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GENDER NEUTRALITY IN INDIAN LAW: A CRITICAL ANALYSIS

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ABSTRACT

This paper analyses the debate on gender neutrality in the context of an emergent Indian Law. Since Indian law has historically contained protections for women against socio-patriarchal oppression through protectionist discrimination under Article 15(3), breaks by the judiciary to protect the arcane statutory binaries in Articles 14 and 21 have challenged its legal foundations. To that end, this paper analyses the constitutional paradigm vis-a-vis feminism in four statutory spheres in current law:

1. **Criminal Jurisprudence:** Gender-exclusive sexual offences under BNS Section 63 and the statutory void left for male, transgender, and non-binary victims following the repeal of IPC Section 377.
2. **Domestic & Workplace Abuse:** Presumed female victimhood and male perpetration under BNS Section 85 (Cruelty), the PWDVA (2005), and the POSH Act (2013).
3. **Maintenance Provisions:** Statutory asymmetry under BNSS Section 144 contrasted with the gender-neutral civil standard under Sections 24 and 25 of the Hindu Marriage Act, 1955.
4. **Adoption & Civil Rights:** Sex-based discrimination under CARA Regulation 5(4)—prohibiting single fathers from adopting female children—and the statutory exclusion of transgender parents under HAMA and the JJ Act.

As a solution to address and balance for Article 14 equality and Article 15(3) safeguards, a new Asymmetric Gender-Neutral Model is put forward which introduces gender-neutral core

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offences and equal civil rights for women and victims while safeguards these through targeted legislative presumption, increased punishments and procedural protections.

KEY WORDS: Gender Neutrality, Bharatiya Nyaya Sanhita (BNS), Bharatiya Nagarik Suraksha Sanhita (BNSS), Article 14, Article 15(3), Substantive Equality, CARA Adoption Regulations, POSH Act, Transgender Rights, Asymmetric Neutrality, Legal Reform.

CHAPTER I: INTRODUCTION & THEORETICAL FOUNDATIONS

1.1 Conceptualizing Gender Neutrality, Inclusivity and Specificity

Statutory text forms the basis of legal subjects, creates rights, and imposes penal liabilities- in the context of legislative policy and legal drafting. Statutory law exhibits three approaches of framing gender:

First, **Gender-Specific Legislation**, which manifests through laws drafted to cover only one gender as either the protected object of the law (victim) or the responsible subject of the law (perpetrator). Under the primary criminal code of India—the Bharatiya Nyaya Sanhita (BNS), 2023—a key example is Section 74, which penalizes criminal force used against a woman to outrage her modesty.²

Secondly, the **Gender-Neutral Legislation** is a range of laws that are drafted with gender-neutral language that relates equally to both sexes or genders ("any person," "another person," or "whoever" etc.). The Prevention of Children from Sexual Offences (POCSO) Act, 2012 is the most operational example of this drafting style in the Indian penal law.³

Third, Gender-Inclusive Laws are laws that explicitly recognize the existence of people who do not fit in the binary, such as men, women, trans, intersex, and non-binary-people, without actually listing those terms or using other acknowledgments of variety.

The central legal argument that is made today in India is whether law itself should inevitably move from the protective gender-specific nature of statutoriness to pure, absolute gender neutrality or, in the alternative, to gender inclusiveness.

1.2 Historical Trajectory: Colonial Origins to contemporary BNS Framework

² Bharatiya Nyaya Sanhita, 2023, § 74.

³ Protection of Children from Sexual Offences Act, 2012 (Act No. 32 of 2012), §§ 3, 5.

The original founding structure of Indian criminal law was established in the mid-19th century colonial time period through the Indian Penal Code (IPC) 1860. This colonial code was a Victorian moral Code that embodied the paternalistic protections (coverture ideology), heteronormative binary thinking, and the criminalization of Non-conforming sexual practices (Section 377 IPC).⁴

When the Constitution was being drafted after independence, the team of framers of the Constitution were conscious about the gross socio-economic inequality, the evil of dowry, pervasive systemic violence against women and thus, Article 15(3) of the Constitution was added wherein it is stipulated that the State shall make special provisions for women and children.⁵

Different legislations were made over the years by the Parliament for individual gender identities like the Dowry Prohibition Act, 1961,⁶ Protection of Women from Domestic Violence Act, 2005,⁷ and POSH Act, 2013.⁸

On 1 July 2024 India replaced the Indian Penal Code, the Indian Evidence Act and the Criminal Procedure Code with a comprehensive criminal code called the Bharatiya Nyaya Sanhita, 2023 (BNS),⁹ the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023¹⁰ and the Bharatiya Sakshya Adhiniyam (BSA), 2023.¹¹ Thus, Parliament preserved the same gendered language regarding adult sexual offences and adultery in the new legislation, raising a constitutional challenge as to the vote exclusion of non-female victims.

