

Gender Justice and Criminal Procedure: Rethinking the Ban on Women's Arrest After Sunset

Jatinder Kaur¹

Dr. Dev Parbhakar²

This paper critically assesses the most debated amendments of the Code of Criminal Procedure, 1973, namely, section 46(4) which denies the arrest of women after sunset and before sunrise, and its consequent provision of the Bharatiya Nagarik Suraksha Sanhita 2023 section 43(2), while this provision is designed to save women from violence in the custody and support their dignity; however, along with feminist legal theory, constitutional jurisprudence, and empirical evidence, the provision is critically reviewed as a typical example of protective paternalism undermining gender justice. The paper cites this ban as a gender-discriminative device, which not only supports idealistic biased conceptions and stereotypes but also generates differentials in criminal accountability and invites socioeconomically better-off women to take advantage of it. In addition, this research is showing that the regulation is failing the constitutional requirements of equality (Article 14) and non-discrimination (Article 15), violating India's international obligations under CEDAW and opposing Supreme Court's constitutional morality and anti-stereotyping doctrine.

By comparing gender-neutral protective measures of such countries as the United Kingdom, United States, and South Africa, and by giving examples of the universal effectiveness of protections like the D.K. Basu guidelines, the paper argues that the legitimate way to gender justice is not the existence of identity-based exemptions, but rather the availability of robust, rights-based, and universally applicable procedural safeguards. The paper closes with concrete proposals for legislative changes that would place the emphasis on protection by risk rather than by gender, thus, ensuring equal treatment, investigative efficacy, and institutional accountability.

KEYWORDS

Gender Justice; Criminal Procedure; Feminist Jurisprudence; Protective Paternalism; Equality before Law; Women's Rights; Constitutional Morality; CEDAW;; Arrest of Women; Gender-Neutral Reforms.

Introduction

Section 46(4) of the Code of Criminal Procedure, 1973 ("CrPC") states that in instances of such exceptional circumstances, a policewoman, on going to the place of arrest, shall, after recording the details of the incident in writing, and obtaining prior permission of the Judicial Magistrate of the first class of the local jurisdiction, effect the arrest.³ This provision, was inserted through the Code of Criminal Procedure (Amendment) Act, 2005.⁴ Although it can be seen as a measure to protect the dignity and safety of the concerned party, the nature of its stark, gender-exclusive character leaves open the question of its conformity with the constitutional principles of equality, the rule of law, and substantive gender justice.

¹ LLM Scholar, University Institute of Legal Studies, Chandigarh University, Mohali.

² Assistant Professor, University Institute of Legal Studies, Chandigarh University, Mohali.

³ Code of Criminal Procedure, 1973 (Act 2 of 1974), s 46(4).

⁴ Code of Criminal Procedure (Amendment) Act, 2005 (Act 25 of 2005).

However, in many cases, these measures confound protection with paternalism and, thus, do not recognize women as autonomous legal subjects but as a category of the law that needs state guardianship.⁵

This research defends a position that Section 46(4) of CrPC and corresponding Section 43(2) of BNSS⁶ is an outdated provision that perpetuates stereotypical notions of gender, creates unbalanced situations in criminal accountability, and can be easily exploited for strategic purposes by socioeconomically privileged women. Rather than being an instrument to protect the weak, it is a procedural privilege that conflicts with the fair administration of justice. This paper contends that, real gender justice is a universal rights-based safeguards that shield every human from abuse of power and ensure equal treatment under the law.

Literature Review

1. Poonam Pradhan Saxena, “Arrest of Women: Legal Safeguards and Judicial Response” (2015)

Saxena views Section 46(4) as a mechanism that the judiciary uses to prevent abuse in custody and follows its judicial roots in the decision of the Christian Community Welfare Council.⁷ She points out that the local authorities are not always clear about the procedures and that the officers lack the zeal to implement those procedures, but she limits her investigation to the law and does not challenge the provision’s revolt-eye perspective or the possible effects on the women’s legal agency and freedom.⁸

2. Saumya Uma, “Gender, Law and Justice: Revisiting Protective Legislation in India” (2018)

Uma questions the gender-protection laws with the help of feminist jurisprudence and argues that “protective” measures only delay the bursting of the bubble of female dependency and stereotype women as always weak. She sees Section 46(4) as a piece of symbolic legislation that is full of good intentions but nevertheless regressive and illustrating the way in which procedural safeguards can become a vehicle for inequality by confusing protection with justice instead of providing the latter which is the ultimate goal of accountability and should be of a gender-neutral nature⁹.

