

# GENDER DISCRIMINATION AND GENDER NEUTRALITY UNDER THE BHARATIYA NYAYA SANHITA, 2023: A CRITICAL LEGAL ANALYSIS

**Jeeval M, Student,**

School of Law, II-year, B.A. LL.B.(Hons.), SASTRA Deemed University, Thanjavur, Tamil Nadu, India. E-mail: [129087020@sastra.ac.in](mailto:129087020@sastra.ac.in)

**Saikrithi LN, Student,**

School of Law, II-year, B.A. LL.B.(Hons.), SASTRA Deemed University, Thanjavur, Tamil Nadu, India. E-mail: [129087043@sastra.ac.in](mailto:129087043@sastra.ac.in)

## ABSTRACT:

The Bharatiya Nyaya Sanhita, 2023 (BNS); intended to replace British Era Indian Penal Code, 1860 (IPC) is a legislative effort to reform India's criminal justice system and allow for greater citizen centeredness in criminal law. The law will provide for a move from IPC to BNS which represents a significant legislative development designed to facilitate the de-colonisation of India and bring Indian criminal law into line with modern society. In addition, this research studies gender discrimination in the BNS and assesses to what extent the new statute has been able to achieve goals of equality, inclusivity, and modernity. Additionally, this research assesses how criminal law under IPC or BNS has advanced or not to meet the requirements posed by today's legal and social conditions. Based upon this comparison, the BNS provides modernising changes to some areas of criminal law; however, with respect to gender justice, BNS continues to be reliant upon socially constructed gender stereotypes. Areas examined in detail include; sexual offences, spousal relationships and victim protection where women will be afforded recognition as victims while men and transgender individuals do not enjoy the same level of legal recognition.

This paper adopts the method of doctrinal research by analysing statutory laws, constitutional

doctrines, case laws, and comparative approaches from other nations. It will also evaluate the constitutional impact of gender-specific laws in the context of Articles 14, 15, and 21 of the Constitution of India. This paper argues that whereas the BNS does make several necessary reforms and modernizes the criminal laws in many aspects, it still lacks a gender-neutral approach towards sexual crimes and victims.

This paper concludes that true gender equality requires a well-balanced and holistic approach which not only ensures safety and protection of all individuals regardless of their gender but also provides safeguards for marginalized communities. Therefore, although the BNS is a forward-looking step taken by the country in terms of criminal law reform, yet some changes are still required to ensure complete gender equality.

**Keywords:** Gender neutrality, Bharatiya Nyaya Sanhita, equality, criminal law reform, constitutional morality, sexual offences.

## INTRODUCTION

The enactment of the Bharatiya Nyaya Sanhita, 2023 became a landmark moment in the history of criminal law in India. Claimed to be a replacement for the Indian Penal Code of 1860, the BNS is considered a statute aimed at decolonizing the criminal laws of India and making them relevant

for contemporary Indian society. In particular, the Government of India emphasized that new criminal laws will be based on the principles of justice, victim rights, efficiency, and national interests. Thus, the creation of the legal framework based on constitutional principles and the realities of contemporary Indian society can be viewed as an attempt to decolonize the criminal law.

Drafted under British colonialism by Lord Macaulay, the Indian Penal Code of 1860 was the principal criminal code of India for more than one hundred and fifty years. Despite numerous changes made to the criminal code throughout many decades, it is still based on colonial views on the issues of morality, gender roles, and social interaction. As a result, legal scholars believe that it is necessary to update the existing criminal justice system because of new crimes and technologies.

However, despite introducing many changes, one of the most controversial aspects of the Bharatiya Nyaya Sanhita is the aspect of gender discrimination and non-gender-neutral criminal provisions. The interpretation of constitutional equality in today's world focuses on the element of inclusiveness and the recognition of the right regardless of the gender. In this respect, the critics claim that the BNS perpetuates the traditional gender roles through the sexual offence provisions, which view women only as victims while men only as perpetrators.

Gender discrimination in criminal laws refers to the differential legal protection or treatment based on gender identity. Traditionally, the Indian criminal law was created out of the need for protection due to violence and discrimination against women. Hence, many of the laws were consciously created as women-centric laws. Such laws were deemed necessary to achieve substantial equality in a patriarchal society.

