

# ADDRESSING THE ROADBLOCKS TO GENDER NEUTRALITY IN SEXUAL AND DOMESTIC VIOLENCE LAWS: A SOUTH ASIAN PERSPECTIVE

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*Sexual and domestic violence laws across several countries in South Asia are gendered in nature. These legislations brand men as the perpetrator and women as the victim due to the wide prevalence of violence against women. In this paper, the author argues that gendered laws fail to accommodate abuse against men and other genders, as well as reinforce the one-dimensional image of women as a victim. In making this claim, the author addresses various counter-arguments made against gender neutrality and draws lessons from Bhutan, which has gender-neutral laws and also shares historical and social contextual similarity with other South Asian countries.*

**Keywords:** *Law and society; gender constructs and drafting; specificity; sexual and domestic violence laws; South Asia; male and non-binary persons' victimisation; gender neutrality*

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## I. INTRODUCTION

Law and society are intertwined to inevitably influence each other.<sup>1</sup> In this context, this paper explores the potential of legal drafting in challenging gender roles.<sup>2</sup> It argues in favour of gender neutrality on the basis that the law not only governs the society but also influences its course and progression. The paper carefully exposes the manner in which social constructs regarding gender influence the drafting of the law and in turn, investigates the role of the law in perpetuating gender constructs with specific reference to sexual and domestic violence laws in South Asian countries such as Afghanistan, Nepal, Bangladesh, Pakistan, Sri Lanka and Bhutan. The common perception that usually the perpetrator is male and the victim is female, disregards the victimisation of males and non-binary persons.<sup>3</sup> It also reinforces a gender binary 'resting on the essentialised notions of male aggression and female submissiveness'.<sup>4</sup> While rape and domestic violence of transgender persons are completely excluded from the discourse, the notion of the male victim also remains deeply stigmatised. It is thus, evident that gender specificity, i.e., the gender-based assumption that the perpetrator is mostly male and the victim is mostly female, is not solely a consequence of the law being reflective of social realities but also an outcome of biased social perceptions that have crept into the legal conscience of the drafters.

There is abundant discussion available on the issue of gender neutrality in sexual and domestic violence laws.<sup>5</sup> It is important to observe that the arguments in the existing literature have been largely restricted to developed nations

<sup>1</sup> Yehezkel Dror, 'Law and Social Change', (1958–1959) 33 *Tulsa Law Review* 787; Dipika Jain, 'Law-Making by and for the People: A Case for Pre-legislative Processes in India', (2019) 20 *Statute L Rev* 1, 3, 7, 10.

<sup>2</sup> Nandita Gandhi, Geetanjali Gangoli & Nandita Shah, 'Drafting Gender Just Laws', (1996) 31(43) *Economic and Political Weekly* 2858; MP Singh, 'Gender, Law and Sexual Assault', (1997) 32(11) *Economic and Political Weekly* 543.

<sup>3</sup> (Throughout the paper, 'non-binary persons' has been used to refer to LGBTQ+ persons).

<sup>4</sup> Mikkola Mari, 'Feminist Perspectives on Sex and Gender', *The Stanford Encyclopedia of Philosophy* (Edward N Zalta ed, Fall 2019 Edition) <<https://plato.stanford.edu/archives/fall2019/entries/feminism-gender/>> accessed September 2, 2020; Dr Chris Dolan, 'Into The Mainstream: Addressing Sexual Violence Against Men And Boys in Conflict' 2, 5 (A briefing paper prepared for the workshop held at the Overseas Development Institute, London, 14 May 2014) <[https://reliefweb.int/sites/reliefweb.int/files/resources/Into\\_The\\_Mainstream-Addressing\\_Sexual\\_Violence\\_against\\_Men\\_and\\_Boys\\_in\\_Conflict.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Into_The_Mainstream-Addressing_Sexual_Violence_against_Men_and_Boys_in_Conflict.pdf)> accessed September 2, 2020.

<sup>5</sup> Russel P Dobash & Rebecca Emerson Dobash, 'Women's violence to men in intimate relationships: Working on a puzzle', (2004) 44(3) *British Journal Of Criminology* 324; Anant Kumar, 'Domestic Violence against Men in India: A Perspective', (2012) 22(3) *Journal of Human Behavior in the Social Environment* 290; Patricia Novotny, 'Rape Victims in the (Gender) Neutral Zone: The Assimilation of Resistance?' (2003) 1 *Seattle Journal For Social Justice* 744; Ngaire Naffine, 'Possession: Erotic Love in the Law of Rape', (1994) 57(10) *Modern Law Review* 25; CA MacKinnon, 'Liberalism and the Death of Feminism' in *The Sexual Liberals and the Attack on Feminism* (1990) 3–13; Flavia Agnes, 'Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law', (2002) 37 (9) *Economic And Political Weekly* 846; Philip NS Rumney, 'In Defence of Gender Neutrality within Rape', (2007) 6(1) *Seattle Journal of Social Justice* 481.

of the Global North. Drawing a comparison between South Asian nations and the Global North's developed nations' societal structures and beliefs would be an unrelatable effort. There is a reason why the categorisation of 'developed' and 'developing' exists. The developed nations are far ahead in terms of economic and social development as compared to developing nations. As a result, there are differences in the fundamental problems that exist, and the pace of change, as well as the evolution of social perception between developed and developing nations. While gender neutrality is an essential issue which has been discussed and acted upon in few developed nations of the Global North, it has been given a backseat in the developing nations which struggle with other issues such as unemployment, poverty, corruption, gender-based violence, etc. Amidst such understanding, it is essential to highlight that Bhutan is one such South Asian nation that has challenged this approach. Despite Bhutan being one of the very few countries in the South Asian context that practices gender neutrality, there has been little or no reference to it in existing popular literature on the subject.

Hence, a comparative analysis with Bhutan is of relevance, and also appears more feasible as compared to a comparison with the Global North. Along with the outlined belief system, there are well-known cultural similarities in South Asia such as the significance attached to family interaction, the preservation of customs, languages, traditions and the wide prevalence of Hinduism and Buddhism in South Asia, particularly in Bhutan and India.<sup>6</sup> Both India and Bhutan have a history of cultural and societal norms creating inequality for women. The prevalence of gender-based crime and need to adopt a gender mainstreaming approach is common for both the countries. In the comparative methodology, it is essential to draw a comparison between jurisdictions/societies that share similar traits and reflect scope for encapsulating each other's features in the given socio-cultural context. This is because a key determinant of the feasibility and efficacy of a long term legal reform is the responsiveness of the socio-cultural environment of society to change.<sup>7</sup> Simply transplanting laws from foreign jurisdictions would render the exercise futile due to its incompatibility with the practical issues in implementation.<sup>8</sup> Extensive efforts<sup>9</sup> are being undertaken in South Asian countries to improve the status of women who have long suffered violence, subjugation, and injustice. Bhutan's initiative to carry forward sustained efforts of this kind, along with introducing gender neutrality in its legislation provides a fresh perspective for deliberation and comparison.<sup>10</sup>

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<sup>6</sup> Padma Anagol & Daniel Grey, 'Rethinking Gender and Justice in South Asia', (2017) 14(4) *Cultural And Social History* 419; Janki Shankar, Gita Das & Sabrina Atwal, 'Challenging Cultural Discourses and Beliefs that Perpetuate Domestic Violence in South Asian Communities: A Discourse Analysis', (2013) 14(1) *Journal Of International Women's Studies* 248.

<sup>7</sup> Agnes (n 5) 847.

<sup>8</sup> *ibid.* (Agnes expresses a similar concern in the context of gender neutrality in rape laws).

<sup>9</sup> Santosh Mehrotra & Sushma Kapoor, 'Gender Discrimination in Asia: A Regional Perspective', (2009) 9 (supp) *Global Social Policy* 197.

<sup>10</sup> Domestic Violence Act of Bhutan, 2013, s 3; Penal Code of Bhutan, 2004, s 177.

Bhutan also adopts a different approach towards development, which is based on Gross National Happiness ('GNH') rather than Gross Domestic Product.<sup>11</sup> The idea of happiness revolves around sustainable development of the society at large. There is a consistent emphasis on gender mainstreaming and gender equality in policy documents.<sup>12</sup> Gender mainstreaming is essential to address the deeply ingrained privileges, pre-conceived gender roles and norms harbouring inequalities within a society. This approach can act as an inspiration for other South Asian jurisdictions.

