
THE DILEMMA OF GENDER NEUTRALITY: THE CRIMINAL LAW TRIAD

Adyasha Syam, National Law University Delhi

ABSTRACT

On July 1, 2024, the Government of India implemented the three new criminal laws: the Bharatiya Nyaya Sanhita, the Bharatiya Nagarik Suraksha Sanhita, and the Bharatiya Sakshya Adhiniyam. This triad replaced the Indian Penal Code, the Code of Criminal Procedure, and the Indian Evidence Act, respectively.

This essay evaluates the extent to which the three criminal codes have fulfilled their stated objective. After providing in brief the background of India's criminal law reforms, the author presents a wide-ranging interpretation of gender neutrality, as adopted by this research. The paper utilizes this definition to evaluate the text of the three criminal codes, starting with the Bharatiya Nyaya Sanhita's chapter, 'Offences Against Woman and Child,' before analysing procedural provisions regarding these offences, included in the Bharatiya Nagarik Suraksha Sanhita and the Bharatiya Sakshya Adhiniyam.

The paper then addresses the objections put forward by the Union Government to gender neutrality in criminal law, including potential misuse and scale of amendments required. By suggesting the execution of institutional reforms to prevent the misuse of existing laws, the paper proposes a step-by-step modification of criminal laws to reflect gender neutrality. Finally, the paper uses the doctrine of fair labelling to propose a novel approach towards gender inclusivity and equality in criminal law while accommodating the gender differentials prevalent in society.

Introduction

Any analysis of our myriad statutes and codes is incomplete without referencing the ultimate law of our land. The Constitution of India, crafted by the intellect of 299 scholars and the labour of lakhs toiling for freedom, is perhaps the strongest testament to the democratic experiment this country undertook more than seven decades ago. Accommodative and responsive as it is to the changing society and its evolving needs, the Constitution enshrines in itself the foundations of Indian democracy, protected by a maze of safeguards from arbitrary amendments. Two particular statements in the Preamble of the Constitution stand out: justice — social, economic and political — and equality of status and opportunity¹. These values portray a society in which each and every person has certain rights guaranteed to them, allowing a certain standard of living to be achieved as well as proper recourse in case those rights are violated.

The Constitution of India includes all these provisions and more. Equality before the law is a Fundamental Right, owed by the state to every person. What is ironic, however, is that each of these provisions automatically presumes every person to be male. In a country with around 943 females for every 1000 males², the word ‘she’ does not appear even once in our Constitution.

Such an oversight may be attributed to the subconscious biases prevalent during the time of drafting of the Constitution, but what cannot be ignored is the pitiful condition of all other genders except males in India. Ranked 129th out of 146 countries³ in the World Economic Forum’s Global Gender Gap Report, India continues to struggle in bridging gender gaps in the arenas of politics, economic empowerment, education and health. The lacunae in these sectors are made all the worse by outdated laws catering to men as a default, effectively disregarding women as secondary, with other genders finding a mention only once in a blue moon. Chief amongst such biased statutes were the three codes of criminal law: the Indian Penal Code (hereafter referred to as the IPC), the Code of Criminal Procedure (hereafter referred to as the CrPC), and the Indian Evidence Act (hereafter referred to as the IEA). All three were recently replaced by a triad of new criminal laws, which came into effect in July 2024.

¹ India Const. pmb1.

² Press Information Bureau, <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=2044607> (last visited Oct. 20, 2024).

³ The Hindu, <https://www.thehindu.com/opinion/editorial/two-steps-back-on-india-and-the-global-gender-gap-report-2024/article68289197.ece> (last visited Oct. 20, 2024).

The new criminal laws

In 2023, the Indian Parliament undertook a complete revamping of the country's criminal justice system. The Bharatiya Nyaya Sanhita, 2023, replaced the Indian Penal Code of 1860. The Bharatiya Nagarik Suraksha Sanhita, 2023, was implemented as the replacement of the 1973 Code of Criminal Procedure, and the Indian Evidence Act of 1872 was substituted by the Bharatiya Sakshya Adhiniyam, 2023.

The three laws were first introduced by Home Minister Amit Shah on August 11, 2023, in the Lok Sabha before being referred to a 31-member Parliamentary Standing Committee on Home Affairs. After undergoing scrutiny and review, the revised Bills were once again put forward by the Home Minister on December 12, 2023, in the Lok Sabha. The Lok Sabha passed the three Bills on December 20, 2023, with the Rajya Sabha following suit on December 21, 2023. The new criminal law Bills thereafter received Presidential assent and were notified in the Gazette of India on December 25, 2023, slated to be implemented on July 1, 2024⁴.

While introducing the three new criminal law Bills, the Home Minister highlighted the Centre's intent to replace the colonial remnants of British rule in the form of the old criminal laws. He recalled Prime Minister Modi's 2019 call for British-era laws to be remade in accordance with the current time in the interest of contemporary Indian society. The IPC, the CrPC and the IEA were, as per the government, meant to strengthen and protect only the British rule. The Home Minister slated their purpose to be punishment instead of imparting justice, contrary to the 2023 Bills, which were made to protect the rights of Indian citizens given by the Constitution. The objective of the new laws was said to be "not . . . to punish anyone but give justice and in this process punishment will be given where it is required to create a sense of prevention of crime."⁵

Gender neutrality in criminal justice

On the topic of a separate chapter for crimes against women and children in the Bharatiya Nyaya Sanhita (hereafter referred to as the BNS), Home Minister Amit Shah reasoned that the colonial laws placed heinous crimes like murder or crime against women below other crimes

⁴ Press Information Bureau, <https://pib.gov.in/PressReleasePage.aspx?PRID=2001862#:~:text=2023%2C%20which%20were%20passed%20in,Gazette%20of%20India%20on%2025.12>. (last visited Oct. 20, 2024).

