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GENDERED CRIMINAL LAW AND EXCLUSION: HOW THE BHARATIYA NYAYA SANHITA, 2023, FAILS TO ADDRESS THE NEEDS OF MEN AND LGBTQ+ VICTIMS

~ Samarth Tiwari & Aaditya Shukla

Abstract:

India recently overhauled its entire criminal legal framework by enacting new criminal laws, namely the Bharatiya Nyaya Sanhita, Bharatiya Nagarik Suraksha Sanhita, and Bharatiya Sakshya Adhinyam. The primary purpose was to decolonize and depart from the existing criminal law framework by making it more liberal and victim-centric in nature. This paper aims to analyze such claims as propagated and examine their on-the-ground implications critically, specifically under sexual offenses. Contrary to their stated objectives, the new laws do not enhance gender-neutral inclusivity; instead, they limit themselves by making provisions exclusively to safeguard the rights of women, thus creating a legal vacuum for men and the LGBTQ+ community. This can be evidently witnessed in the case of the omission of Section 377 of the Indian Penal Code, which historically proved to be the only course of remedy available for males, as it penalizes the “intercourse against the course of nature,” and also in the definition of rape under Section 63 of Bharatiya Nyaya Sanhita, which by words explicitly positions men as perpetrators and women as victims of sexual wrong by adopting a gender-biased approach. The void thus created for men can be correlated with the pre-existing social bias that equates masculinity with aggression and femininity with submissiveness, which presumes males are unsusceptible to any sexual vulnerabilities. Moreover, the binary definition under chapter 5 of BNS excludes members from the LGBTQ+ community from the general course of remedy. The paper seeks to analyze such deeply embedded societal norms that tend to influence the current criminal laws regime. The study relies on doctrines, reports, theories, and comparative statistical data to investigate the claims as projected and understand the underlying reasoning behind the lack of adequate safety provisions for men and members of the LGBTQ+ community. The study is significant as it critically the structural issues in new

criminal laws and advocates for a gender-inclusive approach that deviates from pre-existing binary-based definitions.

Keywords: Bharatiya Nyaya Sanhita; Gender Neutrality; Sexual Offences; Section 377; LGBTQ+ Rights; Male Survivors; Criminal Law Reform; Binary Gender Norms.

Introduction:

The BNS promised reforms regarding the gender-specific nature of the old penal codes, but there are major structural issues that are being continued to be overlooked in the domain of sexual offenses. This can be clearly seen in Chapter V, Section 63 of the Bhartiya Nyaya Sanhita, where the statute defines what constitutes rape. In this particular section a woman is recognized as a victim and a man as the perpetrator, thereby maintaining the binary structure inherited from colonial laws.¹ This legal gap not only contradicts Article 14 and 21 of the Constitution of India, which guarantees equality and the right to life with dignity, but also perpetuates silence and stigma around non-female survivors of sexual violence that includes males and transgenders.² Despite being controversial for criminalizing consensual sexual acts among same-sex relationships, it also served as the only protective measure for male and transgender victims of penetrative sexual violence. With its decriminalization and the lack of substitute provision in the new framework, a legal vacuum has created. Non-female victims are now forced to depend on minor offenses that do not adequately acknowledge the seriousness of sexual violence.³ The new criminal codes do represent a constitutional and post-colonial shift; the continuation of gender-specific definitions indicates a conflict between legal and constitutional equality. This paper explores the contradiction of whether the new criminal laws can uphold constitutional morality while omitting gender-neutral provisions against sexual violence.

Research Questions:

1. Has the omission of Section 377 IPC resulted in a legal vacuum for male and LGBTQ+ victims?

¹ Bharatiya Nyaya Sanhita, No. 45 of 2023, Section 63, India Code (2023).

² Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech Under the Indian Constitution* 122 (Oxford Univ. Press 2015).

