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Assessing Gender Neutrality in the Bharatiya Nyaya Sanhita 2023: A Critical Analysis of India's Criminal Law Reforms

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ABSTRACT

The Bharatiya Nyaya Sanhita (BNS) 2023 represents India's first comprehensive criminal law reform since the colonial-era Indian Penal Code of 1860. This paper critically examines whether the BNS achieves genuine gender neutrality or remains constrained by gendered assumptions. Through doctrinal legal analysis and comparative examination of gender-neutral frameworks in the United Kingdom, Canada, and Australia, the study evaluates key provisions on sexual offences (Sections 63-69), procedural reforms (Zero FIR, e-FIR, time-bound investigations), and protections for transgender and non-binary individuals. The research reveals that while the BNS 2023 introduces selective gender-neutral language and victim-centric reforms, it perpetuates gender bias through its female-centric rape definition, retention of the marital rape exception, and inadequate implementation of constitutional protections for LGBTQIA+ individuals. The paper distinguishes between formal gender neutrality (linguistic) and substantive gender justice (protective outcomes), arguing that true equality requires comprehensive statutory amendments, institutional reforms, and societal transformation. The analysis acknowledges its empirical limitations, since the law's recent enactment precludes outcome data, and proposes a framework for future empirical research and implementation monitoring.

Keywords: Gender neutrality, Bharatiya Nyaya Sanhita 2023, Criminal law reform, Sexual offences, Transgender rights

I. INTRODUCTION

The Bharatiya Nyaya Sanhita (BNS) 2023, which came into force on 1 July 2024, represents India's first comprehensive overhaul of criminal law since the Indian Penal Code (IPC) was enacted in 1860 under British colonial rule.¹ The Statement of Objects and Reasons to the BNS Bill itself records that the IPC was enacted on the recommendation of the First Law Commission,² and the transition from the IPC to the BNS has been presented, in official framing

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¹ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), § 1(2); MINISTRY OF HOME AFFS., Notification S.O. 850(E) (Feb. 23, 2024) (appointing July 1, 2024 as the date of commencement).

² MINISTRY OF HOME AFFS., Statement of Objects and Reasons, Bharatiya Nyaya Sanhita Bill, 2023, Bill No. 121 of 2023 (Lok Sabha, Aug. 11, 2023), ¶ 2.

and in early commentary, as a fundamental jurisprudential evolution from a punitive, retributive approach rooted in the concept of ‘Dand’ (punishment) to a restorative, victim-centric, and rehabilitative philosophy emphasizing ‘Nyaya’ (justice).³ The IPC, formulated under British oversight and heavily influenced by the ideas of Lord Thomas Babington Macaulay, was designed more to rule than to establish the rule of law, reflecting colonial attitudes toward governance.⁴

The BNS 2023 comprises 358 sections organized into 20 chapters, streamlining the IPC’s 511 sections and 23 chapters.⁵ The reform introduces significant modifications to the law on defamation, sedition, attempted suicide, and capital punishment for offences such as mob lynching and sexual violence against minors.⁶ Beyond structural reorganization, the BNS purports to modernize India’s criminal justice system by incorporating victim-centric provisions, procedural innovations, and, critically for this study, gender-neutral language in a range of offences, a feature that the Statement of Objects and Reasons itself records.⁷

This paper critically examines whether the BNS 2023 represents a progressive step towards genuine gender neutrality in criminal law or whether it remains constrained by gendered assumptions that perpetuate historical inequities. Gender neutrality in criminal law is not merely a matter of linguistic reform; it encompasses substantive equality in protection, recognition, and access to justice for all individuals regardless of gender identity.⁸ The question is particularly urgent given India’s constitutional commitment to equality (Articles 14 and 15), the Supreme Court’s landmark recognition of transgender rights in *National Legal Services Authority v. Union of India (NALSA)*,⁹ and the decriminalization of consensual same-sex relations in *Navtej Singh Johar v. Union of India*.¹⁰

The central argument of this paper is that while the BNS 2023 makes notable efforts to use gender-neutral language in certain provisions and introduces victim-centric procedural reforms, it falls short of achieving substantive gender justice. The law perpetuates gender bias through

³ T. Balakrishna, *From IPC to BNS: Evaluating the Transition and Its Implications for Law Enforcement and Judiciary in India*, 1 RSCH. DIG. ON ENG’G MGMT. & SOC. INNOVATIONS 51 (2025), <https://doi.org/10.46647/g8a4vc30>.

