
PROTECTIVE DISCRIMINATION OR LEGAL STEREOTYPING? REVISITING GENDERED CRIMINAL LAWS IN INDIA

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ABSTRACT

There exists a widespread social presumption that women are the default targets of sexual offences while the man are the natural perpetrators. This stereotype has also been codified under the Indian criminal law. the Bhartiya Nyaya Sanhita 2023, and even its predecessor Indian Penal Code, majorly protect women from sexual violations, leaving adult male and transgender survivors without explicit statutory relief. This female-centric approach against combating sexual offences conflict with the constitutional commitments to equality, dignity and non-discrimination as well as the international human rights norms. This paper critically examines BNS provisions related to sexual offences, contends that patterns of perpetration do not justify excluding other victims and proposes legal social and institutional reforms to move forward towards a gender neutral inclusive legal framework.

Keywords: Sexual offences, gender- neutrality, Bhartiya Nyaya Sanhita, gender bias

Introduction

The ultimate aim of any legal system is welfare of the society. The Indian legal system has long accorded special provisions (maintenance, job benefits, and reservation) in favour of women on the basis of historical and contemporary socio-economic disadvantages. Those relaxations have been awarded in order to restore substantive equality between the two sexes and found legal legitimacy under the provisions of Article 15 of the Constitution of India. The inclusion of Article 15(3) in the Constitution serves as an acknowledgment of the fact that women require different treatment than their male counterparts and for that purpose, protective discrimination is needed. This conception is also reflected in our criminal laws wherein only a woman is presumed to be in a vulnerable position and is granted protection against certain crimes. However, this generalisation somewhere solidifies the gender stereotypes wherein women is considered weak and in constant need of protection rather than being an autonomous right bearer. It also remains to be seen that how far these laws were able to achieve their intended objectives of social justice. One of the most debated consequences of women-centric criminal provisions is the widespread allegation of misuse, particularly with laws such as Section 498A Indian Penal Code (now, S.85 of Bhartiya Nyaya Sanhita) which many women have invoked not as shields against genuine harm but as weapons in matrimonial disputes, property conflicts, or custody battles. The misuse of such favourable laws by women as a tool for revenge has even been labelled as “legal terrorism” by the Supreme Court of India¹. This paper primarily focuses on the analysis of gendered language used in relation to sexual offences under Bhartiya Nyaya Sanhita and its social and legal implications.

1. *Sushil Kumar Sharma v. Union of India*, (2005) 6 SCC 281.

Analysing Gender Bias in BNS

The Bhartiya Nyaya Sanhita (BNS) 2023 was introduced to replace and modernize the 164-year-old Indian Penal Code (IPC) consolidating and updating substantive criminal law to reflect contemporary crimes and aligning penal laws with present social realities. However, despite the promise to reform, the BNS largely inherits gendered framework of the Indian Penal Code in relation to sexual offences. All sexual offences are placed under Chapter V of BNS which is titled as “Offences against Women and Child” and the text predominantly speaks of male as an offender and woman as a victim. It essentially reproduces the Victorian morality embedded in the colonial era IPC—a morality based on patriarchal assumption of female chastity and male dominance. In this respect, while the law has been linguistically and structurally updated, it still reflects 19th century notion of gender and sexuality, raising doubts about whether the reform genuinely embodies “modernisation” in substance. This can be ascertained by a brief analysis of provisions under Chapter V.

Offence of Rape

The Nirbhaya gang rape was a deeply tragic event² yet the legal reforms that followed failed to draw the most important lesson— that rape is fundamentally a violation of human dignity, bodily autonomy and integrity, irrespective of gender. Instead of criminalising the act as an offence against a human body, the law continued to emphasize on gender binaries, creating a biased legal framework that extended protection only to women in heterosexual encounters, while excluding non-heteronormative sexual violence. Ironically, even the Justice Verma Committee report which formed the basis of 2013 amendment, recommended covering all genders as potential victims of rape. Yet, BNS which was introduced a decade later, failed to take note of these progressive recommendations. BNS S.63 essentially replicates IPC S.375’s wording: it defines rape as “a man... penetrates his penis... into... the vagina, mouth, urethra or anus of a woman” under specified circumstances. One of the defining elements of rape remains penetration in a heterosexual context, excluding the lived realities of male, transgender, and non-binary victims.