³ Ratna Kapur, *Challenging the Gender Binary in Rape Law*, *The Wire* (July 23, 2017), <https://thewire.in/gender/rape-laws-india-gender-binary>

2. Is the gender-specific drafting of sexual offenses constitutionally sustainable under Article 14?

Research Methodology:

The study uses a multidimensional approach that includes doctrinal analysis in which the author has examined statutory provisions under BNS and analysis of constitutional principles and judicial precedents. The study also compares and analyzes the framework of different countries on the facet of sexual offenses of males and LGBTQIA. Also, the major part of the study is devoted to statistical analysis in which the authors have used publicly available crime reports, academic studies, and institutional reports. Also, the paper does a thorough examination of data on male and LGBTQIA victimization. The scope of this study is only to the extent of analyzing sexual offenses under the Bharatiya Nyaya Sanhita, 2023, with particular emphasis on their implications for gender rights and vulnerabilities. Procedural reforms introduced under the Bharatiya Nagarik Suraksha Sanhita, 2023, are examined only to the extent that they directly influence victim protection, reporting mechanisms, and access to justice. The research predominantly relies on doctrinal sources, constitutional principles, judicial precedents, and publicly available empirical data. Given the recent enactment of these legislations, the limited availability of judicial interpretation and practical enforcement data constrains a comprehensive evaluation of their long-term impact on gender justice.

Historical Framework:

The old Indian criminal laws, including the IPC, CrPC, and IEA, were drafted by the first Law Commission constituted under Thomas Babington Macaulay in the year 1835. The laws were framed with the intent of exercising penal control over the people rather than looking for the needs of the individual. It prioritized the colonial interest in preserving morality and made for maintaining public order, not looking after the interests of their subjects. Thus, the concept of sexual offenses was shaped by nineteenth-century English morality, which viewed sexuality through a rigid binary lens that framed women primarily as bearers of virtue and honor. As a result, it shaped the definition of rape by only looking at the binary gender norms of perceiving males as perpetrators rather than victims of sexual violence.

However, the steps were taken by the colonial regime to inculcate a more liberal and inclusive approach while framing the laws by incorporating section 377, which criminalizes intercourse

against the law of nature.⁴ This developed as a provision that penalized the consensual acts of sexual intercourse and same-sex relationships. Despite these oppressive origins, Section 377 was used as the only course of remedy available to non-female victims.

Amendments were brought periodically in the old framework, yet the foundational principle remained the same regarding gender neutrality. Despite embedding the principles of equality, dignity, and personal liberty, the criminal laws continued to operate in the same framework. However, due to evolving constitutional jurisprudence, precedents have placed a major emphasis on protecting individuals' rights, including bodily integrity, privacy, and autonomy, incorporating them as fundamental constitutional values. The expansion can be seen as progressive concerning the legal vacuum in bridging the gap between constitutional morality and gender neutrality.

The Law Commission, in its 172nd report (2000), recommended making rape laws gender-neutral by replacing the term "woman" with "any person"; that means expanding the scope of the offense to cover all victims regardless of gender.⁵ However, these recommendations have not been implemented, and India continues to rely on gender-specific provisions for such a serious offense. Also, the Criminal Law (Amendment) Bill 2013,⁶ following the Nirbhaya case and on the recommendations of the Justice Verma Committee,⁷ considered the question of gender neutrality by expanding the definition of rape and adding new offenses like voyeurism and stalking but still retaining a more female-centric definition of sexual offenses, citing social relations and misuse. This step could be seen as a shift towards a protectionist approach by incorporating a more gender-neutral reality while also prioritizing women's safety. However, these suggestions on gender neutrality were absent in the actual implementation of the amendment due to their ambiguous definitions.

Later, the Supreme Court in *Navtej Singh Johar v. Union of India*⁸ further narrowed down the definition of "carnal intercourse against the ordinary course of nature" by omitting consensual sexual acts from the ambit of this definition. Thus, the omission of Section 377 *Navtej* being

⁴ *Indian Penal Code*, No. 45 of 1860, Sec 377 (India).

⁵ Law Commission of India, *172nd Report on Review of Rape Laws* (Mar. 2000), <https://lawcommissionofindia.nic.in/101-169/Report172.pdf>

⁶ Criminal Law (Amendment) Act, 2013, No. 13 of 2013, India Code (2013).

⁷ Justice J. S. Verma Committee, *Report of the Committee on Amendments to Criminal Law* (Jan. 23, 2013)

⁸ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India).

the only remedy from the British-era regime, further intensified the need to bridge the remedial gap and depart from exclusive gender definitions.⁹

Historically, the trajectory of Indian criminal law evolution reveals a persistent struggle to incorporate the need for non-female victims under the statutory framework while also not substituting the interest of principal patients of sexual offenses, i.e., women. Moreover, the continued colonial assumptions show us the inadequate attempts to evolve a legal framework complying with substantive constitutional equality.