The paper attempts to address the theoretical and policy related concerns including the peculiarities of masculinity, femininity and victimisation which are specific to the social contexts of South Asia. The paper, in the following parts, provides an overview of existing sexual and domestic violence law in South Asia along with a categorised discussion on main arguments against gender neutrality in sexual and domestic violence laws. This paper is divided into two sections. Part II provides a critical analysis of the various issues involved in replacing gender-specific laws with gender-neutral laws. While the author argues for gender neutrality, which will act as a redressal to both male and non-binary persons, the arguments and claims against gender neutrality that have been addressed make specific references to males alone at various instances. This is because the existing laws refer to male and female exclusively. Part III provides an overview of the existing sexual and domestic violence laws in India and Bhutan with a tabular representation of few other South Asian countries such as Afghanistan, Bangladesh, Pakistan, Nepal and Sri Lanka. This section concludes with the lessons that can be learnt from the Bhutanese case, in the interests of justice, without diluting the existing protection such laws extend.

## II. CRITICAL ANALYSIS OF ARGUMENTS CONCERNING GENDER NEUTRALITY IN SEXUAL AND DOMESTIC VIOLENCE LAWS

In the following section, the author advocates for inculcating gender neutrality in law, after giving due consideration to major arguments against the concept of gender neutrality.

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<sup>11</sup> Center for Bhutan Studies, Indicators and Thresholds of the 2010 GNH Index (November 2011), <<http://www.grossnationalhappiness.com/wp-content/uploads/2012/04/Short-GNH-Index-edited.pdf>> accessed July 29, 2020.

<sup>12</sup> Domestic Violence Act of Bhutan, 2013, s 3; Penal Code of Bhutan, 2004, s 177; Japan International Cooperation Agency, Survey of Country Gender Profile (Kingdom of Bhutan) 28, February 2017, <[https://www.jica.go.jp/english/our\\_work/thematic\\_issues/gender/background/c8hovmoo0oanjqj6-att/bhutan\\_2017.pdf](https://www.jica.go.jp/english/our_work/thematic_issues/gender/background/c8hovmoo0oanjqj6-att/bhutan_2017.pdf)> accessed July 29, 2020.

## A. NEUTRALITY DILUTES THE 'UNIQUE NATURE OF VIOLENCE'

The existing literature on gender neutrality builds its arguments on the works of McKinnon and Novotny wherein they discuss whether neutrality is a backlash against feminism and a threat to the exclusive acknowledgement of violence against women.<sup>13</sup> Rumney has addressed few of these concerns in his work, but his discussion is limited to the courtroom discrimination faced by male sexual assault victims, and he engages in theoretical debates revolving gender neutrality in the western context.<sup>14</sup> He has dealt with the difference between the treatments of female as opposed to male rape complainants and how the attention given to male rape complainants is lesser.<sup>15</sup> He has also touched upon various issues such as bad treatment by police, misunderstood concept of consent based on reactions during rape, unreliability, false case allegations, past sexual history, physical resistance and injury used in a derogatory manner against male victims during a courtroom trial.<sup>16</sup> He has emphasised upon the need for judicial training of authorities, to help them handle the cases sensitively to avoid the discussed issues.

The opponents of gender neutrality such as Novotny, Naffine and MacKinnon have made arguments on how gender neutrality is not a good choice.<sup>17</sup> It leads to a growing recognition of male victimisation, serves as a medium for backlash against feminism, appears as gender disguise and as an attempt to treat both victimisation equally.<sup>18</sup> Rumney discusses the concerns raised, including the fact that gender neutrality has not just damaged the legal response to rape but also equates the experience of sexual assault among men and women.<sup>19</sup> In the Indian context, Flavia Agnes<sup>20</sup> raises concerns regarding the implication of gender neutrality on the marginalised sections of society. She argues that neutrality would dilute the focus of our attention to women, without elaborating on how this risk will manifest.

Kapur points out, that in the aftermath of heinous criminal incidents, there have been attempts to constrain women's 'freedom' of expression and the 'flaunting' of their sexuality, for being considered as contributing factors inviting rapes.<sup>21</sup> This reflects how the perception of sexuality is distorted in the Indian social

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<sup>13</sup> Novotny (n 5) 744; Mackinnon (n 5) 3.

<sup>14</sup> Philip Rumney, 'Male Rape in the Courtroom: Issues and Concerns', (2001) *Criminal L Rev* 207–208.

<sup>15</sup> *ibid.*

<sup>16</sup> *ibid.*

<sup>17</sup> Novotny (n 5) 744; Naffine (n 5) 25; Mackinnon (n 5) 3.

<sup>18</sup> Novotny (n 5) 748.

<sup>19</sup> Rumney (n 5) 500.

<sup>20</sup> Agnes (n 5) 846.

<sup>21</sup> Ratna Kapur, 'Gender, Sovereignty and a Sexual Security Regime', (2013) *14(2) Melbourne Journal of International Law* 317, 318.

context, and there is a need for region-specific analysis on the issue of gender neutrality. The key argument against gender-neutral laws is that neutrality obscures the uneven power dynamics and, in particular, de-recognises the long-standing marginalisation of women.<sup>22</sup> Another argument<sup>23</sup> against gender neutrality is that rape differentially affects men and women as the latter, apart from facing the violation of sexual integrity, may also suffer through the deep-seated social stigma of losing their virginity and are also ‘uniquely’ situated to bear the risk of unwanted pregnancies. While the author understands and shares these concerns, it is essential to point that the different groups of victims are each dissimilarly and uniquely situated in relative comparison to one another. While women continue to suffer from historical prejudice, men are pressured to act within the strict constraints of aggressive masculinity which disallows them from showing any kind of vulnerability, and non-binary persons endure near-complete legal exclusion, social isolation and economic deprivation.<sup>24</sup> Even if one was to operate on the argument that the nature of violence faced by women is unique given the patriarchal context, the opponents of gender neutrality who claim that neutrality leads to dilution, have failed to provide a cohesive explanation as to ‘how’ this dilution happens. It is difficult to accept that categorisation of rape of all persons (irrespective of sex and gender identity) under the same offence will itself dilute the severity of the act for any particular group.

A different perspective to the concern of ‘dilution’ can be explained through a hypothetical: A law that addresses violence against X class of people and requires considerable infrastructure if also extended to accommodate Y class of people, should not ordinarily lead to dilution of protection initially offered to X unless the existing infrastructure is overburdened with both X and Y. Therefore, by making a simultaneous increase in the infrastructure, the required attention can be maintained. Thus, it has been persuasively argued that leaving one category vulnerable in order to provide special protection to the other lacks a logical basis.<sup>25</sup>

Emphasising this ‘unique’ nature of violence may not serve its intended purpose of inculcating sensitivity towards female victims. For instance, research points out that although feminist groups employ the term “battered woman” to call attention to the issue of domestic violence, usage of such term implies that

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<sup>22</sup> Novotny (n 5) 744; Naffine (n 5) 25; Mackinnon (n 5) 3; Agnes (n 5) 846; Lillian Artz & Dee Smythe, ‘Feminism vs the State?: A Decade of Sexual Offences Law Reform in South Africa’, (2007) 7 *Empowering Women for Gender Equity* 6–9, 11.

<sup>23</sup> Susan Estrich, ‘Rape’, (1986) 95 *Yale LJ* 1150; Model Penal Code, 1980, s 213.1.

<sup>24</sup> Virinder S Kalra, ‘Between emasculation and hypermasculinity: Theorizing British South Asian masculinities’, (2009) 7(2) *South Asian Popular Culture* 113; Ramaswami Mahalingam and Sundari Balan, ‘Culture, Son Preference, and Beliefs about Masculinity’, (2008) 18(3) *Journal of Research on Adolescence* 541.

<sup>25</sup> Rumney (n 5) 495, 499.

the “main identity of a woman is that of a helpless victim”.<sup>26</sup> Sen argues that the images of women constructed by the law as the “battered wife” and the “real rape victim” have a coercive effect in making women believe such an identity is “natural and inevitable”.<sup>27</sup> Domestic violence is often resorted to assert control and dominance. In a relationship, when a partner seeks to exert control over the other and is unable to, the most common response to the frustration is violence.<sup>28</sup> With its increased prevalence in the existing family structures worldwide, the need to address the malady from a wider legal perspective has arisen.<sup>29</sup>

Gender neutrality, in this context, is commonly regarded as “devoid of all social reality”.<sup>30</sup> It has been argued by Dobash and Dobash,<sup>31</sup> that domestic violence is asymmetrical due to the substantial difference in frequency of violence inflicted by men on women as opposed to women on men in a domestic set up. The hesitation to address and engage with cases of male victimisation, even if few and far between, has partly contributed to the inadequate empirical research on this issue.<sup>32</sup>

While the author recognises this asymmetry, as a positive mover of social change, the law’s scope should be expanded. The author agrees that gender-based inequalities and crimes exist in society and have been existing for a long time. They deserve and require special policies and affirmative steps to address inequality and promote gender mainstreaming. A gender-neutral legislation, which does not address such inequalities, ends up harbouring them further. Along with gender-neutral legislations, simultaneous policies and strategies dealing with inequalities are required for an overall balanced legal approach for all genders and to ensure gender mainstreaming.<sup>33</sup> Neither the existence of gender-based atrocities nor the suffering of other genders, which are currently deprived of legal remedy for the same criminal act of sexual and domestic violence, should be ignored. A balanced legal response is required to accommodate both scenarios.