⁵ Press Information Bureau, <https://pib.gov.in/PressReleasePage.aspx?PRID=2001862#:~:text=2023%2C%20which%20were%20passed%20in,Gazette%20of%20India%20on%2025.12>. (last visited Oct. 20, 2024).

like treason and robbery. Therefore, special care has been taken of women and children under the ambit of these laws, according to the Press Information Bureau.⁶

In line with these stated objectives, the criminal law reforms have attempted to make the criminal justice system of India more gender-neutral. The differences between the BNS and the IPC attain significance in this matter. Whereas Section 8 of the IPC explicitly restricted the range of gender to only men or women⁷, Section 2(10) of the BNS includes transgender persons in the definition⁸ of “gender”. The BNS has also made the perpetrators of offences such as voyeurism and insult to the modesty of women gender-neutral, unlike the IPC, which specified the perpetrators of such offences to be male. Offences against children have been altered to address the victim in a gender-neutral manner as well. On face value, such changes act in pursuance of a legal system based on equality between the genders, as is supported by the Constitution.

However, the criminal law reforms are careful to not stray too far away from the rigidly binary perspective of gender prevalent in Indian society. Transgender persons, though accorded recognition, are given effectively no protection against sexual offences under the new laws. Even within the gender binary, the male members of society are not offered safeguards against rape either, and women are treated by most provisions as passive victims without any agency of their own. The novel gender-neutral approach towards victims and perpetrators has been limited to a select few offences, with others retaining the specifications of the IPC. Moreover, all three laws continue to be peppered with predominantly male pronouns.

In the literal sense, the concept of gender neutrality can be defined as “the use of non-sexist language, inclusive language or gender-fair language.”⁹ As per the European Parliament’s 2008 guidelines on gender-neutral language, the aim of this exercise is to alter gender-biased statements, prevent gender stereotyping and work towards gender equality. However, gender neutrality as an attempt to reform criminal law cannot be limited to the rewording of a select few provisions of the three criminal codes. Crime is not a phenomenon to be viewed in isolation; criminal behaviour hinges on the psychological, environmental, cultural and social circumstances of the individual. No sooner can sex and gender be separated from crime than

⁶ *Supra*, note at 5.

⁷ Indian Penal Code, 1860, § 8, No. 45, Acts of Imperial Legislative Council, 1860 (India).

⁸ Bharatiya Nyaya Sanhita, 2023, § 2(10), No. 45, Acts of Parliament, 2023 (India).

⁹ European Parliament, https://www.europarl.europa.eu/cmsdata/151780/GNL_Guidelines_EN.pdf (last visited Oct. 20, 2024).

the switching of pronouns in a handful of laws can achieve its purpose of equality between the genders.

True gender neutrality thus goes beyond the switching of pronouns to encompass a legal approach that accommodates the needs and interests of not just males and females, but all gender groups of the society. This includes the shedding of paternalistic and patriarchal approaches in not just the letter of the law, but also its implementation, thus ensuring equality of all sexes and genders in the legal sphere. It is through this broad interpretation of gender neutrality that this essay analyses the three new criminal codes, with particular focus on gender-based offences in the Bharatiya Nyaya Sanhita along with the procedural law aspects of the other two legislations.

The Bharatiya Nyaya Sanhita

Offences against women and children

Like in the erstwhile IPC, the offences listed in the BNS are subdivided into multiple chapters, with each corresponding to a particular type of offence. Most gender-specific offences of the IPC, such as those related to sexual assault and marriage, were clubbed under one broad chapter: *Of Offences Affecting the Human Body*¹⁰. However, the new law has segregated these offences into an entirely new chapter. Chapter V of the BNS, *Of Offences Against Woman and Child*¹¹, covers a range of offences, including:

1. Sexual offences
2. Criminal force and assault against woman
3. Offences relating to marriage
4. Causing miscarriage
5. Offences against child

This is immediately followed by a separate chapter on offences affecting the human body, whose provisions do not display much difference than those remaining in the relevant IPC

¹⁰ Indian Penal Code, 1860, ch. 16, No. 45, Acts of Imperial Legislative Council, 1860 (India).

¹¹ Bharatiya Nyaya Sanhita, 2023, ch. 5, No. 45, Acts of Parliament, 2023 (India).

chapter.

While the Union Government is of the opinion that such a distinction increases the urgency accorded to such reported offences, the very nomenclature of Chapter V contravenes their purported objective of gender equality. Despite sustained efforts to temper the rampant misogyny prevalent in the country, India remains, at its very core, a deep-rooted patriarchy. The perception of women in Indian society is interwoven with their role in marriage and motherhood, thereby linking them to matters of the home alone. This chauvinistic outlook includes a set of “appropriate” characteristics for women: modesty, dutifulness and submission, to name a few.

