
TOWARDS GENDER-INCLUSIVE CRIMINAL JUSTICE SYSTEM IN INDIA: A CRITICAL ANALYSIS OF THE BHARATIYA NYAYA SANHITA, 2023

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ABSTRACT

The Bharatiya Nyaya Sanhita, 2023, is a major change in the framework of Indian criminal justice system as it was introduced as a replacement to the Indian Penal Code, 1860. Despite the aim of modernising and transform the old criminal law, the issue of gender neutrality is still under-addressed in a number of substantive provisions. This study critically examines the extent of accommodation of the principles of equality and broader criminal justice framework in the Bharatiya Nyaya Sanhita, 2023 with specific reference to men and transgender persons. The study examine constitutional guarantees under Articles 14, 15 and 21 of the Constitution of India and evaluates the compatibility of the continuity of gender specific offences under new legislation with the modern notions of equality and justice. The paper also discusses provisions on sexual crimes, domestic violence, cruelty and crimes related to dowry, and also highlights the current status and exclusion of male and transgender victims from many legal provisions. Although Judgement which transform the perspective of transgender such as NALSA v. Union of India and Navtej Singh Johar v. Union of India have emphasised constitutional morality, dignity and inclusiveness. After all these judgments, many provisions under the Bharatiya Nyaya Sanhita still reflect a binary understanding of gender. This article, through doctrinal and analytical methods, explores recent discussions on the misuse of gender-specific laws, false implication, and the legal invisibility of transgender victims in criminal proceedings. The report concludes that real reform must include the use of gender-neutral language, that all victim categories must be recognised and that safeguards must be built in to prevent abuse, while maintaining real protections for vulnerable groups. The study ultimately express for a wider criminal jurisprudence that is able to respond to changing social realities in India.

Keywords: Gender Neutrality, Bharatiya Nyaya Sanhita, 2023, Criminal Jurisprudence Transgender Rights, Constitutional Equality, Criminal Justice Reform.

1. Introduction

The enactment of the *Bhartiya Nyaya Sanhita, 2023* (hereinafter “BNS”) marked a watershed moment in the revolution of Indian criminal justice system. Whole idea as a comprehensive overhaul of the old colonial-era Indian Penal Code, 1860 (IPC), the BNS has come to modernise and rationalise the Main criminal law. In this modern era and by 21st century Gender neutrality is a fundamental requirement of developed and modern democracies. However, in the context of gender justice and neutrality, which should be as that laws neither feels privilege to anyone nor discriminate anyone based on gender, the BNS represents both progressive step and significant continuities with the previous old law that was IPC. This research critically evaluates whether the BNS has indeed moved towards a balanced, gender-neutral criminal jurisprudence or whether it has perpetuated gender-specific biases inherent in the earlier erstwhile legal framework.

1.1. Constitutional and Courts mandate on gender neutrality

The concept of gender neutrality in criminal law basically comes from constitutional guarantee of equality under constitution of India which empowers and protect us through Article 14 which enshrined equality before law and prohibits all kind of discrimination based on gender Although Article 15(3) permits special provisions for women and children, the evolution of jurisprudence emphasises that such provisions must be reasonable, justified by compelling state interest, and not result in reverse discrimination. The jurisprudence of the Supreme Court in *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1, reinforces that protective discrimination must withstand the test of reasonableness and not perpetuate archaic gender roles. And in *NALSA v. Union of India*, (2014) 5 SCC 438, the Supreme Court held that gender identity is a fundamental component of dignity, personal liberty and self-expression under Articles 14, 19 and 21 of the Constitution. The Court noted that “the recognition of one’s gender identity is at the heart of the fundamental right to dignity.” Similarly, in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, the Supreme Court stressed on the ideas of constitutional values, transformational constitutionalism and individual dignity while protecting the rights of sexual minorities. These judicial reforms reflect a constitutional move away from rigid gender binaries towards a more inclusive understanding of equality and personal liberty, requiring criminal laws adapted to the rights and limitations of everyone.

2. Gender-Specific Provisions in BNS: A Critical Analysis

2.1. Sexual Offences

In the BNS, one of the important provisions from the old law IPC is evident in the provisions relating to sexual offences. “Section 63 of the Bharatiya Nyaya Sanhita (erstwhile Section 375 of the Indian Penal Code, 1860), defines the offence of rape with a gender-specific framework, defining women as victims and men as perpetrators”. The retention of this binary, despite societal and judicial recognition of male and transgender victims of sexual assault, underscores a legislative decision to embrace a truly gender-neutral approach. The Hon’ble Supreme Court held in *NALSA v. Union of India*, (2014) 5 SCC 438, which recognized the rights and identity of transgender persons, highlighted the need for inclusive laws. Yet, the BNS remains silent on this point.

