

Balancing Protection and Accountability: A Critical Analysis of Gender Provisions in Indian Criminal Law

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Abstract

The reform of Indian criminal law through the enactment of the Bharatiya Nyaya Sanhita, 2023 (BNS), Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), and Bharatiya Sakshya Adhiniyam, 2023 (BSA) marks a decisive break from colonial-era codes. Among the most significant features of the new framework is the gradual movement towards gender-neutral language in defining offences. By replacing gendered terminology such as “any man who” with inclusive terms like “whoever,” and by extending protections to children irrespective of sex, these reforms acknowledge a more diverse understanding of gender. The BNS also explicitly recognizes transgender persons, thereby aligning statutory definitions with constitutional guarantees of equality and dignity. However, despite such progressive developments, the criminal law continues to retain gendered elements, most notably in the definition of rape under Section 63, which remains confined to male perpetrators and female victims. This exclusion leaves male and transgender survivors of sexual violence outside its scope, undermining the constitutional vision of substantive equality.

This paper critically examines the interplay between gender neutrality and protective discrimination in Indian criminal law. It evaluates the extent to which recent reforms have addressed gender bias, highlights the persisting gaps in sexual offence provisions, and explores the balancing act between inclusivity and the prioritization of women and children as vulnerable groups under Articles 15(3) and 15(4) of the Constitution. Drawing upon landmark judicial pronouncements and international human rights obligations, the paper argues for a nuanced reform strategy that ensures inclusivity without diluting protective measures for structurally disadvantaged groups.

Keywords: Gender neutrality, Bharatiya Nyaya Sanhita (BNS), sexual offences, constitutional equality, crimes against women and children, transgender rights, Domestic Violence Act, POCSO Act, judicial interpretation, substantive equality, criminal law reforms.

Introduction

Criminal law reflects not only the State’s authority to punish but also its commitment to constitutional principles of justice, equality, and dignity. For decades, India’s criminal justice system was governed by the Indian Penal Code, 1860, a colonial enactment that largely ignored the complexities of gender, identity, and vulnerability. The enactment of the *Bharatiya Nyaya Sanhita, 2023* (BNS), alongside the *Bharatiya Nagarik Suraksha Sanhita, 2023* (BNSS) and

the *Bharatiya Sakshya Adhiniyam, 2023* (BSA), represents a historic attempt to modernize and indigenize Indian criminal law. A notable feature of these reforms is the gradual shift towards gender-neutral drafting, with several provisions restructured to apply across genders.

Yet, gender neutrality in law remains a contested terrain. On one hand, it is celebrated as an inclusive move that acknowledges male and transgender victims, dismantling stereotypes that equate vulnerability exclusively with women. On the other hand, critics caution that the pursuit of gender neutrality must not obscure the heightened vulnerability of women and children in a patriarchal society. The Constitution itself, through Articles 15(3) and 15(4), empowers the State to adopt protective measures for disadvantaged groups, recognizing that formal equality cannot substitute for substantive justice.

This paper seeks to analyze the evolving discourse on gender neutrality in Indian criminal law. It explores the extent to which the BNS achieves inclusivity, identifies the gaps that persist—particularly in sexual offence provisions—and situates these developments within broader constitutional and international frameworks. At the same time, it underscores the importance of retaining special protections for women and children as structurally vulnerable groups, thereby advocating a balanced approach that harmonizes gender-neutral reforms with protective discrimination.

Objectives of the Study

1. To examine the gender-neutral provisions introduced under the Bharatiya Nyaya Sanhita, 2023, and assess their impact on Indian criminal law.
2. To identify and analyze the persisting gender-specific elements in sexual offence provisions, particularly the definition of rape.
3. To evaluate the balance between gender neutrality and protective discrimination for women and children under constitutional mandates.
4. To suggest reforms and recommendations that ensure inclusivity for all genders while retaining safeguards for vulnerable groups.

Research Methodology

This paper follows the doctrinal research method, relying on primary sources such as statutes, constitutional provisions, and judicial decisions, along with secondary sources like books, articles, Law Commission reports, and international conventions. The study uses qualitative analysis to interpret legal provisions, identify gaps in gender neutrality, and assess their alignment with constitutional equality. A comparative approach with international practices is also adopted to suggest reforms.