While a common-sensical analysis would attribute such a perspective to traditional villages and smaller towns, the reality is far more troubling. In July 2024, Bihar Chief Minister and veteran politician Nitish Kumar told female Opposition leader Rekha Devi Paswan to listen to him quietly, shouting that as a woman she did not know anything¹². Not only was this remark made in the Bihar Assembly, but it was made by a person who has held the Chief Minister’s berth for nine terms, backed by a government that supposedly champions women’s education and empowerment. From seasoned political leaders to the common masses, sexism in India is very much a common vice. In this context, shelving crimes against women’s bodily integrity and autonomy along with those against children only perpetuates the view that women are weak and need to be protected by the State, by the society — basically by men. Despite the intent of its framers, the BNS’s categorization of different crimes is a veiled dismissal of female agency, be it physical, emotional, intellectual, decisional or sexual.

Moreover, the BNS’s classification hinders the establishment of a separate social identity for women, independent of marriage or children. The 2013 Justice Verma Committee, while suggesting amendments to criminal laws, emphasised on the need for “widespread measures raising awareness of women’s rights to autonomy and physical integrity, regardless of marriage or other intimate relationship”¹³. Chapter V, however, reduces the status of women from individuals to that of wives and mothers, thereby reinforcing regressive restrictions on a substantial proportion of India’s female population.

¹² The Wire, <https://thewire.in/women/nitish-kumars-youre-a-woman-you-know-nothing-remark-exposes-latent-misogyny-in-our-politics> (last visited Oct. 20, 2024).

¹³ Justice Verma Committee, Report of the Committee on Amendments to Criminal Law 117 (2013), https://adrindia.org/sites/default/files/Justice_Verma_Amendmenttocriminallaw_Jan2013.pdf

The evolving definitions of “gender”

Section 2(10) of the BNS states that “the pronoun ‘*he*’ and its derivatives are used of any person, whether male, female or transgender.”¹⁴ The three genders have been defined as follows:

- 1) Transgender persons refer to those whose gender does not match with the gender assigned to them at birth. This includes trans-men, trans-women, persons with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta (As per Section 2(k) of the 2019 Transgender Persons Act)¹⁵.
- 2) “Man” refers to male human being of any age.¹⁶
- 3) “Woman” refers to female human beings of any age.¹⁷

While the definitions of “man” and “woman” were the same in the IPC¹⁸, Section 8 of the erstwhile Code stated that “the pronoun ‘*he*’ and its derivatives are used of any person, whether male or female.”¹⁹ This definition of gender explicitly excluded transgender persons from the purview of the Code, a mistake that the newly minted BNS seems to rectify at first glance.

However, the use of the word ‘transgender’ is limited only to Section 2(10) of the BNS. While the inclusion of transgender persons can be generalized in the use of ‘*he*’ and its derivative pronouns in other provisions, the same cannot be done for Chapter V, which includes provisions on offences related to rape, other forms of sexual assault and marriage. Though all such offences target transgender persons as well, the victim has been specified to be a woman in each scenario. Due to the rigid wording of these provisions, the BNS treats transgender women who are victims of rape and cisgender women in the same circumstances in drastically different ways, in blatant disregard of the discriminatory and adverse societal conditions faced by transpersons.

Similarly, transwomen cannot invoke Section 69 of the BNS, which penalizes sexual intercourse based on false promises to marry, as held by the Himachal Pradesh High Court in

¹⁴ *Supra*, note at 8.

¹⁵ Transgender Persons (Protection of Rights) Act, 2019, § 2(k), No. 40, Acts of Parliament, 2019 (India).

¹⁶ Bharatiya Nyaya Sanhita, 2023, § 2(19), No. 45, Acts of Parliament, 2023 (India).

¹⁷ Bharatiya Nyaya Sanhita, 2023, § 2(35), No. 45, Acts of Parliament, 2023 (India).

¹⁸ Indian Penal Code, 1860, §10, No. 45, Acts of Imperial Legislative Council, 1860 (India).

¹⁹ *Supra*, note at 7.

September 2024.²⁰ Despite the right of transgender persons to enter heterosexual marriages being affirmed²¹ by the Supreme Court, the gendered provisions of the BNS have rendered them without any substantial protection against offences in said marriages. A cursory mention of transgender persons in one clause of the new criminal law, therefore, does nothing to promote gender inclusivity, and is instead a violation of transpersons' right to recognition of their self-perceived gender identity.

Sexual offences and assault

The BNS's set of provisions related to sexual offences and assault against women is the primary point of contention in this debacle of gender neutrality. The IPC, unlike its successor, had placed its sections on sexual offences under Chapter XVI (Offences Affecting the Human Body). The foremost problem with the colonial provisions, as flagged by numerous stakeholders, was that the perpetrators and victims of the respective offences could only be of specific genders. The new law's attempt to rectify this extends to changing only a few words of certain sections, leaving the rest untouched. Rather than bringing about gender neutrality, the BNS has blindly bypassed glaring faults in the old law. The same can be observed by grouping the concerned sections into three classes, given as follows:

Rape:

Section 63 of the BNS defines rape as an offence committed by a man against a woman²². It is verbatim to Section 375 of the erstwhile IPC, with the gender-specific nature of the provision left unchanged²³ despite the alterations made to its succeeding sections. While problematic on numerous fronts, Section 63 of the BNS violates the true spirit of gender neutrality on three main grounds: the gender of the perpetrator, the gender of the victim, and Exception 2 of the provision.