⁴ *Id.*

⁵ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India) (358 sections in 20 chapters); Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India) (511 sections in 23 chapters).

⁶ A.S. Kowshikaa, *India’s Criminal Justice Reform: An In-Depth Look at the New Laws*, 2 J.L. & LEGAL RSCH. DEV. 21 (2024), <https://doi.org/10.69662/jllrd.v2i1.35>.

⁷ MINISTRY OF HOME AFFS., *supra* note 2, ¶ 4.

⁸ Aashish Gupta, *Gender-Neutral Rape Laws: Need for Reform in Indian Criminal Jurisprudence*, 6 INDIAN J. LEGAL REV. 585 (2026), <https://doi.org/10.65393/LQRQ5478>.

⁹ *Nat’l Legal Servs. Auth. v. Union of India*, (2014) 5 SCC 438 (India).

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

its female-centric rape definition (Section 63), retention of the marital rape exception, inadequate protections for male and transgender survivors of sexual violence, and failure to implement fully the constitutional vision articulated in *NALSA*. The paper distinguishes between formal gender neutrality, meaning the use of gender-neutral language in statutory provisions, and substantive gender justice, meaning the achievement of equal protection, recognition, and access to justice for all individuals regardless of gender identity or expression.¹¹

This analysis is particularly timely because the BNS 2023 is in the early years of its implementation. Early scholarly intervention can influence judicial interpretation, administrative implementation, and future legislative amendments. However, this paper acknowledges a critical limitation: the law's recent enactment precludes empirical data on implementation outcomes, case statistics, or stakeholder experiences. This study therefore employs doctrinal legal analysis and comparative law methodology to evaluate statutory provisions, identify gaps, and propose reforms. It concludes with a framework for future empirical research and implementation monitoring to assess whether the BNS achieves gender neutrality in practice.

The paper proceeds as follows. The next section articulates the research methodology and its limitations. The section that follows defines key terms and establishes the analytical framework. The paper then examines the BNS's claimed philosophical shift and its selective gender-neutral language reforms, before analyzing the sexual offence provisions, focusing on the rape definition, the enhanced punishments, and the marital rape exception, and engaging counter-arguments. It then evaluates the procedural reforms and their gender dimensions, and examines protections for transgender and non-binary individuals, including an intersectional analysis of caste, class, and disability. A comparative analysis of gender-neutral frameworks in the United Kingdom, Canada, and Australia, including implementation experiences, is followed by an assessment of implementation challenges in India, detailed recommendations with proposed statutory language and an implementation monitoring framework, and a conclusion.

II. RESEARCH METHODOLOGY

This section articulates the methodological approach employed in this study, including the doctrinal legal analysis framework, the comparative law methodology, the criteria for evaluating gender neutrality, and an explicit acknowledgment of limitations.

¹¹ This conceptual distinction draws on feminist legal theory and comparative constitutional scholarship. See Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008); Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1 (2011).

A. Doctrinal legal analysis

This study employs doctrinal legal analysis as its primary methodology, examining statutory provisions, constitutional principles, and judicial precedents to evaluate the BNS 2023's approach to gender neutrality.¹² Doctrinal analysis involves the systematic examination of legal texts (statutes, cases, constitutional provisions) to identify rules, principles, gaps, and inconsistencies.¹³ This approach is appropriate for evaluating newly enacted legislation where empirical data on implementation is not yet available.

The doctrinal analysis proceeds through four stages:

1. Textual analysis: close reading of BNS provisions (particularly Sections 63-69 on sexual offences) to identify the language, definitions, and scope of protection.
2. Constitutional analysis: evaluation of BNS provisions against the constitutional guarantees of equality (Articles 14 and 15) and of life and dignity (Article 21), and against Supreme Court jurisprudence on gender equality and LGBTQIA+ rights (particularly *NALSA* and *Navtej Singh Johar*).
3. Comparative analysis: systematic comparison of BNS provisions with IPC provisions to identify changes, continuities, and gaps.
4. Gap identification: analysis of areas where BNS provisions fail to achieve gender neutrality or substantive equality.

