manikikar's arrest, the agency was free to do so. Another instance was that of *State vs Sunita*<sup>15</sup> where a woman had been arrested for allegedly stabbing a woman. Where on the one hand, the judgement cited *Joginder Kumar*<sup>16</sup> to say that "the arrest of a person becomes eminent only in certain circumstances like when the allegations involves a grave offence like murder, dacoity, robbery, rape etc. and it is necessary to arrest the suspect to prevent him from escaping or evading the process of law," on the other hand, it rules in favour of the accused woman and lets her off on bail. Simultaneously the judgement further states that in case a woman is to be kept in custody overnight, her family members should be informed and that they should stay with her. Further reinforcing the idea of her being helpless. One of the primary reasons for the arrest of women not being allowed after sunset and before sunrise is the fact that women have been sexually assaulted and abused by police officers in the past. Although there was a PIL by journalist Sheela Barse<sup>17</sup> for the same and the Court had allowed for separate lock ups for women that would be led by women officers, the same was not implemented.

It is only the Tihar jail in Delhi that has separate lock ups for women but there is still a dearth of women officers, super intenders, etc.<sup>18</sup> The creation of separate lockups has the capacity to help bridge the gap in terms of the disparate treatment that is received by women in jails as opposed to their male counterparts. As women are provided lesser food, sanitation and health care. Therefore, while the threat of women being sexually assaulted while in prisons and police custody is a very real possibility, the way forward would not be to not arrest them at all but to make necessary structural changes in prisons and police stations across the nation, as has been done in the Tihar jail and facilitate better care and protection. The judgement in *State v Sunita* and the idea that the family should stay with the woman is a plausible one but should be implemented in the interim until structural changes are implemented and a safer environment is created for women; instead of viewing it as a permanent solution.

The third section can almost be seen as reverse sexism or sexism targeted towards the dominant sex. As if men are inherently 'masculine' or well-built, powerful and strong and hence, lack the capability to be subjected to any kind of violence or worse, rape. Just the same way as they seemingly lack the ability to cry and/or feel emotions; they also cannot be victims of rape. While it is true that rape has been seen as a penetrative assault and a

<sup>15</sup> State v. Sunita, Delhi District Court, FIR No. 265/2013. (Unreported).

<sup>16</sup> Joginder Kumar versus State of UP 1994 SCC (4) 260.

<sup>17</sup> Sheela Barse versus State of Maharashtra AIR 1983 SC 378.

<sup>18</sup> Press Trust of India, 'Tihar jail has separate lock-ups for women, care for their children' Indian Express (New Delhi, 27 November 2014).

property assault in general, there have been instances where men have also been raped.<sup>19</sup> While the legislation in itself is plausible since it aims to bring about justice by providing unhindered opportunity to be heard, the same should also be afforded to men. The lack of this space being available to men reinforces the patriarchal ideals of men being the strong, invincible protectors of women. Which leads us, once again, an implicit reinforcement of women being objects that need protection.

This then leads me to a similar case of *Sushma Rani versus State of H.P.*<sup>20</sup> Where two people were the accused in this case. One of whom was a woman and had been accused of murdering her husband. First the sessions court used the reasoning provided by *Joginder Kumar*<sup>21</sup> and did not grant her bail on the basis of her being a woman but this decision was overturned by the High Court. It did grant her bail while citing the case of *Reeta Devi versus State of H.P.*<sup>22</sup> As well as stating that she “can be treated differently from her co-accused” keeping in mind her womanhood. It brings back the idea of a woman being incapable of committing crimes and being a passive recipient instead. It is this passivity, lack of identity and agency that is being reflected throughout the legislation as well as the judgements. The phallogocentrism of society is so inherent that all legislations use the pronoun ‘he’ when referring to anybody, male or female.<sup>23</sup>

In the case of Reeta Rani, a woman had been accused of multiple criminal charges on account of having thrown stones, caused injuries with rods and caused multiple deaths but had been released on account of her being a woman, and as per section 437. Along with the fact that she was a mother of two children. Although she had been granted bail against an exorbitant sum of money, which goes against the judgement stated in *Moti Ram v State of M.P.*<sup>24</sup> the fact remains that she had been granted bail. One of the reasons stated for this judgement was that this decision was in consonance with the law laid down in Article 15(3) of the Indian Constitution and allowed for such discrimination. Which, I believe, is an Article that is greatly misconstrued and needs clarification.

### 3. Interplay with Constitutional provisions

---

<sup>19</sup> John Stokes, ‘India’s law should recognise that men can be raped too’ (Scroll.in, 11 September 2011) available at <<https://scroll.in/article/676510/India's-law-should-recognise-that-men-can-be-raped-too>> (Last visited on July 13, 2020).

<sup>20</sup> *Sushma Rani versus State of H.P.* 2019 SCC OnLine HP 277.