Firstly, Section 63 of the BNS begins with the following phrase: "A man is said to commit rape . . ." The wording of the section makes clear that the perpetrator of the offence of rape can only be male, excluding all other genders. Therefore, under the scope of the BNS, penetrative sexual assault committed by any person other than a man on a woman cannot be classified as rape.

²⁰ Bhupesh Thakur v. State of Himachal Pradesh, 2024 LiveLaw (HP) 56.

²¹ Supriya Chakraborty & Anr. v Union of India, 2023 INSC 920.

²² Bharatiya Nyaya Sanhita, 2023, § 63, No. 45, Acts of Parliament, 2023 (India).

²³ Indian Penal Code, 1860, § 375, No. 45, Acts of Imperial Legislative Council, 1860 (India).

Considering the frequency with which horrific and brutal instances of rape occur in India, this technicality will only further complicate the prosecution of the heinous offence in a country that continues to be extremely unsafe for women.

Secondly, even if the provision is amended to remove the bar on the perpetrator's gender, the fact remains that Section 63 identifies only women as potential victims of rape. For male and transgender victims, the provision is effectively null and void.

Ironically, the colonial-era IPC was comparatively more comprehensive in this aspect. Section 377 of the IPC, which criminalized unnatural offences²⁴, was read by the Supreme Court to apply only to non-consensual sexual acts and bestiality²⁵ in the landmark Navtej Singh Johar verdict. With this interpretation, consensual same-sex relationships were decriminalized, and the section operated to provide men, transgender persons and people of other genders protection against rape and sexual assault. The new law fails to provide any such safeguards, leaving men without statutory protection and propagating patriarchal frameworks of toxic masculinity, oppressive gender roles and rigid ideas about sexuality. This systemic misogyny presents a dyadic dilemma wherein, on the one hand, mentions of sexual violence against men are used to trivialize the severity of sexual violence faced by women. On the other hand, the dismissal of sexual violence against men is a testament to the institutional apathy that denies survivors crucial community and legal support.

Though transgender individuals can seek remedies under the 2019 Transgender Persons Act, all offences under the Act are punishable with imprisonment which may only extend to two years²⁶, unlike the minimum rigorous imprisonment of ten years²⁷ in Section 64 of the BNS. Despite the Supreme Court acknowledging the prevalence of sexual violence committed against transgender people with impunity²⁸, offences against transgender and queer victims continue to be treated with relative complacency as compared to cisgender women. The omission of an equivalent provision of the IPC's Section 377 in the new law thus has severe implications on the safety of marginalised gender and sexual minorities.

²⁴ Indian Penal Code, 1860, § 377, No. 45, Acts of Imperial Legislative Council, 1860 (India).

²⁵ Navtej Singh Johar & Ors. v. Union of India, (2018) 1 SCC 791.

²⁶ Transgender Persons (Protection of Rights) Act, 2019, § 18(d), No. 40, Acts of Parliament, 2019 (India).

²⁷ Bharatiya Nyaya Sanhita, 2023, § 64, No. 45, Acts of Parliament, 2023 (India).

²⁸ National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

A news report by the Hindu points to the possibility of an amendment to incorporate the missing section on sexual crimes against men and transgender persons²⁹. Until such a change comes to pass, a senior government official stated that other related sections of the BNS, like wrongful confinement and physical hurt, can be used to prosecute such offences. In the meantime, however, the glaring oversight in the new law leaves no scope for male and transgender victims of rape and sexual assault to seek justice.

Lastly, the BNS retains a highly regressive part of the IPC in the form of Exception 2 of Section 63, which states the following: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape³⁰." In the process of drafting the reforms, the age mentioned in the section has been raised from fifteen years in the IPC to eighteen years in the BNS. Though the amended provision is in consonance with the age of consent demarcated by other BNS provisions³¹ and various statutes³², the justification for including it in the first place is questionable at best.

In October 2024, the Central Government filed a preliminary affidavit for petitions seeking criminalization of marital rape in India. The reasoning offered by the Centre on the continued inclusion of this exception was based on the existence of alternative remedies in law to protect married women against sexual violence, in the context of which attracting the offense of "rape" to the institution of marriage might be "excessively harsh" and disproportionate. The Centre stated that, "(in) an institution of marriage, there exists a continuing expectation, by either of the spouses, to have reasonable sexual access from the other³³." This argument reflects a highly oppressive and outdated view of marriage which considers wives to be the property of their husbands, without any autonomy of their own. As mentioned previously, the essence of gender neutrality lies not in switching around a few words, but in constructing frameworks that ensure inclusivity and equity of all genders. The inclusion of Exception 2 in the BNS, by legalizing marital rape, therefore contradicts a key element of gender neutrality.

²⁹ The Hindu, <https://www.thehindu.com/news/national/centre-likely-to-amend-bns-to-include-section-on-sexual-crimes-against-men-transgender-people/article68352479.ece> (last visited Oct. 20, 2024).

³⁰ *Supra*, note at 22.

³¹ Bharatiya Nyaya Sanhita, 2023, § 2(3), No. 45, Acts of Parliament, 2023 (India).

³² Protection of Children from Sexual Offences, 2012, § 2(d), No. 32, Acts of Parliament, 2012 (India).

³³ Live Law, <https://www.livelaw.in/top-stories/supreme-court-centre-opposes-challenge-to-marital-rape-exception-says-married-women-already-protected-271527> (last visited Oct. 20, 2024).