B. Comparative law approach

This study employs comparative law methodology to examine gender-neutral criminal law frameworks in three common law jurisdictions: the United Kingdom, Canada, and Australia.¹⁴ These jurisdictions were selected on four criteria:

1. Common law tradition: all three share legal traditions with India, facilitating the transferability of concepts and approaches.
2. Gender-neutral reforms: all three have enacted gender-neutral sexual offence provisions, providing models for India.
3. Diverse approaches: the three jurisdictions represent different approaches to gender neutrality (the UK's consent-based framework, Canada's comprehensive gender-

¹² Terry Hutchinson, *Doctrinal Research: Researching the Jury*, in RESEARCH METHODS IN LAW 8 (Dawn Watkins & Mandy Burton eds., 2d ed. 2017).

¹³ Paul Chynoweth, *Legal Research*, in ADVANCED RESEARCH METHODS IN THE BUILT ENVIRONMENT 28 (Andrew Knight & Les Ruddock eds., 2008).

¹⁴ MATHIAS SIEMS, COMPARATIVE LAW 12-45 (2d ed. 2018).

neutral provisions, and Australia's state-level variation), allowing for comparative evaluation.

4. Implementation experience: all three have substantial experience of implementing gender-neutral frameworks, providing lessons on challenges and outcomes.

The comparative analysis examines: (a) statutory provisions defining sexual offences; (b) the treatment of marital rape; (c) protections for LGBTQIA+ individuals; (d) procedural reforms; and (e) implementation experiences and outcomes. While this study focuses on these three jurisdictions, future research should examine additional jurisdictions, particularly in the Global South (for example South Africa, whose Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 is comprehensively gender-neutral and whose policing experience bears directly on intersectional inequality).¹⁵

C. Framework for evaluating gender neutrality

This study distinguishes between formal gender neutrality and substantive gender justice.

Formal gender neutrality refers to the use of gender-neutral language in statutory provisions, that is, language that does not specify the gender of perpetrators or victims. For example, rape may be defined as committed by 'whoever commits penetrative sexual assault without consent' rather than by 'whoever, being a man, commits sexual intercourse with a woman without consent'.

Substantive gender justice refers to the achievement of equal protection, recognition, and access to justice for all individuals regardless of gender identity or expression. Substantive equality requires not only gender-neutral language but also: (a) recognition of diverse forms of sexual violence; (b) protections for marginalized groups (male survivors, transgender and non-binary individuals); (c) procedural mechanisms that facilitate access to justice; (d) institutional capacity to implement protections; and (e) societal attitudes that support survivors.

This framework allows an evaluation of whether the BNS 2023 achieves merely linguistic reform (formal neutrality) or meaningful equality (substantive justice). The framework is operationalized through five criteria:

- Linguistic inclusivity: do statutory provisions use gender-neutral language?
- Scope of protection: do provisions protect all individuals regardless of gender?

¹⁵ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (S. Afr.); see DEE SMYTHE, RAPE UNRESOLVED: POLICING SEXUAL OFFENCES IN SOUTH AFRICA (2015).

- Recognition of diverse harms: do provisions recognize diverse forms of sexual violence?
- Access to justice: do procedural mechanisms facilitate access for all survivors?
- Implementation capacity: are institutional mechanisms adequate to implement protections?

D. Limitations and future research

This study has significant limitations that must be explicitly acknowledged:

1. Absence of empirical data: the BNS 2023 came into force on 1 July 2024. As of this writing (April 2026), comprehensive empirical data on implementation is not yet available. This study cannot assess: (a) how police, prosecutors, and courts are interpreting gender-neutral provisions; (b) whether male or transgender survivors are accessing protections; (c) case statistics, conviction rates, or sentencing patterns; (d) stakeholder experiences and perspectives; or (e) unintended consequences of the reforms.
2. Limited comparative scope: this study examines three jurisdictions (the UK, Canada, and Australia) but does not include other relevant jurisdictions (South Africa, New Zealand, the Nordic countries) or examine Global South perspectives in depth.
3. Doctrinal focus: this study concentrates on statutory provisions and constitutional principles and does not examine administrative implementation, police practices, prosecutorial discretion, or judicial attitudes in depth.
4. Intersectional analysis: while this study includes an intersectional analysis of caste, class, and disability, that analysis is preliminary and requires more systematic development.