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<sup>26</sup> Nancy Berns, ‘Degendering the Problem and Gendering the Blame: Political Discourse on Women and Violence’, (2001) 15(2) *Gender And Society* 262, 279.

<sup>27</sup> Rukmini Sen, ‘Law Commission Reports on Rape’, (2010) 45(44–45) *Economic and Political Weekly* 81.

<sup>28</sup> Debra Umberson et al, ‘Domestic Violence, Personal Control, and Gender’, (1998) 60(2) *Journal of Marriage and Family* 442, 444.

<sup>29</sup> UN Women, ‘Facts and figures: Ending violence against women’, November 2018, <<https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>> accessed July 16, 2020.

<sup>30</sup> Agnes (n 5) 846, 847.

<sup>31</sup> Dobash & Dobash (n 5) 324.

<sup>32</sup> Kumar (n 5) 290–296, 292.

<sup>33</sup> Maria Stratigaki, ‘Gender Mainstreaming vs Positive Action: An Ongoing Conflict in EU Gender Equality Policy’, (2005) 12(2) *European Journal of Women’s Studies* 169.

## B. POTENTIAL MISUSE ON ACCOUNT OF FALSE COUNTER-ALLEGATIONS

One of the most crucial arguments<sup>34</sup> against gender-neutral legislations is that they carry the potential to cause more trauma and humiliation to women. One of the ways in which the law could be misused by men, is in the form of false counter-allegations against women. The concern here is that the male perpetrators who hold powerful and influential positions in society will misuse gender-neutral laws by blackmailing or by filing a false counter-allegations in rape or domestic violence cases against the female victim. The potential risk of misuse (which is capable of being addressed) does not undermine the need for protection. Even the existing laws have reportedly been misused in the form of false rape cases. As per Crime Statistics 2016,<sup>35</sup> out of the 55,071 rape cases for investigation, 2839 were found to be false cases. Often falsity is determined by acquittal; however, in the above-referred report, there are separate categorisations of acquittal due to insufficient evidence and acquittal due to falsity.<sup>36</sup>

Initially, in the Indian context, domestic violence law came as a response to outrage against dowry deaths. The domestic violence legislation was broad enough to cover violence other than that related to demands for dowry, but its ambit was restricted to violence against married women by their husbands and husband's relatives, thereby ignoring other victims and scenarios of violence.<sup>37</sup> Since its introduction, the domestic violence law in India has faced criticism because of a range of reasons, including its suspected misuse, the unclear ambit of 'cruelty' and poor implementation by law enforcement authorities.<sup>38</sup>

The Law Commission in its Report no. 243, pointed out that though there are widespread complaints regarding misuse of the domestic violence law by women and the judiciary has also taken cognisance of such large scale misuse, there is no reliable data based on an empirical study on the extent of the alleged misuse.<sup>39</sup> There are different versions of the extent of misuse, however, in the absence of any ground level study, the extent is difficult to comment upon.<sup>40</sup> The courts have recommended various measures to ensure that the misuse is minimised, and those who are innocent are not harassed. In several cases, the immediate family members of the husband are also roped in when an allegation of domestic violence is filed against the husband. This has led to social humiliation

<sup>34</sup> Agnes (n 5) 846.

<sup>35</sup> Ministry of Home Affairs, National Crime Records Bureau, Crime in India (2016) 148.

<sup>36</sup> *ibid.*

<sup>37</sup> Jayna Kothari, 'Criminal Law on Domestic Violence: Promises and Limits', (2005) 40(46) Economic and Political Weekly 4843, 4844.

<sup>38</sup> *ibid.*; Flavia Agnes, 'What Survivors of Domestic Violence Need from Their New Government', (2019) 54(17) Economic and Political Weekly.

<sup>39</sup> Law Commission of India, s 498A IPC, Report No 243, 3 ¶ 1.3 (August 2012).

<sup>40</sup> *ibid.*



as well as arrests of innocent persons.<sup>41</sup> However, as a response to such misuse, courts in various cases such as *Preeti Gupta v State of Jharkhand*,<sup>42</sup> *Chander Bhan v State*,<sup>43</sup> etc. have issued guidelines to address the problem of misuse by making the process more stringent and subject to greater scrutiny in order to ensure that no innocent or unnecessary arrests are made that could lead to embarrassment or cause inconvenience to the accused or his family members. Similar guidelines can also be issued in case the gender-neutral laws create scope for misuse.

The author acknowledges that if this concern is left unguarded, it will leave the purpose of the proposed change unfulfilled. This is because, firstly, with high scope for misuse, the credibility of the complainant in genuine cases will suffer and secondly, it will increase the scope for harassment of the opposite party through false counter allegations. While the basic principles of criminal law and inbuilt evidentiary safeguards should ideally serve as a safeguard against misuse, the inadequacies of law should not result in the denial of legal protection and legal recourse.

Considering that South Asian jurisdictions largely have gendered legislations, the author has attempted to observe the experience of other jurisdictions, which have adopted gender-neutral legislations. Gender-neutral rape legislations were introduced in a number of jurisdictions such as England and Wales, parts of the United States and Canada, on account of the recognition of a range of sexual acts which are beyond the archaic understanding of sexual activity.<sup>44</sup> The gender-neutral laws stand on their law books to date. The fact that there has not been any noticeable retraction of such gender-neutral protections suggests that the concerns regarding misuse are indeed manageable.<sup>45</sup>

### C. GENDER NEUTRAL VICTIMS: AN IMAGINED CONSTRUCT?

Siobhan Weare<sup>46</sup> has written about the negative effect of gendered rape laws in reinforcing the construction of women as sexually passive and men as the initiators of sex. The *Masiya* case,<sup>47</sup> in which the South African Constitutional Court extended the definition of rape to include the anal penetration of women but declined to accord similar protection to men, has become the focal point for

<sup>41</sup> *Kans Raj v State of Punjab* (2000) 5 SCC 207, AIR 2000 SC 2324.

<sup>42</sup> (2010) 7 SCC 667.

<sup>43</sup> 2008 SCC OnLine Del 883, (2008) 151 DLT 691.

<sup>44</sup> Kwong Leung Tang, 'Rape Law Reform in Canada: The Success and Limits of Legislation', (1998) 42(3) International Journal of Offender Therapy and Comparative Criminology 260.

<sup>45</sup> Rumney (n 5).

<sup>46</sup> Siobhan Weare, "Oh you're a guy, how could you be raped by a woman, that makes no sense": towards a case for legally recognising and labelling "forced-to-penetrate" cases as rape', (2018) 14(1) International Journal of Law in Context 110.

<sup>47</sup> *Masiya v Director of Public Prosecutions (Pretoria)* (2007) 5 SA 30 (CC), (2007) 8 BCLR 827 (CC).

the analysis of gender neutrality. In relation to this decision, Dyani<sup>48</sup> has argued that the court should have extended similar protection to male victims as well, considering the past judicial recognition of male victimisation, while Bonthuys<sup>49</sup> has pointed out that the court's approach regresses to old patriarchal dichotomies. In order to overcome these binaries, the author borrows from the approach of Porter<sup>50</sup> who has suggested re-imagining of rape as 'sexual trespass on the boundaries of being'. The author believes that such an approach will facilitate the shift of academic discourse from focusing exclusively on sexual difference and gender characteristics to viewing the act of rape and domestic violence as a violation of one's personal integrity.<sup>51</sup>

It is believed that women raping or beating men is not a social reality and it is also claimed that not many such complaints have come up.<sup>52</sup> The female to male, female to female, male to male, male to non-binary, female to non-binary, non-binary to non-binary violence are few other combinations, in addition to the most widely accepted male to female violence. The concern here is that given the unavailability of legal redressal, such incidents of violation are not as widely recorded either in data or literature.<sup>53</sup> The need for systematic data collection has indeed been duly noted.<sup>54</sup> The situation is further exacerbated considering the hesitation men face in reporting.<sup>55</sup> Even in nations where gender-neutral legal redressal is available, there is a serious issue of under-reporting of sexual violence by men.<sup>56</sup>

The deep-rooted social perception of masculinity as being associated with domination and power restricts the conceptualisation of male sexual victimisation. Such skewed branding leads to alienation of male victimhood by the society.<sup>57</sup> Moreover, this may result in lopsided understandings among male victims

<sup>48</sup> Ntombizozuko Dyani, 'An Opportunity Missed for Male Rape Survivors in South Africa: Masiya v Director of Public Prosecutions and Another', (2008) 52(2) *Journal of African Law* 284–301.