Legal framework in BNS:

It is against this historical trend of colonial continuity and partial reform; the passing of the Bharatiya Nyaya Sanhita, 2023; the Bharatiya Nagarik Suraksha Sanhita; and the Bharatiya Sakshya Adhinyam is a turning point in the evolution of criminal law in India. These legislations came in as a complete overhaul plan aimed at substituting the colonial legal system with one that was sovereign and constitutionally attuned. The repealing of the Indian Penal Code, 1860, and subsequent amendments by the legislature was, in symbolic and substantive terms, to break with the colonial legal philosophy. Nevertheless, this shift can be a structural change or just a change of text, and this is a critical question to ask, especially in the area of sexual offenses where the male and female genders have been historically ingrained.

In sections 63 and 70 of BNS, there is a clear definition of rape and aggravated rape as male offenders engaged in penetrative actions against female victims, which reflects the existing gendered understanding of sexual crime based on history.¹⁰ The method follows the conventional definitions of IPC but does not acknowledge male or transgender victimization, thus undermining the gender neutrality concept. This type of language promotes the stereotypes that only women can be victims and only men can be offenders, which is not in line with constitutional requirements of equality as is stipulated in Articles 14 and 15 of the Constitution of India.¹¹ Section 63 pertaining to rape in BNS still uses the same definition as rape in IPC Section 375 that introduced the concept of man being the violator of any form of sexual abuse, be it rape or gang rape.¹² It is through the same Chapter V of BNS in Section 70, which specifies

⁹ Anand Grover, The Thoughtless Sec. 377 IPC Oversight in Bharat Nyaya Sanhita, NewsClick, <https://www.newsclick.in/thoughtless-sec-377-ipc-oversight-bharat-nyaya-sanhita> (last visited Mar. 1, 2026).

¹⁰ Bharatiya Nyaya Sanhita, No. 45 of 2023, Sections 63, 70 (India).

¹¹ A. Bano, H. S. Dey & S. Datt, Gender-Neutral Criminal Law in India: A Critical Review of Scholarly Literature on Legal Protection for Male Victims in Matrimonial Offences, *Int'l J. Res. Publ. Rev.* (2025), <https://ijrpr.com/uploads/V6ISSUE12/IJRPR57319.pdf>.

¹² Indian Penal Code, No. 45 of 1860, Section 375 (India).

the meaning of gang rape; it also carries the same idea of man being the perpetrator and woman being the victim.¹³ Thus, Sections 63 and 70 can be criticized not because of protecting women in themselves, but because they could not be balanced with the inclusive principles of the Constitution that could acknowledge various gender identities and equal autonomy of the human body. Aggravated punishments with aggravated punishments added when the victim is a woman or a minor would better reflect the intent of the legislation with constitutional requirements of equality and dignity.

Section 64 of the Bharatiya Nyaya Sanhita, 2023, optimizes the punishment of rape under aggravating conditions like custodial control or misuse of power.¹⁴ On the one hand, this is a reasonable purpose of punishment of power-based exploitation; nevertheless, by its gender-specific definition of rape in Section 63 puts limits on both the offender and its victim in binary terms. There is no gender requirement for abuse of authority, and in *Navtej Singh Johar v. Union of India*,¹⁵ the Supreme Court emphasized that constitutional morality needs to break down the laws that make the identity of marginalized people invisible. In this regard, Section 64 can be criticized not on account of being harsh, but rather on the basis of continuing to exclude based on gender by its exclusivity.¹⁶

Section 65 of the Bharatiya Nyaya Sanhita, 2023, prescribes severe punishment to the rape of a minor under the specific ages and can be considered a very protective approach to a child.¹⁷ But here there occurs a doctrinal discrepancy with the interpretation of this provision in the context of the Protection of Children from Sexual Offences Act, 2012 (POCSO), which takes on a gender-neutral perspective of children of all sexes as potential victims.¹⁸ On the one hand, POCSO confirms that child protection is inclusive; on the other hand, depending on the gender-related definition of rape, provided in Section 63, the act is limited to female minors. Such deviation indicates that the legislature has adopted gender neutrality in the context of child sexual abuse but has not applied the same practice in the framework of the fundamental rape terminology in the BNS, which undermines the consistency of teachings and presents issues in Article 14 of the Constitution.