After the offence of rape under Section 63, the Bharatiya Nyaya Sanhita, 2023, retains several other sections concerning sexual offences which state to represent as it was in old Criminal law, which was largely based on gender-specific legislative framework. A significant example is Section 69 of the BNS, which criminalises sexual intercourse gained by ‘deceitful means’ such as false promises of marriage, employment, or promotion, or concealment of identity. Unlike the former judicial approach under Section 375 of Indian Penal Code read with Section 90 relating to consent gained under mistake of fact, the BNS adds a separate statutory crime for sexual intercourse induced by deception. However, the clause is limited exclusively to sexual intercourse with a woman and does not afford male victims the same statutory protection. While the provision attempts to maintain the sanctity of free and informed consent in intimate relationships, its gender-specific phrasing raises constitutional problems on equality and inclusiveness under Articles 14 and 21 of the Constitution. Moreover, in the light of *Navej Singh Johar v Union of India*, (2018) 10 SCC 1, where the Supreme Court emphasised on constitutional values, sexual autonomy, dignity and rights of sexual minorities, absence of a comprehensive gender-neutral scheme for sexual offences under the BNS is a major legislative gap. The gendered victim-perpetrator categories persist, which shows that the shift from the Indian Penal Code to the Bharatiya Nyaya Sanhita is not totally in sync with the emerging constitutional vision of an broader criminal justice framework.

2.2. Domestic Violence and Abuse

The Bharatiya Nyaya Sanhita, 2023, mostly follows the structure of the previous Section 498A

of the Indian Penal Code, with Section 85, that criminalises cruelty by the husband or his relatives against a married woman. The provision remains a gendered legislative approach, recognising exclusively women as victims and limiting the category of perpetrators to the husband and his kin. The legal purpose of the provision is based upon the historical and social realities of domestic violence, matrimonial cruelty and harassment in relation to dowry encountered by women in patriarchal societal set up. But the exclusion of male victims, transgender persons and persons in non-heteronormative relationships still throws up significant constitutional problems concerning equality, inclusion and equal treatment of laws under Articles 14 and 21 of the Constitution of India.

This question becomes all the more pertinent in the context of the developing constitutional law that recognises gender identity and sexual orientation as vital to dignity and personal autonomy. However, whereas the State has a legitimate interest in enacting protective legislation for disadvantaged groups under Article 15(3), such protection must satisfy the test of reasonableness and should not be employed to entrench strict gender stereotypes or to bring about reverse discrimination. The judicial concern with the exploitation of the matrimonial cruelty laws is also shown in the rulings like *Rajesh Sharma v. State of U.P.*, (2017) 11 SCC 192, whereby the Supreme Court has taken note of the instances of mechanical arrests and misuse of Section 498A IPC. The Court, however, did not reduce the need for legal protection for genuine victims but pointed out the need for Legal safeguards to avoid arbitrary implication of the accused. In this sense, the retention of a strictly gender-specific framework under section 85 of the BNS is indicative of the continued legislative preference for a protection-oriented paradigm over a wider legal recognition to domestic abuse jurisprudence.

2.3.Dowry death

Likewise, Section 86 of the *Bharatiya Nyaya Sanhita, 2023*, largely reproduces the offence of dowry death as it was included under Section 304B of the Indian Penal Code. The provision makes it a crime to kill a woman by burns, physical injury or otherwise than under normal circumstances during seven years of marriage if it is proved that she was subjected to cruelty or harassment in connection with dowry demands. However, the crime continues to be constructed within a gender-specific structure which recognises only women as victims of dowry-related-violence.

No doubt the dowry related offences are a serious societal problem and have adverse impact

on women in India and thus demand harsh criminal legislation. Contemporary discussions on gender neutrality in criminal law, however, have raised ever more questions about whether absolute gender-specific categories accurately portray current social reality. The need to balance protection of victims with protections against exploitation has sparked judicial and scholarly conversation in instances of charges of abetment, mental harassment and misuse of matrimonial laws against males and their family members. Although the constitutional validity and social necessity of the anti-dowry laws have been consistently upheld by the courts, concerns remain over the selective application, presumptive bias and the absence of legal recognition to male or transgender victims subjected to analogous forms of domestic coercion or abuse. Thus, the continued use of gender-specific expressions in section 86 indicates the legislature's conservative approach towards criminal justice reform in sensitive socio-cultural areas.