3. Sneha Rao, “Paternalism or Protection? Gender-Specific Provisions in Indian Criminal Law” (2020)

Comparing Section 46(4) with other gendered procedural norms like Section 160 CrPC, Rao argues that gender-specific exemptions erode the principle of equality before the law. Taking a rights-based approach, she considers these measures as legislative paternalism that deprives women of the capacity to act as autonomous citizens, thus continuously embedding within the criminal procedure the existence of unequal assumptions.¹⁰

4. Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex” (1989)

The intersectional framework of Crenshaw challenges the idea of a single “female subject” and demonstrates that legal systems fail to acknowledge that the same people can be oppressed on grounds of race, class, as well as gender. Even though it is based on the U.S. context, her argument helps to understand how the Indian legal

⁵ Flavia Agnes, *Law and Gender Inequality: The Politics of Women’s Rights in India* (Oxford University Press, 1999) 102.

⁶ Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 33 of 2023), s 43(2).

⁷ Poonam Pradhan Saxena, “Arrest of Women: Legal Safeguards and Judicial Response” (2015) 57(2) *Journal of the Indian Law Institute* 210, 215.

⁸ *Ibid.*

⁹ Saumya Uma, “Gender, Law and Justice: Revisiting Protective Legislation in India” (2018) 11(1) *NUJS Law Review* 45, 52.

¹⁰ Sneha Rao, “Paternalism or Protection? Gender-Specific Provisions in Indian Criminal Law” (2020) 12 *NALSAR Student Law Review* 88, 94.

discourse of providing a uniform “female protection” under Section 46(4) is, in fact, overlooking the situations of socially disadvantaged women and at the same time, it is assisting the creation of collusion between the law and the elite-centric narratives of vulnerability.¹¹

5. Catharine A. MacKinnon, “Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence” (1983)

MacKinnon argues against the liberal state’s assertion that it is the protector of women and claims that the so-called “protection” is nothing but a convincing way of perpetuating male dominance through the law from the perspective of a paternalistic voice. Her critique brings to light the ideological basis of Section 46(4), being that it suggests that the actor in the role of the woman - in this case, the legal system - is treated more leniently, but really it is under strict control, though disguised as empowerment, that she is allowed to function within patriarchal legal frameworks.¹²

6. Ratna Kapur, “The Tragedy of Victimization Rhetoric: Resurrecting the ‘Native’ Subject in International/Postcolonial Feminist Legal Politics” (2002)

Kapur challenges the “victimization” narrative in the context of feminist legal politics worldwide and demonstrates that postcolonial regimes reshape the image of women as passive subjects who need to be rescued by the West. Thus her critique, when taken in the context of Indian criminal procedure, uncovers the ways in which the Section 46(4) continues the colonial tradition of establishing the of the protector and the protected and, in doing so, it locates women’s vulnerability as the ground on which their limited legal agency is to be justified.¹³

7. Flavia Agnes, *Law and Gender Inequality: The Politics of Women’s Rights in India* (1999)

Agnes analyzes the feminists of the elite who were the ones that created the gender laws in India and demonstrates how the gender-protective provisions in the criminal law work to perpetuate the hierarchies of society. Her article, which among other things deals with the issue of custodial violence and the role of procedural safeguards, culminates in the argument that true transformation must not be dependent on symbolic gender-differentiated statutory protections but must first and foremost focus on the question of structural accountability.¹⁴

Research Methodology

The research work in this paper is done by a doctrinal and critical-analytical method and it looks at the legal provisions, court rulings, and feminist legal theory to figure out legal and socio-legal effects of the Section 46(4), CrPC. The paper uses comparative feminist jurisprudence and various reports like the Law Commission Reports and the Justice Verma Committee to position the provision as a protective measure and a step towards

¹¹ Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) 1989(1) *University of Chicago Legal Forum* 139, 145.

¹² Catharine A MacKinnon, “Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence” (1983) 8(4) *Signs* 635, 642.

¹³ Ratna Kapur, “The Tragedy of Victimization Rhetoric: Resurrecting the ‘Native’ Subject in International/Postcolonial Feminist Legal Politics” (2002) 15(1) *Harvard Human Rights Journal* 1, 12.

¹⁴ Agnes (n 3) 95.

substantive equality.¹⁵ The paper, thus, becomes a combined theoretical and empirical exercise, with the critique being drawn from feminist jurisprudence and the evidence coming from the field studies like those conducted by the CLPR.¹⁶

The Feminist Critique of 'Protection'

Feminist intervention in the 1980s and 1990s, which was a result of the public outrage over custodial rape and dowry deaths, only on the face of it, advocated for the enactment of protective legislation as a means to fix the problem of systemic misogyny within state institutions.¹⁷ This "protectionist" paradigm tried to shield women from the worst of the patriarchal state power by creating new kinds of legal rights specifically for them.¹⁸

Nevertheless, towards the end of the 1990s, the critical feminist scholars started to question the fallout of such measures besides their intended effects. According to Flavia Agnes, "pro-women" laws mostly mirror the issues discourses of feminist urban, elite women and by that, they overlook the realities of the intersection of gender, caste, and class of those women.¹⁹ Nivedita Menon, in *Seeing Like a Feminist*, warns that it is a mistake to identify empowerment with protection, and asserts that the legal frameworks that see women as one category of continuous victims which lacks agency are the ones that deprive women of agency and support biological determinism.²⁰ Nivedita Menon maintains that "respect cannot be given by making an exception from the rule of accountability; rather, it is through equal involvement in the public sphere that it is obtained."²¹