Offences covering perpetrators of all genders:

The given category covers the following sections:

- 1) Section 68: Sexual intercourse by person in authority.³⁴
- 2) Section 69: Sexual intercourse by deceitful means or false promise to marry.³⁵
- 3) Section 72: Disclosure of identity of victim of certain offences.³⁶
- 4) Section 73: Printing or publishing any matter relating to Court proceedings without permission.³⁷
- 5) Section 74: Assault or criminal force to woman to outrage her modesty.³⁸
- 6) Section 76: Assault or criminal force with intent to disrobe.³⁹
- 7) Section 77: Voyeurism.⁴⁰
- 8) Section 79: Word, gesture, act intended to insult modesty of a woman.⁴¹

Throughout these sections, the perpetrator of the offence is referred to as “whoever”, implying a wider scope that ranges across male, female and transgender offenders. This is an undeniably welcome detail that broadens the ambit of legal projection and remedies guaranteed to people facing such crimes. The provisions, however, fail to extend this ambit to the entire population by specifying the gender of the victim to be female. Article 14 of the Indian Constitution provides for equality before the law and the equal protection of the laws within Indian territory⁴². Any differential treatment must be based on reasonable classification, that is, an intelligible differentia that distinguishes the respective groups from each other. This differentia must have a rational relation to the objective of the statute⁴³, a test that the specifications of

³⁴ Bharatiya Nyaya Sanhita, 2023, § 68, No. 45, Acts of Parliament, 2023 (India).

³⁵ Bharatiya Nyaya Sanhita, 2023, § 69, No. 45, Acts of Parliament, 2023 (India).

³⁶ Bharatiya Nyaya Sanhita, 2023, § 72, No. 45, Acts of Parliament, 2023 (India).

³⁷ Bharatiya Nyaya Sanhita, 2023, § 73, No. 45, Acts of Parliament, 2023 (India).

³⁸ Bharatiya Nyaya Sanhita, 2023, § 74, No. 45, Acts of Parliament, 2023 (India).

³⁹ Bharatiya Nyaya Sanhita, 2023, § 76, No. 45, Acts of Parliament, 2023 (India).

⁴⁰ Bharatiya Nyaya Sanhita, 2023, § 77, No. 45, Acts of Parliament, 2023 (India).

⁴¹ Bharatiya Nyaya Sanhita, 2023, § 79, No. 45, Acts of Parliament, 2023 (India).

⁴² India Const. art. 14.

⁴³ R.K. Garg v. Union of India, (1981) 4 SCC 675.

these sections fail to fulfil. The very objective of the provisions is to secure one's safety, dignity, bodily integrity and sexual autonomy, all of which are basic human rights that cannot be restricted to any particular gender. While there remains a constant danger of such provisions, completely amended to reflect gender neutrality, being misused for malicious prosecution, that risk alone is not sufficient to deny legal protection to males and transgender persons from offences like assault and voyeurism.

Offences in which the perpetrator is exclusively male, and the victim is exclusively female:

Falling under this category are the following two provisions of the BNS:

- 1) Section 75: Sexual harassment.⁴⁴
- 2) Section 78: Stalking.⁴⁵

By limiting the scope of the two provisions to male perpetrators and female victims alone, the BNS treads a dangerously narrow path that places recourse from such offences out of the reach of more than half of the Indian population. The new law once again falls short of ensuring equal protection of laws regardless of gender by dismissing instances of sexual harassment and stalking committed against men and transpersons. Even for female victims, the sections consider only offences committed by men, effectively legalizing crimes committed by other genders and setting a dangerous precedent in which criminal law is administered through the lens of rigid and binary gender roles.

Marriage and children

Sections 80 to 87 of the BNS deal with offences relating to marriage. With the Supreme Court having denied legal recognition to marriage between non-heterosexual partners in the 2023 Supriyo case⁴⁶, the offences listed in these sections are limited to heterosexual marriages between women and men to begin with, removing any possibility of gender neutrality regardless of the usage of words like "whoever" in these provisions. This creates a vicious cycle wherein the gender-specific nature of these provisions hinders efforts towards achieving gender neutrality. While the legality of non-heterosexual marriages is a question for the

⁴⁴ Bharatiya Nyaya Sanhita, 2023, § 75, No. 45, Acts of Parliament, 2023 (India).

⁴⁵ Bharatiya Nyaya Sanhita, 2023, § 78, No. 45, Acts of Parliament, 2023 (India).

⁴⁶ *Supra*, note at 21.

judiciary and, in the Supreme Court's opinion, the Parliament to decide, the gendered language of the new criminal code when talking about marriage props up even more obstacles for such a reform to ever occur. Section 81, for instance, deals with cohabitation caused by man deceitfully inducing belief of lawful marriage⁴⁷, and clearly identifies the parties to a marriage as a man and a woman. In a future where the issue of legalization of non-homosexual marriages is once again taken up by the appropriate organs of government, the consideration of having to alter or reinterpret all such provisions further dissuades any attempt at making a meaningful change.

Moreover, the sections demarcated above are in continuation of prevalent patriarchal notions which deny women any autonomy or ability of their own. Section 81 penalizes any man who causes a woman to cohabit or have sexual intercourse with him based on the deception that he is married to her, while Section 84 deals with the offence of detaining or enticing away with criminal intent the wife of another man⁴⁸. Men who might become victims to the same type of offence are simply presumed to need no legal protection from the same. Both provisions view women as passive victims, especially in the context of marriage, who are unable to protect themselves against the deceit and scheming behaviour of unscrupulous men. Women's expression of their own sexuality on their own terms is almost an alien notion, incapable of negating the ancient ideals that link all women to the dutiful, chaste wife archetype.