<sup>49</sup> Elsje Bonthuys, 'Putting Gender into the Definition of Rape or Taking it Out', (2008) 16(2) *Feminist Legal Studies* 249.

<sup>50</sup> Holly Porter, 'Rape Without Bodies? Reimagining the Phenomenon We Call "Rape"', (2018) 25(4) *Social Politics* 589, 608.

<sup>51</sup> Ruth Graham, 'Male Rape and the Careful Construction of the Male Victim', (2006) 15(2) *Social and Legal Studies* 187, 197, 199.

<sup>52</sup> Agnes (n 5) 846.

<sup>53</sup> World Health Organization (WHO), *World Report on Violence and Health* (2002) 87–113.

<sup>54</sup> John Stokes, 'India's Law Should Recognize that Men Can Be Raped Too', Scroll.in, September 11, 2014, <<http://scroll.in/article/676510/India's-law-should-recognise-that-men-can-be-raped-too>> accessed July 29, 2020; Jai Vipra, 'A Case for Gender Neutral Rape Laws in India', (2013) 286(1) *Centre for Civil Society Working Paper* 7.

<sup>55</sup> Fred Pelka, 'Raped: A Male Survivor Breaks His Silence' in *Rape and Society: Readings on the Problem of Sexual Assault* (Patricia Searles & Ronald J Berger 1995) 252.

<sup>56</sup> Amrita Kapur and Kelli Muddell, 'When No One Calls It Rape: Addressing Sexual Violence Against Men and Boys in Transitional Contexts', *International Center for Transitional Justice* (2016) 9, 11–17.

<sup>57</sup> *ibid.*

themselves, regarding the nature and gravity of the sexual violation. Men who are influenced by social stereotypes of masculinity may face strong hesitation<sup>58</sup> in articulating their victimisation, since being socially perceived as a victim (weak) would be far more 'undignified' than bearing the trauma of sexual violation.<sup>59</sup>

Men are raised to take violence 'like a man'. Having been dictated and guided by the superficial idea of machoism, men are deterred from reporting such offences owing to the fear of maligning their social image of embodying strength and virility.<sup>60</sup> The power dynamics in a male-female relationship are typically understood to completely exclude the possibility of a female perpetrator and a male victim. While the cases of female-perpetrator and male-victim may be small in number, men who have reported their experiences of violence have been publicly treated with mockery and derision.<sup>61</sup> Although the author has generally refrained from relying on statistics from Western jurisdictions, it may be of some, albeit limited, significance (given contextual differences) to note that one of the largest surveys conducted on intimate partner violence in the U.S., i.e., the 2010 National Intimate Partner and Sexual Violence Survey, showed that more than 1 out of 4 men, which is about 28.5%, have been victims of some form of violence by their intimate partners.<sup>62</sup> In India, the National Family Health Survey-4, 2017, has also analysed the data on the number of husbands who have been subjected to violence by their wives.<sup>63</sup> When compared with violence against women by their husbands, the numbers are low, but incidences of violence against men in the household also do take place. However limited the number of male victims be, they do need and deserve a legal remedy and acknowledgement for their suffering.

Even the jurisdictions, which classify sexual violence against males and non-binary persons as 'physical' violence, fail to recognise the specific nature of trauma suffered in case of crimes which are sexually motivated. Wider consciousness and sensitisation with respect to the existence of male sexual violence is essential to ensure redressal against such acts of violence.<sup>64</sup> The lack of appropriate training of police personnel and/or medical practitioners to handle such cases

<sup>58</sup> 'I knew it wasn't right, because I felt so awful afterwards, but I didn't know what it was because nobody had heard of male rape in those days' as stated in Stephen Allen, 'Male Victims of Rape: Responses to a Perceived Threat to Masculinity' in *New Visions of Crime Victims* (C Hoyle & R Young 2002) 23, 33; Pelka (n 55).

<sup>59</sup> See *ibid*, Allen, 33.

<sup>60</sup> See *ibid*, Allen, 33.

<sup>61</sup> Owen O'Sullivan, 'Domestic Violence-The other half of the picture', (2010) 61(5) *The Furrow* 293, 295.

<sup>62</sup> MC Black et al, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report*, Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, Table 4.2, 2011 (USA) 38–39.

<sup>63</sup> International Institute for Population Sciences (IIPS) and ICF, *National Family Health Survey (NFHS-4), 2015–16: India*, Mumbai: IIPS, Table 16.16 (2017) 595–596.

<sup>64</sup> Kapur and Muddell (n 55) 9, 11–17.

has also been observed as one of the issues.<sup>65</sup> It is argued that the fundamental problem lies in the conceptualisation of sexual violence in reference to the gender of the subjects rather than the 'nature' of the crime.<sup>66</sup> These reasons together have led to under-reporting of crimes by men as compared to women. All persons, irrespective of gender identity, possess bodily integrity, which is capable of being violated and thereby, all genders require and deserve legal protection.

#### D. BIOLOGICAL 'IMPOSSIBILITY' OF WOMEN BEING PERPETRATORS OF VIOLENCE

Considering the dearth of empirical evidence on rape cases where a woman is the perpetrator, this debate is relatively of less importance, as the theoretical arguments cannot be verified with empirical research satisfactorily. However, the distinction between the impossibility and improbability of female perpetrators remains to be clarified. Thus, the author addresses the argument that women are biologically incapable of being rapists, by considering both the restrictive and expansive definitions of rape.

- i. Restrictive definition: It has been widely argued that it is outrageous<sup>67</sup> to conceive of women raping men, as the restrictive definition of rape requires penile-vaginal intercourse, which is not biologically possible without the consent of the male partner. It is believed that under fear, terror and stress, it is not possible for a man to gain an erection, thereby rendering penetration impossible.<sup>68</sup> To counter this argument, the author seeks to rely on studies<sup>69</sup> which state, with statistics, that it is indeed possible for a man to experience erection even under duress. Further, some also believe that complete penetration is a requirement to constitute rape. However, this definitional debate over what constitutes rape has been addressed by legislation,<sup>70</sup> specifically in India, that mere penetration is sufficient and the extent of such penetration is not relevant.
- ii. Expansive definition: Since the definition of rape in most jurisdictions has been expanded to include forced oral sex and the use of objects for penetration, the biological 'impossibility' argument clearly falls short as a criticism to gender neutrality in legislation dealing with sexual violence.

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<sup>65</sup> *ibid.*

<sup>66</sup> Jocelyne A Scutt, 'Reforming the Law of Rape: The Michigan Example', (1976) 50 *Australia Law Journal*.

<sup>67</sup> 'Can a woman rape a man?', *The Times of India* (March 28, 2010) <<https://timesofindia.indiatimes.com/Can-a-woman-rape-a-man/articleshow/5733229.cms>> accessed July 22, 2020.

<sup>68</sup> Rumney (n 14).

<sup>69</sup> Philip Sarrel et al, 'Sexual molestation of men by women', (1982) 11 *Archives of Sexual Behavior* 117; Roman Msaki, 'When a Rapist is a She: The Quest for gender neutral law in Tanzania' in *Selected Works of Roman Joseph Msaki* (2011) 1.

<sup>70</sup> The Indian Penal Code, 1860, s 375(a).

Domestic violence, on the other hand, although an inclusive term with wide-ranging meaning covering financial, mental and emotional violence, is often conflated with physical violence in its popular usage. The concept of spousal abuse has been feminised and there are debates around the argument that women resort to violence mainly for self-defence against the violence inflicted by their husbands.<sup>71</sup> The central idea and conceptualisation of domestic violence has for long revolved around the physical aspect of hitting and beating. However, laws have now evolved and taken into account a wider definition of violence, such as physical, emotional, sexual and economical.<sup>72</sup> Thus, the counter proposition highlighting the physical improbability of women perpetrators is weak as it is based on an archaic understanding of domestic violence. Having said that, while cases of women perpetrators may be few in number, the point the author seeks to convey here is *how* the cases that do exist have been perceived. In this context, it is relevant to note that instances of physical violence inflicted by women on men are generally dismissed as acts of self-defence or mutual combat.<sup>73</sup> Thus, the domestic violence laws in place are primary aggressor laws which ignore a large number of cases where the woman is either partly liable or wholly at fault.

Steinmetz has conducted a historical analysis to reveal that society has always made a caricature out of men who have not conformed to the stereotypical definition of a strong, assertive man and have suffered beatings by their wives.<sup>74</sup> The author would like to draw attention to the images<sup>75</sup> below, which depict the influence of social stereotypes on artistic representation, where the act of a wife beating her husband is celebrated with humour and while violence is reconsidered brutal and gruesome, when it is the other way round. Thus, Steinmetz highlights the issue of “husband battering” as either having been dismissed or treated with “selective inattention”.<sup>76</sup>

<sup>71</sup> Sotirios Sarantakos, ‘Husband Abuse: Fact or Fiction?’ (1999) 34(3) Australian Journal of Social Issues 231, 231–233, 238.