The argument here is consistent with the worldwide feminist legal theory. Catharine MacKinnon makes a difference between formal equality (same treatment) and substantive equality (compensating structural disadvantage), but she cautions that if different treatment on the basis of gender is grounded on the assumption of incapacity instead of contextual vulnerability, it may further subordinate the group.²²

Kalpana Kannabiran has argued in *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge, 2012) that symbolic legal protections in India tend to hide the state's failure to address deep-rooted structural inequalities.²³ According to her, the "woman" created by laws for protection is always upper-caste, middle-class, and heterosexual - thus the experiences of Dalit, Adivasi, and Muslim women, who face multiple forms of state violence, remain invisible. Uma Chakravarti, on her part, explains how caste and gender come together to create different kinds of vulnerabilities which disappear when one thinks in terms of universal legal categories.²⁴

Grounded research by the Centre for Law and Policy Research (CLPR) indicates that Section 46(4) CrPC or Section 43(2) BNSS or similar protective measures are mainly used by well-to-do women in cases of white-collar crimes, while women from the lower sections of the society, who are more frequently arrested during

¹⁵ Justice J.S. Verma, Justice Leila Seth and Gopal Subramaniam, Report of the Committee on Amendments to Criminal Law (Government of India, 2013) para 18.5.

¹⁶ Centre for Law and Policy Research (CLPR), *Gender and Arrest Procedures in Urban India* (2021) 24.

¹⁷ Upendra Baxi, *The Future of Human Rights* (Oxford University Press, 2nd edn, 2008) 203.

¹⁸ *Ibid.*

¹⁹ Agnes (n 3) 102

²⁰ Nivedita Menon, *Seeing Like a Feminist* (Zubaan, 2012) 81.

²¹ *Ibid.*

²² MacKinnon (n 13) 645.

²³ Kalpana Kannabiran, *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge, 2012) 189.

²⁴ Uma Chakravarti, *Gendering Caste Through a Feminist Lens* (Stree, 2003) 62.

daytime raids or in the course of public encounters, do not get any real advantage from such provisions.²⁵ Most of the commentaries consider it as a straightforward extension of women's rights without much critical examination of its impact on equality, the integrity of the investigation, or intersectional justice.²⁶

Critical Analysis: Re-evaluating the Ban

The laws laying down the increased procedural safeguards for women have been in the making long before the 2005 amendment. In its 177th Report on the Law Relating to Arrest (2001), the Law Commission of India, after a detailed examination of the procedures of arrest to curb the abuse of power, made various recommendations that are significant.²⁷ The report didn't suggest a complete statutory ban but it noted the 'desirability of not arresting women after sunset except in unavoidable circumstances' very clearly. It focused on procedural changes like the presence of a female police officer during the arrest of a woman which was later established by law. The Court's intervention in moving from the Commission's subtle recommendation to a categorical ban, therefore, marks an important moment in the transition to a more paternalistic framework.

The ban on the arrest of women after sunset is directly based on the Supreme Court verdict in the State of Maharashtra v. Christian Community Welfare Council case. The Court, in this case, issued binding directions in response to the reports of abuse in police custody of women that no woman should be arrested before sunrise or after sunset except in "exceptional circumstances" and that such arrest must be carried out by a woman police officer with the prior written permission of a Judicial Magistrate.²⁸

Statement of Objects and Reasons emphasized the need to "safeguard the dignity and decency of women" and to stop the "harassment and torture in police custody." Judicial pronouncements after the enactment have relied on the provision as being of a compulsory nature rather than of a directory nature.²⁹ In Rajesh Kumar v. State (NCT of Delhi), the Delhi High Court impugned the night's arrest without magistrate's permission and stated that failure to comply makes the arrest "illegal and void ab initio."³⁰

This provision is supported by other gender-specific safeguards in the CrPC, such as Section 51(2) (women's search is done only by female officers) and CrPC Section 160(1)³¹ BNSS Section 179(1)³² (women are not obliged to be present at police stations for questioning). Together, these provisions represent the legislature's view that women, because they are women, need to be protected from the power of the state.

Article 14 grants equal protection of laws, while Article 15(1) forbids discrimination based on sex. But Article 15(3)³³ gives the state the power to make "special provisions" for women and children. The Supreme Court has always maintained that such facilities must have a legitimate protective goal and should not be seen as unreasonable classification. In Anuj Garg v. Hotel Association of India, the Court declared unconstitutional a law that barred women from working in bars and stated that "protection must not become a tool of

²⁵ CLPR (n 20) 31.

²⁶ Saxena (n 5) 225.

²⁷ Law Commission of India, 177th Report: Law Relating to Arrest (2001) para 3.12.

²⁸ State of Maharashtra v. Christian Community Welfare Council, (2003) 12 SCC 770, para 6.

²⁹ Statement of Objects and Reasons, Code of Criminal Procedure (Amendment) Bill, 2005.