1.3 The Constitutional Conflict: Formal Equality (Art. 14) vs. Protective Discrimination (Art. 15(3))

The debate surrounding gender neutrality involves two competing constitutional principles:

Any law which is required to be held under the rule of Formal equality (as per Article 14) shall be presumed to treat all persons equally unless shown that it classifies some persons on the basis of an intelligible differentia which has a rational relationship with the object of the

⁴ Indian Penal Code, 1860 (Act No. 45 of 1860), § 377.

⁵ Constitution of India, 1950, Art. 15(3).

⁶ Dowry Prohibition Act, 1961.

⁷ Protection of Women from Domestic Violence Act, 2005

⁸ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (Act No. 14 of 2013).

⁹ Bharatiya Nyaya Sanhita, 2023 (Act No. 45 of 2023).

¹⁰ Bharatiya Nagarik Suraksha Sanhita, 2023 (Act No. 46 of 2023).

¹¹ Bharatiya Sakshya Adhiniyam, 2023 (Act No. 47 of 2023).

legislation (*State of West Bengal v. Anwar Ali Sarkar*).¹² Gender-Neutral advocates contend that the differential treatment of Male/Transgender/Non-binary victims of Sexual Assault/Domestic Violence is not on the basis of an intelligible differentia, and not enough to even attract Article 14.

However, Substantive Equality and Protective Discrimination (Article 15(3)) recognizes that equal treatment of unequals is unfair. Article 15(3) permits the State to adopt asymmetric gender-specific legislation to redress the socio-economic disadvantages of the past.¹³ Supporters of gender-specific legislation contend that gender neutrality in a patriarchal setup disregards the existing power structures, which may undercut the legislated safeguards available for female victims.

1.4 Research Methodology and Core Questions

The research methodology adopted for this paper is socio-doctrinal in nature. The doctrines formed by the analysis of provisions of the BNS, BNSS, BSA, and other specialized welfare laws, landmark judicial decisions, Law Commission reports, and empirical data from the National Crime Records Bureau (NCRB) have been used.

The core research questions examined are:

1. Whether the provision of adult sexual offences in Section 63 of the Bharatiya Nyaya Sanhita, 2023, considering gender bias in its provision is violative of Articles 14, 15 and 21 of the Constitution in the light of the rulings in NALSA and Navtej Singh Johar?
2. What statutory void was created by repealing IPC Section 377 without incorporating a gender-neutral adult sexual assault provision in the BNS?
3. How can the Indian legal system reconcile protective discrimination under Article 15(3) with universal access to justice under Article 14?

CHAPTER II: CONSTITUTIONAL JURISPRUDENCE & JUDICIAL PARADIGM SHIFTS

2.1 The Constitutional Triad: Articles 14, 15, and 21

¹² *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75.

¹³ Constitution of India, 1950, Art. 15(3).

Articles 14, 19, and 21 form the constitutional triad which enforces all statutory action, including penal laws, to be just, reasonable, and non-exploitative. Read in conjunction with Article 15, classification on the ground of sex in the statutes cannot be based on paternalism or gender stereotypes.

In *Anuj Garg v. Hotel Association of India*,¹⁴ the Supreme Court of India invalidated a statutory provision preventing women's employment in premises which serve liquor, taking the view that "Paternalistic masquerades are the protective garb for preserving status quo." Paternalistic legislation often reinforces negative gender stereotypes.

2.2 Reconceptualizing Gender Identity: *NALSA v. Union of India* (2014)

In *National Legal Services Authority (NALSA) v. Union of India*,¹⁵ the Supreme Court recognized transgender individuals as a "third gender."

The Court established three foundational principles:

Right to Self-Identification of Gender - Gender identity is an integral facet of human dignity, personhood, and individual liberty which is protected by Article 21.

Expansion of Sex under Article 15 - The term "sex" as used in Articles 15 and 16 has been interpreted to mean "gender identity". Discrimination against transgender status amounts to an infraction of Articles 14 and 15.

Rejection of Binary Statutory Categorisation - The Court held that binary legal designations ("man"/"woman" or "male"/"female") inherently contradict transgender people's right to equality of law, which demands statutory protections for crimes and benefits to be afforded to "third-gender" citizens.

2.3 Striking Down Stereotypes: *Joseph Shine v. Union of India* (2018)

In *Joseph Shine v. Union of India*,¹⁶ the Constitution Bench declared Section 497 IPC (Adultery) to be unconstitutional. The law criminalized the act of a man having consensual sex with a woman who is married but without the consent of her husband, making her a chattel and not prosecutable.