Future empirical research is essential to complement this doctrinal analysis. Proposed research includes:

1. Quantitative analysis: collection of case statistics on BNS sexual offence cases, disaggregated by victim gender, offence type, and outcome, and comparison with IPC baseline data.
2. Qualitative research: interviews with 30-50 stakeholders (police, prosecutors, judges, defense lawyers, survivors, advocates) to understand implementation experiences and challenges.

3. Case studies: analysis of 15-20 judicial decisions interpreting BNS gender-neutral provisions to examine how courts are applying the law.
4. Comparative implementation research: examination of how the UK, Canada, and Australia have addressed implementation challenges and what outcomes they have achieved.
5. Longitudinal monitoring: establishment of data collection systems to track BNS implementation over time, with annual reports on case statistics, outcomes, and challenges.

This paper provides a foundation for such empirical research by identifying key questions, gaps, and areas requiring investigation.

III. KEY DEFINITIONS AND CONCEPTUAL FRAMEWORK

This section defines the key terms used throughout this paper to ensure clarity and consistency.

A. Gender neutrality: formal versus substantive

Gender neutrality in criminal law refers to legal frameworks that do not discriminate on the basis of gender identity or expression. This study distinguishes between two dimensions.

Formal gender neutrality (linguistic neutrality): the use of gender-neutral language in statutory provisions that does not specify the gender of perpetrators or victims. Example: ‘whoever commits sexual assault’ rather than ‘whoever, being a man, commits sexual assault’.

Substantive gender justice (protective equality): the achievement of equal protection, recognition, and access to justice for all individuals regardless of gender identity or expression. Substantive equality requires: (a) recognition of diverse forms of sexual violence; (b) protections for marginalized groups; (c) procedural mechanisms facilitating access; (d) institutional capacity for implementation; and (e) supportive societal attitudes.

This distinction is critical because formal neutrality alone does not guarantee substantive equality. A law may use gender-neutral language while failing to protect marginalized groups in practice.

B. LGBTQIA+ terminology

LGBTQIA+: an acronym for lesbian, gay, bisexual, transgender, queer or questioning, intersex, asexual, and other sexual and gender minorities.

Transgender: persons whose gender identity differs from the sex assigned at birth. In India, this includes hijras, kinnars, and other traditional gender-diverse communities.¹⁶

Non-binary: persons whose gender identity does not fit within the binary categories of male or female.

Cisgender: persons whose gender identity aligns with the sex assigned at birth.

Gender identity: a person's internal sense of their own gender, which may or may not correspond to the sex assigned at birth.

Gender expression: how a person presents their gender through appearance, behavior, and other external characteristics.

Sexual orientation: a person's emotional, romantic, or sexual attraction to others (distinct from gender identity).

C. Analytical framework

This study employs a five-criteria framework to evaluate gender neutrality in the BNS 2023.

Criterion 1, linguistic inclusivity: do statutory provisions use gender-neutral language that does not specify perpetrator or victim gender?

Criterion 2, scope of protection: do provisions protect all individuals regardless of gender identity (male, female, transgender, non-binary)?

Criterion 3, recognition of diverse harms: do provisions recognize diverse forms of sexual violence (penetrative and non-penetrative, against all genders)?

Criterion 4, access to justice: do procedural mechanisms facilitate access for all survivors (complaint procedures, evidence rules, victim support)?

Criterion 5, implementation capacity: are institutional mechanisms adequate to implement protections (police training, forensic capacity, judicial awareness)?

Each BNS provision is evaluated against these five criteria to assess whether it achieves formal neutrality, substantive justice, both, or neither.

IV. GENDER NEUTRALITY IN THE BNS 2023: THE LEGISLATIVE SHIFT

This section examines the BNS 2023's claimed philosophical transformation from 'Dand' (punishment) to 'Nyaya' (justice) and evaluates the extent to which the law achieves gender neutrality through linguistic reforms.

