

LAWS ON SEXUAL VIOLENCE: A FEIMINIST PERSPECTIVE OF MODESTY

Krati Agarwal
Student
School of Law
Christ, Bangalore, India

Abstract : Section 354 and Section 509 of Indian Penal Code criminalize any act done to outrage the modesty of a woman. What is the meaning of the term modesty is not defined in penal laws or in any other law. The researcher aims to define and analyze the term modesty. The paper starts off with the Court's observation of the same with various case laws and its analysis. Courts have mostly relied on dictionary meaning of it and termed it as an attribute of female personality. With the narrow approach of the Courts regarding the same, the paper tries to find answers as to whether it is a gender neutral term or just relates to woman as being referred in IPC with the help of works of various eminent scholars.

The paper goes from specific field of modesty to general field of laws being gender biased or patriarchal in their structure. Laws which relates to sexual violence against women are not serving the purpose they intend. The amendment which takes place after every unfortunate event just calms the public uproar and solves the problem at the superficial level, i.e. only the symptoms of it and not the roots of it, i.e. the question of power balance between men and women. The legislations passed only talk about the changes in existing patriarchal set of laws and hence they are not effective. Amending laws on the same footing will never solve the problem and instead create more problems. The paper further analyses the proposed The Criminal Law Amendment Ordinance, 2018 on the same arguments. The paper concludes by giving possible solutions for this problem.

IndexTerms – Gender, Human Right, Modesty, Patriarchy, Sexual violence

I. INTRODUCTION

Women constitute half of the world's population but still are the most powerless and marginalized section of the society. They have always been subjected to control and violence in one form or the other. Gender stereotyping, assigning specific roles to women and listing out their code of conduct is a common way in which women suffer subjugation in society. One attribute which is assigned to women commonly is that of 'modesty'. In India, Section 354 and Section 509 of the Indian Penal Code prescribes punishments for doing any act which intends to outrage the modesty of a women or using of criminal force to outrage the modesty of a women. But what is the meaning of the term modesty is not defined in IPC or any other law. The societal perception of it defines it as 'a womanly behavior', or 'an uninviting behavior on a female's part'.

'Modesty' is an attribute of human personality, a characteristic which is gender neutral and not gender specific. Society influences the laws of the land and laws are an extension of a human personality. The attitude of Section 354 and Section 509 of IPC clearly indicate the attitude of society. Not only with modesty but also with various other aspects, the laws related to sexual violence against women are made and amended with the same footings. After every unfortunate incident of violence against women, the laws are amended to include more stringent punishment. The more stringent the laws, the more effective it would be doesn't appear to be the possible solution when it comes to curb down sexual violence against women in India, because the laws are patriarchal in their set-up. So amending them hardly makes a difference. They only focus on the symptoms of the problem, i.e. the violence and how to address it and not the issue itself, hatred towards women, their low status, etc. The Criminal Amendment Act, 2018 which was recently passed by parliament to make the punishment more stringent for sexual offenders may not serve the purpose it intends to bring because it lacks on various footings. This issue has to be looked into from the position of power difference between the two and taking steps towards improving the same rather than focusing on deterrence.

Abbreviations and Acronyms

IPC	Indian Penal Code
v.	Versus
POCSO	Prevention of Children from Sexual Offences
Edn.	Edition
CEDAW	Convention on Elimination of all forms of Discrimination Against Women
LGBTQ	Lesbian Gay Bisexual Transgender Queer
&	And

2. Meaning and Analysis of 'modesty':

Indian Penal Code or any other law of India is silent on the definition of 'modesty'. It is no doubt a subjective term and cannot be limited but its understanding has to be expanded and not restricted. The meaning of the term 'modesty' as per Oxford Dictionary is "Behavior, manner, or appearance intended to avoid impropriety or indecency" and Webster defines it as "propriety in dress, speech, or conduct". The dictionary meaning of it is quite expansive and does not limit itself to the women. But the Indian perspective seems to be limited in this regard.

According to Supreme Court of India, the essence of women's modesty is her sex.