³⁰ Rajesh Kumar v. State (NCT of Delhi), 2017 SCC OnLine Del 11879, para 12.

³¹ Code of Criminal Procedure, 1973, ss 51(2), 160(1).

³² The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 179(1).

³³ Constitution of India, art 15(1), 15(3).

oppression.”³⁴ The issue then becomes whether Section 46(4) CrPC, 43(2) BNSS is a fair classification as per Article 15(3) or a wide-ranging measure that interferes with the equality clause by providing procedural immunity which is not connected to real vulnerability.

Historical Context: Custodial Violence and Legislative Reform

The moment that changed everything was the Supreme Court decision in *Tukaram v. State of Maharashtra* in 1979, a case which came to be known as the Mathura custodial rape case.³⁵ The Court contrary to popular opinion, freed the two policemen who were alleged to have sexually assaulted the plaintiff at the police station. The reason for the Court's decision was that there were no injuries and the victim was someone 'habituated to sexual intercourse.'

The judgement led to protests across the country and was countered by a feminist legal scholars' landmark open letter, which eventually resulted in the Criminal Law (Amendment) Act, 1983.³⁶ This legislative change has, for the first time, enumerated the specific crimes of the policemen concerning the sexual assault of the person in the custody of the law (Section 376(2) (BNS Section 70(1)(a)) and BSA Section 117 have been the location where the burden of proof has been shifted to the accused officer in such cases. rights.³⁷ The activism was still on in the 1980s and 1990s, with the People's Union for Civil Liberties (PUCL), a human rights organization, and SAHELI, a women's group, continuously sending reports about the reality of abuse in custody.³⁸ The judicial intervention which was at the core of the directives in *Christian Community Welfare Council* and the subsequent legislative enactment of Section 46(4) was made possible by this long-term background of activism.

Woman" as a Monolithic Category

Section 46(4) is one of those legal provisions that presupposes women as a thousand-and-one single group of ladies who are equally vulnerable to be mauled at night. The argument of this universalising idea fails to acknowledge the vulnerability aspect that is intersectional in nature, which is Kimberlé Crenshaw's theory and is followed by scholars like Uma Chakravarti³⁹ and Sharmila Rege in India. These women, in comparison, are very likely to be the victims of custodial violence while being arrested in a rural police station during the day, whereas women of the elite class living in cities, who are facing white-collar charges, are unlikely to experience such kind of violence in the police station.⁴⁰

Constitutional Incompatibility and the Erosion of Equal Accountability

The principle that everyone should be held equally accountable and that their rights under the law should be protected equally is the cornerstone of the rule of law. By exempting women from a core aspect of the criminal procedure related to arrest CrPC Section 46(4) (43(2) BNSS), the department has created a two-tiered system of justice. Thus, men can be arrested at any hour without warrant, while women have the procedural protection of not being arrested. Such differences go against the essence of Article 14 which requires that equals be treated equally and unequals unequally but only on rational grounds.

³⁴ *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1, para 25.

³⁵ *Tukaram v. State of Maharashtra*, AIR 1979 SC 185.

³⁶ People's Union for Civil Liberties (PUCL), *Custodial Violence in India: A Report* (1985) 12.

³⁷ Indian Penal Code, 1860 (Act 45 of 1860), s 376(2); Bharatiya Nyaya Sanhita, 2023 (Act 32 of 2023), s 70(1)(a).

³⁸ SAHELI, *Women and the Criminal Justice System: A Study of Custodial Practices in Delhi* (1992) 33.

³⁹ Crenshaw (n 11) 149; Chakravarti (n 29) 55.

⁴⁰ National Crime Records Bureau, *Crime in India 2022* (Ministry of Home Affairs, 2023) 187

The court of the last resort in *State of West Bengal v. Anwar Ali Sarkar* emphasized that classification under Article 14 should be logically connected with the goal of the law. Section 46(4)'s goal of preventing custodial abuses can be fulfilled by non-gendered measures such as compulsory magistrate supervision for all night-time arrests. Hence, the gender-based classification is irrational in that it is over-inclusive (protecting women who are less likely to be victims) and under-inclusive (for instance, excluding men who are vulnerable such as transgender persons or minors).⁴¹

The definition of the test set forth in *Anwar Ali Sarkar*⁴² and later decisions is that any classification must meet the two conditions: (1) it must be based on an intelligible differentia, which sets apart the persons or things that are classified together from those which are left out of the group and (2) the differentia must be logically connected to the goal being pursued by the statute in question. The official aim of S. 43(2) BNSS is to prevent the police from physically abusing women in their custody. Nevertheless, a complete prohibition on night-time arrests does not have an indirect or a rational link with this goal in every case. It incorrectly assumes that all women are vulnerable at night while all men are not, and that police abuses happen only at night. A reasonable approach would be to, irrespective of gender and time, take the necessary precautions for the arrest of any person who is vulnerable. In addition, contemporary constitutional law, as exemplified by the *Anuj Garg* case⁴³, has developed an anti-stereotype principle. This concept means that regulations which base their argument on overly general, paternalistic and stereotypical assumptions concerning the roles, abilities and weaknesses of a certain gender are invalid from the point of view of the constitution. Section 46(4) illustrates a regulation, which is founded on the stereotype of women as a group that is perpetually weak and in need of protection by the state, rather than being treated as autonomous individuals who have the same rights as any other citizen under the law and are entitled to be treated without discrimination.