<sup>21</sup> *ibid*, 13.

<sup>22</sup> *Reeta Devi versus State of H.P.* MANU/HP/0039/2016.

<sup>23</sup> Indian Penal Code, 1860.

<sup>24</sup> 1979 SCR (1) 335.

While Article 15 recognizes the systematic oppression of women that has taken place over centuries and has been formulated in a way that authorizes the state to create special provisions for women, using it as a defence in cases such as Reeta Rani is not the way the framers of the Constitution anticipated its use. It provides a way for the creation of special provisions for women and children so that they can come to par with the status of men in all fields and all walks of life. Further, although it provides leeway to the state to judge which circumstance warrants a creation of a special provision, it by no means implies a frivolous and arbitrary use of the Article.<sup>25</sup> An example of the correct usage or interpretation of this Article can be seen in the case of *Padmraj Samarendra vs. State of Bihar*<sup>26</sup> where a percentage of seats reserved for female students in medical colleges was under challenge and had been upheld by the Court. In a like manner, another example of the way the article is to be construed was seen in the case of *Dattatraya Motiram More v State of Bombay*<sup>27</sup> where provisions under the Bombay Municipal Boroughs Act were being examined since they allegedly violated Articles 14, 15 and 16 of the Constitution. The Supreme Court held that Article 15(3) is a proviso to Article 15(1) and hence seats reserved for women were validated. The court elucidated on the scope of Article 15 as follows:

*“Even if in making special provisions for women for giving them reserved seats the State has discriminated against men, by reason of Article 15(3) the Constitution has permitted the state to do so even though the provision may result in discrimination only on the ground of sex.”*

Following from the case of *Charu Khurana v Union of India*<sup>28</sup>, where the court had held that equality can only be achieved if both genders are provided equal opportunities. Implying, therefore, that it is to be used to bring about affirmative action and equality of status. Such as increasing the number of women elected offices of government and better ways for the protection and development of a girl child so as to prevent female infanticide. However, at the same time, despite the fact that the case is

---

<sup>25</sup> Constituent Assembly Of India Debates (Proceedings) - Volume VII (quoting K. T. Shah: The rage for equality which has led to provide equal citizenship and equal rights for women has sometimes found exception in regard to special provisions that, in the long range, in the interest of the country or of the race, exclude women from certain dangerous occupations, certain types of work. That, I take it, is not intended in any way to diminish their civic equality or status as citizens. It is only intended to safeguard, protect or lead to their betterment in general; so that the long-range interests of the country may not suffer) Available at <[https:// www. constitution of india. net/ constitution\\_ assembly\\_ debates/ volume/ 7/ 1948-11-29](https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29)>.

<sup>26</sup> 1978 SCC OnLine Pat 64.

<sup>27</sup> AIR 1953 Bom 311.

<sup>28</sup> (2015) 1 SCC 192.

trying to bring about positive outcomes, it reflects a kind of romantic paternalism that women need to be protected and taken care of.<sup>29</sup>

In the recent judgment of *Joseph Shine v UOI*<sup>30</sup> the following section had been read down:

*Section 198(2):*

*For the purpose of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code<sup>31</sup>:*

*Provided that in the absence of the husband, some person who had care of the woman on his behalf at that time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.*

Section 198(2) needs to be read with section 498 of the Indian Penal Code, 1860. Under both, the law affords the right to file a complaint against an adulterous wife to the husband but does not afford the same right to a woman. It takes for granted that the husband is the aggrieved party and negates the fact that the wife of the adulterer can also be the aggrieved party. Furthermore, it goes so far as to confer this right to any person ‘who had care of the woman on his behalf’ to file the complaint but not to the woman. As perceived by the law, the male is either incapable to being adulterous or whatever he does is justified. Additionally, *care* implies infantilization as it equates a grown woman to a child who needs to be taken care of. Although this section has now been struck down, the reason why this becomes important at this juncture is because this is an instance of where the judiciary has tried to place both men and women on an equal footing. Despite the fact that this is a recent judgment and we are yet to see its actual and full-fledged implementation, it is still a move towards the right direction.

#### 4. Conclusion

Although the framers of the Criminal Procedure Code may believe that it is being protectionist towards women and probably had good intentions at heart, it is implicitly infantilising women and promoting their loss of agency. Men have used their narrative to frame the laws, to infantilize women, and have skewed the power dynamics even further. One might say that these laws are for the betterment of women, for the prevention of their

---

<sup>29</sup> Anuj Garg versus Hotel Association of India & Ors. AIR 2008 SC 663; Yusuf Abdul Aziz AIR 1951 Bom 470.

<sup>30</sup> 2018 SCC OnLine SC 1676.