In the various case laws which came before the courts, the judges have relied on these definitions and not to any jurisprudence. In the case of *State of Punjab v Major Singh*¹, court laid down the test to ascertain whether modesty has been outraged or not, which is followed as a precedent in majority of the cases. In the same case, when confronted with the definition of 'modesty', they have acknowledged the problem of not having a set definition and relied on the dictionary meaning of it. The facts of the case were that the respondent had caused injuries to the vagina of a seven and a half month old child by fingering. He was held guilty of an offence under Section 323, (Voluntarily causing hurt) of the Indian Penal Code. The contention on behalf of the State was that the offence amounts to outraging the modesty of a woman and is thus punishable under Section 354, Indian Penal Code. But the Sessions Judge and two of the three Judges of the High Court who heard the appeal against the decision of the Sessions Judge were of the view that a child seven and a half month old being incapable of having a developed sense of modesty, the offence was not punishable under Section 354. While hearing the appeal, the Judge quoted the meaning of the word "modesty" given in the Oxford English Dictionary (1933 Edn.)--which is, "womanly propriety of behavior, scrupulous chastity of thought, speech and conduct (in men or women) reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions". He observed that "this obviously does not refer to a particular woman but to the accepted notions of womanly behavior and conduct. It is in this sense that the modesty appears to have been used in Section 354 of the Indian Penal Code". The court's reliance on such definition of modesty which is terming it as a 'womanly behavior' is speaking of the accepted notion of the attribute. Court was of the view, when the question whether modesty has been outraged or not comes, it depends on the woman's reaction, as per the language of Section 354, IPC. But her reaction is always not necessary. The Court in this case took a protective approach by assigning modesty to women of all age groups, even though they are incapable of understanding its implication.

In another case of *Rupan Deol Bajaj v KPS Gill*², commonly known as 'bottom slapping' case, the court referring to the above case held that when any act done to or in the presence of a woman is clearly suggestive of sex according to the common notions of mankind that must fall within the mischief of Section 354 IPC. The court again quoting the above case held that it outraged the modesty of a woman and that the essence of a woman's modesty is her sex and from her very birth she possesses the modesty which is the attribute of her sex. Similarly in the case of *Tarkeshwar Sahu v.State of Bihar*³, Court has held that 'modesty is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex.'⁴ In another case of *Raju Pandurang Mahale v.State of Maharashtra*⁵, 'Modesty' is given as "womanly propriety of behavior, scrupulous chastity of thought, speech and conduct (in man or woman); reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions".

In the case of *State of Kerala v Hamsa*⁶, it was stated by the court that, "What the legislature had in mind when it used the word modesty in Sections 354 and 509 of the Penal Code was protection of an attribute which is peculiar to woman, as a virtue which attaches to a female on account of her sex. Modesty is the attribute of female sex and she possesses it irrespective of her age. The two offences were created not only in the interest of the woman concerned, but in the interest of public morality as well. The question of infringing the modesty of a woman would of course depend upon the customs and habits of the people. Acts which are outrageous to morality would be outrageous to modesty of women. No particular yardstick of universal application can be made for measuring the amplitude of modesty of woman, as it may vary from country to country or society to society."

One commonality that can be drawn from the above case study is that, although our laws assign the attribute of modesty to women, the same is affirmed by the Courts as well. The attitude of law makers clearly indicate that 'modesty' is something which is specific to women only, which shows us the male chauvinistic structure of the laws.

2.1 Modesty and Gender Neutrality:

The Modesty Movement is a perfect example to show how 'modesty' as a moral is imposed on the women. The movement basically focuses on unrevealing way of dressing up among women to avoid unnecessary attention. Modesty is a person's right on his body, and how others perceive it is irrelevant until the question of it being outraged arise. In that case, as asserted by Courts in India, if the act is clearly suggestive of sex as per the common understanding of the mankind, then that act would constitute outraging the modesty.