Miscellaneous provisions

Considering the pervasive cultural and traditional conceptions of women holding value only as a means of marriage and childbearing, one might be inclined to think that these glaring instances of gender biases can be found only in the provisions related to marriage and childbirth. Such preconceptions, however, have crept their way into unrelated provisions such as that of prostitution. Sections 98 and 99 of the BNS respectively criminalize the selling⁴⁹ and buying⁵⁰ of children for the purposes of prostitution, and both include an explanation shifting the burden of proof on the defendant if the child in question is a female under eighteen years of age. Considering that male and transgender children are in need of the same level of legal

⁴⁷ Bharatiya Nyaya Sanhita, 2023, § 81, No. 45, Acts of Parliament, 2023 (India).

⁴⁸ Bharatiya Nyaya Sanhita, 2023, § 84, No. 45, Acts of Parliament, 2023 (India).

⁴⁹ Bharatiya Nyaya Sanhita, 2023, § 98, No. 45, Acts of Parliament, 2023 (India).

⁵⁰ Bharatiya Nyaya Sanhita, 2023, § 99, No. 45, Acts of Parliament, 2023 (India).

safeguards should they find themselves in that vulnerable position, such an explanation has no basis in the concept of intelligible differentia.

Other examples of unreasonably gender-specific language can be found in chapters as tangential as Chapter XVIII, which covers offences relating to documents and property marks. Sections 338 and 343 deal with the offences of forgery⁵¹ and destruction⁵², respectively, of important documents regarding testamentary matters, adoption or any valuable security. For these sections, documents related to adoption include only those providing authority to adopt a son, with no mention of adopting daughters. While this can be attributed to prevailing Hindu law before 1956, which permitted the adoption of only male children, retaining such a restriction in the new criminal law of 2024 casts aspersions on its proclaimed gender-neutral stance.

The Codes of Procedural Law

The Bharatiya Nagarik Suraksha Sanhita, hereafter referred to as the BNSS, replaces the CrPC as the primary legislation on criminal law administration in India. Despite outlining established procedural aspects for the most part, the BNSS is not entirely without fault either when it comes to gender neutrality.

Though “gender” has not been explicitly defined, Section 2(2) of the BNSS states that all words and expressions which are used but not defined bear the meanings assigned to them in the BNS instead⁵³. The tokenistic approach of the BNS towards gender and sexuality is thus reflected in the BNSS as well. In the 533-section-strong criminal code, the pronoun “she” is only mentioned twelve times, mostly in relation to marriage or children. The BNSS, like the BNS, struggles to view women as anything but a misogynistic archetype of wives and mothers, while men are treated as the default gender. The pronoun “he”, as a result, punctuates nearly every section and provision of the BNSS, whereas the phrase “his or her” is mentioned only thrice in its text. Though the BNSS incorporates the word “man” into its text only twice, the increased number of references to “women” are, for the most part, simply to set aside changes in procedure while dealing with female offenders.

⁵¹ Bharatiya Nyaya Sanhita, 2023, § 338, No. 45, Acts of Parliament, 2023 (India).

⁵² Bharatiya Nyaya Sanhita, 2023, § 343, No. 45, Acts of Parliament, 2023 (India).

⁵³ Bharatiya Nagarik Suraksha Sanhita, 2023, § 2(2), No. 46, Acts of Parliament, 2023 (India).

The Bharatiya Sakshya Adhiniyam, referred to as the BSA from here on, hardly fares better than the BNSS on this front. Section 2(2) of the BSA retains the definitions set out by the BNS and the BNSS⁵⁴. The word “she” appears only six times in the BSA, each time being used in the context of rape, marriage or, in one instance, an illustration on a chartered vessel. The remainder of the text is peppered with “he” and its derivative pronouns, with the alternative of “his or her” added to just one illustration in the new law.

Instead of any step towards gender neutrality, what these legislations do manage to achieve is augmenting the idea that women own no identity separate from the family, be it in the eyes of society or in the eyes of law. Chapter XV of the BNSS, which provides conditions required for the initiation of criminal proceedings, includes several sections that dilute nearly all the provisions listed in Chapter V (Offences Against Woman and Child) of the BNS. Section 219 of the BNSS accords the right to file a complaint about any offence under Chapter V of the BNS to specified aggrieved persons alone.⁵⁵ While the wording seems innocuous enough, the BNSS has titled this section as “Prosecution for offences against marriage,” thereby overlooking the sexual offences, criminal assault, causing miscarriage and offences against children that are listed out in the BNS.

Considering marriage as the overarching link between various offences against women, the BNSS goes so far as to dictate who can or cannot be thought of as the person aggrieved by these offences. Subsection (2) of Section 219 states that: “. . . no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under Section 83 of the Bharatiya Nyaya Sanhita, 2023. . .”⁵⁶ The concerned BNS section deals with marriage ceremony fraudulently gone through without lawful marriage, an action that equally impacts the spouses of both the offending parties. Granting the right to file a complaint solely to the husband of the woman, without any mention of the wife of the man, is no different in spirit than the erstwhile Section 497 of the IPC, which criminalized adulterous acts only if committed by a married woman with another man⁵⁷. The Supreme Court of India, in 2018, struck down this provision⁵⁸ on the grounds that it represented Victorian principles of morality that violated women’s autonomy and dignity.