3. Example of Gender-Neutral Attempts

Although most of gender-specific offences have been copied as it is, but in this New Law Bharatiya Nyaya Sanhita, 2023, does have several legal provisions that try to demonstrate a trend towards more gender neutral laws. An important example is section 143 on trafficking of persons, which employs comparatively broad and gender-neutral language by recognising that victims of trafficking might be of any gender. The trafficking provisions of the BNS, in contrast, depart from traditional provisions that are largely constructed around female victimhood and acknowledge the multidimensional nature of exploitation that can be in the form of forced labour, slavery, servitude, sexual exploitation and organ removal affecting persons regardless of gender identity.

Hence, the broader language of the legislation is more in consonance with the constitutional principles laid down by the Supreme Court in *NALSA v. Union of India*, (2014) 5 SCC 438 and *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 to the effect that dignity, autonomy and inclusiveness are to be viewed within the framework of the Constitution. However, despite these progressive features, the BNS does not take a gender-neutral approach across all types of offences. The inclusion of gender-neutral laws together with rigidly gender-specific offences leads to legal inconsistencies in the criminal justice system. Consequently, the BNS is not achieving much progress in the adoption of an broader criminal justice framework but fails to develop a comprehensive gender-neutral penal architecture that can cater to the rights and

vulnerabilities of all persons irrespective of gender identification.

4. Recent Controversies and Case Studies Concerns about Abuse of Matrimonial and Sexual Offence Laws

In recent years, the discussion on the gender neutrality in criminal law has become more prominent. The courts become more concerned about the misuse of several gender-based criminal provisions. While laws regarding sexual offences and matrimonial cruelty were enacted with the proper intent of protecting women from institutionalised violence and discrimination, courts have in many cases recognised situations where these provisions have been invoked in a manner not consistent with the legislative purpose.

In *Rajesh Sharma v. State of Uttar Pradesh*, (2017) 11 SCC 192, the Supreme Court noted the increasing trend of implicating all family members in proceedings under Section 498A of the Indian Penal Code (IPC) without proper first inspection. The Court noted that the provision may be misused leading to unwarranted arrest and protracted criminal litigation which affects the rights and dignity of the accused. The Court subsequently underlined that the clause itself is constitutionally vital for the protection of women, but the judgement stressed the necessity for procedural protections to prevent arbitrary prosecution.

Similar concern was expressed by the Supreme Court in *Social Action Forum for Manav Adhikar v. Union of India*, (2018) 10 SCC 443, wherein the Court observed that although the misuse of criminal provisions cannot be a ground to dilute the statutory protection available to the genuine victims, the criminal justice process must, however, ensure fairness, objectivity and protection against mechanical prosecution. These rulings indicate a growing judicial appreciation that the success of criminal law rests not only on harsh penal provisions, but also on fair inquiry and proportionate application.

4.1.False Dowry Harassment Allegations

In *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273, the Supreme Court noted that “the increasing misuse of Section 498A IPC and cautioned against automatic arrests in matrimonial disputes”. The Court observed that “unnecessary arrests not only violate personal liberty under Article 21 of the Constitution but also contribute to misuse of criminal law as an instrument of harassment”. Consequently, the Court issued guidelines directing police authorities to exercise

restraint and conduct proper investigation before making arrests in offences punishable with imprisonment up to seven years. The judgment remains a significant authority on the principles of procedural fairness and proportionality in matrimonial offences.

4.2 Transgender Rights and the Limitations of Existing Sexual Offence Laws

Another significant dimension of the gender neutrality debate concerns the limited recognition accorded to transgender persons within the framework of criminal law. The Supreme Court in *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438, “formally recognized transgender persons as a “third gender” and affirmed that gender identity forms an essential part of dignity, autonomy, privacy, and personal liberty under Articles 14, 19, and 21 of the Constitution. The Court emphasized that constitutional protections cannot be confined within orthodox binary notions of gender and that transgender individuals are equally entitled to protection of law and equal citizenship”.

The constitutional position was more strengthened in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, “wherein the hon’ble Supreme Court decriminalized consensual same-sex relations and reaffirmed the principles of constitutional values, dignity, privacy, and individual autonomy”. The judgment marked an important shift towards a more inclusiveness of constitutional values of gender and sexuality. However, despite these progressive constitutional developments, the substantive framework governing sexual offences under the Bharatiya Nyaya Sanhita, 2023, continues to retain predominantly gender-specific formulations in several provisions relating to rape, sexual assault, and matrimonial offences.