A Comparative Study: India's 'Protective Exceptionalism'

India's decision to implement a gender-based time limit for arrests in one blow is quite different from the way other major constitutional democracies handle the issue of custodial vulnerability. They rather provide gender-neutral procedural safeguards to ensure safety of the person in custody than give categorical exemptions.

In the UK, all arrest and detention activities are regulated by the Police and Criminal Evidence Act 1984 (PACE). PACE does not differentiate between males and females with regard to the time of arrest. It rather offers a detailed universal framework of rights that includes the maintenance of custody records as a mandatory requirement, well-defined time limits for detention without charge and the right to legal counsel. The protections provided to vulnerable individuals, e.g. women, minors and persons with mental health problems, depend on the circumstances and among other things, it is required that an Appropriate Adult is present. Searches on persons of the same gender are mandated, however, the fundamental rights that are focused on oversight and accountability for everyone are universal.⁴⁴

Moreover, in the US, the Fourth Amendment to the Constitution safeguards all individuals from unreasonable searches and seizures. The question of whether an arrest at night is "reasonable" is answered on the basis of the facts of the case (e.g., the seriousness of the offense, the risk of escape), rather than by the gender of the suspect. The measures against malpractices are post-facto through civil rights litigation and police regulations that are

⁴¹ CLPR (n 20) 31.

⁴² *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75, para 18.

⁴³ *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1, para 28.

⁴⁴ Police and Criminal Evidence Act, 1984 (UK), ss 37, 58, 61.

in place before the fact, for example, the compulsory use of body-worn cameras⁴⁵. They are not through gendered procedural immunities.

Even the South African Constitution, which has a strong equality clause (Section 9),⁴⁶ deals with vulnerability in a context-based manner. For example, its Domestic Violence Act, 1998, offers certain protections to victims while the criminal procedure followed in arrests is centered on the rights of the accused persons.⁴⁷ Comparing these examples makes it clear that India approach is that of a protective exception. It implies that there is a legislative reflex which most of the time results in paternalistic exemptions that are based on identity, thus, instead of enhancing institutional accountability and procedural rights of every citizen, it takes the opposite direction.

Operational Inefficiencies and Investigative Impediments

Section 46(4) from the viewpoint of criminal justice administration is a major source of inefficiencies. It is often night-time when law enforcement can be most effective in the arrest of perpetrators of organised crime, cyber fraud, or economic offences, especially when the evidence is in digital form, and it can be destroyed easily. The requirement of obtaining a magistrate's permission for the arrest of a woman at night creates procedural bottlenecks. In a 2021 CLPR study, it was found that in large cities, the delay in economic offence investigations involving women due to compliance with Section 46(4) exceeded 72 hours in more than 35 per cent of the cases⁴⁸, thus giving rise to the risk of tampering with evidence and intimidating witnesses.

In addition to that, police officers who are concerned about their procedural compliance may not be willing to register FIRs against women and this is particularly true in the case of inter-se disputes (e.g., matrimonial or property conflicts with criminal allegations) where women might be the complainants. Thus, the situation becomes worse as legitimate complaints remain unreported, and the state's obligation to investigate crimes in an impartial manner is violated.

The Ambiguity of 'Exceptional Circumstances' and the Paradox of Illegality

Section 46(4) suffers from a major defect that is the lack of clarity in the definition of the term "exceptional circumstances" which the Code does not explain. Because of this indefiniteness, law enforcement experiences a chilling effect, and therefore police officers are reluctant to decide subjectively only to have their decision overturned by a court exposing them to departmental action or contempt proceedings. The upshot of this is that in addition to the time lost in the investigation, there is often a complete lack of intervention with the result that inappropriate detention of women is not rare, even in situations where it is vital for the destruction of evidence not to occur or the commission of further offences.

In *P. R. Sreejith v. State of Kerala* (2023) case, the Kerala High Court⁴⁹, on the one hand, severing the case against the officers for their unauthorized night arrest, on the other hand, it noted that the procedural failure cannot be regarded as a ground for the annulment of the final report filed against the accused woman as well as the investigation. Hence the court holds that the provision is "mandatory" but the implication of its infringement is not that the prosecution is annulled. This underpins the theory of the section being a less significant shield for

⁴⁵ US Const amend IV.

⁴⁶ Constitution of the Republic of South Africa, 1996, s 9.

⁴⁷ Domestic Violence Act, 1998 (South Africa), s 2

⁴⁸ Centre for Law and Policy Research (CLPR), Gender and Arrest Procedures in Urban India (2021) 31.