Modesty, as defined earlier with the dictionary meaning is the sense of decency and propriety in dress, sense or conduct across all genders. Every human being, be it a man, woman or transgender possess certain sense of modesty which if violated leads to a crime. A crime is an act which is considered to be committed against the whole society, and hence as per section 354 and 509, IPC it is implied that only when a woman's modesty is outraged and not man's, it is against the morals of the society. The morals of the society are intensely connected with the sexuality of women that it is not able to look beyond it and recognize the protection needed by other genders as well. As per the language of law, it is assumed that a man's 'modesty' cannot be outraged, as it is inviolable. This negates the possibility of abuse on men and reaffirms the idea that it is the body of women which when suffers violence is a 'dent' in the family's, community's name and honor. One of the most interesting case is that of *State of Himachal Pradesh v. Dharam Pal*⁷, where the court mentions that a woman's most valuable possession is her honor, dignity, character and reputation, and an attempt to commit rape if translates into the act, is an assault on

¹ AIR1967SC 63

² AIR1996 SC 309

³ (2006)8SCC 560

⁴ id.

⁵ AIR 2004 SC 1677

⁶ (1988) 3 Cri 161

⁷ (2004)9 SCC 681

her most valuable possession. It is a failed understanding of the society that an assault on woman's body is an attack on her honor and her community instead of her Human Right. This comes from the most traditional Indian understanding of women being goddess or keeping them at pedestal rather than treating them as fellow human beings.

Not recognizing modesty as an attribute of human personality is a major lacuna in the justice system of the country. There are many human right violations of men, LGBTQ community in terms of their modesty and they have no recourse for it. The most vulnerable target is the LGBTQ community. They are not accepted as human beings in most cultures and even if they are, their human rights are not given much importance. If they are assaulted, their orientation is targeted and are not given any legal protection even though preventing Human Right violation is one of the goal of the Indian Constitution. Section 11 of the POCSO (Protection of Children from Sexual Offences) Act, 2012 protects children (gender neutral) from Sexual harassment, hence protecting modesty of male child below 18 years of age. The laws are silent on the aspect of adult males. More than laws, the society finds it unacceptable to attribute modesty to men.

India being a signatory to CEDAW (Convention on Elimination of all forms of Discrimination against Women), Article 5 of the same reads that all the State Parties to the Convention have 'to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.' But India, having declared reservations to this Article, has not taken any step to eliminate the gender-role stereotyping or modifying the social-cultural patterns of its people. Hence, the problem continues. This is not just a problem of not being gender neutral but much more than that.

3. Patriarchal Structure of Laws relating to Sexual Violence:

On the plain reading of the provisions of Indian Penal Code which relate to the protection of women from sexual offences, they appear to be protective and progressive. But on a deeper look, they reflect the patriarchal foundation of these laws. Language symbolizes the attitude of the people using it, and in terms of law it symbolizes the attitude of society. Just like the provisions of 'modesty' various other provision of the Penal laws, are build up on patriarchal footings.

The Laws against Sexual violence in India have a hierarchy in it. The law distinguishes between attempt to molestation (Section 509), molestation (Section 354), and Rape (Section 375,376). This distinction is based on the concept of feminine modesty.⁸ It affirms the idea that attempt to molest is less severe than actual molestation and the most severe of it is rape. As quoted by Uttar Pradesh High Court, rape is a 'deathless shame'⁹. Rape is considered as something which is the 'end' point of a women's life. With it, her honor, her community's honor is lost. It is generally understood that Molestation or attempts to molestation is less severe than rape, but in reality the everyday instances of molestation is giving a sanction to these acts and are working as breeding grounds for rape to happen.