<sup>72</sup> The Protection of Women from Domestic Violence Act, 2005, s 3; The Indian Penal Code, 1860, s 498A.

<sup>73</sup> Michelle Carrado et al, ‘Aggression in British heterosexual relationships: A descriptive analysis’, (1996) 22(6) Aggressive Behavior, 402, 413; Sarantakos (n 71).

<sup>74</sup> Suzanne Steinmetz, ‘The Battered Husband Syndrome’, (1977–1978) 2 Victimology 499, 500.

<sup>75</sup> Cartoon Stock, ‘Man-Beater Cartoons and Comics’, <<https://www.cartoonstock.com/directory/m/man-beater.asp>> accessed July 29, 2020. [Image 1]

Pinterest, <<https://www.pinterest.com/pin/39547302948433186/?lp=true>> (accessed July 29, 2020). [Image 2]

Love Question Life Answer, ‘Physical Violence’, <<http://lovequestionlifeanswer.org/en/gender/physical-violence>> accessed July 29, 2020. [Image 3]

Alamy, ‘Vector Illustration of Domestic Violence’, May 2, 2016, available at <<https://www.alamy.com/stock-photo-vector-illustration-of-a-domestic-violence-104225533.html>> accessed July 29, 2020. [Image 4]

<sup>76</sup> Steinmetz, (n 74).

Image (1)<sup>77</sup>Image (2)<sup>78</sup>Image (3)<sup>79</sup>Image (4)<sup>80</sup>

Gender neutrality in law is reflective of the changes in the understanding of the concept of sexual and domestic violence, as an invasion of privacy, dignity, and autonomy, irrespective of the gender involved. The law cannot be limited by the “boundaries of aggressive male sexuality” and must strive to accommodate abuse in every form.<sup>81</sup> Feminist engagement is crucial for moving towards achieving the goal of sexual equality. The argument that there is a greater incidence of violence against women does not discharge the burden of ensuring legal recourse to all victims of violence.

The key arguments against gender neutrality as discussed above, highlight the delicate balance that needs to be struck between providing the remedy for all types of victims, irrespective of gender, and being sensitive towards special needs of any particular category of victims. Law and policy act as a medium to ensure

<sup>77</sup> Cartoon Stock, ‘Man-Beater Cartoons and Comics’, <<https://www.cartoonstock.com/directory/m/man-beater.asp>> accessed July 29, 2020.

<sup>78</sup> Pinterest, <<https://www.pinterest.com/pin/39547302948433186/?lp=true>> accessed July 29, 2020.

<sup>79</sup> Love Question Life Answer, ‘Physical Violence’, <<http://lovequestionlifeanswer.org/en/gender/physical-violence>> accessed July 29, 2020.

<sup>80</sup> Alamy, ‘Vector Illustration of Domestic Violence’, May 2, 2016, <<https://www.alamy.com/stock-photo-vector-illustration-of-a-domestic-violence-104225533.html>> accessed July 29, 2020.

<sup>81</sup> Agnes (n 5) 845.

this delicate balance within the society is maintained. This section addressed the arguments from a theoretical perspective. The following section deals with the overview of sexual and domestic violence laws in South Asian countries with a detailed discussion on Indian and Bhutanese laws and the difference in approaches.

### III. OVERVIEW OF SEXUAL AND DOMESTIC VIOLENCE LAWS IN SOUTH ASIA (WITH SPECIAL FOCUS ON INDIA AND BHUTAN):

In this section, a brief description of the sexual and domestic violence laws in few South Asian countries has been provided. An introduction to these laws helps create a base for understanding the comparative analysis with Bhutan.

#### South Asian Jurisdictions (other than India):

*The table below offers a glance at the laws of South Asian jurisdictions, namely, Afghanistan, Bangladesh, Pakistan, Nepal and Sri Lanka relating to rape, minor sexual offences and domestic violence. The idea is to understand the general trend in countries that share similar cultures, history and social constructs within South Asia, with respect to three categories of laws i.e. rape, minor sexual offences and domestic violence.*

COUNTRY	LAW AGAINST RAPE	LAW AGAINST DOMESTIC VIOLENCE	LAW AGAINST MINOR SEXUAL OFFENCES (Outraging of Modesty, Voyeurism, Stalking, Sexual Assault)
Afghanistan	Gendered <sup>82</sup>	No separate provision for 'domestic' violence. However, violence against women is a punishable offence. <sup>83</sup>	Gendered <sup>84</sup>

<sup>82</sup> Law on Elimination of Violence against Women, 2009, art 17.

<sup>83</sup> Law on Elimination of Violence against Women, 2009.

<sup>84</sup> Law on Elimination of Violence against Women, 2009, arts 14–15.

COUNTRY	LAW AGAINST RAPE	LAW AGAINST DOMESTIC VIOLENCE	LAW AGAINST MINOR SEXUAL OFFENCES (Outraging of Modesty, Voyeurism, Stalking, Sexual Assault)
<b>Bangladesh</b>	Gendered <sup>85</sup>	Gendered <sup>86</sup>	Gendered <sup>87</sup>
<b>Nepal</b>	Gendered <sup>88</sup>	Gender-Neutral <sup>89</sup>	No provision in the existing law. However, there is a law relating to sexual harassment at workplace, which is gender-neutral. <sup>90</sup>
<b>Pakistan</b>	Gendered <sup>91</sup>	Gendered <sup>92</sup>	Gendered <sup>93</sup>
<b>Sri Lanka</b>	Gendered <sup>94</sup>	Gender-Neutral <sup>95</sup>	Gender-Neutral <sup>96</sup>
<b>Bhutan</b>	Gender-Neutral <sup>97</sup>	Gender-Neutral <sup>98</sup>	Gender-Neutral <sup>99</sup>

From the comparison above, it is evident that the jurisdictions with gender-neutral laws are mainly Bhutan followed by Sri Lanka. While Nepal has some influence of gender neutrality in its legislation, Bangladesh, Afghanistan and Pakistan have gendered laws, in all the three categories, which consequently reinforces stereotypes and denies justice to those who do not fit the existing gender constructs of laws against sexual and domestic violence crimes. A detailed

<sup>85</sup> The Penal Code, 1860, s 375.

<sup>86</sup> The Domestic Violence (Prevention and Protection) Act, 2010, s 3.

<sup>87</sup> The Prevention of Oppression against Women and Children Act, 2000, s 10; The Penal Code, 1860, s 374.

<sup>88</sup> Muluki Ain regarding Rape, ch 14 (Nepal).

<sup>89</sup> The Domestic Violence (Offence and Punishment) Act, 2009, s 3.

<sup>90</sup> The Sexual Harassment at Workplace Prevention Act, 2015 (2071).

<sup>91</sup> Pakistan Penal Code, 1860, s 375.

<sup>92</sup> The Domestic Violence (Prevention and Protection) Act, 2013, s 5. (The provision states 'other vulnerable persons' who can be subject to domestic violence, which may include men. However, there is no clear mention of gender neutrality.)

<sup>93</sup> Pakistan Penal Code, 1860, s 354, 354A, 509. (Although §354B, mentioned 'person' instead of women.)

<sup>94</sup> Penal Code of Sri Lanka, 1883, s 363.

<sup>95</sup> Prevention of Domestic Violence Act, No 34 of 2005.

<sup>96</sup> Penal Code of Sri Lanka, 1883, s 345, 365B.

<sup>97</sup> Penal Code of Bhutan, 2004, s 177.

<sup>98</sup> Domestic Violence Act of Bhutan, 2013, s 3.

<sup>99</sup> Penal Code of Bhutan, 2004, s 205.



description of sexual and domestic violence laws in India is provided below, followed by a discussion on approach adopted by Bhutan.

## A. INDIA

### 1. *Sexual violence laws*

Sexual offences in India are criminalised under the Indian Penal Code, 1860 in Chapter XVI, which is entitled ‘Offences against Human Body’. Sections 354, 354A-D, and 375 to 376 define and punish various types of non-consensual sexual acts. The Criminal Law Amendment Act of 2013 brought major changes in the law related to sexual offences and filled several loopholes which have been briefly elaborated upon below. However, it is important to note that the amendment, *inter-alia*, rejected two important proposals made by the Justice Verma Committee<sup>100</sup> which was set up in the aftermath of the 2016 Delhi Rape case, namely, the criminalisation of marital rape and the introduction of gender neutrality in the law, considering that ‘the possibility of sexual assault of men, homosexuals, transgender and transsexual rape is a reality’.<sup>101</sup>

### 2. *Rape*

Section 375:<sup>102</sup> This provision defines rape and categorises the different acts that constitute rape. The provision adopts a gendered approach. It brands males as perpetrators by using the phrase, ‘a man is said to commit rape’ and also restricts the understanding of victim to only women. Section 376 and 376A-D,<sup>103</sup> address *inter-alia*, the punishment for rape and the different degrees or aggravated forms of rape, such as rape resulting in death, gang rape, and rape by repeat offenders.