Nevertheless, contemporary discussions on gender justice have moved beyond the conventional dichotomy of male perpetrators and female victims. Greater awareness of male victims of sexual violence and constitutional recognition of transgender rights have spurred calls for gender-neutral criminal laws. Landmark judicial rulings, including National Legal Services Authority v. Union of India and Navtej Singh Johar v. Union of

India, have substantially reshaped constitutional discussions on gender identity and sexual autonomy.

Even with these developments, the BNS still defines rape in gender-specific terms under Section 63, acknowledging only women as victims. Male and transgender victims of penetrative sexual assault, the continued retention of the marital rape exception reflects patriarchal assumptions about marriage and consent.

On the other hand, those who support the implementation of women-oriented legislations argue that women continue to suffer from much higher levels of violence, discrimination, and social vulnerability. According to this perspective, criminal protection laws are needed in order to address issues of structural inequalities and give women legal redress.

This research thus seeks to evaluate critically the ability of the Bharatiya Nyaya Sanhita in balancing modernization with equality and inclusion within the context of the constitution. This is done through an evaluation of the differences between the Indian Penal Code and the Bharatiya Nyaya Sanhita.

## RESEARCH OBJECTIVES

- To investigate the notion of gender discrimination within criminal law.
- To compare gender-related provisions in the IPC and the BNS.
- To determine if the BNS includes principles of gender neutrality.
- To assess the constitutional legitimacy of laws that differentiate sexual offences based on gender.
- To assess why male and transgender victims are excluded from rape laws.
- To examine the marital rape exception within the BNS.
- To examine different international approaches to gender-neutral criminal laws.
- To propose reforms aimed at achieving inclusive gender justice in India's criminal legal framework.

## RESEARCH METHODOLOGY

A doctrinal methodology is applied to conduct research for this study. The research primarily

makes use of secondary sources such as statutes, constitutional provisions, case law, journals, legal commentary, government reports, and comparative legal research materials.

Comparative analysis is performed between the IPC 1860 and BNS 2023 with regard to gender-based clauses. Constitutional interpretation is utilized to test whether gender-based criminal legislation complies with Article 14, 15, and 21 of the Constitution of India.

Comparative legal analysis is also conducted through the identification of gender-neutral criminal laws in jurisdictions such as the United Kingdom, Canada, Australia, and the United States. The purpose of comparative analysis is to identify alternative legislative frameworks that will promote inclusivity and victim protection.

## LITERATURE REVIEW

There has been a lot of attention paid to the subject of gender neutrality in Indian criminal laws in the last few years, particularly after the promulgation of the Bharatiya Nyaya Sanhita, 2023. The existing literature contains contradictory opinions concerning the necessity for gender-neutral criminal laws and the constitutional ramifications of gender-based legislation.

According to Arushi Bajpai and Akash Gupta, who conducted research on gender neutrality in the BNS, despite the fact that the new criminal laws aim at reforms, they maintain the gender-based structure of the Indian Penal Code. According to the authors, the rape laws still neglect the male and transgender victims, thus ensuring inequality before the law.

Devakumar Jacob conducts a similar analysis by exploring the problem of patriarchal assumptions inherent in the BNS. The author suggests that the marital rape exception is based on outdated conceptions regarding the concept of consent and the role of the husband and wife.

In Nikunj Kulshreshtha's analysis of gender inclusivity in India's rape laws, the researcher challenges traditional arguments opposing gender neutral laws. The author argues that gender neutrality does not jeopardize women's rights but is necessary for reaching equality guaranteed by the constitution.

A number of researchers have also noted the lack of sufficient safeguards for transgender people in India's criminal law. Since the ruling recognizing transgender rights in National Legal Services Authority v. Union of India, the literature has increasingly stressed the importance of addressing the needs of transgender victims in mainstream sexual offences legislation.

At the same time, feminist scholars criticize absolute gender neutrality in criminal legislation. According to them, women still experience structural inequality, economic dependence, and sexual violence. Therefore, women-centric protections remain an indispensable step towards equality.

As can be seen from the existing literature, the issue of gender neutrality in criminal law is very complicated. Even though academics may differ in their opinions about the kind of changes that are required, there is a broad agreement that Indian criminal law should evolve in line with the constitution.