Judicial interpretation has also reinforced this gender bias. In *Priya Patel V State of M.P.*³, the Supreme Court analysed the question of whether a woman could be prosecuted for the offence of rape, either as a principal or an accomplice. The court held that rape could only be committed by a man, thereby supporting the gender-biased patriarchal foundation of the law and excluding women from the ambit of potential perpetrators, even in the cases of gang rape.

Historically, coercive male-on-male intercourse was dealt with under *Section 377 IPC* as an act “against the order of nature.” The flaw lied in its amalgamation of non-consensual assault with consensual homosexual relations. However, this was remedied by the Supreme Court of India in 2018 in the case of *Navtej Singh Johar v. Union of India*⁴, wherein the Court decriminalized consensual homosexual acts by reading down Section 377. But unlike S. 375, there was no provision for death sentence neither there was any minimum sentence. By contrast, the Criminal Law (Amendment) Act, 2018 added rigor to the already stringent punishment for rape under *Section 376 IPC*. This disparity underscores how male sexual

2. “What happened on the night of 16th December 2012?”, available at <http://ibnlive.in.com/news/delhi-gangrape-what-happened-on-the-night-of-december-16-2012/420729-3-244.html>; (last visited at 7 July, 2025)
3. (2006)6 SCC 263
4. AIR 2018 SC 4321

victimisation has never been given the same footing as female victimisation and has been treated as a lesser violation.

Section 377, despite its flaws, was the only provision under IPC that could be invoked to punish *non-consensual male-on-male sexual assault*. Sadly, BNS completely erased this provision without giving any alternate legal recourse. With its removal, male and transgender victims are left without a specific penal remedy, since rape under *Section 375 IPC* remains restricted to women as victims, even in BNS.

Interestingly, legislators themselves tacitly acknowledged that sexual violence is not gender exclusive. This recognition is evident in the Protection of Children from Sexual Offences Act 2012 which criminalises sexual assault against children, irrespective of their gender. Even the perpetrator can be both male as well as female. Ironically, the same 17-year-old boy who can be assaulted by a woman, becomes immune from sexual violence the moment he turns 18.

Outraging the modesty and Insulting the modesty of a woman

S.74 of BNS provides that “an assault or use of criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty”, constitutes an offence under this section. On the other hand, as per Section 79 of the Sanhita, “any word, sound, gesture, exhibition of an object with the intention that such words or sounds shall be seen by the woman or that such gesture or object will be seen by her or commits any act which shall be taken by the women as intrusion on her privacy, is said to insult her modesty”. Both sections basically replicate the text of sections 354 and 509 respectively. Even the punishments are kept the same.

It is crucial to note that IPC as well as BNS protect a woman's modesty. In our culture, a woman's modesty, especially in relation to her sexual dignity, is held in high regard. Therefore, this clause punishes the same when it is violated. However, the concept of a man or a non-binary person being modest is not even considered. The law assumes only women possess “modesty” worth protecting, reinforcing the stereotype that women’s sexuality is tied to honour while men are “immune” to such violation. This supports the patriarchal assumption that men or transgenders cannot be sexually violated in ways that harm their dignity. The lawmakers missed the chance to rectify the shortcomings of the IPC and address the problems faced by all genders.

The term “modesty” is another issue that highlights the section's gender specificity. Courts have repeatedly struggled with defining “modesty” but consistently applied it only to women. According to some, modesty refers to the sexual quality that sets women and men apart⁵. This emphasises how a woman's virtue is determined by her sexuality and that sexual virtue is precious. BNS while trying to become more modernised and individual right-centric, still protects the age-old societal stereotypes.