The Rape laws in the country since its inception only included non-consensual penile-vaginal intercourse which was based on the presumption that rape is an act committed to satisfy the lust. This presumption is highly validating the act of moral policing towards women in terms of their dressing-style, choice of conduct, and about all their conduct which is decided by the society. This problem was recognized in various instances earlier but was only implemented to a provision after the 2012 Delhi Gang Rape Case. The Criminal Amendment Act,2013 expanded the definition of rape under Section 375 to include oral sex as well as insertion of any object or any other body part into the urethra, vagina or anus. It took years for the law-makers to realize that rape as an act of violence is not only driven by lust but is also a way to enforce the power, superiority of the stronger upon the weaker. Justice Verma Committee Report (The Committee established aftermath the 2012 Delhi Gang Rape Case) suggested to include the concept of Marital Rape in the penal laws, which was excluded from Criminal Amendment Act,2013 as a form of violence against women. In India, the institution of marriage is given a huge importance, with this importance comes the position of women in that institution, who bears the sole responsibility of maintaining it. Violence in the name of this institution is a normalized concept in India. It is not looked from an individual perspective of a person, i.e. woman and her human rights, but is looked from the family point of view, to maintain this institution. By not penalizing Marital Rape, the burden of maintaining a family life, its sanctity is casted upon one gender at the cost of her basic Human Rights. It also reaffirms the concept of man being superior party in the marriage and the woman has to be submissive to him. This is exactly what is taught to young women in the country, to be obedient wives, 'pativrata'.

Section 376B, IPC inserted after the Criminal Amendment Act, 2013 penalizes rape by the husband of his wife during separation. It is interesting to note that while the general punishment for rape is minimum 7 years of imprisonment (Section 376), here in this Section it is a minimum 5 years imprisonment. This shows us the attitude of legislators and the high status given to marriage. Because there is an institution of marriage involved here in this case, and hence a woman's human rights become less important.

3.1 The Criminal Law Amendment Act, 2018

The Criminal Law Amendment Act, 2018 is another effort of the Parliament to curb down the sexual offences especially with regards to minor. It has brought various changes to POSCO Act, 2012, IPC, 1860 to deal with the issues effectively. This initiation is a perfect example as to how legislators are only concerned with the symptoms of the problem, to create deterrence in order to curb the crime and not the real issue. This is the reason, why after the amendments in the past, the figures of rape and other offences have not gone down but instead has increased.

After the Kathua Rape Case and other similar incidents, the questions from the Supreme Court bench, pressure from the Delhi Commission for Women Chairperson and demands from certain sections of the civil society have made the government push an ordinance which doesn't include many things which were demanded. Amendments in the past do not serve the purpose they intend because of the same reason that they leave out a lot which was demanded.

⁸ Kanchana Mahadevan, *The 'Virtuous Woman': Law, Language & Activism* (43 ed. 2008), Economic & Political Weekly.

⁹ Rafiq v. State of UP, 1981 AIR 559

The major changes brought are to the rape laws are that the minimum punishment for rape which was earlier 7 years is now increased to 10 years, if the rape is committed on a woman below 16 years of age, the minimum punishment is 20 years, if the rape is committed on a girl below 12 years of age, minimum punishment of 20 years with rigorous imprisonment which is extended up to Death Penalty/ Life imprisonment. If the police officers are committing rape, they have to serve a rigorous imprisonment of minimum 10 years. The fine imposed in such a case should be of such an amount that it can help the victim meet the medical and other expenses. No anticipatory bail can be granted to a person accused of rape of a girl below 16 years of age. The investigation has to be completed within 2 months and appeals in such cases have to be disposed off in 6 months.

The demands asked initially were very progressive, which included recruitment of police personnel as per the United Nation Standards and fixing accountability of the police force. In most of the cases it has been observed that police is at fault majorly. They do not take the matters seriously and also the investigation done is not up to the standard as required, they are highly influenced by politics etc. Requiring them to meet these standards would have tackled the problem more effectively. It was also demanded for setting up of a high-level committee, comprising of Delhi chief Minister, Home Minister and Lieutenant Governor to review the safety of women in the national Capital. Setting up of a new fast-track trial courts for minors was also one of the demand. But sadly the Act doesn't find any reference to any such demands.

The Ordinance also doesn't do anything to tackle the procedural fallacies, appalling conviction rates, lack of proper infrastructure at the Special Courts to handle POCSO Act, and lack of judges in the Courts in India. Introducing Death Penalty is not such an achievement because it has been introduced earlier also and there is no significant change in the statistics of it.