¹⁶ *Nat'l Legal Servs. Auth.*, *supra* note 9, ¶ 12 (recognizing hijras, eunuchs, kothis, aravanis, jogappas, and shiv-shakthis as part of the transgender community).

A. From ‘Dand’ to ‘Nyaya’: philosophical transformation

The government presented the transition from the IPC to the BNS as a move towards a citizen-centric legal structure and speedier justice,¹⁷ and early commentary has characterized the shift as one from a punitive, retributive approach rooted in colonial governance to a restorative, victim-centric, and rehabilitative philosophy emphasizing justice.¹⁸ The very change of name from ‘Penal Code’ to ‘Nyaya Sanhita’ (Justice Code) signals this intended transformation. The Statement of Objects and Reasons accompanying the BNS Bill 2023 presents the reform as a comprehensive review of the 1860 Code intended to strengthen law and order, simplify procedure, ensure ease of living, and make the law relevant to the contemporary situation.¹⁹

This philosophical shift is reflected in several features of the BNS and its companion procedural code:

1. Victim-centric provisions: the new codes introduce enhanced protections for victims, including fines payable to the victim in sexual offence cases, statutory victim compensation schemes, time-bound investigations, and procedural innovations (Zero FIR, e-FIR) designed to facilitate access to justice.²⁰
2. Rehabilitation focus: the BNS introduces community service as a form of punishment for certain minor offences, a gesture towards rehabilitation alongside punishment.²¹
3. Procedural reforms: the BNS is accompanied by the Bharatiya Nagarik Suraksha Sanhita (BNSS) 2023, which introduces significant procedural reforms, including the electronic registration of information, time-bound investigation of sexual offences, and a victim’s right to be informed of the progress of the investigation.²²
4. Selective gender-neutral language: the BNS introduces gender-neutral language in certain provisions, moving away from the IPC’s explicitly gendered framework in some areas.²³

¹⁷ MINISTRY OF HOME AFFS., *supra* note 2, ¶ 3.

¹⁸ Balakrishna, *supra* note 3.

¹⁹ MINISTRY OF HOME AFFS., *supra* note 2, ¶ 3.

²⁰ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), §§ 65, 70; Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), §§ 173, 193(2), 396.

²¹ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), § 4(f) (community service).

²² Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), §§ 173(1) (information by electronic communication), 193(2) (two-month investigation for offences under §§ 64-68, 70 and 71 of the Bharatiya Nyaya Sanhita), 193(3)(ii) (progress report to the victim within ninety days).

²³ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), §§ 137-142 (kidnapping and abduction), 351 (criminal intimidation), 356 (defamation).

However, this philosophical transformation is incomplete and inconsistent. While the BNS introduces victim-centric reforms, it retains punitive approaches in many areas, including capital punishment for rape causing death or a persistent vegetative state and for the rape of a child under twelve, and enhanced sentences for repeat offenders.²⁴ More critically for this study, the BNS's approach to gender neutrality is selective and partial, as examined in the following subsections.

B. Selective gender-neutral language reforms

The BNS 2023 introduces gender-neutral language in certain provisions, representing a departure from the IPC's explicitly gendered framework. Key examples include:

1. Kidnapping and abduction (Sections 137-142 BNS): the BNS uses gender-neutral language ('any child') rather than the IPC's gendered provisions, which distinguished between the kidnapping of males under sixteen and females under eighteen.²⁵
2. Criminal intimidation (Section 351 BNS): the provision uses gender-neutral language applicable to all persons.²⁶
3. Defamation (Section 356 BNS): the provision applies to all persons without gender specification.²⁷
4. Certain sexual offences (Sections 74-79 BNS): the provisions on sexual harassment (Section 75), voyeurism (Section 77), and stalking (Section 78) are sometimes described as gender-neutral, but each remains woman-specific as to the victim, so any neutrality is partial at best; sexual offences against children are governed principally by the Protection of Children from Sexual Offences Act 2012, outside the BNS, with the BNS itself addressing the rape of girls under sixteen and twelve and gang rape of a woman under eighteen.²⁸

These linguistic reforms represent progress toward formal gender neutrality. However, the BNS's approach is selective and inconsistent. The most critical sexual offence provision, the rape definition in Section 63, retains explicitly gendered language, as examined in the discussion of Section 63 below.