Sexual Harassment

As a result of the Criminal Law (Amendment) Act 2013, sexual harassment became a distinct offence under the provisions of IPC. No doubt, the intent behind Section 354A was well-thought, and by making it a separate offence, the legislature and society as a whole acknowledged that “she” faces sexual harassment on a daily basis. The most important thing to

5. “Offences against women”, available at: [https://blog.ipleaders.in/offences-against-women/#:~:text=Outraging%20the%20Modesty%20of%20Women%20%5BSection%20354%5D,to%20female%20decency%20and%20dignity](https://blog.ipleaders.in/offences-against-women/#:~:text=Outraging%20the%20Modesty%20of%20Women%20%5BSection%20354%5D,to%20female%20decency%20and%20dignity;); (last visited at 7 July, 2025)

note is that in this offence, the act must be done by a man against a woman⁶. This indicates that legislature requires a gender-specific conduct to make it culpable and punishable. BNS in S.75 reproduces the four actions listed in IPC S. 354A (unwelcome physical contact, demands for sexual favours, unwanted pornography, or sexual remarks). The statute takes only males as perpetrators and females as victims, still ignoring the presence of third gender altogether, even though they might be the most vulnerable to sexually coloured remarks targeting a person's sexual orientation, such as being gay or lesbian. BNS despite including third gender under the definition of "gender", it continues to neglect their presence in public spaces or at workplaces.

However, a step towards gender justice was made in 2018 with the ruling in *Anamika v. Union of India*⁷, which stated that even if the victim is a transgender person and not a conventional woman, a First Information Report under section 354A must be filed. But it's important to note that this decision was not made on the merits because, despite several court orders, the state government did not present any arguments.

Stalking

The offence of stalking was first codified in Indian criminal law in 2013 with the insertion of Section 354D IPC, through the Criminal Law (Amendment) Act, 2013. Although the provision was introduced in response to growing concerns about harassment particularly through technology and social media, its language remaining consistent with the rest of the 2013 amendment- framed entirely within heteronormative and patriarchal lens. The section recognised stalking only in terms of a man pursuing a woman thereby reinforcing the assumption that only women can be victims of persistent unwanted advances and only man can be perpetrators. This not only excludes man but also entirely disregards the possibility of stalking in same-sex relationship or by persons of diverse sexual orientations and gender identities. BNS has replicated the language used in this section.

Such framing is difficult to justify in the technological age. Digital tools of harassment are neutral in design and accessible to all, irrespective of gender or sexual orientation. By artificially restricting the provisions to a male female dynamic the law gendered the misuse of technology, treating it as if harassment through electronic means is uniquely a heterosexual problem. A more rational approach would have been to draft a gender-neutral provision that focuses on the abusive conduct itself, rather than the sex of the parties involved. The main objective to bring S.354D was to effectively address the core mischief—persistent, unwanted, and intrusive pursuit through communication or surveillance— remains to be fulfilled due to regressive framework of the section, narrowing the protection to women alone and perpetuating the patriarchal assumption that only women's autonomy and privacy merit safeguarding in the context of harassment. The text of the offence has not been suitably updated to reflect digital realities. A few legislative changes could have ensured comprehensive coverage of online abuse without reproducing gender stereotypes.

Other Offences

BNS in Section 76 penalises assault or use of criminal force to disrobe a woman while in Section 77, it penalises Voyeurism, i.e., *"Whoever watches, or captures the image of a woman engaging in a private act... or disseminates such image... shall be punished..."*

6. I'm a Man Who Was Sexually Harassed by a Woman, available at: <http://time.com/4772182/sexual-harassment-workplace-women-men/> (last visited on July 3, 2025)

7. W.P.(CRL.) 2537/2018

Sections 76 and 77 mark partial progress by making the offender gender neutral through the use of the term “whoever” but the victim remains exclusively female. This duality exposes the legislatures unwillingness to detach sexual offences from patriarchal notions of women's vulnerability instead of embracing genuinely gender-neutral autonomy-based framework. The framing reinforces the stereotype that modesty/privacy violations are women's issues, tied to protecting female honour, rather than recognising bodily autonomy for all humans.

The Indian Penal Code, drafted under colonial rule, was heavily influenced by Victorian morality. Women were viewed in terms of sexual purity, and violations of that purity were seen less as offences against the woman herself and more as injuries to her family's honour. Even the later amendments in IPC reflected this ideology. Sadly, the situation did not change much by the introduction of BNS. Section 72 of the BNS 2023 retains the approach used in S.228A IPC, continuing to exclude male and transgender survivors of sexual assault from privacy safeguards. This reflects how the law, while progressive in intent, still reinforces patriarchal notions of protecting female “honour” and societal perception rather than ensuring a universal right to privacy and dignity for all survivors.