⁵⁴ Bharatiya Sakshya Adhiniyam, 2023, § 2(2), No. 47, Acts of Parliament, 2023 (India).

⁵⁵ Bharatiya Nagarik Suraksha Sanhita, 2023, § 219, No. 46, Acts of Parliament, 2023 (India).

⁵⁶ Bharatiya Nagarik Suraksha Sanhita, 2023, § 219(2), No. 46, Acts of Parliament, 2023 (India).

⁵⁷ Indian Penal Code, 1860, § 497, No. 45, Acts of Imperial Legislative Council, 1860 (India).

⁵⁸ Joseph Shine v. Union of India, (2019) 3 SCC 39.

The BNSS, despite being implemented in 2024, continues that archaic line of thought in not just the aforementioned example, but also its succeeding provisions. Section 219(6) forbids courts from taking cognizance of sexual intercourse by a man with his underage wife, should more than one year have passed from the date of commission of the offence⁵⁹. As per Section 221, no court can take cognizance of sexual intercourse by husband upon his wife during separation, except when it is prima facie satisfied of the facts which constitute the offence upon the wife's complaint against the husband⁶⁰. Both provisions introduce procedural complications that pile onto the adverse societal reactions and social taboos women face when calling out cases of rape and sexual assault, especially within the supposedly sacred institution of marriage. Far from championing equality of all genders in India's transforming society, the new criminal codes retain conservative traditional mindsets that contribute nothing to the pursuit of gender neutrality.

The Way Forward

The demand for gender neutrality in criminal law is neither unfamiliar nor baseless in the Indian legal system. In March 2000, the Law Commission of India released its 172nd report reviewing existing rape laws, where it proposed the modification of these laws to make them gender-neutral, in light of frequent instances of custodial rape and sexual abuse against youngsters⁶¹. Following the horrific 2012 Delhi gangrape incident, the Criminal Law (Amendment) Ordinance, 2013, codified these calls for neutrality into concrete amendments to the Indian Penal Code, substituting gendered pronouns with the word "person" for every provision⁶². However, the recommendations of the 2013 Ordinance were not reflected in the actual Amendment Act of 2013, which did not retain gender neutrality as an aspect of laws dealing with sexual offences⁶³. This spawned a jarringly contradictory system of criminal justice where the general population could not be offered legal protection without gender contradistinction.

The matter resurfaced in July 2019, when a Criminal Law Amendment Bill⁶⁴ was introduced

⁵⁹ Bharatiya Nagarik Suraksha Sanhita, 2023, § 219(6), No. 46, Acts of Parliament, 2023 (India).

⁶⁰ Bharatiya Nagarik Suraksha Sanhita, 2023, § 221, No. 46, Acts of Parliament, 2023 (India).

⁶¹ Press Information Bureau, <https://archive.pib.gov.in/archive/releases98/lyr2002/rjan2002/04012002/r040120023.html> (last visited Oct. 20, 2024).

⁶² Criminal Law (Amendment) Ordinance, Ord. No. 3 of 2013.

⁶³ India Code, https://www.indiacode.nic.in/bitstream/123456789/15357/1/criminal_law_ammend_act_2013.pdf (last visited Oct. 20, 2024).

⁶⁴ Digital Sansad, <https://sansad.in/getFile/BillsTexts/RSBillTexts/Asintroduced/crimnal-E-12719.pdf?source=legislation> (last visited Oct. 20, 2024).

in Rajya Sabha as a private members' Bill by K.T.S. Tulsi, with the objective of reforming criminal law to infuse gender neutrality in laws relating to sexual offences, so as to include men and transgender persons as victims. Even though it was reintroduced as the Criminal Law (Amendment) Bill in December 2021, the attempt failed to achieve its intended goal. While gender neutrality in the three new criminal codes seems to have not been considered in the first place, the Parliamentary Standing Committee on Home Affairs, acting as a reviewer of the draft codes, did recommend⁶⁵ retaining Section 377 of the erstwhile IPC to criminalise non-consensual carnal intercourse against men and transgenders and acts of bestiality. The conspicuous absence of this provision in the BNS is yet to receive an official explanation or even acknowledgement, despite the ripples it has caused to the status of legal protection of Indians from sexual offences.

The hesitation of the Central Government and the legislature in revamping criminal laws accordingly is not entirely without reason. Sexual offences in India continue to target women predominantly, with the perpetrators overwhelmingly identified as men in most cases. The introduction of neutrality in the concerned laws may lead to a host of other problems due to the staggering gender imbalance in our country, including counter-cases against victims who speak up and increased harassment of marginalized genders and sexualities, thereby going against the very purpose of rape law. Apart from practical feasibility, the Centre also has numerous other statutes and legislations to keep in mind, all of whom were drafted and still are drafted with the male gender taken as the default.

It is undeniable that crime, the most glaring example of deviant behaviour, cannot be separated from the influence of countless social and societal elements. The most prominent amongst said determinants are sex and gender, divided as the human population inherently is along these lines. In the words of Rosemary Gartner, "Ask people to imagine a criminal and most will see a male, probably young and possibly nonwhite. Ask them to visualize a crime victim and many will picture a female, perhaps a small child or an elderly woman, a teenaged girl or a young wife."⁶⁶ Gender neutrality in its expansive form therefore cannot be achieved by a simple change of pronouns. The spread of a particular linguistic innovation, as per linguist William

⁶⁵ The Economic Times, <https://economictimes.indiatimes.com/news/india/par-panel-recommends-retaining-ipc-section-377-adultery-provision-in-proposed-bharatiya-nyaya-sanhita/articleshow/105131929.cms?from=mdr> (last visited Oct. 20, 2024).