Apart from these demands, there are major defects with regard to gender issues. Section 173 1(A), as inserted by the Amendment Act of 2013 reads investigation in case of rape of a child shall be completed within 3 months. But Section 13 of the 2018 Act has further amended this provision and has added "*an offence under Section 376, 376A, 376 AB, 376B, 376C, 376D, 376DA and 376DB of IPC should be completed within 2 months*". It is pertinent to note that these Sections of IPC are gender specific and only protects women. So the provision is very effective when it comes to girl child as faster the investigation, faster it is to convict the criminal. The law is silent on the issue of male child, making a very major defect in the law.

Another major defect with regard to Gender is that there is different punishment imposed on the criminal based on the gender of the victims. Section 24 of the Amendment Act of 2018 states, "*In Section 42 of POCSO Act, 2012 for the figures and letters, "376A, 376C, 376D", the figures and letters, "376A, 376AB, 376B, 376C, 376D, 376DA, 376DB", shall be substituted.*"

Section 42 of POCSO previously read, "*Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree*".

If an act is punishable under two or more Acts, then whichever imposes higher degree of punishment is imposed. There was no problem to it earlier because the punishment for rape under IPC and POSCO prescribed was same. But, by this Amendment Act of 2018, IPC provisions are amended to increase the punishment for rape. With this disparity in both the laws, the quantum of punishment granted for rape of a male child is less than that granted for a rape of female child. The Court can also impose death penalty in case the victim is a girl but cannot if the victim is a male. The Courts now have to distinguish between the punishments for the same offence because of gender of victim. This differentiation is clearly violative of Article 14 of the Constitution.

3.2 Gender Neutrality

When discussing patriarchal structures of laws, one of the main issues of debate which comes into picture is that of gender-neutrality. Gender neutrality means that the laws should not assume gender of victim or perpetrator. A crime is a crime, irrespective of who commits it and should be punished accordingly. While the provisions for Acid Attack (Section 326-A and Section 326-B) are gender neutral but when it comes to sexual offences they are still gender-specific.

One of the arguments of gender neutrality is that of making it gender-neutral from the side of victim. The word 'victim' is understood to only denote a woman from many years. This is based on the assumptions that rape is an act to satisfy lust only, but now it is proved that it is a way to show dominance or superiority of one caste, class, religion, community over the other and is the act of power and humiliation. A victim can be a woman, man, transgender in such a scenario. Verma Committee Report also suggested victim to be made, gender neutral recognizing the same problem but it was not added to the Amendment Act.

With regard to perpetrator, there is a huge debate. Arguments against making it gender neutral are that it is physically impossible for a woman to rape a man, it is anti-woman, there is no instance of a woman raping a man or a woman, it is harmful for the victim, etc. All these arguments can be rebutted. On the aspect of impossibility of a woman raping a person, it has to be understood that rape is not non-consensual penile-vaginal intercourse only, but its scope is expanded to inserting objects as well. So in scenarios of wars, communal riots, there can be a situation where women are also aiding in commission of such offence.

In the case of Shankar Kisanrao Khade v State of Maharashtra¹⁰, husband and wife abducted a minor with an intention to rape her and later husband raped the minor. When the case came before the court, only the husband was charged under Section 375 for rape as a woman cannot be charged under the same section. Even though Gang rape only requires 'common intention' and not the actual commission of rape by every perpetrator, she was charged only for kidnapping as the Section starts with gender specific term, 'A man is said to commit "rape" if'. Making it neutral from the side of perpetrator is not anti-woman, it is just anti-crime and there are many instances of woman committing such acts.