S.84 apparently protects a married woman (identified only as “the wife of any other man”) and criminalizes others for leading her into “illicit intercourse.” By tying the woman's identity to her husband and forbidding her extramarital sexual activity, the text treats the wife not as an autonomous individual but primarily as an appendage of her husband. The section's aim is not to protect the woman's interests or consent, but to shield the husband's conjugal “rights.” Critiques note that provisions like this “consider women to be passive victims and reinforce the rightful property of their husband or other patriarch in the family” In other words, the law's very wording presumes a husband's ownership of his wife and sees violations of that ownership (through adultery or elopement) as the real injury. The language assumes the married woman is a passive party, easily “enticed” or “taken away” by others⁸. It does not acknowledge her own desires or agency. Even if she were a willing participant in leaving her husband, the act is automatically labelled “illicit” and criminal because of her marital status. Critics note that Section 84 is “husband-centric”

BNS S.69 is a new offence with no direct IPC analogue. It makes it illegal for a person who “by deceitful means or by making promise to marry a woman without any intention of fulfilling the same, [to] have sexual intercourse with her”. Importantly, the provision is gender-specific: it only applies when the deceived party is a woman. The offender is whoever does this (implicitly a man, given the context), and the victim is “a woman” (It even clarifies that “deceitful means” include false promises of marriage, employment, etc.). Unlike the IPC, which relied on judicial interpretation of consent under S.90 and S.375, the BNS now expressly codifies what was previously treated as “rape-by-fraud.” However, the provision is explicitly gendered: it applies only when a woman is the victim, thereby presuming the offender to be male. By excluding male, transgender, or same-sex victims of similar deceit, Section 69 reflects continuity with colonial-era morality, prioritising protection of women's chastity and marriage prospects over a gender-neutral right to sexual autonomy.

It is deeply problematic that both Indian law and society persist in assuming that victims of sexual assault can only be women, while social realities suggest otherwise. The People's Union for Civil Liberties–Karnataka (PUCL-K), in its study of the living conditions of the transgender

8. Legal perspective of gender equality in India: a critical analysis, *available at*: <https://shodhganga.inflibnet.ac.in/handle/10603/10227> (last visited on July 12th, 2025)

community in Bangalore, revealed that this minority remains highly vulnerable to sexual and physical abuse⁹. Instances of brutal violence, such as beatings, threats, disfigurement by acid bulbs, and systemic social exclusion, were recorded. Their bodily integrity and sexual privacy are routinely violated, yet existing criminal law does not even recognise *transgender victimisation* as a distinct offence. This lacuna underscores the urgent need for the adoption of truly *gender-neutral* criminal laws.

Concept of Gender-neutrality

The term "gender neutral" is defined by the Oxford Dictionary as an adjective that is appropriate for, relevant to, or shared by both male and female genders¹⁰. It outlines the notion that laws, language, and other social institutions should not assign people to specific roles based on their sex or gender and places emphasis on the equal treatment of men and women in all areas of the law without discrimination. It envisages a certain form of society in which real equality will be created without harming any particular gender. A truly gender-neutral law is one that neither specifies the gender of the perpetrator nor that of the victim, making its application universal. In other words, regardless of gender, these apply to anybody who commits a crime.

There can be two major perspectives on Gender Neutrality in penal laws:

- i). Victim
- ii). Perpetrator

The BNS, like the IPC, continues to assume that the perpetrator of most sexual offences is a "man", while the victim is a "woman." Even newer offences like deceitful intercourse (S. 69) continue this male–female binary: the offender is implicitly male, the victim explicitly female. Certain less serious sexual offences under BNS (like Section 76 – voyeurism and Section 75 – disrobing) use the word "*whoever*", which makes the provision technically gender-neutral as to the perpetrator. On the other hand, core sexual offences (like rape) remain to be gender specific. The BNS essentially entrenches the stereotype of men as aggressors and women as passive victims in serious sexual offences. True neutrality would mean recognising all genders—male, female, and transgender—as potential perpetrators as well as victims, thereby aligning the law with lived realities and principles of equality.