¹³ Bharatiya Nyaya Sanhita, No. 45 of 2023, Section 70 (India).

¹⁴ Bharatiya Nyaya Sanhita, No. 45 of 2023, Section 64 (India).

¹⁵ *Supra* note 6

¹⁶ BNS Section 64

¹⁷ Bharatiya Nyaya Sanhita, No. 45 of 2023, Section 65 (India).

¹⁸ Protection of Children from Sexual Offences Act, No. 32 of 2012, India Code (2012).

In Bharatiya Nyaya Sanhita, 2023, in Section 66, the punishment is increased in case of rape leading to grievous injury, vegetative state, or death, and it is prolonged to life imprisonment or even to the death penalty.¹⁹ Despite such improvement being proportional to the severity of injury, there is still fears that the extension of the death penalty in sexual crimes has failed to demonstrate evident deterrence and may be contradictory to new criminal justice reforms. Also, since Section 66 is pursued under the gender-specific definition of rape in Section 63, it has the most vigorous protection of male and transgender victims who can also experience much of the same harm. As was stressed in *Joseph Shine v. Union of India*, criminal law should not continue to use gender stereotypes but instead provide substantive equality, and thus the argument against Sections 64-66 is not that they are harsh but rather that they are extraterritorial.²⁰

The Bharatiya Nyaya Sanhita, 2023, Section 67, makes sexual intercourse of a husband with his wife during a period of separation illegal without her permission.²¹ Although such a provision recognizes the independence of a separated wife, it, at the same time, demonstrates the wider marital rape exception that remains in effect outside of this. Even the acknowledgement of non-consenting intercourse as a crime only in time of separation proves a conditional and partial recognition of bodily autonomy. In addition, similar to the above considerations, Section 67 is framed within the gender-based framework of rape in Section 63, thus continuing to presume that a wife is the only victim and a husband is the only perpetrator. This selective identification of injury shows how the statutory design continues to perpetuate relational and gendered hierarchies.

In section 68 through 72 of the Bharatiya Nyaya Sanhita, sexually related crimes like sexual harassment, assault with intent to disrobe, voyeurism, and stalking are covered.²² Although the provisions were added or widened to respond to modern-day counterparts of sexual misconduct, they still remain reworded in a way that defines women as the only available form of victimization. In this case, crimes like voyeurism and stalking are put in the context of a man to a woman, which is a way of supporting the assumption that a woman is more susceptible to such evils. This trend indicates that Chapter V is not simply a set of gender-specific provisions, but rather a part of a bigger protective system that treats sexual victimhood as an equivalent of

¹⁹Bharatiya Nyaya Sanhita, No. 45 of 2023, Section 66 (India).

²⁰*Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39 (India).

²¹Bharatiya Nyaya Sanhita, No. 45 of 2023, Section 67 (India).

²² *Bharatiya Nyaya Sanhita*, No. 45 of 2023, Sec 68–72 (India).

womanhood. The compounding nature of this is the marginalization of male and transgender people in statutory matters in areas where similar harms can take place.

The rest of the provisions of Sections 73 to 79, such as offenses related to procurement, trafficking, and exploitation, continue to bear a predominantly gendered interest.²³ Although in a few cases, trafficking regulations can be extended to a larger group of individuals, the general structure of Chapter V shows that the law tends to perceive sexual harm as perpetrated on women. This trend demonstrates that the gendered language is not only an error or particular to rape but an entire chapter.

The wording of sexual offenses in Chapter V of the *Bharatiya Nyaya Sanhita* is gender-specific, which can be only fully comprehended by examining the social assumptions that have influenced the rape law throughout the years. Sexual violence is regarded by feminist scholars, in particular the radicalism strand of feminism, as evidence of patriarchal dominance rather than sexual desire.