¹⁴ *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1.

¹⁵ *National Legal Services Authority (NALSA) v. Union of India*, (2014) 5 SCC 438.

¹⁶ *Joseph Shine v. Union of India*, (2018) 2 SCC 189.

The Court held that laws based on institutional gender stereotypes-where the man is presumed to be the aggressor and the woman the defenseless victim-constitute discrimination prohibited by Article 14.¹⁷ The Court also explained that Article 15(3) does not provide the protection necessary to uphold laws enforcing paternalistic gender roles as upholding women's protection.¹⁸

2.4 Decriminalization and Autonomy: *Navtej Singh Johar v. Union of India* (2018)

In *Navtej Singh Johar v. Union of India*,¹⁹ the Court struck down the criminal provision of Section 377 IPC, which criminalized consensual sexual acts between adults in private.²⁰ The Court argued that sexual orientation and consensual sexual acts are protected as fundamental rights (under Articles 14, 19 and 21) and that law must be interpreted through the lens of constitutional morality and not the traditionally held social morality, or binary gender classification.

Nonetheless, a vital statutory flaw was created, since the Court decriminalized consensual sexual acts but maintained the criminal remedy on non-consensual sexual acts with adults through Section 377; when Parliament passed the Bharatiya Nyaya Sanhita (BNS) in 2023, Section 377 was absent and the lone criminal provision for non-consensual sexual offences on adult men and transgender individuals was literally taken away by the BNS.²¹

2.5 Statutory Limits of Judicial Interpretation: *Supriyo @ Supriya Chakraborty v. Union of India*, (2023)

In *Supriyo @ Supriya Chakraborty v. Union of India*,²² a five-judge Constitution Bench examined whether those in a same-sex couple could marry under the Special Marriage Act, (SMA), 1954²³ and answered that the amendment of gender-specific matrimonial laws (such as 'husband' and 'wife' to the 'spouse') fell well beyond the ambit of the Court's interpretation as per the Constitution.²⁴ As a result, the Court clarified that where a provision is found to be inconsistent with the Constitution, the Court can always declare it as such but cannot reframe laws to make them gender-neutral.

¹⁷ *Id.* at 221 (per D.Y. Chandrachud, J.).

¹⁸ *Id.* at 245.

¹⁹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

²⁰ *Id.* at 112.

²¹ Bharatiya Nyaya Sanhita, 2023, Schedule (repealing Indian Penal Code, 1860 without re-enacting § 377)

²² *Supriyo @ Supriya Chakraborty v. Union of India*, (2023) 15 SCR 1.

²³ Special Marriage Act, 1954 (Act No. 43 of 1954).

²⁴ *Supriyo @ Supriya Chakraborty v. Union of India*, (2023) 15 SCR 1.

CHAPTER III: CRIMINAL JURISPRUDENCE UNDER THE BHARATIYA NYAYA SANHITA (BNS), 2023

3.1 Statutory Breakdown: BNS Section 63 (Rape) and Sexual Offence Provisions

The BNS 2023 is the promulgated criminal code in India. Though the courts have interpreted NALSA and Navtej Johar, the remedial bodies seek the statutory definition of adult sexual offences under Chapter V, BNS 2023, as gender-specific.

In Section 63 of the BNS, a 'man' commits 'rape' if...he...conjugates eight descriptions of circumstances...as against a woman...²⁵

The table below summarises the statutory application across sex-related offences against modesty, bodily autonomy, and privacy:

Offence (BNS Section)	Statutory Definition of Perpetrator	Statutory Definition of Victim	Statutory Neutrality Status
Rape (Sec. 63)	Restricted to “a man”	Restricted to “a woman”	Gender-Exclusive
Outraging Modesty (Sec. 74)	Applicable to “whoever” (any person)	Restricted to “a woman”	Semi-Gendered
Sexual Harassment (Sec. 75)	Restricted to “any man”	Restricted to “a woman”	Gender-Exclusive
Disrobing (Sec. 76)	Applicable to “whoever” (any person)	Restricted to “a woman”	Semi-Gendered
Voyeurism (Sec. 77)	Restricted to “any man”	Restricted to “a woman”	Gender-Exclusive
Stalking (Sec. 78)	Restricted to “any man”	Restricted to “a woman”	Gender-Exclusive
Murder (Sec. 101)	Applicable to “whoever” (any person)	Applicable to “any person”	Fully Neutral
Simple Hurt (Sec. 115)	Applicable to “whoever” (any person)	Applicable to “any person”	Fully Neutral

²⁵ Bharatiya Nyaya Sanhita, 2023, § 63.