Challenges in making sexual offences gender neutral

Gendered Expectations and Patriarchal Pressures

Studies show that both men and women experience unwanted sexual behaviour. However, patriarchal norms pressure men into silence. Fear of being seen as "unmanly" or homosexual compels them to accept advances. Weakness in men is often equated with failure, reinforcing

9. Legal Safeguards for Transgenders from Sexual Offences: The Need of the Hour, available at: <https://www.scconline.com/blog/post/2021/10/01/legal-safeguards-for-transgenders-from-sexual-offences/> (last visited on 3 July, 2025)

10. Definition of gender-neutral adjective from the Oxford Advanced American Dictionary, available at: https://www.oxfordlearnersdictionaries.com/definition/american_english/gender-neutral (last visited on July 1, 2025)

harmful stereotypes. Women too, sometimes reinforce patriarchy through what Kamla Bhasin terms “paternalistic domination,” wherein systemic oppression is normalised through cultural indoctrination, deprivation, and social conformity.

Harmful Sexual Stereotypes

The persistence of stereotypes such as *men are always willing for sex* and *women must regulate male sexuality* distorts our understanding of sexual offences. Such beliefs not only trivialize sexual assault against men but also reinforce victim-blaming against women. Men who experience sexual assault often hesitate to report it for fear of stigma, while women victims are blamed for allegedly provoking male desire. This reinforces patriarchal notions of male dominance and female subservience in sexual relations, shaping how sexual crimes are legally and socially understood.

The Miniscule Minority Argument

Opponents of gender-neutral laws often argue that male and transgender victims form only a small fraction of sexual abuse survivors. However, this is a flawed stance rooted in limited research and pervasive stigma. Studies show that male sexual victimisation is underreported due to fear of being ridiculed or labelled as homosexual. The lack of recognition of such cases perpetuates silence, creating a cycle where the absence of data is used to deny the need for reform. In reality, sexual violence is less about gratification and more about dominance, humiliation, and control—regardless of the gender of the victim.

Anatomical Difference as a Justification

One of the most cited arguments against recognising women as perpetrators of sexual offences is based on anatomical differences. It is assumed that men, being physically stronger, can resist women’s advances. This notion is biologically flawed. Physiological responses—such as erection or ejaculation in men and lubrication in women—can occur involuntarily during abuse and do not indicate consent¹¹.

Feminist Concerns over Gender Neutrality

Feminist scholars like Susan Brownmiller and Jean Hampton argue that sexual abuse is a gendered crime, symbolising systemic male dominance¹². They caution that making perpetrators gender-neutral risks minimising women’s disproportionate vulnerability and the collective harm caused by sexual violence against women.

The lived experience of sexual abuse is shaped by gendered realities. Women face a significantly higher threat of sexual assault compared to men, which instills a constant sense of fear and vulnerability. By contrast, most men do not live with the daily fear of being coerced into sex by women, even though such instances occur more often than society acknowledges.

While it is true that women are far more likely to face sexual assault, ignoring male and transgender victimisation creates blind spots in law and justice. Ann Cahill notes that women

11. Legal What Science says about arousal during rape’ (2013), available at: <<https://www.popsoci.com/science/article/2013-05/science-arousal-during-rape/>> (last visited on 13 July 2025)

12. Feminist Perspectives on Rape, available at: <https://plato.stanford.edu/entries/feminism-rape/> (last visited on 23 July, 2025)

live under an omnipresent threat of sexual abuse, shaping their behaviour in ways men rarely experience¹³. Nonetheless, acknowledging male victimisation alongside women's vulnerabilities is essential to a just and inclusive legal framework.

Making laws gender neutral does not negate the continued need for advocacy for women's rights and protections. On the contrary, it complements the fight against sexual violence by ensuring inclusivity, while still recognising that women remain the most frequent and vulnerable targets of such crimes. Just as racism carries different meanings depending on whether it is committed by a dominant or marginalised group, the social and historical context influences how sexual abuse is perceived. Acknowledging that men can be abused by women does not erase or diminish the suffering of female victims, just as recognising "reverse racism" does not minimise the systemic impact of racism against Black people.

Defining sexual offences in gender-neutral terms ensures that male and transgender victims are not left outside the protection of law. However, recognising male victimisation does not undermine women's disproportionate vulnerability. Instead, it acknowledges the full spectrum of abuse while maintaining awareness that men historically use sexual violence as a tool of power and control over women.