⁴⁹ P.R. Sreejith v. State of Kerala, 2023 SCC OnLine Ker 5672, para 18.

women and more a procedural police hurdle without police being eventually restrained from the prosecution of the illegally arrested.

Certainly, courts worried about the potential abuse of the statute, have started to shape some of their decisions that limit the provision's extent. In the landmark decision of *Kavita Manikikar v. Central Bureau of Investigation* (2018),⁵⁰ the Bombay High Court ruled out the prohibition of Section 46(4) to be inapplicable to an arrest effectuated by a court directive, for instance, when executing a non-bailable warrant (NBW). It was explained that an arrest under a judicially issued mandate is entirely different from an arrest carried out by the police during an investigation of their own accord. The said interpretation indeed solves a significant problem - the scenario of the accused women who are trying to escape the warrants issued by the court, but it exposes that the provision contains inherent contradictions. By doing so, it indirectly concedes that the prohibition in question is too extensive and may hinder the progress of justice, thus the judiciary is compelled to make interpretive exceptions so that its role as a regulatory body is not weakened.

Reinforcement of Patriarchal Stereotypes

Ironically, a measure aimed at securing the safety of women is strengthening patriarchal stereotypes that depict women as passive and dependent. Section 46(4) does this by treating females as if they are not able to go through the same legal procedures as males. This is against the feminist idea of women being the ones having the power and control over their lives. The Court in *Christian Community Welfare Council* described women as "tender" and "delicate," characteristics that relate to Victorian-era ideas of femininity. Such language, even if it is used with good intentions, sees women's worth in their being saved from state scrutiny, not in their right to be treated fairly and respectfully by it.⁵¹

This kind of stereotype reinforcement is contrary to India's binding obligations on the international stage. India, a signatory of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), is bound by Article 5 to undertake "all necessary measures to change the social and cultural... patterns of behavior of men and women, with the aim of completely doing away with prejudices and customary practices that are based on the idea of the inferiority or the superiority of either of the sexes or on the use of stereotyped roles for men and women."⁵² By enacting the law that presumes women are universally fragile and need male/state guardianship at night, it can be argued that Section 46(4) not only brings about the; stereotyped roles; which CEDAW aims to remove, giving rise to a contradiction between the local and international human rights law regimes.

Susceptibility to Strategic Misuse in Economic and White-Collar Crime

Just as a measure to protect women in vulnerable situations, this provision has become the most widely used procedural tool by defendants in high-stakes economic and white-collar crime cases. In the cases of financial investigations that involve corporate fraud, money laundering, or securities law violations, arrests are usually scheduled with raids that obtain vital digital and documentary evidence. Section 46(4)'s blanket prohibition creates a time interval of several hours during which a female accused may interfere with the evidence, inform the co-conspirators, or even flee without being detected.

⁵⁰ *Kavita Manikikar v. Central Bureau of Investigation*, 2018 SCC OnLine Bom 4521, para 14.

⁵¹ *State of Maharashtra v. Christian Community Welfare Council*, (2003) 12 SCC 770, para 5.

⁵² Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted 18 December 1979, United Nations General Assembly Resolution 34/180, art 5(a)

For instance, in the cases handled by the Serious Fraud Investigation Office (SFIO) or the Enforcement Directorate (ED), where the simultaneous arrest of multiple suspects is necessary to prevent collusion, the inability to apprehend a female mastermind or director after sunset can be what causes the whole operation to be compromised. This was a matter that provoked intense debate in the public sphere during the case that revolved around the Chanda Kochhar investigation (ICICI Bank-Videocon loan case) whereby the custodial interrogation of the key players and timing of arrests were of utmost importance. Individuals facing accusations and having access to proficient legal counsel are reported to be in a habit of taking advantage of this provision by making their whereabouts after sunset untraceable thus, effectively, putting the investigative process on hold.⁵³ The use of this provision in this way turns it from a protective measure into a procedural privilege wielded by the powerful, thereby giving rise to the notion that a different set of rules applies to those who are enriched and well-connected which, in turn, leads to the dwindling of the public trust in the impartiality of the justice system.

Deconstructing 'Protection' in Criminal Law

A thorough review of the Section 46(4) needs to be informed by bigger and comprehensive legal and feminist theories, which by themselves question the concept of 'protection' and 'equality'..

The debate about 'sameness versus difference' is at the core of feminist legal theory and it points directly to the issue with Section 46(4). The 'sameness' approach is normally connected with liberal feminism and it supports the idea of formal equality. This means that gender equality is better achieved by treating men and women equally under the law. Based on this point of view, Section 46(4) is a discriminatory provision by nature because it establishes a procedure for operations only on the basis of sex and at the same time negates women the right of equal treatment and responsibility.