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<sup>100</sup> (The Committee was set up to look into the reforms relating to Criminal Law, specifically the law on sexual assault. It was constituted by GOI, Notification No SO(3003)E (Notified on December 23, 2012)).

<sup>101</sup> Justice JS Verma Committee, Report of the Committee on Amendments to Criminal Law (January 23, 2013) 416.

<sup>102</sup> s 375. (A man is said to commit ‘rape’ if he— (a) penetrates his penis, to any extent, into the vagina, mouth urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,...’)

<sup>103</sup> Indian Penal Code, 1860.

### 3. *Child Sexual Abuse: The Protection of Children from Sexual Offences Act (POCSO)*

The law relating to child sexual abuse has also been drafted as a gender-neutral legislation. Under POCSO, both the victim and the perpetrator are defined in 'gender neutral' terms.<sup>104</sup> The definition of child includes any 'person' below the age of 18 years.<sup>105</sup> This is a welcome step towards extending legal protection to all child victims. It recognises the need for the law to address the abuse faced by children, irrespective of their gender.

### 4. *Minor sexual offences*

Section 354:<sup>106</sup> The provision punishes the outraging of modesty of a woman, leaving no scope for including males and non-binary persons as victims of the crime, by way of interpretation. However, it must be noted that the use of 'whoever assaults' gives scope for gender-neutral construction of the perpetrator.

Section 354A to 354D: These sections were added to the existing legislation by the Criminal Law (Amendment) Act of 2013, in order to criminalise sexual harassment,<sup>107</sup> forced disrobing,<sup>108</sup> voyeurism,<sup>109</sup> and

<sup>104</sup> The Protection of Children from Sexual Offences Act, 2012, s 3, s 5; The Protection of Children from Sexual Offences (Amendment) Act, 2019.

<sup>105</sup> The Protection of Children from Sexual Offences Act, 2012, s 1(d).

<sup>106</sup> s 354. (Assault or criminal force to woman with intent to outrage her modesty.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.)

<sup>107</sup> s 354A.

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 (I) 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 (I) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

<sup>108</sup> s 354B. Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.

<sup>109</sup> s 354C. Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either

stalking,<sup>110</sup> respectively. The specific reference to ‘any man’ in these provisions as the perpetrator, perpetuates gender specificity. The provision on voyeurism under Section 354-C refers to *actus reus* ‘by the perpetrator or by any other person at the behest of the perpetrator’ providing a limited gateway to the broadening of the gender construct, although such an interpretation is yet to be confirmed by the judiciary.

The underlying legal approach to tackle sexual violence against women has been along the lines of paternalism and protection, which has led to a one-dimensional image of a woman as a victim.<sup>111</sup> Since law and society are reflective of each other, a one-dimensional victimised image of woman portrays women as weak and ignores the concept of female criminality. This renders the gender construct of a perpetrator and a victim skewed and narrow. The Indian Constitution formalises this approach to some extent by allowing the framing of special provisions<sup>112</sup> for the ‘protection of women and children’ which runs as an exception to Article 15 of the Indian Constitution.<sup>113</sup> While the special legal provisions in favour of women may be necessary and desirable in some cases, the clubbing of

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description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

Explanation I.— For the purpose of this section, ‘private act’ includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy and where the victim’s genitals, posterior or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public.

Explanation 2.— Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.)

<sup>110</sup> s 354D.

1. Any man who—

- i. follows a woman and contacts, or attempts, to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or
- ii. monitors the use by a woman of the internet, email or any other form of electronic communication, commits the offence of stalking;

Provided that such conduct shall not amount to stalking if the man who pursued it proves that—

- i. it was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or
  - ii. it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or
  - iii. in the particular circumstances such conduct was reasonable and justified.
2. Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.)

<sup>111</sup> Kapur (n 21) 342.

<sup>112</sup> The Constitution of India, 1950, art 15.

<sup>113</sup> The Constitution of India, 1950, art 14.

women and children in the contemporary context may further enforce the belief that women are necessarily vulnerable and weak.

The author argues that gender neutrality is a powerful tool to challenge historically embedded stereotypes. Notably, the proposition for gender neutrality with respect to Indian laws, has been made and but has been ultimately rejected without much discussion in a number of separate instances, including the 172<sup>nd</sup> Report of Law Commission,<sup>114</sup> the Criminal Law Ordinance of 2013,<sup>115</sup> and the 2018 Supreme Court petition filed to demand gender-neutral rape laws.<sup>116</sup> The 172<sup>nd</sup> Law Commission Report suggested the substitution of the gendered provision on 'rape' with the gender-neutral offence of 'sexual assault', as a response to the growing concerns regarding the existence of sexual violence against both girls and boys.<sup>117</sup> The proposed definition was sufficiently broad to accommodate the possibility of gender-neutral perpetrators and victims.

The Criminal Law Ordinance of 2013<sup>118</sup> marked a step forward in formalising gender neutrality in sexual assault laws by amending the gendered 'rape' provision to gender-neutral 'sexual assault'. However, the Amendment Act of 2013, which replaced the ordinance, while expanding the definition of rape to include sexual acts other than penile-vaginal intercourse, retracted gender neutrality from the definition. The Supreme Court dismissed the petition<sup>119</sup> to demand gender-neutral rape laws in 2018 as 'imaginative', finding the possibility of a woman as a rapist implausible. The response of the apex court, in discarding, without due consideration, the prospect of male and non-binary persons' victimisation, is indicative of the reluctance to envisage situations which contradict the traditional notions of masculinity and femininity.

The extension of the definition of rape in the Criminal Law (Amendment) Act 2013 to include oral sex and use of objects, beyond penile-vaginal penetration, could logically be extended to protect men and non-binary persons as well.<sup>120</sup> However, the Indian Parliament has retained its gendered categorisation of the perpetrator and victim to 'male' and 'female' respectively. Such ideological

<sup>114</sup> Law Commission of India, 'Review of Rape Laws', Report No 172 (March 2000) 36.

<sup>115</sup> The Criminal Law (Amendment) Ordinance, 2013.

<sup>116</sup> Outlook Web Bureau, 'SC Declines to make laws on rape gender-neutral', February 2, 2018, <<https://www.outlookindia.com/website/story/sc-declines-to-make-laws-on-rape-gender-neutral/307734>> accessed July 15, 2020.

<sup>117</sup> Law Commission of India (n 114) chs 3, 3.1.

<sup>118</sup> The Criminal Law (Amendment) Ordinance, 2013.

<sup>119</sup> *Criminal Justice Society of India v Union of India*, Writ Petition (Civil) No 1262 of 2018, order dated 12-11-2018 (SC), <[https://main.sci.gov.in/supremecourt/2018/37109/37109\\_2018\\_Order\\_12-Nov-2018.pdf](https://main.sci.gov.in/supremecourt/2018/37109/37109_2018_Order_12-Nov-2018.pdf)> accessed July 30, 2020; Outlook Web Bureau (n 116).

<sup>120</sup> s 375 (b), (d).

barriers have led to the legislature restricting itself in entirely realising the potential of this amendment in terms of gender neutrality.<sup>121</sup>

### 5. *Domestic Violence Laws*

Domestic violence in India is a major concern and has been criminalised under section 498-A of the Indian Penal Code, 1860. Under this section, the gender construct of a perpetrator is different as that in rape laws. Here, domestic violence can be inflicted by either the ‘husband or any relative of such husband’.<sup>122</sup> The word ‘relative’ being gender-neutral includes within its ambit, violence perpetrated by persons across the gender spectrum. However, this section perpetuates gender specificity by recognising women alone as victims.<sup>123</sup> In light of the increased incidence of domestic violence against women, legislative response in the form of a specifically dedicated legislation, i.e., ‘Protection of Women from Domestic Violence Act, 2005’<sup>124</sup> was framed. As the name of the Act and the definition clause<sup>125</sup> suggests, the protection therein is extended to female victims alone, thereby, leaving violence against other men and non-binary persons in a domestic set up unaddressed.

The Protection of Women from Domestic Violence Act, 2005 (‘PWDVA’), which provides legal redressal for domestic violence, has a major flaw as it does not cover violence against men and non-binary persons, thereby contributing towards the normalisation of such incidences in the society. Besides legislative protection, the state machinery and infrastructure does not even provide for

<sup>121</sup> Nivedita Menon, ‘Myths and Facts about the Criminal law Amendment Bill, 2013’, March 19, 2013, <<https://www.outlookindia.com/website/story/myths-and-facts/284467>> accessed July 24, 2020.

<sup>122</sup> s 498A. (Husband or relative of husband of a woman subjecting her to cruelty: 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
- (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.)