3.2 The Existing Statutory Void: Omission of IPC Section 377 and Exclusion of Non-Female Victims

Prior to the BNS, 2023, sexual assault of a woman was prosecuted through Section 375 IPC; sexual acts against adult male and transgender persons without consent was under Section 377 IPC ('Unnatural Offences').²⁶

When Parliament enacted BNS, 2023, it repealed Section 377 IPC without reforming Section 63 BNS to make it gender-neutral, nor brought any new provision to penalize sex without consent of adult males and transgender persons.²⁷

Consequently, there is a statutory deficit in two ways:

1. Statutory Under-Categorization - Non-consensual sexual penetration of adult males or transgender persons can only be charged under general hurt provisions such as causing hurt (Section 115 BNS) and using criminal force (Section 131 BNS).

The severity of such charges is undoubtedly significantly less than under Section 63 BNS, which prescribes from 10 years to life imprisonment with rigorous imprisonment.²⁸

2. Lack of Procedural Safeguards for Victims of Non-Women - They are ineligible for specific procedural safeguards provided for victims of other crimes under the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, such as recording of victim statements by specialists, free-of-cost medical examination, and victim compensation schemes under Sections 183 and 397 of the BNSS.²⁹

3.3 The POCSO Act, 2012: The Gold Standard for Statutory Gender Neutrality

The Protection of Children from Sexual Offences (POCSO) Act, 2012, acts as a useful illustration in India of gender neutral penal drafting.³⁰

Under section 2 (1)(d) of the act, a "child" is defined as a person who has not completed eighteen years of age.³¹ Furthermore sections 3 and 5, which outline what constitutes penetration assault in sections, employ gender neutral language: A person is said to commit

²⁶ Indian Penal Code, 1860, §§ 375, 377.

²⁷ Bharatiya Nyaya Sanhita, 2023, § 63 & Schedule.

²⁸ Bharatiya Nyaya Sanhita, 2023, §§ 63, 115, 131.

²⁹ Bharatiya Nagarik Suraksha Sanhita, 2023, §§ 183, 397.

³⁰ Protection of Children from Sexual Offences Act, 2012 (Act No. 32 of 2012).

³¹ Id. § 2(1)(d).

penetrative sexual assault if he or she penetrates his or her penis, or any object, or an organ, to any extent, into the vagina, mouth, urethra or anus of a child....³²

The POCSO framework provides three key operational advantages:

1. Gender-Neutral Child Victims: Insists on equal protection for boys, girls, and intersex children. Valid empirical evidence shows that most victims of sexual abuse in India are boys.³³
2. Neutral Perpetrators: Acknowledges that girls and boys may be the perpetrators of crimes against children. Not differentiates the sex of the perpetrator.
3. Gender-Neutral Evidentiary Rules: Child-sensitive procedures for the court, medical examinations, and evidentiary standards remain gender-neutral.

3.4 Asymmetry in Offences Against Bodily Modesty and Privacy

Besides sexual assault, the following secondary offences that have also been kept gender-specific in relation to bodily privacy:

1. **Section 75 of BNS (Sexual Harassment):** The offence of demand for sexual favours, or looking at or demanding or broadcasting of pornography cannot be committed by a woman or any gender other than "any man who commits...".³⁴
2. **Section 77 of BNS (Voyeurism):** The offence of capturing an image or watching a woman in a private act cannot be committed by a woman or any other gender than by "any man who watches or captures or records the said act without the permission of the other person".³⁵
3. **Section 78 of BNS (Stalking):** The offence of stalking cannot be committed by a woman or any other gender other than "any man who...".³⁶

CHAPTER IV: DOMESTIC VIOLENCE, CRUELTY, AND MATRIMONIAL & ADOPTION LAWS UNDER CURRENT STATUTES

4.1 BNS Section 85 (Cruelty): The Presumption of Male Perpetration and Female Victimhood

³² Id. §§ 3, 5.

³³ Ministry of Women and Child Development, Government of India, Study on Child Abuse: India (2007), pp. 45–52.

³⁴ Bharatiya Nyaya Sanhita, 2023, § 75.

³⁵ Id. § 77.

³⁶ Id. § 78.

Section 85 of the Bharatiya Nyaya Sanhita, 2023 (re-enacting Section 498A of the previous IPC) criminalizes cruelty by a husband or his relatives to his wife.³⁷ Section 85 states: "Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine."³⁸

Among other things, this law is seen to have been brought about as a domestic law response to dowry harassment and structural domestic violence in marital homes,³⁹ and it does not provide for the same in relation to cruelty caused by a wife or her relatives to a husband or a transgender spouse.