²⁴ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), §§ 65(2), 66.

²⁵ Compare Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India), §§ 359-369 (§ 361: a minor is under sixteen if male and under eighteen if female), with Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), §§ 137-142 (§ 137(1)(b): 'any child').

²⁶ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), § 351.

²⁷ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), § 356.

²⁸ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), §§ 74 (assault or criminal force to woman with intent to outrage her modesty), 75 (sexual harassment), 77 (voyeurism), 78 (stalking); §§ 65, 70(2) (rape of a woman under sixteen or twelve, and gang rape of a woman under eighteen).

C. Persistent gendered framework in core provisions

Despite selective gender-neutral language reforms, the BNS 2023 retains a fundamentally gendered framework in its core provisions, particularly regarding sexual offences. The most significant example is Section 63 BNS, which defines rape. The section provides that ‘a man’ commits rape if he performs any of four penetrative acts (penile penetration, insertion of an object or another part of the body, manipulation of a part of the body so as to cause penetration, or application of the mouth) upon the vagina, mouth, urethra, or anus of ‘a woman’ in any of seven specified circumstances.²⁹

This definition explicitly specifies that only men can be perpetrators and only women can be victims of rape. This gendered framework has several implications:

1. Exclusion of male survivors: men and boys who experience penetrative sexual violence cannot be recognized as rape victims under Section 63. They were formerly covered under other provisions (notably Section 377 IPC on ‘unnatural offences’, now repealed), but the law does not recognize their experience as rape.³⁰
2. Exclusion of transgender and non-binary survivors: transgender and non-binary individuals are not explicitly recognized as potential victims of rape under Section 63. While courts may interpret ‘woman’ to include transgender women (consistent with *NALSA*), the statutory language does not provide clear protection.³¹
3. Exclusion of female perpetrators: women cannot be prosecuted as primary perpetrators of rape under Section 63, though they may be charged as abettors or conspirators.³²
4. Reinforcement of gender stereotypes: the gendered rape definition reinforces stereotypes that men are inherently perpetrators and women inherently victims, failing to recognize the complexity of sexual violence.³³

This gendered framework in the core rape definition undermines the BNS’s claimed commitment to gender neutrality and victim-centric justice. The following sections examine this issue in greater detail.

²⁹ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), § 63.

³⁰ Gupta, *supra* note 8.

³¹ *Id.*

³² Seema & Kulvinder, *Gender Neutrality in Sexual Offences: Need for Reform in Indian Rape Laws*, 7 INT’L J. MULTIDISCIPLINARY RSCH., no. 4, 2025, at 6, <https://doi.org/10.36948/ijfmr.2025.v07i04.51769>.

³³ Gupta, *supra* note 8.

V. SEXUAL OFFENCES AND VICTIM PROTECTION

This section provides a detailed analysis of the BNS provisions on sexual offences, focusing on the rape definition (Section 63), the punishment provisions (Sections 64 to 66), sexual intercourse by deceitful means (Section 69), and the marital rape exception. It concludes by engaging counter-arguments against gender-neutral rape laws.

A. Section 63 BNS: the rape definition and its limitations

Section 63 BNS defines rape not by ‘sexual intercourse’ but by four penetrative acts. A man is said to commit rape if he penetrates his penis into, inserts any object or a part of the body (not being the penis) into, manipulates any part of the body of a woman so as to cause penetration into, or applies his mouth to, the vagina, mouth, urethra, or anus of a woman, in any of seven circumstances:³⁴

1. against her will;
2. without her consent;
3. with her consent, where the consent has been obtained by putting her, or any person in whom she is interested, in fear of death or of hurt;
4. with her consent, where the man knows that he is not her husband and that the consent is given because she believes him to be another man to whom she is, or believes herself to be, lawfully married;
5. with her consent, where at the time of giving it she is unable, by reason of unsoundness of mind or intoxication or the administration of any stupefying or unwholesome substance, to understand the nature and consequences of that to which she gives consent;
6. with or without her consent, where she is under eighteen years of age; and
7. where she is unable to communicate consent.