<sup>123</sup> *ibid.*

<sup>124</sup> The Protection of Women from Domestic Violence Act, 2005.

<sup>125</sup> s 2(a). (2. Definitions.—In this Act, unless the context otherwise requires,—

- (a) “aggrieved person” means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;)

sheltered homes or state-sponsored psychological therapists for male and non-binary victims of domestic violence.<sup>126</sup>

Legislative history hints that prior to 2005, when specific legislation against domestic violence came to protect women, the issue was treated in a gender-neutral manner but eventually resulted in the passage of a gendered legislation. The author, however, disagrees with the special status granted to this legislation, as the protection against domestic violence should be extended to all victims irrespective of gender. While there is an absence of reliable data on domestic violence against men, the possibility has been acknowledged by judiciary on various occasions. In *Aruna Parmod Shah v. Union of India*, the Delhi High Court stated:

*“We do not rule out the possibility of a man becoming the victim of domestic violence, but such cases would be few and far between, thus, not requiring or justifying the protection of Parliament.”*<sup>127</sup>

Thus, while the court recognised the existence of domestic violence against male victims, it consciously restricted itself from extending protection on the basis of a limited number of cases. In response to this, it may very well be argued that law should be anticipatory and not reactionary in giving protection. From such a standpoint, the justification of the limited quantum of domestic violence cases against males, should not be accepted.

In the recent 2016 case of *Hiral P. Harsora v. Kusum Narottamdas Harsora* (‘Harsora’),<sup>128</sup> the Supreme Court struck down the words “adult male” from the definition of “respondent” in Section 2(q) of the PWDVA, 2005. Before this case, the impugned section permitted persons aggrieved under this Act to file a case only against ‘adult male relatives’ with whom the aggrieved person in question shared a domestic relationship. Post the Harsora case, an aggrieved woman can file a case against other female relatives. In this case, the Supreme Court reasoned that the object of the PWDVA was to prevent *any* kind of domestic violence and thus, concluded that limiting the definition of “respondent” did not meet the purpose of the Act. Thus, this judgement expressly recognises the possibility of female aggressors, and it may be said that Indian law is now partially gender-neutral. A move to bring in complete consonance with gender neutrality, by including men and transgender persons in the definition of an “aggrieved person” as defined in Section 2(a) of the Act, would more completely serve the goal of preventing domestic violence, as it takes place in multiple forms.

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<sup>126</sup> Shannon Garret, ‘Battered by Equality: Could Minnesota’s Domestic Violence Statutes Survive a Fathers’ Rights Assault’, (2003) 21(2) *Law & Inequality: A Journal of Theory and Practice* 341 (The discussion around need for shelter in other jurisdictions can be found here.)

<sup>127</sup> *Aruna Parmod Shah v. Union of India* 2008 SCC OnLine Del 457.

<sup>128</sup> (2016) 10 SCC 165.

The social gender construct appears to be a vicious circle. The masculinity of men does not permit them to appear fragile and victimised. This creates a very strong social obstruction in reporting violence resulting in a lack of structural remedies to address their victimisation. The incidences of violence against men, albeit rare, have been acknowledged in a few cases. In a recent case,<sup>129</sup> the High Court of Bombay allowed the husband the right to seek divorce on the grounds that the wife had made false charges of infidelity against him, denied him physical relations, verbally abused, and physically assaulted him. Although in the judgment, the denial of physical relations was considered as a ground for divorce, the author respects the sexual autonomy of all persons across the gender spectrum and is not implying that the denial of physical relations amounts to domestic violence. The judgment has been used in the paper only to point out that verbal and physical abuse perpetrated is an illustration of domestic violence against men. Having said that, the judicial observations in this regard clearly stem from a patriarchal sensibility that husbands are entitled to sexual intercourse and one should, therefore, keep in mind the need to read judgments with necessary caution.

There are a few other cases in which courts have recognised verbal abuse and physical assault against male victims. In all these cases,<sup>130</sup> it is important to note that the remedy provided was that of divorce (a civil remedy) and there was no discussion on the concept of domestic violence by women against men and the associated liability.

## B. BHUTAN

### 1. *Sexual Violence Laws*

The Penal Code of Bhutan, 2004, criminalises offences of a sexual nature under Chapter 14 of the Code. Sections 177-200 define and criminalise various forms of rape. Other varieties of involuntary sexual conduct such as child molestation and sexual harassment are also criminalised under this chapter.

Section 177<sup>131</sup> of the Code defines rape using gender-neutral terms such as “defendant” and “person” indicating the perpetrator and victim of the crime respectively, without specifying the associated gender. The scope of the definition explicitly covers four kinds of situations wherein consent of the “person” (used in the sense of victim in this Code) is deemed to be absent.<sup>132</sup> In all of these

<sup>129</sup> *Anupama Ashok Aher v Ashok Bajirao Aher* 2014 SCC OnLine Bom 792, (2015) 5 Bom CR 302.

<sup>130</sup> *Bhagwanti v Laxmandas Panjwani* 1999 SCC OnLine MP 39, AIR 2000 MP 190; *Vijay Kumar Jain v Sunita Vijay Kumar Jain* 2000 SCC OnLine MP 230, (2001) 1 MP LJ 412; *Vidya Ramakrishnaiah v RN Vikram* 2004 SCC OnLine Kar 360, (2005) 3 Kant LJ 347.

<sup>131</sup> Penal Code of Bhutan, 2004, s 177. (‘A defendant shall be guilty of the offence of rape, if the defendant has sexual intercourse with another person: (a) Without the person’s consent....’)

<sup>132</sup> Penal Code of Bhutan, 2004, s 177. (‘. (a) Without the person’s consent or with consent, when consent is obtained by putting the person or a third person in fear of death or of grievous hurt;

situations, the drafters of this Code have consistently used the term “person”. Hence, the definition accommodates situations where rape has been committed by a female against a female, a female against a man, a man against a man, a man against a female and even situations where a non-binary person is the victim or the perpetrator of the crime. Thus, there is no scope, on a literal reading of the text of the Act, to label any gender, be it male, female or non-binary person(s) as the default perpetrator or victim of the crime. Even in the case of marital rape,<sup>133</sup> the terms “defendant” and “person” are used displacing the popular assumption that the wife upon marriage has irrevocably consented to sexual activity. The definitions of child molestation<sup>134</sup> and sexual harassment<sup>135</sup> are also gender-neutral. Thus, there is consistency in drafting with respect to the law on sexual offences in Bhutan.

The author concludes by adding an important caveat that mere inclusion of persons, regardless of gender orientation in legislation, may not be sufficient in actually according protection. The author proposes that along with changes in the legislation, actionable response in terms of infrastructure, training of personnel, rehabilitation process, etc. also needs to be monitored. Absence of these measures may lead to further trauma to the victim.<sup>136</sup>

## 2. Domestic Violence Laws

The Domestic Violence Prevention Act of Bhutan, 2013, defines domestic violence as violence against a ‘person’ by ‘another person’ with whom that person is, or has been in a domestic relationship. The definition of domestic violence mentioned in Section 3 of the Act recognises various forms of domestic violence, such as physical, emotional and economic domestic violence. Bhutan took a step forward in the direction of gender neutrality by enacting Domestic Violence Act, 2013, as a gender-neutral Act. The 2013 Act does not make any gender-specific branding of perpetrator and victim based on pre-conceived societal notions of gender roles which makes it a progressive and inclusive law. It thereby accommodates every aggrieved individual, regardless of their gender. Bhutan approaches

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(b) Compels the other person to submit to sexual intercourse by force, or by threat of imminent death, bodily injury or serious bodily injury or the commission of a felony to that person or a third person; (c) Substantially impairs the other person’s ability to appraise or control the conduct by administering drugs, intoxicants, or other substances without consent for the purpose of preventing the person’s resistance to the sexual intercourse, or (d) Renders the other person unconscious for the purpose of committing sexual intercourse....’)

<sup>133</sup> Penal Code of Bhutan, 2004, s 199. (‘A defendant shall be guilty of marital rape, if the defendant engages in sexual intercourse with one’s own spouse without consent or against the will of the other spouse.’)

<sup>134</sup> Penal Code of Bhutan, 2004, s 203. (‘Child molestation: A defendant shall be guilty of the offence of child molestation, if the defendant molests a child.’)

<sup>135</sup> Penal Code of Bhutan, 2004, s 205. (‘A defendant shall be guilty of sexual harassment, if the defendant makes unwelcome physical, verbal or non-verbal abuse of sexual nature.’)