In *Arnesh Kumar v. State of Bihar*,⁴⁰ the Court dealt with cases where the section was invoked as a sort of lawfare tool in matrimonial frictions, and where the engagement of Section 498A had caused the automatic arrest of relatives without adequate prior investigation. The Court held the procedural safeguards created by Section 41 CrPC (now Section 35 BNSS, 2023) for avoidance of indiscriminate arrest, and re-iterated the existence of the provision as necessary for women who are truly aggrieved.⁴¹

4.2 Protection of Women from Domestic Violence Act (PWDVA), 2005

The Act was originally implemented as a civil law remedy with protection orders, residence orders, and monetary relief.⁴² Section 2(a) provides that an "aggrieved person" is "any woman who is, or has been, in a domestic relationship with the respondent..."⁴³

As a result, men and transgender persons who experience physical, emotional, or economic abuse in a domestic relationship are ineligible for civil protection orders under the Act.

4.3 Maintenance Frameworks: BNSS Section 144 vs. Hindu Marriage Act Sections 24 & 25

A comparative analysis of maintenance statutes reveals varying statutory approaches to gender applicability:

³⁷ Bharatiya Nyaya Sanhita, 2023, § 85; Indian Penal Code, 1860, § 498A

³⁸ Bharatiya Nyaya Sanhita, 2023, § 85.

³⁹ Criminal Law (Second Amendment) Act, 1983 (Act No. 46 of 1983).

⁴⁰ *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.

⁴¹ Code of Criminal Procedure, 1973, § 41; Bharatiya Nagarik Suraksha Sanhita, 2023, § 35.

⁴² Protection of Women from Domestic Violence Act, 2005 (Act No. 43 of 2005).

⁴³ Id. § 2(a).

Statute	Statutory Scope	Gender Applicability
BNSS, 2023 (Sec. 144)	Summary criminal maintenance remedy	Asymmetric: Wives, children, and parents can claim maintenance from a man
Hindu Marriage Act, 1955 (Secs. 24 & 25)	Civil matrimonial maintenance remedy	Gender-Neutral: Either spouse (husband or wife) can claim maintenance
Special Marriage Act, 1954 (Secs. 36 & 37)	Inter-faith civil marriage remedy	Asymmetric: Only the wife can claim maintenance

The Delhi High Court in *Rani Sethi v. Sunil Sethi*⁴⁴ held that a husband has a claim for maintenance against his wife under Section 24 of Hindu Marriage Act, 1955, if he proves that he has no independent income, and cannot support himself due to illness or physical inability. This civil example clearly shows how gender-neutral maintenance laws function effectively in Indian family law.

4.4 Gender Discrimination in Adoption Laws: HAMA, 1955, Juvenile Justice Act, 2015, and CARA Regulations

Gender discrimination is also codified in Indian child adoption law outside of penal and matrimonial legislation. Child adoption in India is regulated by two different bodies of laws. personal statutory law by the Hindu Adoptions and Maintenance Act, 1955; and secular law by the Juvenile Justice (Care and Protection of Children) Act, 2015, which is supplemented by the Adoption Regulations, 2022 issued by the Central Adoption Resource Authority (CARA).

Framework / Statute	Governing Scope	Key Provisions & Gender-Based Rules
Hindu Adoptions and Maintenance Act (HAMA), 1955	Personal Law	• Sections 7 & 8: Historical male dominance in adoptive rights; amended in 2010 to grant equal capacity to women. • Section 11(iii) & (iv): A mandatory 21-year age gap is required where the adoptive parent and child are of opposite sexes.

⁴⁴ *Rani Sethi v. Sunil Sethi*, 179 (2011) DLT 414.

Framework / Statute	Governing Scope	Key Provisions & Gender-Based Rules
Juvenile Justice (Care & Protection) Act, 2015 & CARA Regulations	Secular/ Statutory Law	• Regulation 5(4): A single female applicant can adopt a child of any gender. • Regulation 5(4): A single male applicant is explicitly prohibited from adopting a female child.

1. Explicit Discrimination Against Single Prospective Adoptive Fathers -

Statutory eligibility for single prospective adoptive parents is specifically asymmetrical under Regulation 5(4) of the CARA Adoption Regulations, 2022 (and Section 57(3) of the JJ Act, 2015):

- i. One prospective female adopter can apply to adopt a child of either sex (male or female).⁴⁵
- ii. A male single applicant may not adopt a female child.⁴⁶

The exclusion is therefore based on the patriarchal and discriminatory stereotype that a single male parent is either unsafe or unsuitable to parent a female child. In *Shabnam Hashmi v. Union of India*,⁴⁷ the Court acknowledged the secular fundamental right to adopt under the JJ Act as a fundamental right of the Constitution under Art. 21, but upheld the gender-biased ban on single fathers remaining as such. This stands to violate the uniform right of a single man to adopt as an equal parent, under Art. 14.