Catharine MacKinnon and Andrea Dworkin suggested rape as an instrument of male dominance in male-dominated societies arranged by gender hierarchy.²⁴ Such research as the analysis of heterosexual relations conducted by Gavey demonstrates that females tend to be perceived as passive in sexual intercourse, and the coercion may be implicit and even related to ingrained rules of power rather than the direct use of force.²⁵ Under this perception, specific rape statutes were favorable since they were protection of the more vulnerable group in respect to sexual violence. Nonetheless, male and gender-diverse victims also remain out of the scope of the same assumptions. Conventional conceptions of masculinity associate men with power, command, and sexual dominance, and therefore, a male victim seems impossible or uncommon. These deep cultural narratives presuppose a male perpetrator and a female victim of sexual harm, not due to the study of all sexual harm. The phrase “vulnerability” remains solely a female word in the law because of the binary model of power that does not consider the survivors of men and lesbians, gays, and bisexuals. Thus, though the gender design might have originated due to a real patient's views on patriarchy, its persistence in a modern system of construction implies questions of equality and fairness.

Legal and Statistical Implications:

²³ *Bharatiya Nyaya Sanhita*, No. 45 of 2023, Sec 73–79 (India).

²⁴ Andrea Dworkin, *Intercourse* 111–40 (1987); Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 32–45 (1987).

²⁵ Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* 75–110 (2005).

Section 377 IPC was an important remedial provision to the Indian Penal Code that assists male and transgender victims of forced sex. Despite its criticism as rendering consensual same-sex relationships illegal, it nonetheless extended to non-consensual forceful sex despite the court having partially read and struck down part of it in *Navtej Singh Johar v. Union of India*.²⁶ Section 377 criminalized driving a carnal intercourse against the order of nature regardless of the gender of a victim and provided a sentence of up to ten years' imprisonment or life imprisonment in addition to a fine. Practically, it was the only explicit law that allowed male and transgender individuals who were made to engage in anal or oral sex to initiate a case in cases where the gender-specific rape laws did not exist.

Section 377 was repealed when the *Bharatiya Nyaya Sanhita* was enacted, but another gender-neutral law was omitted on non-consensual penetrative sexual acts. Chapter V of the BNS, particularly, Section 63 to 73, continues to describe rape as a deed perpetrated by a man on a woman. Consequently, the new law does not regard forced penetrative acts on adult men or transgender people as serious sexual offences. The other general laws regarding assault or hurt would apply technically but not exhaustively cover the sexuality or severity of such injury. This puts an imbalanced approach to the law of sexual violence.

The practical impact of this omission is immense when we consider the actual statistics of victimization of males. It has been demonstrated that male rape, despite being highly neglected, is not uncommon.²⁷ The latest survey estimates over 27% of men and over 32% of women as victims of some kind of sexual victimization at some time in their lives.²⁸ Accurate figures on adult males are difficult to obtain due to stigmatization and underrepresentation. The sexual vulnerability of men is denied or downplayed in the society where masculinity is associated with power.²⁹ Victimization of adult men is underreported in most of the early studies, mainly those that were conducted on child victims or prisoners. This is shown by the laws that presume that the only perpetrators of sexual violence are men and not victims.

LGBTQIA+ individuals have a worse time with the exclusion. The actual magnitude of violence against gender-diverse individuals is not typically reflected in official crime statistics.

²⁶ *Supra* note 6

²⁷ Mark Lowe & Paul Rogers, *The Scope of Male Rape: A Selective Review of Research, Policy and Practice*, 35 *Aggression & Violent Behavior* 38 (2017).

²⁸ Kathleen C. Basile & Sharon G. Smith, *Sexual Violence Victimization of Women: Prevalence, Characteristics, and the Role of Public Health and Prevention*, 5 *Am. J. Lifestyle Med.* 407 (2011).

²⁹ Aditya Lohani Lohani & Aniruddh Atul Garg, *Unveiling the Veiled: Exposing the Hidden Plight of Male Rape Survivors in India*, *Indian Journal of Law and Legal Research* (Mar. 24, 2024), <https://www.ijllr.com/post/unveiling-the-veiled-exposing-the-hidden-plight-of-male-rape-survivors-in-india>

NCRB captures 236 transgender victims and no rape cases,³⁰ contrary to national human rights reports. In 2018 the National Human Rights Commission found that 92% of trans people had experienced physical or verbal abuse.³¹ In the absence of even a category in which a serious sexual offense can be classified in relation to some groups, it restricts such groups in their capacity to pursue justice and figuratively demotes the acknowledgement of their bodily autonomy. The outcome is structural inequality: the same acts of sexual violence receive dissimilar legal treatment, simply based on the gender identity of the victim, which brings up significant issues of equal protection and equal access to justice.