5. Constitutional and Judicial interpretations on Gender Neutrality

From a constitutional viewpoint, “the principles of equality before law under Article 14 and protection against discrimination under Article 15 require that criminal legislation operate in a fair, reasonable, and non-arbitrary manner. At the same time, the constitutional framework also permits the State to enact protective measures for historically disadvantaged groups under Article 15(3)”. The challenge, therefore, lies in striking an appropriate balance between protective discrimination and real equality without perpetuating stereotypical assumptions regarding gender roles, victimhood, or perpetration. Judicial interpretation has expressed the importance of constitutional values, dignity, and gender-neutral within criminal justice system. So, In *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1, “Hon’ble Supreme Court

cautioned against legislative measures has tangled with the patriarchal thought of gender specific protection. Similarly, in *NALSA v. Union of India*, (2014) 5 SCC 438, and *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, hon'ble "Supreme Court held constitutional protection beyond binary consciences of gender and sexuality, thereby reinforcing the principle that dignity and equality must extend to all individuals irrespective of gender identity or sexual orientation". These judicial developments collectively indicate a gradual constitutional movement towards a more inclusive understanding of criminal justice and equal protection under law.

6. Missed Opportunities under the Bharatiya Nyaya Sanhita, 2023

Although the Bharatiya Nyaya Sanhita, 2023, was introduced as a major legislative change of India's criminal law framework, the legislation substantially retains the gendered structure of the erstwhile Indian Penal Code in several core areas relating to sexual offences, matrimonial cruelty, and dowry-related crimes. While the Act add some progressive and modernising element of legal framework, but it does not comprehensively reviewed the wider question of gender neutrality within criminal justice system.

The legislative approach have some legislative hesitation and a general preference for continuity in areas perceived to involve long-standing social problems. However, by failing to reformed it, not address the changing constitutional interpretation which require: gender identity, inclusiveness, and equal legal protection so, the BNS arguably represents a missed opportunity to reformed a more neutral and modern criminal justice framework. The continued reliance upon old gender classifications may in certain circumstances, undermine the constitutional objective of actual equality and fail to adequately address the realities of male and transgender victimization.

7. Recommendations and the Way Forward

A real meaningful reform in criminal justice system requires a reformative and balanced legislative approach that neither dilute basic protections for vulnerable groups nor ignore the emerging problems of gender diversity and misuse of legal provisions. A comprehensive analysis of gender-specific offences under the Bharatiya Nyaya Sanhita should therefore be undertaken with the objective of analysing whether some legal provisions may be reformed through gender-neutral language and definition while preserving safeguards for historically

suppressed victims.

The acceptance of gender-neutral terminology in gender-specific offences, recognition of male and transgender victims within the legal framework of sexual and domestic violence laws, and also incorporation of legal safeguards against wrongful prosecution would help towards strengthening public confidence in the criminal justice system. Simultaneously, With due care reforms must ensure that the objective of protecting women from structural violence and discrimination is not weakened under the guise of Gender- neutrality.

Further, institutional sensitization are much needed. Judicial officers, police authorities, prosecutors, and investigative agencies must receive comprehensive training regarding gender sensitivity, constitutional values, and the rights of transgender and gender-diverse individuals. Other than their personal biases more reliance upon evidence-based investigation, procedural fairness, and victim-sensitive adjudication can help foster a criminal justice system that is both inclusive and constitutionally consistent.

8. Conclusion

The Bharatiya Nyaya Sanhita, 2023, generally comes with many changes and represents a significant legislative milestone in the evolution in Indian criminal justice framework. Nevertheless, the legislation fails to fully implementation of the principle of gender neutrality within criminal jurisprudence. The persistence of gender-specific provisions, despite evolving constitutional values and changing social realities, reflects the continuing tension between protective legislation and the constitutional objective for real equality.

A genuinely a gender-neutral criminal justice system must move beyond rigid orthodox binary concept of gender and acknowledge that vulnerability, victim and abuse are not limited to a specific gender category. At the same time, any movement towards gender neutrality must remain sensitive to the social inequalities and social realities that continue to disproportionately affect women. The future of Indian criminal jurisprudence, therefore, lies not in the abandonment of protection-based laws, but in the development of a more liberal, inclusive, and constitutionally balanced framework capable of protecting the dignity and equality of all individuals regarding of their gender. The journey towards such a Legal framework remains a constitutional and legislative endeavour which require sustained judicial interpretation, legislative enactment, and societal dialogue.

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