2. Historical & Remaining Asymmetries under HAMA, 1955

Prior to the enactment of the Persons Law (Amendment), 2010, an Indian married male Hindu enjoyed the right to adopt if his wife consented, while a married female Hindu had no right to adopt independently of her husband except in cases where he was the incurably insane or had renounced the world.⁴⁸ While the 2010 law ensured equality of rights between men and women in regard to Sections 8 and 9 of the HAMA,⁴⁹ other statutory limitations on capacity continue to apply according to gender:

⁴⁵ Adoption Regulations, 2022, Reg. 5(2)(b).

⁴⁶ Juvenile Justice (Care and Protection of Children) Act, 2015, § 57(4).

⁴⁷ *Shabnam Hashmi v. Union of India*, (2014) 2 SCC 188.

⁴⁸ Hindu Adoptions and Maintenance Act, 1955, §§ 7, 8 (prior to 2010 amendment).

⁴⁹ Personal Laws (Amendment) Act, 2010 (Act No. 30 of 2010).

- 11(iii) & (iv) of HAMA The adoption of a child of the opposite sex requires the child be at least 21 years younger than the adoptive father or mother.⁵⁰ As a provision meant to help prevent sexual abuse, it presents a bio-sex check at the time of adoption, although it adheres to reinforced gender binaries and sets a biological age floor that is not relevant when adopting a child of the same sex.

3. Statutory Invisibility of Transgender & Non-Binary Adoptive Parents

The JJ Act, 2015, the CARA Adoption Regulations, 2022 and the HAMA, 1955 do not contain any explicit statutory provisions on adoption by a transgender, non-binary or gender non-conforming person. Although in *NALSA v. Union of India*, the Supreme Court recognized third-gender citizens under Articles 14 and 21 and directed that they shall be entitled to all of the legal and constitutional rights that accrue to other citizens,⁵¹ CARA adoption portals and eligibility requirements are clearly binary and male/female. As a result, transgender persons often are made to apply under to a couple designated as "male" or "female," which excludes them and acts as a legal barrier to parenthood.

CHAPTER V: WORKPLACE HARASSMENT & INSTITUTIONAL FRAMEWORKS

5.1 The POSH Act, 2013: Architectural Limits

Following the Supreme Court rulings in *Vishaka v. State of Rajasthan*,⁵² Parliament passed the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act).⁵³

Under the Section 2(a) of the Act defines an "aggrieved woman" as "any woman, who has attained the age of eighteen years, whether employed or not, against whom any act of sexual harassment has been committed."⁵⁴

These created two structural design limitations:

⁵⁰ Hindu Adoptions and Maintenance Act, 1955, § 11(iii), (iv).

⁵¹ *NALSA v. Union of India*, (2014) 5 SCC 438.

⁵² *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

⁵³ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (Act No. 14 of 2013).

⁵⁴ Id. § 2(a).

1. Non-inclusion of employees other than women: male, transgender, and non-binary employees cannot lodge statutory complaints before an Internal Committee (IC) regarding quid-pro-quo and hostile-work-environment harassment at the workplace.⁵⁵
2. It is also inconsistent with the Supreme Court orders in NALSA, which required the State to give affirmative workplace protection to third-gender citizens.⁵⁶

5.2 Private Sector Adaptations: Gender-Neutral Internal Policies

As the statutory scope of the POSH Act is limited to females alone, MNCs and tech companies operating in India have voluntarily implemented their own gender-neutral internal codes of conduct :

- A Statutory POSH Policy processes complaints lodged by female employees made under the 2013 Act.
- An Internal Code of Conduct processes complaints lodged by male, transgender or non-binary workers made with gender-neutral definitions before internal tribunals.

These 'internal codes of conduct' operate with identical levels of evidentiary requirements and disciplinary measures (including warning or deduction in salary or dismissal), for all employees irrespective of gender identity, to illustrate that operational implementation of gender-neutral workplace harassment policies is indeed feasible.

CHAPTER VI: CRITICAL LEGAL ANALYSIS: FORMAL NEUTRALITY VS. SUBSTANTIVE JUSTICE

6.1 The Case for Universal Statutory Protection

The basic arguments for gender-neutral law-making are as follows:

1. Gender neutrality is at least one manifestation of the fundamental assurances in Articles 14 and 21 to be free from bodily harm, sexual violence, and civil discrimination; degrees of victimization, if any, should be established by objective standards and not sex.⁵⁷ Whether the victim should be entitled to redress under the law or the adoptee has the right to this or that person is fit to adopt, has to be proved objectively and not on the basis of sex.

⁵⁵ Id. §§ 2(a), 4.

⁵⁶ *NALSA v. Union of India*, (2014) 5 SCC 438, at 492.