<sup>31</sup> Indian Penal Code, 1860.



exploitation, and hence, is an anti-discriminatory right<sup>32</sup> given to them. Only, that is not the purpose being fulfilled here. Women are only being seen as weak and subservient to men. It can be said that it is a special right due to the fact that there are no duties being created in its implementation; hence, it is akin to a privilege.<sup>33</sup>

We can have all the best legislations in the world, create special rights for women and call them anti-discriminatory, but unless and until the society and its outlook shifts from being phallogocentric to being neutral, equality can never be truly achieved.<sup>34</sup> Equality is presently being looked at from the lens of a man which is why it fails to include experiences of women in this male-dominated world, as the 'other'. And although it is patriarchy that makes men superior, masculinity is the process of producing superior men.<sup>35</sup> Gender equality is an inalienable right, violation of which could constitute a crime against humanity itself. Moreover, while these cases show that courts are trying to place men and women on an equal footing, it would be more beneficial to provide equity instead of equality. By providing equality instead of equity, the courts are potentially erasing women's political & historical past and the current societal ideas that they find themselves in. Furthermore, I believe that the idea that the law is neutral, is a myth<sup>36</sup>. Owing to the fact that it views neutrality only through one group's experiences and ideas while marginalizing the other group's voice altogether while simultaneously negating its patriarchal aspect altogether.<sup>37</sup>

While the laws are being gender biased and are being misused, there is a section of women in society who are still disadvantaged. Women from the lower strata's of society, women from rural villages; a majority of whom do

---

<sup>32</sup> Anti-discriminatory laws are designed to prevent oppression of the minority by the majority.

<sup>33</sup> Wenar, Leif, "Rights", The Stanford Encyclopedia of Philosophy (Fall 2015 Edition), Edward N. Zalta (ed.), available at <<https://plato.stanford.edu/archives/fall2015/entries/rights/>>.

<sup>34</sup> Christine A. Littleton, 'Reconstructing Sexual Equality' (1987) 75 California Law Review available at <[https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1925&context=california\\_law\\_review](https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1925&context=california_law_review)>.

<sup>35</sup> Sanjay Srivastava, 'MASCULINITY AND ITS ROLE IN GENDER-BASED VIOLENCE IN PUBLIC SPACES' (Cequinindia.org, 2010) available at <<http://cequinindia.org/wp-content/uploads/2018/01/MASCULINITY-AND-ITS-ROLE-IN-GBV-IN-PUBLIC-PLACES-Sanjay-Srivastav.pdf>>.

<sup>36</sup> Catharine A MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence" Signs 8, no. 4 (1983): 635-58 available at <<http://www.jstor.org/stable/3173687>>.

<sup>37</sup> Lucinda M. Finley, 'Breaking Women's Silence In Law: The Dilemma Of The Gendered Nature Of Legal Reasoning' [1989] Yale Law School Legal Scholarship Repository.

not even know the reason for their arrest are the ones at the receiving end.<sup>38</sup> Laws should include narratives of women while simultaneously working towards speedy handling of such cases, making people aware of the laws, and punishing only those who are guilty. Although that is the aim of the law, as seen from the article cited above, it isn't completely achieved in reality. In fact, Sir Syed A. Rouf wholeheartedly believed that in the middle of the twentieth century nobody would attempt to discriminate on grounds of 'sex' at all.<sup>39</sup> Little did he know that laws would be constructed and construed in ways that wouldn't bring to light his novel ideas even in the 21<sup>st</sup> century. Therefore, the idea is not to say that laws should be gender-neutral but to say that an equity based approach needs to be adopted. Where men are not be put on a pedestal, would also have recourse to issues they face, and women would be provided protection that furthers their upliftment instead of subjugating them further. All the while ensuring that the law is more accessible and comprehensible not only to people at large but more specifically to those who belong to the lower strata's of society and make the bulk of the Indian population.

---

<sup>38</sup> Dhruvo Jyoti and Roshni Nair, 'Tales from former inmates: What life is like in a women's jail in India' *Hindustan Times* (India, 26 July 2017) <<https://www.hindustantimes.com/india-news/tales-from-former-inmates-what-life-is-like-in-a-women-s-jail-in-india/story-UBBSj0N5yz2VskZpqgGiLK.html>>.

<sup>39</sup> Constituent Assembly of India Debates (Proceedings), Volume VII (quoting Sir Syed A. Rouf: As for "sex", I do not think that in the middle of the twentieth century there will be anybody attempting to make any discrimination on that ground. What was possible in bygone days is not possible now. Now, let us examine whether the word "race" can save the situation). Available at <[https://www.Constitution of india. net/ constitution\\_ assembly\\_ debates/ volume/ 7/ 1948 – 11 - 29](https://www.Constitution of india. net/ constitution_ assembly_ debates/ volume/ 7/ 1948 – 11 - 29)>.