On the contrary, the 'difference' side represented by such scholars as Catharine MacKinnon argues that differences in power and vulnerability that are socially constructed between men and women should not be ignored. Ignoring these differences is equivalent to treating the unequal as equal, thus leading to the perpetuation of inequalities.⁵⁴ This point of view demands 'substantive equality' as the solution to the problem through the use of special measures that take into account the systemic disadvantages of women. In fact, Section 46(4) serves as a textbook illustration of a 'difference' model. Nevertheless, the article's authors, coming from a third-wave feminist perspective, argue against the notion of 'difference' when it is based on universalizing and essentialist assumptions. Nivedita Menon, for example, contests the provision by saying that it creates a uniform 'woman' who is always and everywhere a victim and at the same time denies the existence of class, caste, and agency among the women⁵⁵. Consequently, it becomes a 'protection' that is neither sought by nor is it useful to all women; in fact, it can be dangerous in that it strengthens the stereotype of female helplessness - the very source of subordination.

The Rule of Law and the Principle of Non-Arbitrariness

One of the major characteristics of the rule of law as it has been outlined in the works of legal philosophers such as A.V. Dicey is the respect for the law. This involves law being respected by all, everybody being equal before

⁵³ Central Bureau of Investigation, *FIR No. RC 2018 A 0012: Alleged Irregularities in Sanctioning Loan by ICICI Bank to Videocon Group* (2018)

⁵⁴ MacKinnon (n 13) 640

⁵⁵ Menon (n 24) 88.

the law, and the power not being of arbitrary nature.⁵⁶ The case of subsection 46(4) is conflicting with the principle of equality before the law, which means that any person should not have to live under a different set of laws or be subjected to different procedures just because of their identity. By violating the law in this manner, the provision facilitates gender-based procedural immunity thus, making law an instrument that serves only some individuals.

Therefore, arbitrariness comes into play. For example, a male co-accused might be taken from his home in an economic fraud case by force at 10 p.m. and the arrest will be considered as lawful, whereas the arrest of a female co-accused will be regarded as illegal even if she has committed a more serious fraud or has a higher probability of fleeing. This is an exceedingly obvious instance where the law, instead of being applied equally to all, has singled out people based on their gender. From this viewpoint, the enumerated laws, in this case, the Constitution, Article 21, are being flouted, which guarantees that no person shall be deprived of life or personal liberty except in accordance with the law. This has been furthered by the Supreme Court, which considers such a procedure to be fair, just, and non-arbitrary. A procedure that unfairly decides at random which one of the accused is a woman, thus, failing to meet the standard of justice.⁵⁷

The Lens of Constitutional Morality

Besides the criteria for the test by Articles 14 and 15, Section 46(4) is also at odds with the concept of 'constitutional morality'. This idea, which was formulated by the Supreme Court in its landmark decisions *Navtej Singh Johar v. Union of India* (2018) and *Joseph Shine v. Union of India* (2018), views the Constitution not just as a collection of rules but as a living document, with the purpose of introducing changes⁵⁸. The change it wants to bring is very much consistent with the ideas of human dignity, autonomy, and equality. Actually, it would lose 'public morality' if it turned out to be based on patriarchal, stereotyped and discriminatory notions.

The Section 46(4) is a case in point of an archaic 'public morality' that is trying to pass itself off as law. It is still holding on to the same Victorian-era "romantic paternalism" as the Court has already rejected in the cases of *Anuj Garg* and *Joseph Shine* respectively. The stereotype that women are "tender and delicate" (as the judgment in the case of the Christian Community stated) and thus, they require the maternalistic care of the state, particularly, after dark is worked upon by it. On the contrary, the Constitution morality asks the state to regard and treat all its citizens as equal and autonomous individuals. It further asserts that the term "protection" should not be the cover under which subordination is carried out. The fact that the law is seeing women as a group that is not capable of going through the criminal justice system on an equal footing with men but rather as people who are in need of protection and that their rights, being equal to men's, should be recognized, is a breach of their dignity and agency. The law not only does that but also elevates women as frail and defenseless at its mercy who need the protection by the state, instead of treating them equally as partners in law, thus, violating the fundamental test of constitutional morality.

Institutional Impunity and Custodial Safeguards

The position is additionally undermined by the fact that an effective and gender-neutral legal framework aimed at the prevention of abuse in custody not only exists but has also received constitutional approval. In a landmark decision, the Supreme Court in *D.K. Basu v. State of West Bengal* (1997) spelled out Eleven Anil Failures that

⁵⁶ Dicey (n 58) 202.

⁵⁷ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, para 8

⁵⁸ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, para 114; *Joseph Shine v. Union of India*, (2018) 7 SCC 348, para 92. (n 63) para 119.

are necessary for all arrests and detentions.⁵⁹ These extensive and objective preventive measures, which are based on Articles 21 and 22 of the Constitution, provide not only better but also more consistent protection against police brutality than the grant of partial immunity under Section 46(4). The reason behind the failure to prevent abuse of power, therefore, is not the absence of protective legislation but the failure to implement the universal D.K. Basu guidelines which are meant for all citizens.