## HISTORICAL DEVELOPMENT OF GENDER-BASED CRIMINAL LAW IN INDIA

Historically, Indian criminal laws were developed in a male-dominated culture, with women's role was regarded as dependents who need to be protected by law. The Indian Penal Code, originally drafted in 1860 from the perspective of colonial rule and imported Victorian beliefs about morality and sexuality, defined sexual offenses primarily by identifying men as the perpetrators and women as the victims. Therefore, rape and public outrageous conduct and sexual harassment were considered solely from a woman's viewpoint. Although these laws were established to protect women from sexual violence, they were also designed to maintain traditional gender roles.

Indian rape laws remained narrow and conservative for several decades. However, the emergence of feminist movements and outrage over sexual crimes eventually led to a change in the laws. The Mathura rape case became a watershed moment in the history of feminist legal activism in India. Criticism of the manner in which consent was defined by the judges led to a change in rape laws.

The case of the Delhi gang rape and murder in 2012 brought about considerable changes in the discussion regarding the safety of women and criminal justice reform. Recommendations made by the Justice Verma Committee included wide-ranging reforms to criminal law, such as widening the definition of sexual offences and recognizing marital rape. The Criminal Law (Amendment) Act, 2013 further introduced offences such as stalking, voyeurism, and acid attacks.

Despite these legal amendments, gender-specific language was retained to a large extent by legislators, where women continued to be victims in rape law and men, the perpetrators.

However, there have been considerable developments in constitutional jurisprudence related to gender and sexuality. Transgender persons were recognized as a third gender, and their rights to dignity and equality were protected by the Supreme Court of India in *National Legal Services Authority v. Union of India*. Consensual same-sex relations were also legalized in *Navtej Singh Johar v. Union of India*, and sexual autonomy became part of constitutional liberty.

These changes gave rise to the hope that the BNS would introduce gender-neutral criminal laws. But, according to many critics, the BNS is largely following the same gender approach of the IPC without making any substantial changes.

## COMPARATIVE ANALYSIS OF IPC AND BNS

One of the main objectives of this research paper is to compare the Indian Penal Code, 1860, and the *Bharatiya Nyaya Sanhita, 2023*, with the intention of measuring the level of modernization achieved through the latter legislation.

The BNS introduces a number of structural and procedural changes. Among other things, the legislation seeks to make language simple, remove colonialism from the language, strengthen provisions for organized crime and terrorism, and incorporate the use of technology in criminal law. The introduction of new crimes involving cyber and activities that threaten national sovereignty demonstrate the desire to modernize criminal law.

When it comes to gender-specific provisions, the extent of reform appears more limited.

## Definition of rape

Under sections 375 of the IPC and 63 of the BNS, rape is described using gender-specific language. The two sections recognize women as the victims while men are regarded as the perpetrators of the crime. As such, although the BNS replaced the IPC, there is little change in terms of the theoretical perspective of sexual assault.

The absence of rape laws based on gender neutrality continues to be among the most common criticisms level against the BNS. Legal interpretation of current constitutions is increasingly recognizing the fact that sexual assault may affect people irrespective of their gender orientation. However, male and transgender victims do not have similar recognition.

## Marital Rape Exception

This exception of marital rape has been maintained in the BNS as well. Despite the ongoing debates about the issue of consent in relation to autonomy of the body, there is a presumption of implied consent in marriages.

This shows that while the BNS modernizes many aspects of criminal law, it does not alter traditional assumptions concerning marriage and sexual relation.

## Transgender Protection

Transgender victims were not explicitly covered under the standard sexual offences in the IPC. It was expected that the BNS would adopt an inclusive drafting approach given that the constitution recognized the rights of transgender people. However, like the IPC, the BNS does not make any explicit provision for transgender victims in the rape laws.

Thus, the comparative analysis indicates that despite the reforms made by the BNS to the criminal laws, many gender stereotypes that existed in the IPC remain intact in the BNS laws.

## Stalking & Voyeurism

These offenses have been included within the IPC through the Criminal Law (Amendment) Act, 2013. The offenses are still under the BNS with the gender-specific language being largely similar.

While these laws address very genuine issues related to violence against women, it has been suggested that the laws ignore the possibility of such offenses against other genders.

## **GENDER-SPECIFIC SEXUAL OFFENCE PROVISIONS UNDER THE BNS**

### **Exclusion of Male Victims**

Omission of male victims from the law on rape is one of the most controversial aspects of criminal law in India. Men who suffer sexual violence may face social stigma and be ignored by the law.