<sup>136</sup> Kapur & Muddell (n 56) 9, 11–17.



the question of gender equality through a multidimensional lens. It views gender equality as a long-term goal, necessary not only for social justice but also for economic growth. Dr Rebecca Reichmann Tavares, UN Women Office of India, representative of Bhutan, noted that countries faring well in scales of gender equality showed higher levels of economic growth.<sup>137</sup>

The Statement of Purpose of the Bhutanese legislation states that it is enacted to ensure “just legal remedy for the victims of domestic violence”. This is in contrast to the Indian legislation, which has adopted a paternalistic approach and has sought to “protect the woman from being victims of domestic violence”.<sup>138</sup> The Bhutanese Health ministry recognised that the Domestic Violence Prevention Act, 2013, would play a key role in fulfilling the Millennium Development Goal no. 3, which aims to reduce gender inequality and empower women.<sup>139</sup> Through this move, the Bhutanese Government has made the necessary relationship between gender equality and gender-neutral legislations, clear and explicit.

While the Bhutanese legislation on domestic violence defines domestic violence as an act against a “person”,<sup>140</sup> thereby accommodating every aggrieved individual, it is still sensitive to the plight of women and social realities. The government recognises the large-scale prevalence of violence directed against women. In 2010, the National Bureau of Statistics found that 68.4% of women in Bhutan feel that their husband/partner has a right to hit or beat them for at least one of a variety of reasons, including neglect of children (54.5%), demonstrations of autonomy, (e.g. go out without telling their husbands) (39.7%) or arguing (39.5%).<sup>141</sup> In order to address the issue of violence against women generally, the government has established three Women and Child Protection Units under the Royal Bhutan Police. The author believes that this approach is holistic while also extending the legal protection to all potential victims by strategically allocating infrastructure on the basis of statistics of violence.

In 2013, the government also reported to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee that it had conducted training for health workers, police, law enforcement officials, and judicial officers of domestic violence and sexual assault

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<sup>137</sup> Bhutan News Service, ‘Violence against women still on rise in Bhutan’, 2014, <<http://www.bhutannewsservice.org/violence-against-women-still-on-rise-in-bhutan/>> accessed July 29, 2020.

<sup>138</sup> The Protection of Women from Domestic Violence Act, 2005, Statement of Objects and Reasons.

<sup>139</sup> Asia Pacific, UN Women, ‘Bhutan marks International Women’s Day’, March 8, 2015 <<http://asia-pacific.unwomen.org/en/news-and-events/stories/2015/03/un-women-celebrates-international-women-s-day-in-bhutan#sthash.Bv10EUOA.dpuf>> accessed July 29, 2020.

<sup>140</sup> Domestic Violence Act of Bhutan, 2013, s 3 (Bhutan).

<sup>141</sup> ‘RENEW, Empowering the Disadvantaged’, *Daily Bhutan* (December 14, 2017) <<https://dailybhutan.com/article/renew-empowering-the-disadvantaged>> accessed July 29, 2020.

management.<sup>142</sup> The Bhutan government has specifically included gender focal points in the five-year development plan.<sup>143</sup> Section 8(6) of the Act specifically provides for periodic sensitisation and awareness training to be conducted by competent authority established for effective implementation of the Act. Section 6 of the Act mandates the Bhutanese government to establish an authority to ensure effective implementation. Further, the Act is inclusive and participatory in nature, specifically Sections 37 and 38 of the Act which encourages the community to lend support to the victims at risk. This makes it clear that the intention of Bhutanese legislators is to address the issue of domestic violence at its fundamental root.

The discussion above on India and Bhutan's sexual and domestic violence laws clearly reflect the difference in the drafting of laws. While Bhutanese law consistently reflect gender neutrality by use of terms such as 'person' or 'defendant' in its drafting, Indian laws have major influence of gender specificity, with few limited exceptions. It is interesting to see how the two nations in a similar social construct have drafted their laws with such noticeable differences.

Bhutan uses GNH<sup>144</sup> Policy Screening Tool, which evaluates the effects of policy on gender equality and checks if it propagates gender inequality in any form. In addition, to practising Gender and Development ('GAD') approach,<sup>145</sup> Bhutan has issued the 'National Gender Mainstreaming Guidelines' to promote gender equality in each sector.<sup>146</sup>

Further, gender sensitisation programmes like the 'HeforShe' campaign under which male members of society are empowered as agents of change to achieve gender equality are also conducted. An institutional domestic set-up has also been established in pursuance of this effort. In this context, the author also brings to focus South Asian studies which have attempted to address the dynamics of power and control by involving men in gender-related issues.<sup>147</sup> The relevant national organisations of Bhutan participating in conducting these workshops include the Druk Adolescents' Initiative for Sexual Awareness Network (DAISAN) and the Community based Support System (CBSS) volunteers of

<sup>142</sup> Japan International Cooperation Agency (n 12) 30.

<sup>143</sup> National Commission for Women and Children, Gender Policy Review Report 2013–2018 (Bhutan) 10.

<sup>144</sup> Oxford Poverty & Human Development Initiative (OPHI), Bhutan's Gross National Happiness Index, <<https://ophi.org.uk/policy/national-policy/gross-national-happiness-index/>> (accessed July 30, 2020).

<sup>145</sup> Japan International Cooperation Agency (n 12), Objectives of the Survey. (GAD focuses on including gender perspectives in different aspects of projects and policies such as planning, policy framework, development and implementation. It focuses on both men and women and the relationship between them in the given social context.)

<sup>146</sup> Japan International Cooperation Agency (n 12) 30.

<sup>147</sup> Abhijit Das & Satish K Singh, 'Changing Men: Challenging Stereotypes. Reflections on Working with Men on Gender Issues in India', (2014) 45(1) Institute of Development Studies 69.

Respect, Educate, Nurture and Empower Women (RENEW). It must be recognised that there is a section of men and non-binary persons in Bhutan who are victims of abuse but lack any legal recourse. Higher incidence of violence against women does not discharge the burden of ensuring legal recourse for all victims of violence. The GAD approach that has been emphasised by International Aid Communities since 1980s is one of the popular approaches for gender mainstreaming.<sup>148</sup> Initially, the idea centred on women in the form of Women in Development (WID) but in the contemporary context, it has evolved to GAD and it can be applied with a broader understanding of gender.

What is still missing for Bhutan is the inclusivity of LGBTQI in its drafting. While the rape and domestic violence law is gender-neutral, at various instances, the reference to gender is explained to include both men and women without mentioning LGBTQI. The policy documents do provide arrangement and instructions of treatment with LGBTQI, but at various instances, the reference is made to men and women.<sup>149</sup>

It is evident that while Bhutan has shown consistent efforts towards embracing gender neutrality in its laws, the other South Asian countries have had mixed responses towards gender neutrality. These efforts initiated and practised by Bhutan can be adopted by other South Asian countries as a step towards inculcating gender neutrality.

#### IV. CONCLUSION

Law and society are intertwined to have an evolving impact on each other. With the changing trends in perception and awareness towards the idea of sexuality in a social construct, there is a simultaneous need for the law to reflect the change. In the field of crime, gender has played an important role. Its presence is well noted in the drafting of laws as well. Various crimes are gendered in nature wherein only a man can be a perpetrator, and only a woman can be a victim. The paper has discussed two of such main crimes i.e. sexual and domestic violence, from the lens of gender justice.

From the analysis presented above, an attempt is made to address the arguments against gender neutrality within laws relating to sexual assault and domestic violence. Arguments such as dilution of unique nature of violence, notions of masculinity, biological impossibility, and potential misuse of laws, etc. have been categorically dealt with in the paper. The sexual and domestic violence against male and non-binary person stands without a legal remedy. The idea behind

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<sup>148</sup> Japan International Cooperation Agency (n 12) 6.

<sup>149</sup> National Gender Equality Policy 2020, National Commission for Women and Children Royal Government of Bhutan, Foreword iii, 1, <[https://www.ncwc.gov.bt/publications/National\\_gender\\_equality\\_policy1583629305.pdf2020](https://www.ncwc.gov.bt/publications/National_gender_equality_policy1583629305.pdf2020)> (Bhutan) accessed July 29, 2020.

arguing in favour of gender neutrality has not been to de-recognise or suppress the struggle and vulnerabilities that a woman faces. Instead, the appeal for gender neutrality is to provide remedy to all types of victims. Bhutan's approach in this context accommodates the special steps that are required to cater to the aspect of 'gender-based' crimes and at the same time provides legal remedy to all types of victims without restricting it to females. There are various ways of acknowledging the inequalities and differences in cultural and societal norms that exist towards a particular gender. Depriving one gender to show solidarity for the other may not be the correct approach. Denying legal remedy and social acknowledgement to those suffering other than females is also a form of indifference and inequality that is harbouring in the present context. In addition to gender-neutral laws, with special policies and arrangements can be made, as in case of Bhutan, for women and other victims who are specially placed in society and carry a long history of victimisation. This will provide due acknowledgement to their struggle as well as provide legal remedy to all genders. The framing of the law should be expansive enough to address various forms of violence, thereby extending protection to all victims beyond the restrictive constructs of gender.