⁵⁷ Constitution of India, 1950, Arts. 14, 21.

2. Evidence shows that men and even transgenders are victims of sexual assault, domestic abuse, harassment, and parental discrimination. Researchers, such as the National Institute of Mental Health and Neurosciences (NIMHANS), have found evidence of male victims of domestic and institutional violence.⁵⁸ Excluding these classes of persons from equal access to justice is unnecessarily unfair.

3. Conversely, the current sex-specific penal and civil statutes emphasize patriarchal stereotypes, like masculinity is defined by domination over women and the propensity to violence and men are unlikely to be good carers or fathers. These debilitating norms perpetuate negative and dangerous stereotypes about men and women alike and make real advancement in the gender equality cause harder to attain.⁵⁹

6.2 The Case for Targeted Protective Legislation

Opponents of gender neutrality raise three primary counter-arguments:

First, data from the NCRB on national crime rates show that women are the prime victims of sexual violence, dowry-related abuse and domestic violence.⁶⁰ Advocates for gender-specific legislation counter that gender neutral laws work on the presumption of societal equality which does not presently exist.

Secondly, the defendant could, where gender-discriminatory offences like rape or domestic cruelty are made gender-neutral, bring counter-complaints that are wrongfully lodged against women, with a view to achieve an out-of-court settlement.⁶¹

Third, Article 15(3) provides that Parliament may make special affirmative action schemes in favour of women to minimise past socio-economic disadvantages.⁶²

6.3 Synthesis: The Asymmetric Gender-Neutral Model

One way India can strike a balance between universal protection under Article 14 vis-à-vis protective discrimination under Article 15(3) is through an "Asymmetric Gender Neutral Model".

⁵⁸ National Institute of Mental Health and Neurosciences (NIMHANS), *Report on Male Victimization and Domestic Trauma in Urban India* (2019), pp. 112–118.

⁵⁹ Justice Verma Committee, *Report of the Committee on Amendments to Criminal Law* (2013), Ch. 3.

⁶⁰ National Crime Records Bureau (NCRB), *Crime in India 2022 Report*, Ministry of Home Affairs, Government of India (2023).

⁶¹ Law Commission of India, *172nd Report on Review of Rape Laws* (2000), pp. 33–38.

⁶² Constitution of India, 1950, Art. 15(3).

Under this model, the definitions of offences and civil rights and eligibility shall be separated from the statutory presumptions and procedural protections:

- 1. Equal Civil Rights & Offence Definitions (Gender-Neutral Core):** Core criminal offences (sexual assault, domestic abuse) and civil rights (eligibility for adoption under CARA/HMA) are defined in gender-neutral language, of equal availability to all persons.⁶³
- 2. Exceptions for Female & Vulnerable Victims (Gender-Specific Safeguards):** Statutory presumptions (such as the presumption of absence of consent under Section 120 of the Bharatiya Sakshya Adhiniyam, 2023) and maximum-minimum penalties are preserved specifically for female and vulnerable persons under Article 15(3).⁶⁴
- 3. Procedural Safeguards:** Female-led investigative options and procedural safeguards are preserved for female, transgender, and minor victims in order to address vulnerabilities during investigation and trial.

CHAPTER VII: LEGISLATIVE AMENDMENT PROPOSALS

7.1 Proposed Statutory Redraft of BNS Section 63

63. A person is said to commit “rape” if he—

(a) penetrates his or her penis, or any object, or any part of the body, to any extent, into the vagina, mouth, urethra, or anus of another person, or makes another person do so with him or her or with any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the person or makes the person to do so with him or any other person; or

(c) manipulates any body part of another person so as to cause penetration into the vagina, urethra, anus, or any part of the body of such person; or

(d) applies his or her mouth to the vagina, penis, anus, or urethra of another person;

without the consent of such other person.

⁶³ Law Commission of India, *172nd Report on Review of Rape Laws* (2000).

⁶⁴ Bharatiya Sakshya Adhiniyam, 2023, § 120.

Explanation 1.—Consent means an unequivocal voluntary agreement when the person by words, gestures, or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.

Provided that an offence committed by a man against a woman, or against a transgender person, shall be recognized as an aggravated form of sexual assault, carrying enhanced minimum punishment as prescribed under sub-section Section 64(2).

7.2 Proposed Statutory Redraft of Adoption Laws (CARA & HAMA)

SECTION 57A (JJ ACT) / SECTION 8A (HAMA): RIGHTS OF TRANSGENDER PERSONS TO ADOPT

"Notwithstanding anything contained in any other law or custom for the time being in force, a transgender or non-binary person shall have the equal statutory right to adopt a child, and no application for adoption shall be rejected solely on the ground of the applicant's gender identity or expression."