While gender-neutral laws broaden the scope of protection, the punishment for sexual offences must consider context, motive, and impact. In many cases, it may be justifiable for a male perpetrator to face harsher punishment, given the structural and systemic role of male violence against women. Gender neutrality in law does not mean neutrality in sentencing or ignoring the broader social power dynamics.

Need for Gender Neutrality

The Constitution of India is the foundational legal text that sets forth the principles of justice, equality, and governance. It forms the root of all Indian laws and seeks to ensure fairness across society, but its treatment of sex and gender reflects both progress and limitations.

Article 14 guarantees equality before law to "any person," making it seemingly gender neutral. However, in practice, it excluded transgender persons until the landmark *NALSA v. Union of India*¹⁴ judgment, where the Supreme Court recognized transgender people as a third gender. Despite this, societal acceptance remains weak, as seen in the resignation of India's first transgender college principal due to discrimination.

Article 15 prohibits discrimination on grounds including sex, yet sub-clause (3) permits affirmative measures for women and children. While protective, this framework historically centred on women alone, leaving LGBTQIA+ persons outside its ambit. Even after seven decades, substantive equality for women remains elusive, and gender-neutral inclusivity is absent.

Article 21 is broad and facially gender-neutral, extending to all persons. Judicial interpretations expanded it to include dignity, privacy and protection against gender-based violence. Yet, its application often leans toward safeguarding women alone, overlooking LGBTQIA+

13. J. Ann Cahill, 'Foucault, Rape, and the Construction of the Feminine Body,' Vol. 15, *Hypatia*, Issue 1, 2000

14. AIR 2014 SC 1863

vulnerabilities. DPSP like Article 46 focus on socio-economic upliftment and can be extended to LGBTQIA+ persons, who remain marginalized educationally and economically.

Moreover, Global human rights instruments strongly support a gender-neutral approach to law and justice. The Universal Declaration of Human Rights (UDHR, 1948) and the International Covenant on Civil and Political Rights (ICCPR, 1966) guarantee equal rights to “all persons” without discrimination based on sex or gender. Similarly, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979)—while focusing on women’s rights—emphasises the obligation of States to eliminate gender-based distinctions in law and practice. More recently, the Yogyakarta Principles (2006, updated 2017) specifically recognise sexual orientation and gender identity, stressing that legal protections against violence and discrimination must be gender-neutral and inclusive of LGBTQ+ individuals.

India is a signatory to most of these instruments and has a constitutional framework that guarantees equality (Articles 14, 15, 21). Despite all that, Indian criminal law continues to retain gender-specific language, especially in sexual offences under the IPC/BNS, where women are still seen as default victims and men as perpetrators.

Conclusion

The researcher critically analyses both the Indian criminal justice system and prevailing societal attitudes towards sex, gender, and sexual orientation. A comprehensive study reveals that while recent judicial precedents such as *NALSA*, and *Independent Thought* indicate that the legal system is gradually embracing gender neutrality, societal acceptance remains limited. Without a parallel shift in social mentality, gender-neutral reforms risk remaining symbolic rather than transformative. This gap was exemplified when former Army Chief Bipin Rawat, even after the decriminalisation of consensual homosexual acts in Navtej Singh Johar case, publicly asserted that homosexuality and adultery would continue to be punishable under the Army Act, 1950—demonstrating how institutional resistance can undermine progressive legal changes.

Gender neutrality represents the ultimate stage of justice that Indian society must aspire to, but its acceptance remains doubtful as even substantive equality is yet to be achieved in law and society. As Roscoe Pound rightly observed, “the law must be stable, but it must not stand still,” which means criminal law must evolve in line with justice and equality. Reforming gender-biased provisions is vital, since empowering women cannot come at the cost of excluding other victims. With many nations adopting gender-neutral frameworks, it is time for India to move beyond gender-specific laws that deepen divides instead of ensuring parity. Sexual autonomy is a universal human right, and recognition must extend equally to men, women, and transgender persons. A truly equal system requires acknowledging male victimisation, female criminality, and transgender inclusion, reflected through gender-neutral legislative language such as “any person” or “any spouse.” Only then can the constitutional vision of equality be realised for both perpetrators and victims alike.

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