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## EVERY VOICE, EVERY WOUND

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### ABSTRACT

India's rape laws have long operated within a limited imagination, one that sees cisgender women as the only possible victims, and cisgender men as the only possible perpetrators. Such a narrow framework is not only archaic but violently exclusionary. Survivors who are male, transgender, non-binary, or intersex remain invisible to the law, their pain silenced by omission, their trauma unlegislated.

In 2023, the Bharatiya Nyaya Sanhita ("BNS") was passed to replace the colonial Indian Penal Code. Yet Section 63, which redefines rape, retains the same heteronormative lens, continuing to frame rape as a crime committed by a man against a woman.<sup>1</sup> While cloaked as reform, this section perpetuates a legal fiction that justice must fit neatly into binary genders and predefined roles of powerlessness and predation. This paper argues that such exclusion is not just outdated, it is unconstitutional, violating the guarantees of equality, dignity, and life under Articles 14, 15, and 21 of the Constitution.<sup>2</sup> Through a synthesis of real-life testimonies, landmark case laws, comparative international jurisprudence, and constitutional interpretation, this paper calls for a radical, inclusive reimaging of India's rape laws.

The work centers survivor narratives that have been sidelined - men raped by men, trans persons brutalized by police, non-binary individuals denied recognition even in trauma and demands that law reflect their realities.

At its core, this research is a reckoning: a call to legislators, jurists, and citizens to recognize that a justice system which excludes some, protects none.

**Keywords:** cisgender, perpetrators, intersex, heteronormative, reckoning

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<sup>1</sup> Bharatiya Nyaya Sanhita, 2023, § 63, Gazette of India, Extraordinary, Part II, Sec. 1 (Aug. 2023).

<sup>2</sup> INDIA CONST. arts. 14, 15, 21; see also *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (decriminalizing homosexuality and affirming the dignity of LGBTQ+ persons).

## INTRODUCTION

The Indian legal system, in its current form, sees survivors only through a narrow keyhole: a cisgender woman victimized by a cisgender man. This fixed gaze is not accidental; it is a remnant of colonial morality and patriarchal scripting. Yet, real life spills over such artificial boundaries. The truth is this: anyone can be raped. And in India, many are—but only some are legally acknowledged.

In the eyes of the law, pain has a gender. Section 63 of the Bharatiya Nyaya Sanhita, 2023 (BNS) defines rape as a crime that a man commits upon a woman, using anatomical language and gendered constructs that erase other survivors entirely.<sup>3</sup> This formulation, though dressed in legislative modernity, repackages archaic assumptions. It ignores transgender persons, non-binary individuals, queer survivors, and even male victims, denying them not only justice but legal existence itself.

This paper begins with a wound, a wound not only inflicted by the assaulter but sustained by the system. By focusing solely on “man-on-woman” rape, Indian rape laws fail to recognize the full spectrum of sexual violence. This silence is not neutral; it is violent in its own right.

The issue is not just one of legislative language, but of constitutional betrayal. Articles 14, 15, and 21 promise equality, non-discrimination, and dignity for all.<sup>4</sup> Yet the law continues to exclude survivors based on their gender identity, their anatomy, or their place in society’s hierarchy of suffering.

This paper argues that India stands at a legal and moral crossroads. It is no longer enough to patch old laws with symbolic amendments. What is needed is a jurisprudential reimaging, one that listens to every voice and tends to every wound.

### Legal Landscape: What the Law Sees & Ignores

The architecture of India’s rape laws was laid not in independent India, but under colonial British rule, with Section 375 of the Indian Penal Code, 1860 (IPC). The law constructed rape as a crime against a woman’s chastity, not her autonomy. It reflected Victorian morality, where

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<sup>3</sup> Bharatiya Nyaya Sanhita, 2023, § 63, Gazette of India, Extraordinary, Part II, Sec. 1 (Aug. 2023).

<sup>4</sup> INDIA CONST. arts. 14, 15, 21; see also National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (affirming the legal recognition and rights of transgender persons in India).

sexuality was policed, and rape was not about consent but about honor. This moral lens shaped legal definitions that treated women as passive recipients of violence and denied the possibility that anyone other than a cisgender woman could be raped.

Section 375 defined rape as a penile-vaginal act, committed by a man upon a woman, and excluded male victims or survivors of non-penile forms of sexual violence. The law also carved out a marital rape exception, reinforcing patriarchal control over women's bodies even within intimate spaces. These exclusions were not incidental - they were systemic blind spots, and they still echo in today's statutes.