7.3 Proposed Statutory Redraft of POSH Act Section 2(a) and BNSS Section 144

POSH Act, 2013 — Section 2(a): Amend the term "aggrieved woman" to "aggrieved person," defined as "*any individual, of any gender identity or expression, who alleges to have been subjected to sexual harassment at the workplace.*"⁶⁵

Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023 — Section 144: Amend sub-section (1) to enable any dependent spouse who lacks independent income to claim maintenance from a spouse possessing sufficient means, aligning the provision with Sections 24 and 25 of the Hindu Marriage Act, 1955.⁶⁶

CHAPTER VIII: CONCLUSION

The gender neutrality debate in Indian law illustrates the evolution of India's constitutional jurisprudence: whereas our statutory policy in post-Independence India approached gender-based discrimination through protective discrimination (under Article 15(3)), our

⁶⁵ Sexual Harassment of Women at Workplace Act, 2013, § 2(a) (proposed amendment).

⁶⁶ Bharatiya Nagarik Suraksha Sanhita, 2023, § 144 (proposed amendment).

constitutional model of equal justice under articles 14 and 21 will need to develop a nuanced and broader anti-discrimination framework. The decision to retain gender-exclusive adult sexual offence definitions in the Bharatiya Nyaya Sanhita, 2023, and avoid India's criminal law against sexual violence under IPC Section 377, has created a legislative vacuum that deprives adult male, transgender and non-binary victims of any clear penal redress. The explicit exclusion of single prospective adoptive fathers under the CARA Regulations and the statutory exclusion of transgender persons from the scope of the existing adoption legislations similarly constitute unconstitutional classifications under Article 14.

A hybrid model of Asymmetric Gender-Neutral Law strikes an appropriate constitutional balance: by having gender-neutral primary definitions of all crimes and guarantees of civil rights (such as adoption) for all, with on the other hand adhering to targeted statutory presumptions and procedural protections for women and other historically disadvantaged groups under Article 15(3), Parliament can respect human dignity, ensure equal access to justice and achieve constitutional objectives of equality for all citizens.

LIST OF REFERNECS:

- Constitution of India, 1950, art. 15(3).
- *National Legal Services Authority (NALSA) v. Union of India*, (2014) 5 SCC 438.
- *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.
- *Joseph Shine v. Union of India*, (2018) 2 SCC 189.
- *Supriyo @ Supriya Chakraborty v. Union of India*, (2023) 15 SCR 1.
- Bharatiya Nyaya Sanhita, 2023 (Act No. 45 of 2023).
- Protection of Women from Domestic Violence Act, 2005 (Act No. 43 of 2005).
- Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (Act No. 14 of 2013).
- Bharatiya Nagarik Suraksha Sanhita, 2023 (Act No. 46 of 2023).
- Hindu Marriage Act, 1955 (Act No. 25 of 1955).
- Hindu Adoptions and Maintenance Act, 1955 (Act No. 78 of 1955).
- Juvenile Justice (Care and Protection of Children) Act, 2015 (Act No. 2 of 2016).
- Central Adoption Resource Authority (CARA), Ministry of Women and Child Development, Government of India, *Adoption Regulations*, 2022.
- Indian Penal Code, 1860 (Act No. 45 of 1860), § 377.
- Constitution of India, 1950, art. 14.
- Bharatiya Nyaya Sanhita, 2023, § 74.
- Protection of Children from Sexual Offences Act, 2012 (Act No. 32 of 2012), §§ 3, 5.
- Dowry Prohibition Act, 1961 (Act No. 28 of 1961).
- Bharatiya Sakshya Adhiniyam, 2023 (Act No. 47 of 2023).
- *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75.
- *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1.
- Criminal Law (Second Amendment) Act, 1983 (Act No. 46 of 1983).
- *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.
- Code of Criminal Procedure, 1973.
- *Rani Sethi v. Sunil Sethi*, 179 (2011) DLT 414.
- Hindu Adoptions and Maintenance Act, 1955, §§ 7, 8, 11.
- *Shabnam Hashmi v. Union of India*, (2014) 2 SCC 188.
- Personal Laws (Amendment) Act, 2010 (Act No. 30 of 2010).
- *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

- National Institute of Mental Health and Neurosciences (NIMHANS), *Report on Male Victimization and Domestic Trauma in Urban India* (2019), pp. 112–118.
- Justice Verma Committee, *Report of the Committee on Amendments to Criminal Law* (2013), ch. 3.
- National Crime Records Bureau (NCRB), Ministry of Home Affairs, Government of India, *Crime in India 2022* (2023).
- Law Commission of India, *172nd Report on Review of Rape Laws* (2000), pp. 33–38.
- Special Marriage Act, 1954 (Act No. 43 of 1954).