This definition is substantively identical to Section 375 IPC as amended in 2013, with minor drafting changes. The critical limitation is the explicitly gendered language: the offender must be ‘a man’ and the victim ‘a woman’. This language has several problematic implications:

1. Male survivors excluded: men and boys who experience penetrative sexual violence are not recognized as rape victims under Section 63. While they were formerly covered under other provisions (notably Section 377 IPC on ‘unnatural offences’,

³⁴ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), § 63.

now repealed by the BNS), the law does not recognize their experience as rape with the same severity and social recognition.³⁵

2. Transgender and non-binary survivors excluded: the definition does not explicitly recognize transgender or non-binary individuals as potential victims. While courts may interpret ‘woman’ to include transgender women (consistent with *NALSA*’s recognition of self-identified gender),³⁶ the statutory language creates ambiguity and may deter transgender survivors from reporting.
3. Female perpetrators excluded: women cannot be prosecuted as primary perpetrators of rape under Section 63, though they may be charged as abettors or conspirators under the general principles of criminal liability.³⁷ This exclusion fails to recognize that women can commit sexual violence, particularly against children or vulnerable individuals.
4. Reinforcement of gender stereotypes: the gendered definition reinforces harmful stereotypes that men are inherently perpetrators and women inherently victims, failing to recognize the complexity and diversity of sexual violence.³⁸
5. Inconsistency with constitutional principles: the gendered definition is arguably inconsistent with Article 14 (right to equality) and Article 21 (right to life and dignity) of the Constitution of India, which guarantee equal protection and dignity to all persons regardless of gender.³⁹

Comparative perspective: the UK’s Sexual Offences Act 2003, Canada’s Criminal Code, and Australian state laws all use gender-neutral definitions of sexual assault that protect all individuals regardless of gender.⁴⁰ India’s retention of a gendered rape definition is increasingly anomalous in comparative perspective.

Jurisdiction	Perpetrator gender	Victim gender	Penetration requirement	Consent framework
India, IPC 1860 (as amended 2013)	Male only	Female only	Yes (penile, object, body part, or oral; vagina, mouth, urethra, or anus)	Circumstances negating consent

³⁵ Gupta, *supra* note 8.

³⁶ *Nat’l Legal Servs. Auth.*, *supra* note 9, ¶¶ 69, 129(2) (recognizing the right to self-identified gender).

³⁷ Seema & Kulvinder, *supra* note 32, at 6.

³⁸ Gupta, *supra* note 8.

³⁹ *Id.*

⁴⁰ Sexual Offences Act 2003, c. 42, § 1 (UK); Criminal Code, R.S.C. 1985, c. C-46, § 271 (Can.); Crimes Act 1900 (NSW) s 61I (Austl.).

Jurisdiction	Perpetrator gender	Victim gender	Penetration requirement	Consent framework
India, BNS 2023	Male only	Female only	Yes (penile, object, body part, or oral; vagina, mouth, urethra, or anus)	Circumstances negating consent
UK (SOA 2003)	Any gender (rape itself requires a penis)	Any gender	Yes (any penetration)	Absence of consent and lack of reasonable belief
Canada (Criminal Code)	Any gender	Any gender	Yes (any penetration)	Absence of voluntary agreement
Australia (NSW)	Any gender	Any gender	Yes (any penetration)	Absence of consent and knowledge or recklessness

Table 1: Comparative rape and sexual assault definitions

Proposed reform: Section 63 should be amended to use gender-neutral language that protects all individuals regardless of gender identity. Proposed language is provided in the recommendations below.

B. Sections 64 to 66 BNS: enhanced punishments and victim protections

Section 64(1) BNS provides that whoever, except in the cases provided for in sub-section (2), commits rape shall be punished with rigorous imprisonment for a term of not less than ten years, which may extend to imprisonment for life, and shall also be liable to fine. Section 64(2) lists aggravated categories of offender and circumstance (including police officers, public servants, relatives, and persons in positions of authority) and prescribes rigorous imprisonment of not less than ten years, extending to life. Sections 65 and 66 then prescribe enhanced punishments for the rape of a woman under sixteen or under twelve years of age and for rape causing death or a persistent vegetative state.⁴¹

The punishment provisions carry forward, and in places extend, the scheme of Section 376 IPC in several respects:

1. Ten-year minimum retained: Section 64(1) carries forward the minimum sentence of ten years that the Criminal Law (Amendment) Act 2018 had already introduced into Section 376(1) IPC, raising it from seven years; the BNS does not increase it further.⁴²
2. Death penalty for child rape: Section 65(2) provides, for the rape of a woman under twelve years of age, a minimum of twenty years' rigorous imprisonment, extending

⁴¹ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), §§ 64-66.