In 2013, following the brutal Delhi gang rape case (Nirbhaya), the Criminal Law (Amendment) Act sought to expand definitions of sexual violence. It introduced Sections 354A–D to cover sexual harassment, voyeurism, and stalking, and broadened the definition of rape to include oral and digital penetration. Yet even this landmark moment failed to push the law toward gender neutrality. Despite recommendations from the Justice Verma Committee, which explicitly advocated for a gender-neutral definition of sexual assault and recognition of male and LGBTQ+ survivors, Parliament chose to retain a binary, gendered framing.

Why? Because the law continues to conflate vulnerability with femininity, and power with masculinity. As a result, the lived experiences of male, transgender, and nonbinary survivors remain outside legal protection, despite clear evidence of their victimization. For instance, a 2014 study by the NGO Sahodaran revealed that sexual violence against transgender persons and men who have sex with men (MSM) was both widespread and underreported due to fear, stigma, and lack of legal recognition.<sup>5</sup>

Court rulings have occasionally tried to expand the law's spirit. In *Navtej Singh Johar v. Union of India*, the Supreme Court decriminalized homosexuality and affirmed the dignity of LGBTQ+ persons. In *NALSA v. Union of India*, it recognized the right to gender identity as part of the right to life and dignity under Article 21. Yet these constitutional milestones have not been mirrored in statutory rape law, which remains frozen in a binary imagination.

Meanwhile, Section 377 of the IPC, once used to criminalize consensual homosexual activity,

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<sup>5</sup> Sahodaran, "Needs Assessment of MSM and Transgender Quint, " "Ladke Rape Nahi Hote": Gay Man's Struggle to File Rape FIR," (2020).  
Communities in Tamil Nadu," (2014), <https://sahodarantg.org>.

was often a tool to punish same-sex rape, but since its reading down, there is no clear statutory provision for rape of a man or transgender person in many situations, especially when the assailant is not a cisgender man.<sup>6</sup>

The law, in its selective empathy, thus becomes a second perpetrator. It offers a sanctuary to some, while condemning others to silence.

### **BNS 2023: Progress or Prejudice?**

With the introduction of the Bharatiya Nyaya Sanhita, 2023 (BNS), the Indian state promised to break from its colonial legal inheritance and reimagine justice through a more indigenous, progressive lens. Section 63 of the BNS was positioned as a redefinition of rape, supposedly broader, more inclusive, and more aligned with contemporary understanding of sexual violence. But scratch beneath the surface, and a sobering truth emerges: the law may have changed its name, but not its soul.

Section 63 echoes the gendered framework of the now-defunct Section 375 of the IPC. It still describes rape as a crime committed by a man against a woman and retains the same anatomy-centric description penetration of the vagina, mouth, urethra, or anus “with any part of the body or object.” While it acknowledges multiple acts as constitutive of rape, it does so exclusively within the male-perpetrator/female-victim binary.

By failing to explicitly include male, transgender, non-binary, and intersex survivors, Section 63 perpetuates legislative invisibility. It suggests that rape is unimaginable unless suffered by a cisgender woman. This denial is not merely symbolic, it has devastating real-world consequences. Survivors outside the binary are left with no clear path to justice, no specific provision under which to file complaints, and no recognition of their trauma under the law.

This is despite a long-standing call for gender-neutrality in law. The Justice Verma Committee, formed after the 2012 Delhi gang rape, emphatically recommended making rape laws gender-neutral, and acknowledging the vulnerabilities of LGBTQ+ persons. Yet, those proposals were dismissed, first in the 2013 amendment, and now again under the BNS. Parliament seems

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<sup>6</sup> Arvind Narrain, *Gender, Law and the Politics of Recognition*, in *Sexuality and Law in South Asia*, 2015, at 109–112.

committed to legislative regression in the name of reform.

It is also notable that the Transgender Persons (Protection of Rights) Act, 2019, while flawed in many respects, at least attempted to acknowledge the violence faced by trans individuals. However, without corresponding changes in criminal law, trans survivors of sexual assault still face a gaping legal void. If a trans man is raped, where does he go? If a non-binary person is assaulted, who does the system believe they are?

Even from a policy lens, this exclusion is indefensible. The National Crime Records Bureau (NCRB) does not collect disaggregated data on sexual violence against nonwomen survivors. What is not counted is not cared for. And so, violence continues unspoken, unrecorded, and unpunished.

Section 63, in its current form, is not progress, it is performative modernity, a shadow play that pretends to evolve while tethering justice to an obsolete moral framework. It reflects the state's persistent discomfort with bodies that defy its gender binaries and identities that challenge its normative expectations.

### **Case Laws and the Survivors They Forgot**

#### **1. NALSA v. Union of India, (2014) 5 SCC 438**

The Case That Recognized Identity, Yet Left Survivors Outside the Statute.