The Indian Criminal Law Framework

The Indian criminal justice system has undergone a historic transformation with the replacement of colonial-era laws. The Bharatiya Nyaya Sanhita, 2023 (BNS) defines offences and prescribes punishments, the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) governs

investigation and trial procedures, and the Bharatiya Sakshya Adhiniyam, 2023 (BSA) regulates evidentiary standards. Together, these three codes form the backbone of criminal law in India, effective from July 1, 2024.

In addition to these general codes, special legislations continue to provide targeted protection. The Protection of Women from Domestic Violence Act, 2005 (DV Act) addresses abuse within households, while the Protection of Children from Sexual Offences Act, 2012 (POCSO) creates a dedicated, child-specific framework against sexual exploitation. These laws illustrate how the criminal justice system combines general codes with special protections to safeguard the vulnerable while upholding constitutional guarantees of equality and fair trial.

Gender and Sex – Legal Distinctions

In law, sex refers to biological attributes—male, female, or intersex—assigned at birth on the basis of anatomy and physiology. Gender, by contrast, is a broader concept encompassing social, cultural, and personal identity, including categories such as man, woman, transgender, and non-binary.

Modern legal systems, including Indian jurisprudence, increasingly recognize this distinction. Legal protections against discrimination, therefore, extend not only to biological sex but also to gender identity and expression. This shift acknowledges that equality before law must apply irrespective of how individuals identify or express themselves.

Gender-Neutral Reforms under the Bharatiya Nyaya Sanhita

The BNS represents an important attempt at modernization by adopting gender-neutral language in several provisions.

Neutral Phrasing: Offences like assault or use of criminal force with intent to disrobe (Section 76) and voyeurism (Section 77) now begin with “whoever,” replacing the IPC’s earlier “any man who...” This ensures applicability across genders, recognizing that offenders need not be exclusively male.

Protection of Minors: The IPC’s Section 366A on procuring a “minor girl” has been broadened under BNS Section 96 to cover a “child,” thus safeguarding both boys and girls under 18. Similarly, the offence of importing a “girl” (IPC Section 366B) has been reframed in Section 141 of the BNS to cover both boys and girls.

Recognition of Transgender Persons: Section 2(10) of the BNS explicitly acknowledges “transgender” within its definition of gender, affirming legal recognition beyond the male–female binary and aligning statutory law with constitutional principles of dignity and equality.

These reforms mark a progressive step towards inclusivity.

Persisting Gaps in Sexual Offence Provisions

Despite these advances, significant limitations remain. Section 63 of the BNS, which defines rape, continues to be gender-specific: only a woman can be recognized as the victim and only

a man as the perpetrator. This excludes same-sex sexual assault and leaves transgender victims outside the scope of rape provisions, creating a substantial protection gap.

Critics point out that although the statutory definitions of “man” and “woman” have been expanded to include transgender persons, such recognition is largely formal. It does not extend to the substance of sexual offence provisions. As a result, the intent of inclusivity fails to translate into meaningful safeguards for all survivors of sexual violence.

Judicial Interventions: Expanding Accountability

The judiciary has played a pivotal role in dismantling gendered barriers.

In *Hiral P. Harsora v. Kusum Narottamdas Harsora*¹, the Supreme Court struck down the words “adult male” from Section 2(q) of the DV Act as unconstitutional. This broadened the category of possible respondents, making women and even minors liable. However, this expansion of accountability remained limited to domestic violence law and did not extend to sexual offences.

Similarly, in *Anuj Garg v. Hotel Association of India*², the Court held that protective discrimination cannot be based on outdated notions of women’s vulnerability. Laws must be rooted in substantive equality rather than paternalism.

In *Independent Thought v. Union of India*³, the Court read down Exception 2 to Section 375 IPC, holding that sexual intercourse with minor wives amounts to rape. This highlighted judicial willingness to prioritize child protection within criminal law.

These cases demonstrate that while courts have dismantled gendered restrictions in some areas, the rape framework remains exclusionary.

Crimes Against Women and Children: Protective Rationale

In parallel to gender-neutral reforms, Indian criminal law continues to prioritize women and children as vulnerable groups. The Constitution explicitly empowers the State under Article 15(3) to make special provisions for women and children, and under Article 15(4) for socially and educationally disadvantaged classes.