Chapter V of the Bharatiya Nyaya Sanhita stipulates the rules of sexual offenses, which are based on gender. This creates constitutional concerns on Articles 14, 15, and 21. The legislation attempts to safeguard women due to the historical gender-based violence. However, it does not consider men and transgender people as the primary definition of rape, which should be viewed with critical consideration since the Constitution requires equality.

Article 14 states that the separation of people by law should be supported by sense and related to the purpose.³² The rape laws are designed to penalize grave breaches of bodily autonomy through forceful penetration. In Section 63 of the BNS, women are the only victims of rape, and thus a gender category is formed. Sexual violence has long been devastating to women, although it is not the only gender that is at risk of being penetrated. When the injury stemming out of forcible penetration is identical, then exclusion of men and transgender individuals undermines the connection between the category and the purpose of the law. Equality implies a similar harm should receive similar treatment under the law.

Recent judicial rulings revolve around actual equality. In *Navtej Singh Johar v. Union of India*,³³ the Supreme Court said that the government has to separate marginalized people concealed in laws. In *Joseph Shine v. UOI*,³⁴ the court added that gender stereotypes in criminal law are erroneous. The BNS continues to think that men are perpetrators and women are

³⁰ Vandana Bansal, Why Only 236 Trans Person Victims of Crimes Were Recorded in India in 2020, *IndiaSpend* (June 23, 2022), <https://www.indiaspend.com/gendercheck/why-only-236-trans-person-victims-of-crimes-were-recorded-in-india-in-2020-823034>

³¹ Ankush Kumar, Anti-Transgender Discrimination, Violence in India Persists, *Washington Blade* (Sept. 24, 2024), <https://www.washingtonblade.com/2024/09/24/anti-transgender-discrimination-violence-in-india-persists/> (last visited Mar. 1, 2026).

³² INDIA CONST. art. 14.

³³ *Supra* note 6

³⁴ *Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39 (India).

victims, and this is a binary thought process that is founded on the ancient social regulations rather than on the contemporary values.

The Court further stated in *NALSA vs. Union of India* that transgender individuals are entirely legalized by the Constitution, and they possess all fundamental rights.³⁵ The absence of gender-neutral rules in the worst sexual crimes is of concern over whether the perception is adhered to or not. Therefore, the issue of protecting women remains, yet the design of the BNS excluding others may negatively affect the true equality and the idea of dignity and equal protection of all the people guaranteed by the Constitution.

Constitutional Evaluation of Gender-Specific Sexual Offence Provisions:

The gendered structure of the sexual offenses in Chapter V of *Bharatiya Nyaya Sanhita* is highly questionable in the constitutional sense based on Articles 14, 15, and 21 of the Constitution of India. Although it is valid that the desire of the legislature to increase protections against women is a valid acknowledgement of past gender-based violence, the fact that male and transgender victims are not considered in the very definition of rape requires questioning in the light of the equality clause of the Constitution.

Article 14 allows classification to be made, provided it meets the twin tests of “intelligible differentia” and “rational nexus” in relation to the object that is aimed to be obtained.³⁶ Rape law is aimed at punishing serious offenses on body autonomy by means of non-consensual penetration. Section 63 of the BNS, however, acknowledges only the women as rape victims, and this gives a gender distinction. Although women are a historically vulnerable population with disproportionate experience of sexual violence, vulnerability to penetrative assault is not necessarily gender-specific. When the injuries caused as a result of non-consensual sexual penetration fit in the same category, the exclusion of male and transgender victims under corresponding statutory regulation undermines the rational nexus between the characterization and the subject of the statute. Equal protection implies that similar harms should be subjected to similar justice.

Contemporary constitutional law has drifted toward substantive equality. In *Navtej Singh Johar v. Union of India*,³⁷ the Supreme Court underlined that constitutional morality requires the breakdown of legal structures that make the marginalized identities unseen. Similarly, in

³⁵ *National Legal Services Authority v. Union of India*, (2014) 5 S.C.C. 438 (India).

³⁶ *Supra* note 24

³⁷ *Supra* note 6

Joseph Shine v. UOI,³⁸ the Court discarded gender stereotypes that were instituted in criminal law. The fact that the BNS continues to assume that men are the perpetrators and women are the victims is also a binary view of the concept that is based on the old social norms but not grounded in the values that are enshrined in the constitution.