In *National Legal Services Authority v. Union of India*, the Supreme Court of India took a historic step toward restoring dignity to India's transgender community by recognizing their constitutional right to self-identification under Articles 14, 15, 19, and 21. It declared that transgender persons must be treated as equal citizens, not only in social and cultural life, but in legal protection as well.<sup>7</sup>

Yet this constitutional proclamation has remained tragically dishonored in the realm of sexual violence. Section 63 of the *Bharatiya Nyaya Sanhita*, 2023, still defines rape strictly as a crime committed by a man against a woman. No space is afforded to transgender individuals not as victims, nor as perpetrators. This makes the trauma of rape legally invisible for many trans

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<sup>7</sup> *National Legal Services Authority v. Union of India*, (2014) 5 S.C.C. 438. Id. at 492.

persons, especially trans women, whose lived experience of sexual violence has no corollary in the law's language.

This isn't merely poor interpretation it's structural abandonment. NALSA demanded full citizenship. But by retaining anatomically exclusive definitions of rape, Indian law denies trans persons protection from one of the gravest violations of bodily autonomy. No matter how progressive a constitutional judgment may be, its impact is hollow if statutory language remains unchanged.

## **2. Navtej Singh Johar v. Union of India, (2018) 10 SCC 1**

From Decriminalization to Abandonment: When Consent Is Recognized, But Violation Is Not. The Supreme Court's judgment in Navtej Singh Johar was a watershed in the battle for queer dignity. Striking down Section 377 of the IPC to the extent it criminalized consensual same-sex relations, the Court held that "sexual orientation is an essential attribute of privacy," placing it within the protective ambit of Article 21.<sup>8</sup> Justice Chandrachud, in his concurring opinion, framed it poetically "history owes an apology to members of the LGBT community."<sup>9</sup>

### **But what of justice?**

While Navtej unshackled queer lives from colonial criminality, it stopped short of building structures to protect them from harm. Section 63 of the BNS still does not recognize male-on-male rape, or sexual assault of queer or non-binary individuals. Survivors of such acts must fall back on residual provisions like Section 73 (unnatural offences), which continue to carry stigma and semantic confusion.

The queer community gained the right to love but in the event of violation, they are left without legal recourse. The jurisprudence of Navtej compels a statutory follow-through. Without it, we leave queer persons in a constitutional halfway house: legally recognized, but not legally protected.

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

A Warning Against Gender Absolutism in Penal Law.

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<sup>8</sup> Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1. Id. At 59.

<sup>9</sup> Id. At 162.

In Sushil Kumar Sharma, the petitioner challenged the potential misuse of Section 498A IPC, arguing that laws framed to protect women must not become vehicles for harassment of men. While the Court upheld the need for gender-specific protections, it also offered a subtle but significant reflection:

“Legislation must be informed with the realities of society. It must protect the innocent and punish the guilty.”<sup>10</sup>

This dictum speaks powerfully to the current rape law regime, which presumes that perpetrators are always male and victims always female. In a bid to protect, the law has fossilized gender roles rendering male, trans, and queer victims invisible.

Sushil Kumar Sharma was not a sexual violence case but its jurisprudence warns against unchecked gender assumptions. When the law codifies only one narrative of harm, it creates new categories of silence. In doing so, it fractures the very justice it aims to serve.

These cases real, documented, and devastating showcase not just failures of law enforcement, but failures of legislative imagination. NALSA and Navtej gave birth to rights, but the statutes still live in pre-constitutional shadows. If survivors cannot find their trauma mirrored in the law’s text, then justice is not merely delayed it is denied by design.

### **Comparative Perspective: What the World Is Doing Right**

While India continues to bind rape laws in binary definitions, many countries have moved toward gender-neutral, consent-based, and trauma-informed frameworks. These examples serve not only as models for reform, but as proof that justice need not be gender-blind to be inclusive, it must be gender-aware.

In Nepal, the Criminal Code Act of 2017 adopts a gender-neutral definition of rape, recognizing any non-consensual sexual act against any person as rape, regardless of gender or sexual identity. This approach is rooted not in anatomy, but in the absence of consent a principle that centers autonomy over biology.

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<sup>10</sup> Sushil Kumar Sharma v. Union of India, (2005) 6 S.C.C. 281.  
Id. at 288.

Canada's Criminal Code similarly defines sexual assault in a gender-neutral manner. It criminalizes any form of unwanted sexual contact without limiting either the identity of the perpetrator or the survivor. Canadian jurisprudence has long recognized that men, transgender individuals, and non-binary persons can also be victims and that the law must reflect this reality.

In Sweden, the landmark 2018 legislation shifted to a "consent-based" model, defining sex without explicit consent as rape. The law does not categorize victims or perpetrators by gender, and instead emphasizes freely given, mutual agreement as the core determinant of lawful sexual activity.

Closer to home, Bangladesh has introduced discourse around updating its rape laws to become gender-inclusive, spurred by advocacy groups and the UN. Although reforms are ongoing, the movement signals a regional shift in consciousness.