¹⁰ (2013) 5 SCC 546

CONCLUSION:

The paper analyzed the dimensions of modesty in the country. With the help of various case laws, it is clear that modesty is considered as a virtue of women only, instead of a human. By assigning modesty to women, a major burden is put on women to protect it. This reflects the patriarchal setup of the laws in the country. Not assigning it to other genders reflects the lacunae of the legal system to protect the Human rights of the individuals. The paper goes from Specific provisions of modesty to the general provisions of IPC related to Sexual offences and analyzes its faulty set-up. Further, the fallacies in The Criminal Amendment Act, 2018 are pointed out and how it is creating more gender issues than solving it is explained. Another major issue is with regards to the Crime data rates. According to National Crimes Reports Bureau's rules, if there are two offences committed, then the one which is graver will be reported. Hence, in case of rape and murder only murder will be reported. With this new amendment, the punishment for murder and rape is made same and hence it is acting as an incentive for the criminal to murder the person after raping him/her. Hence, it will give wrong status of actual statistics of rape in the country without any gain.

On the issue of gender-neutral laws related to sexual violence, there are both the opinions presented and it is contended that sexual violence against men and transgender should be addressed but it should not create a harmful situation for women. One approach towards it as suggested by Verma Committee Report is that of making Laws related to Sexual violence gender neutral from the point of victim and remain gender specific of men. This serves the purpose of protecting individuals and is not harmful for women also as it negates the idea of filing false complaints against women. But in cases of wars, communal riots, gender neutral laws in terms of perpetrators is the need of the hour, as in such situation gender identity is given less importance and all the other identities are targeted. Also, in cases of gang rape and establishing common intention, women should be included as perpetrators to serve justice in the society.

II. ACKNOWLEDGMENT

The author would like to thank all those people who have helped in framing this paper the way it is. Special thanks to all my teachers and friends for giving me full support.

REFERENCES:**Journal Articles:**

1. Flavia Agnes, *Protecting Women against Violence? Review of a Decade of Legislation, 1980-89* (27 ed. 1992), Economic & Political Weekly.
2. Flavia Agnes, *Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law* (37 ed. 2002), Economic & Political Weekly.
3. Is Gender Justice Only a Legal Issue? Political Stakes in UCC Debate, (32 ed. 1997), Economic & Political Weekly.
4. Kanchan Mathur, *Body as Space, Body as Site: Bodily Integrity and Women's Empowerment in India* (43 ed. 2008), Economic & Political Weekly.
5. Kanchana Mahadevan, *The 'Virtuous Woman': Law, Language & Activism* (43 ed. 2008), Economic & Political Weekly.
6. Scott Woodcock, *The Social Dimensions of Modesty* (38 ed. 2008), Canadian Journal of Philosophy.

Books:

1. Ratna Kapur, *Erotic Justice* (2013)
2. Nivedita Menon, *Recovering Subversions: Feminist Politics beyond law* (2004).
3. Mary Wallstonecraft, *A Vindication of the rights of woman* (1792)
4. Nivedita Menon, *Seeing Like a Feminist* (2013)

Online Sources:

1. Yamini, *Criminal Law (Amendment) Act, 2013: Sexual Offences*, <https://www.lawctopus.com/academike/criminal-law-amendment/>
2. Sourya Banerjee, *Criminal Law (Amendment) Ordinance, 2018: How The "Bandaid Legislation" Creates More Problems Than It Solves* (2018), <https://thelogicalindian.com/awareness/criminal-law-ordinance-2018/>.
3. Ashok K.M., *Death For Child Rape- The Criminal Law Amendment Ordinance, 2018 Promulgated :Read The Salient Features [Read The Ordinance]*, <https://www.livelaw.in/death-child-rape-criminal-law-amendment-ordinance-2018-promulgated-read-salient-features-read-ordinance/>

CASES:

1. State of Punjab v Major Singh AIR1967SC 63
2. Rupan Deol Bajaj v KPS Gill AIR1996 SC 309
3. Tarkeshwar Sahu v.State of Bihar (2006)8 SCC 560
4. Raju Pandurang Mahale v.State of Maharashtra AIR 2004 SC 1677
5. State of Kerala v. Hamsa (1988) 3 Cri 161
6. State of Himachal Pradesh v. Dharam Pal (2004)9 SCC 681
7. Rafiq v. State of UP, 1981 AIR 559
8. Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546