This constitutional mandate justifies targeted protective legislation, including laws on sexual harassment, dowry violence, domestic violence, trafficking, rape, child sexual abuse, and child labour. For example:

The DV Act, 2005 provides civil remedies to women facing abuse in the household.

The POCSO Act, 2012 is gender-neutral but child-specific, recognizing the heightened vulnerability of minors.

¹ (2016) 10 SCC 165

² (2008) 3 SCC 1

³ (2017) 10 SCC 800

International obligations also reinforce this approach. India is a signatory to CEDAW⁴ (1979) and the UN Convention on the Rights of the Child (1989), both of which stress the need for targeted protection for women and children.

Courts, however, have cautioned against protective laws becoming paternalistic. In Anuj Garg, the Supreme Court stressed that protective legislation must evolve with contemporary equality standards, avoiding stereotypes of women as inherently weak.

Comparative Perspective

Globally, many jurisdictions have moved towards gender-neutral sexual offence laws. For instance, the UK Sexual Offences Act, 2003 and Canada's Criminal Code define rape and sexual assault in gender-neutral terms, covering all victims irrespective of gender. Indian law, in contrast, remains partly gendered, highlighting the need for further reform to align with international best practices.

Conclusion

The evolution of Indian criminal law reflects a dual trajectory: on the one hand, the BNS and judicial interventions mark important steps towards gender neutrality; on the other, protective provisions for women and children remain essential to address structural vulnerabilities. This balance reflects the constitutional vision of equality—removing arbitrary gendered barriers while safeguarding disadvantaged groups through Article 15(3) and 15(4).

The challenge ahead lies in bridging the remaining gaps. Gender-neutral phrasing must extend to sexual offence provisions to ensure comprehensive protection for all survivors, including men and transgender persons. At the same time, laws addressing crimes against women and children must continue to prioritize vulnerability without reinforcing stereotypes. Only such a nuanced approach can reconcile inclusivity with protection, advancing the constitutional ideals of dignity, equality, and justice for all.

Recommendation

Adopt Gender-Neutral Language in Sexual Offence Provisions

Section 63 of the BNS should be amended to replace gender-specific phrasing (“man” as perpetrator and “woman” as victim) with gender-neutral terminology such as “any person.” This would ensure that male, female, and transgender survivors of sexual assault are equally protected, bringing India in line with international standards like the UK Sexual Offences Act, 2003.

Create a Separate Provision for Male and Transgender Victims Until Full Reform

As an interim measure, Parliament could introduce an independent section recognizing sexual violence against men and transgender persons. This would plug the current gap without immediately restructuring the rape framework.

⁴ Convention on the Elimination of All Forms of Discrimination Against Women

Judicial Interpretation of Inclusivity

Courts should adopt a purposive interpretation of terms like “woman” in sexual offence provisions, expanding them to include transgender women or persons identifying with the female gender. This approach would align with *NALSA v. Union of India*⁽²⁰¹⁴⁾ and its recognition of gender self-identification.

Strengthening POCSO as a Model for Inclusivity

The POCSO Act, 2012 is already gender-neutral. Its framework could be used as a legislative model for adult sexual offences, ensuring both inclusivity and victim-sensitive procedures.

Victim-Centric Reforms

Alongside gender neutrality, reforms must strengthen procedural safeguards—such as witness protection, confidentiality, fast-track courts, and trauma-informed investigation—to ensure that survivors of all genders feel safe in accessing justice.

Safeguarding Women and Children as Vulnerable Groups

Even within gender-neutral frameworks, the special vulnerability of women and children should not be diluted. Laws should retain enhanced penalties for offences like trafficking, domestic violence, and child sexual abuse, consistent with Article 15(3) and 15(4) of the Constitution.

Awareness and Sensitization

Gender neutrality in law will remain ineffective unless accompanied by sensitization of police, prosecutors, judges, and society at large. Regular training and awareness campaigns should be institutionalized to combat stereotypes and victim-blaming attitudes.

True equality requires both **gender-neutral laws** and **special protection for the vulnerable**. The Indian criminal law framework must therefore evolve into a model that is inclusive, victim-centric, and constitutionally grounded. Bridging the gaps in sexual offence provisions while retaining a protective focus on women and children will harmonize India’s legal system with its constitutional promises and international obligations.

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