In the past, the protection provided to victims of sexual violence under Section 377 of the IPC was inadequate since the crimes involved male victims. After *Navtej Singh Johar v. Union of India*, the law on sexual relations between men was amended, and consensual relations were no longer considered crimes.

Although this decision was an important victory for the Constitution, the problem of omission of male victims from rape laws remains. Male victims do not have adequate protection since the law does not make any special provisions regarding them.

There is no solution to this problem within the BNS. Penetrative sexual assaults committed against male victims remain unrecognized under current rape laws. These crimes can only be charged with other offenses.

These omissions lead to stereotypes that men cannot be victims of sexual violence. Such perceptions are contradictory to principles of equality and fail to consider the pain of the victim.

### **Exclusion of Transgender Victims**

With the Supreme Court recognizing the rights of transgender persons, there was hope for the criminal law to take a more inclusive route. However, the BNS continues to deny transgender persons the protection under the rape sections.

The Transgender Persons (Protection of Rights) Act, 2019 specifically penalizes any form of abuse committed against transgender persons. Yet, the punishments provided in the Act are far less stringent compared to the punishments available under laws related to rape of women.

## **Women-Centric Criminal Law**

Supporters of gender-specific legislation argue that women continue to be subjected to high rates of violence and discrimination in society. According to this perspective, the enactment of gender-specific laws is necessary for promoting equality and offering protection to the victims.

There have been reports of rampant cases of sexual violence, domestic violence, workplace harassment, and discrimination of women in India. For this reason, feminist scholars suggest that a complete neutrality in criminal law can threaten the very purpose of such legislation.

This discussion highlights the challenge faced in protecting women victims while also recognizing the plight of other victims.

## **MARITAL RAPE EXCEPTION AND CONSTITUTIONAL MORALITY**

One of the most controversial provisions in Indian criminal law is the marital rape exception provision. Like the IPC, the BNS exempts marital sexual violence from the scope of rape in certain circumstances.

The origin of the marital rape exception provision dates back to the patriarchal doctrine of common law, where wives were treated as inferior to their husbands. Marital union meant a state of irrevocable and perpetual consent to sexual intercourse.

Today, such assumptions are increasingly rejected by constitutional law. The right to control one's body, privacy, dignity, and personal liberty has been considered as an important part of Article 21 of the Constitution.

In the case of *Justice K.S. Puttaswamy v. Union of India*, the Supreme Court recognized the right to privacy and personal liberty. In the case of *Independent Thought v. Union of India*, the Court underlined the importance of protecting one's physical integrity in substantive relationships.

It has been argued that the marital rape exception violates constitutional principles of equality and dignity by denying married women equal protection as unmarried women.

On the other hand, critics of the proposed legal reform contend that the change will contribute to the misuse of the law and will affect the sanctity of marriage. There is also apprehension about difficulties in collecting evidence and wrongful allegations.

However, moral considerations in the constitution state that the concept of consent should not be ignored merely because of the marital relationship. Marriage does not amount to a license for overriding the body's sovereignty.

Therefore, the continued existence of the marital rape exception in the BNS amounts to a huge hindrance in modernizing Indian criminal law.

## CONSTITUTIONAL ANALYSIS

### Article 14 – Equality Before Law

Article 14 provides for equality before the law and equal protection of the law. Reasonable classification is required when classifying people through the laws made and should be rationally related to its purpose.

Those who favour women-centric laws justify such laws since women are subjected to violence more often and require safeguards. On the other hand, those who criticize women-centric laws state that the complete exclusion of mal and transgender victims from coverage is an act of discrimination.

Constitutional question in this case requires a balance between substantive equality of women and inclusivity of all victims.

### Article 15 – Prohibition of Discrimination

Article 15 prohibits discrimination on the grounds of sex but permits discrimination in favour of women and children under Article 15(3).

Legislation that pertains to women has traditionally been justified on the basis of “protective discrimination” aimed at overcoming structural inequality. However, modern constitutional interpretation has begun recognizing gender identity in ways that transcend the male-female dichotomy.

Recognizing the rights of transgender individuals means that criminal legislation must gradually move towards inclusiveness.

### Article 21 – Right to life and Personal Liberty

Article 21 ensures dignity, privacy, autonomy, and bodily integrity. Sexual violence is a direct violation of constitutional morality.

Not including some victims within the ambit of sexual offence laws might undermine the equality of recognition of their dignity and personhood.