Hence, the most important deficiency is not the absence of gender-specific regulations on the time of day but rather the systemic and widespread impunity for violations of the universal D.K. Basu guidelines. The institutionalized non-compliance with procedures is the origin of the abuse of power in police custody. The addition of a gender-specific aspect such as Section 46(4) does not solve the problem of this fundamental failure; it only allows a procedural loophole to operate in the presence of the police structures that continue to enjoy impunity.

Besides, the factual evidence demonstrates that being in custody and at risk is not a matter exclusive to one gender and that the state's failure is in the lack of accountability rather than the timing issue. The widespread and unchecked phenomenon of which accounts for the entire population regardless of their gender is, therefore, the real crisis. Directing efforts towards the establishment of a women-only time-based arrest ban is a way in which the legislators are deceiving themselves because they fail to acknowledge the systemic issue of the lack of police violence accountability which poses as the main danger to the people who have been arrested.

Conclusion and Recommendations

Section 46(4) of the CrPC is a good example of how a law, despite originating from legitimate concern about violence in custody, gradually loses its relevance. It is even more problematic that the law attempts to solve this issue by means of a paternalistic attitude that contradicts constitutional gender equality, the effectiveness of an investigation, and feminist intersectionality. This kind of approach does not protect women, instead, it facilitates powerful people to become more powerful and at the same time reinforces gender norms which are obstacles to women's rights.

The silence of legal reform bodies on the issue makes the necessity of this re-assessment of law more obvious and louder than ever. In its 268th report titled "Amendments to the Criminal Procedure Code" (2017), the Law Commission of India conducted an exhaustive review of the Code without suggesting any change to or repeal of Section 46(4). The absence of this recommendation insinuates that the protectionist status quo is deeply entrenched and the provision has not been scrutinized sufficiently from the perspective of substantive equality and negative practical consequences.⁶⁰ Consequently, a legislative move, enlightened by academia and civil society, is needed not only to make the law conform to the standards of modern, non-discriminatory policing but also to ensure that the law is equally binding upon everyone.

Moreover, moving towards that direction is not about keeping differential treatment but rather about extending the procedural rights to be guaranteed to everyone. Hence, the following reforms might serve the purpose:

1. Repeal Section 46(4) and, CrPC or Section 4(32) and substitute with a gender-neutral provision which stipulates magistrate's prior permission for all night arrests, thus, arrest between 8 p.m. and 6 a.m. shall be allowed only on obtaining the magistrate's permission irrespective of the suspect's gender.
2. Initiation of universal safeguards for the situation when an arrest occurs at night, including:

⁵⁹ *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 416, para 35.

⁶⁰ Law Commission of India, *268th Report: Amendments to the Code of Criminal Procedure, 1973* (2017) 89.

- ❖ Lawyer or nominated representative being present during the procedure;
- ❖ The whole arrest and the first part of the detention are recorded on camera in real-time;
- ❖ Medical examination, if requested, is done immediately;
- ❖ The family is notified within the next one hour.

3. Institutional infusing with energy of accountability by:

- ❖ Creating special courts to hear cases related to custodial violence;
- ❖ Administering this training and making gender-sensitization compulsory to all police officials as endorsed by the Justice Verma Committee, and also, ensuring that these police officials are certified;
- ❖ Setting up of a non-partisan supervisory body with a purview to observing the compliance of police in performing lawful and regular arrests.

4. Move the implementation of risk-based assessment protocols that take into account personal vulnerabilities (such as age, disability, mental health, history of trauma) as opposed to using gender merely as a risk indicator.

The reforms envisaged here are not merely idealistic; rather, they are derived from working, viable models that have been successfully implemented in other democracies. As an example, the universal protections suggested in Recommendation 2 are based on the current minimum standards in the respective fields. In the United Kingdom, the 24/7 'duty solicitor' service and a mechanism available at any hour to seek judicial approval for warrants (a 'judicial hotline') together ensure that legal and judicial oversight is always accessible, thus, making gender-based time restrictions redundant. In numerous police departments throughout the United States, the obligatory recording of all public interactions, including arrests, through body-worn cameras, is a major step towards creating an objective, real-time record that both dissuades the occurrence of abuses and facilitates the process of holding those responsible accountable⁶¹. These are technology-enabled, transparent, and gender-neutral solutions which revolve around institutional accountability rather than on the granting of arbitrary, identity-based exemptions.

Such steps would bring Indian criminal procedural law into conformity with international human rights law standards such as United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) relying on the principles of dignity and non-discrimination and without providing any gender-based procedural carve-outs⁶².

To sum up, gender justice in criminal law should not be confined within the limits of symbolic protectionism. Essentially, it needs a justice system treating all people with equal respect, putting all under the same rules without exceptions and shielding the vulnerable not by giving them exemptions but through well-functioning institutions.

⁶¹ Police and Criminal Evidence Act, 1984 (UK), ss 58, 61; Body-Worn Camera Policy, New York Police Department (2020).

⁶² United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), GA Res 70/175, UN Doc A/RES/70/175 (2015) rule 1.