⁶⁶ Rosemary Gartner, *Sex, Gender, and Crime*, in *The Oxford Handbook of Crime and Criminal Justice* 348-384 (online ed., 2011).

Labov, is determined by the status of the social subgroup leading the change. If said group is not the highest-status group in the community (which in this scenario would be influential and powerful males), members of the highest-status group will eventually stigmatize the changed form to suit their dominant perspectives through their control of various institutions of the communication network⁶⁷. The offences of rape and sexual assault continue to be violent manifestations of the deeply entrenched power inequalities between men, women and other minority genders and sexualities in our society. Gender neutrality in criminal law thus brings with it the potential for rampant misuse by those in authority and majority.

In this backdrop, the concerns of the government cannot be disregarded. However, what also needs to be taken into account is the slew of loopholes in the three new criminal codes which already serve as barriers to accessing justice. Section 173(3) of the BNSS, for example, grants the police the power to conduct a preliminary inquiry for all cognizable offences punishable with three to seven years of imprisonment⁶⁸. Several other provisions of the BNSS, outlined above, provide similar discretionary powers to the police, setting up the scene for arbitrary misuse according to the personal beliefs of those in power. It is therefore essential for the government to remedy these institutional flaws, regardless of future criminal law reforms. By implementing periodic compulsory training and sensitization programs for law enforcement agencies, as well as establishing round-the-clock psychological and community support services for victims, the government can close the gaps between the letter of the law and the situation on the ground to ensure seamless access to justice, as per the original intent of the new criminal codes.

Such institutional reforms will also pave the way for a step-by-step alteration of existing criminal laws. It is impossible to amend the thousands of male-centric statutes and regulations that the legislature has produced over the years all at once, and nor should the government attempt to start such a drive. What can be done instead is to gradually introduce a gender-neutral approach in the legal system, beginning with the new criminal codes. The popular perception of gender neutrality as a complete rejection of gender needs to be replaced by a principled recognition of gender politics and power differentials in the criminal justice administration. Sexual crimes against men and transgender persons, even if criminalized in the future, will remain underreported due to institutional apathy and social stigma. Transgender

⁶⁷ Susan Ehrlich & Ruth King, *Gender-based language reform and the social construction of meaning*, 3(2) Discourse & Society 151, 16 (1992) <http://www.jstor.org/stable/42887784>.

⁶⁸ Bharatiya Nagarik Suraksha Sanhita, 2023, § 173(3), No. 46, Acts of Parliament, 2023 (India).

persons and other minority genders will face additional barriers due to the unbridled transphobia and queerphobia in Indian society. At the same time, female victims, as can be seen in the existing legal framework, will remain disproportionately affected by both sexual violence and the societal aftermath of harassment, intimidation and victimisation.

The doctrine of fair labelling becomes crucial in circumventing these intrinsic complications. This principle refers to the categorization of like offences together, depending on the degree and outcome of the crime, along with the responsibility and intent of the offender. In other words, the doctrine stipulates that the description of the offence should match the severity of the wrong done. Borrowing from the debate over gender-based crimes in international criminal tribunals, the doctrine can be applied at the domestic level to “meaningfully define gender-based crimes, reflecting different levels of wrongdoings through a clear structure for these offences, and label them in a manner that presents distinctive forms of criminality according to the gravity of each crime, and recognizes a proportion between the crime and the sentence.”⁶⁹ The offence of rape, for example, can be incorporated as a gender-neutral superset in the BNS, under which different subsections can prescribe varying provisions for rapes committed by and against women, men, transgender persons and other genders. By establishing data collection mechanisms to thoroughly analyse the intensity of a particular crime, its societal causes and ramifications, and lasting consequences on the victim, the state can incorporate gender neutrality and inclusivity into criminal law while remaining conscious of the prevalent social scenario.

Conclusion

Born from centuries of oppressive British rule, the nation of India was founded on the idea of equality, with its vast expanse housing innumerable castes, creeds, cultures and customs whose differences are accommodated as far as possible to maintain the country’s pluralistic democracy. The principle of equality, enshrined as both a constitutional value and a Fundamental Right, is the cornerstone of India’s diverse sociopolitical framework. Infusing inclusiveness and acceptance of all genders in the criminal law system is crucial to stand by this ideal, necessitating an enhanced understanding of gender-based crimes beyond rigid patriarchal stances and corresponding institutional changes. The need of the hour is to foster a

⁶⁹ Hilmi M. Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* 27 (Oxford University Press 2014).

supportive atmosphere that encourages and assists all victims, regardless of gender, to call out injustice and access the legal remedies they are entitled to.

The Bharatiya Nyaya Sanhita, the Bharatiya Nagarik Suraksha Sanhita and the Bharatiya Sakshya Adhiniyam, as the three new criminal codes ushering in an era of legal history free from colonial remnants, will play a key role in this endeavour. Through expansive criminal laws that extend protection to the entire population, and improved access to these laws while keeping in mind the special conditions of marginalized and sidelined communities, the revamped criminal justice system can truly uphold the rights and dignity of all individuals, irrespective of social identities.