Bodily autonomy must be protected by the state irrespective of gender identity.

## COMPARATIVE INTERNATIONAL PERSPECTIVES

There have been many countries that have adopted gender-neutral criminal laws without sacrificing the protection from sexual violence.

### United Kingdom

The laws in the United Kingdom are more inclusive in terms of sexual offenses. The Sexual Offenses Act recognizes many forms of assault and protects individuals of all genders under many provisions.

### Canada

In the criminal laws of Canada, there is no mention of gender in cases of sexual assault, and consent and bodily integrity are prioritized.

### Australia

The definition of sexual offenses in Australia is usually gender-neutral, with the main focus being on the absence of consent rather than gender.

### United States

There are many states in the United States where gender-neutral rape laws have been adopted by recognizing both men and women as victims.

Based on the above experience, it is clear that gender-neutral criminal laws can coexist with protective measures for women. Such laws provide good guidance for future reforms in India.

## CHALLENGES IN IMPLEMENTING GENDER-NEUTRAL LAWS

Despite the increasing demand for gender-neutral laws, several practical and sociological hindrances remain.

Firstly, women in India face persistent violence and discrimination. There are therefore fears that the use of gender-neutral language will undermine the measures that have been put in place to address the specific challenges faced by women.

Secondly, male victims of sexual violence tend not to report their experiences because of social stigma. This underreporting makes it hard to estimate the scale of the problem.

Thirdly, concerns over the potential abuse of the law remain at the forefront of the debate surrounding gender neutrality. Critics argue that widening definitions may result in an increase in frivolous accusations.

Fourthly, patriarchal ideas regarding gender and sexuality continue to dominate society. Legal reform alone is therefore inadequate; sensitization is also required.

Such difficulties illustrate the need for careful consideration when adopting a gender-neutral approach.

## SUGGESTIONS AND REFORMS

1. There needs to be a progressive shift towards using gender-neutral terminology instead of gendered language in sexual offenses cases in the Bharatiya Nyaya Sanhita while still maintaining greater protection for the victim.
2. Male and transgender victims of sexual abuse need to have equal rights as victims of rape as defined by the general rape laws.
3. There should be a review of the marital rape exception considering constitutional values such as autonomy, dignity, and consent.
4. Further procedural steps can be taken to avoid the misuse of criminal laws.
5. Training can be provided to police personnel, judges, and doctors on gender sensitivity regarding sexual violence.

There needs to be greater public awareness of sexual violence against all genders.

It is important to remember that legislative reforms need to be accompanied by societal change.

## CONCLUSION

The Bharatiya Nyaya Sanhita, 2023 has been a step towards updating and decolonizing criminal law in India. Various changes have been made in the process of reforming criminal procedures in order to address new forms of crime and improve the efficiency of the criminal justice system. As compared to the Indian Penal Code from 1860, the BNS can be considered as an attempt to modernize criminal law according to contemporary needs.

However, despite all these changes, there are still significant problems regarding gender discrimination and lack of gender-neutral clauses. Gendered definition of rape, lack of recognition of the experiences of transgender people, and the presence of marital rape exemption prove that the BNS did not solve all the problems with gender-related aspects of criminal law.

It should also be noted that the reason for creating criminal laws related to women was the violence that they had to endure. Women in Indian society still face discrimination, violence, and socially unfair conditions. Therefore, any changes made in order to introduce more inclusivity should not undermine their rights and privileges.

The problem for Indian criminal law is not only a matter of choosing between gender-specific laws or gender-neutral laws. Rather, what ought to be pursued is a balance that protects the traditionally vulnerable but does not forget the dignity of every victim irrespective of their gender.

Constitutional equality requires that harm based on bodily autonomy and consent, and not mere gender, be recognized by law. Indeed, it is time for criminal law to break out of its either/or paradigm and provide equality of dignity and justice to every person.

It is for this reason that even though the Bharatiya Nyaya Sanhita represents a considerable step forward in the modernization of criminal law compared to the IPC, further improvements remain necessary for gender inclusiveness and constitutional equality.

## AUTHOR'S NOTE

In this paper, the issue of gender discrimination under the Bharatiya Nyaya Sanhita, 2023, is analysed critically through a study of constitutional interpretation, comparative law, and concepts of gender justice. The aim is to strike a balance between the need to protect women against violence and recognizing the growing necessity to include all victims of discrimination, irrespective of their gender identity.

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