Also, in National Legal Services Authority v. UOI,³⁹ the court ruled in favor of transgender persons and their right to enjoy full protection of fundamental rights and to be recognized as on an equal footing with other citizens in the constitution. Lack of gender-neutral protection in the most serious group of sexual crimes is a cause of concerns about adherence to this acknowledgement. Therefore, even though the protection of females is a valid and imperative goal, the exclusionary nature of the BNS jeopardizes the formation of substantive equality and the constitutional obligation of dignity and equal protection under the law of all citizens.

Comparative insights and ways forward:

When we examine the understanding of sexual offenses by other countries that practice democracy, we observe that legislation is now being crafted in a non-gendered manner. As an illustration, the Sexual Offences Act of 2003 in the UK defines rape as non-consensual sex, and this does not imply that the victim should be a woman.⁴⁰ Canada substituted the previous gender-specific rape offense with the neutral offense of sexual assault because it is acknowledged that anybody could be a victim.⁴¹ The 2007 amendment of South Africa also applies the gender-neutral definition of rape that permits both male victims and male perpetrators as well as female victims and female perpetrators.⁴² These instances demonstrate that it can be done to protect women and also have laws that address everybody. Based on these instances, we get to know that sexual offense law is best addressed when it considers the act and lack of consent, other than the identity of the persons. Gender-neutral laws do not disregard the fact that women have been hit more by sexual violence; they merely extend their protection to all victims of the same harm. The law can even impose more severe sentences on any crime committed against women, children, or vulnerable individuals and preserve the same protection desired by lawmakers without treating all individuals differently.

³⁸ Supra note 26

³⁹ Supra note 27

⁴⁰ *Sexual Offences Act 2003*, c. 42, Sec 1 (U.K.).

⁴¹ *Criminal Code*, R.S.C. 1985, c. C-46, Sec 271–273 (Can.).

⁴² *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*, Sec 3 (S. Afr.).

We would amend Section 63 of the Criminal Code in India by substituting the term “woman” with “any person” but keeping stiff penalties in severe cases. Or we might put a new, gender-neutral crime of non-consensual penetration into the gap created by the repeal of Section 377. That would bring the law in line with the Constitution and the court rulings that affirm that all people must be treated with dignity, freedom, and equal treatment, which was evident in the Navtej Singh Johar, NALSA, and Joseph Shine cases.

Good institutions are also required to buttress the new laws. This is gathering correct data about men and LGBTQIA+ victims, educating the police, and providing coherent instructions to prosecutors. Such measures are necessary in order that the new laws may, in an actual sense, assist people to access justice. Inclusive laws can even fail to make real changes without them.

Ultimately, a law meeting the Constitution ought not only be gender-neutral but also be concerned with vulnerability, consent, and freedom of the body. The examples provided in other countries indicate that people can also be safeguarded by inclusive laws. India can continue to protect women by approaching it gender-neutrally and cautiously but ensuring it fulfills the need of the Constitution for equal protection and dignity for all.

Conclusion:

The Bharatiya Nyaya Sanhita was presented as a sharp contrast to the colonial criminal thought and as the victim-oriented, progressive reform of the Indian criminal system. Closer examination of Chapter 5, however, reveals that the law offers greater protection to women, yet it continues to hold on to a rigid binary of gender that excludes male and LGBTQIA+ victims of sexual offenses as the most severe. The law has increased this gap by not liberalizing Section 377 of the IPC with a gender-neutral provision and has not adequately identified certain types of non-consensual penetration violence.

As demonstrated in this paper, the gender-specific manner of writing sexual offenses is not only a policy choice; it is a colonial moral choice that was subsequently reinforced by the protective feminist ideas. Although such protection was reasonable to combat gender-based suppression, nowadays the constitution needs a broader interpretation of equality. The violence experienced by male and transgender victims, and legislation elsewhere demonstrates that them being the most vulnerable to sexual violence is not a single-gender issue. The dignity, autonomy, and equal protection promise in the constitution implies that the same harms ought to be given equal consideration.

It is not the need to reduce protection of women but the expansion of the law according to true equality. An updated, gender-neutral piece of legislation that has better provisions over groups that have suffered in the past can integrate the original purpose of the law with contemporary moral practices. Ultimately, a really decolonized criminal code has to do much more than merely change words, and that requires justice founded on body autonomy and on equal protection of all.