Meanwhile, South Africa's Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 provides one of the most comprehensive definitions of sexual offences, explicitly extending protection to all genders, and including anal, oral, and object penetration under sexual assault.

These countries reveal what India still denies: that sexual violence is not a women's issue, but a human rights issue. That centering consent and dignity, rather than gender and anatomy, is not a radical act it is the bare minimum of a just legal system.

India need not reinvent the wheel. It must simply choose to turn it.

### **A Gender-Neutral Future: Legal and Moral Roadmap**

If India is to honor the promises of its Constitution and the dignity of its people, it must discard the gendered scaffolding that props up Section 63 and build anew. Reform must not be cosmetic, it must be structural, constitutional, and unapologetically inclusive.

#### **1. A Gender-Neutral Definition of Rape**

At the core of reform lies the need to replace Section 63 with a gender-neutral, consent-based definition of rape. The law should recognize that anyone, regardless of gender identity, can be a victim or a perpetrator of sexual violence. Language should be rooted in the absence of

consent, not biological essentialism. This model must draw from countries like Nepal, South Africa, and Canada, where legal definitions protect all citizens equally.

A sample redefinition might read:

“A person commits rape if they intentionally penetrate, however slightly, the vagina, anus, mouth, or any bodily orifice of another person without that person’s voluntary and informed consent.”

This shifts the focus from anatomy to agency, placing consent not gender as the cornerstone of sexual offence law.

## **2. Legal Recognition of Transgender and Non-Binary Survivors**

Statutory amendments must explicitly include transgender, intersex, and non-binary individuals in both protective and punitive provisions. The language of rape law should reflect India’s constitutional jurisprudence as laid down in NALSA and Navtej Johar, which recognizes gender as a spectrum and affirms the right to bodily autonomy for all citizens.

Further, survivor protections like POCSO, Section 164A CrPC (medical examination), and Section 228A IPC (protection of identity) must be made gender-inclusive. It is not enough to change the main provision the ecosystem of support must evolve with it.

## **3. Comprehensive Data Collection and Police Training**

A recurring barrier to inclusive reform is the absence of data. The National Crime Records Bureau must begin collecting and publishing disaggregated data on sexual violence experienced by LGBTQ+ persons and male survivors. Without this, policy remains blind and uninformed.

Additionally, police officers and medical examiners must receive mandatory sensitivity training on gender diversity, consent, and trauma-informed response. Survivors like Ritika or Meghna should never be met with laughter, suspicion, or bureaucratic coldness. They deserve belief, not interrogation.

## **4. Intersectional Legal Aid and Support Systems**

True justice also requires legal aid tailored to marginalized survivors especially Dalit trans

persons, disabled queer people, and working-class male survivors. Legal aid clinics, psychological counselling, and survivor shelters must be equipped to serve all identities. One-size-fits-all solutions will only reproduce old hierarchies in new forms.

### **5. Legislative Will and Public Accountability**

Finally, legal change is meaningless without political courage. Parliament must move beyond symbolism and legislate with the honesty that trauma demands. Courts must interpret existing laws with constitutional compassion. Civil society must demand reform not only when the survivor is photogenic or familiar, but when they are inconvenient, invisible, or unnamed.

The road to a gender-neutral future is not merely a legal one it is moral, social, and constitutional. It demands that we stop asking who deserves justice and begin asking: why was it ever denied?

## **CONCLUSION**

This paper began with a wound one inflicted by perpetrators, but deepened by law. The Indian legal system, for all its grandeur and solemnity, still refuses to see every survivor. Its gaze is narrow, its language exclusionary, and its heart too often silent.

Section 63 of the Bharatiya Nyaya Sanhita does not merely fail to protect transgender, non-binary, intersex, and male survivors it erases them. It tells them, in quiet legalese, that their pain is not valid, that their bodies do not belong in the narrative of justice. And that is the gravest betrayal: when a survivor comes forward and the law itself turns away.

But it doesn't have to be this way.

The Constitution of India promises equality, dignity, and life without discrimination. The courts have affirmed that gender is not binary, that dignity cannot be reserved for some, and that the law must evolve alongside society. And around the world, countries have shown us how to craft rape laws that are consent-based, gender-inclusive, and survivor-centred.

This is a plea to lawmakers, jurists, activists, and citizens. To unlearn what we've inherited. To listen to the voices drowned out for too long. To remember that justice isn't justice until it includes everyone.

But this is also a promise. That the law can change. That silence can be rewritten. That someday soon, a transgender woman walking into a police station will be heard, not questioned. That a male survivor won't be told to "man up." That a non-binary person won't be asked to pick a side just to get a case registered.

Justice, real justice, begins with belief. And belief must begin with the law.