⁴² Compare Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India), § 376(1) (as amended by the Criminal Law (Amendment) Act, 2018, No. 22, Acts of Parliament, 2018 (India), § 4) (minimum ten years), with Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), § 64(1) (minimum ten years).

to imprisonment for life or death; Section 65(1) prescribes twenty years to life, without death, for the rape of a woman under sixteen. These provisions carry forward the Criminal Law (Amendment) Act 2018, which inserted Section 376AB IPC (death penalty for the rape of a woman under twelve) and Section 376(3) IPC (rape of a woman under sixteen).⁴³

3. Enhanced sentences for aggravated rape: Section 66 punishes rape causing death or a persistent vegetative state with imprisonment of not less than twenty years, extending to life or death, and Section 64(2)(1) treats the infliction of grievous bodily harm as an aggravated category.⁴⁴
4. Fine payable to the victim: Sections 65 and 70 provide that the fine imposed shall be paid to the victim.⁴⁵

These enhanced punishments reflect the BNS's victim-centric approach and respond to public concern about sexual violence, particularly against children. However, several concerns arise:

1. Gendered application: because Section 63's rape definition is gendered, the enhanced protections in Sections 64 to 66 apply only to female victims. Male and transgender survivors do not receive the same level of protection.⁴⁶
2. Death penalty concerns: the death penalty for child rape is controversial. International human rights bodies have expressed concern that capital punishment for rape (as opposed to murder) violates proportionality principles.⁴⁷ Critics also argue that harsh penalties may deter reporting, particularly where the perpetrator is a family member, and may increase the risk that perpetrators kill victims to eliminate witnesses.
3. Mandatory minimum sentences: mandatory minimum sentences limit judicial discretion and may result in disproportionate sentences in some cases, particularly where mitigating circumstances exist.

⁴³ Criminal Law (Amendment) Act, 2018, No. 22, Acts of Parliament, 2018 (India), § 5 (inserting Indian Penal Code § 376AB: death penalty for the rape of a woman under twelve); § 4 (inserting Indian Penal Code § 376(3): rape of a woman under sixteen, minimum twenty years).

⁴⁴ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), § 66 (rape causing death or a persistent vegetative state); § 64(2)(1) (grievous bodily harm).

⁴⁵ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), §§ 65(1)-(2), 70 (fine 'shall be paid to the victim').

⁴⁶ Gupta, *supra* note 8.

⁴⁷ U.N. HUM. RTS. COMM., General Comment No. 36 on Article 6: Right to Life, ¶ 35, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019).

4. Focus on punishment over prevention: the emphasis on enhanced punishment may divert attention from prevention, education, and institutional reforms that could more effectively reduce sexual violence.⁴⁸

C. Section 69 BNS: sexual intercourse by deceitful means

Section 69 BNS addresses sexual intercourse obtained through deceit:

Whoever, by deceitful means or by making promise to marry to a woman without any intention of fulfilling the same, and has sexual intercourse with her, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.⁴⁹

The provision has no direct counterpart in the IPC. It codifies, as a distinct offence, a line of case law under which consent to sexual intercourse obtained by a false promise of marriage was treated as vitiated. The provision raises several issues:

1. Gendered language: the provision applies only to deceit practised on women, not on men or transgender individuals.⁵⁰
2. 'Promise to marry' doctrine: the provision codifies the controversial 'promise to marry' doctrine, under which sexual intercourse obtained through a false promise of marriage can constitute an offence. This doctrine has been criticized for: (a) infantilizing women by suggesting that they cannot consent to sex outside marriage; (b) reinforcing patriarchal norms under which women's sexuality is legitimate only within marriage; and (c) its potential for misuse in cases of relationship breakdown.⁵¹
3. Ambiguity: the Explanation to Section 69 gives 'deceitful means' an inclusive definition (inducement for, or a false promise of, employment or promotion, or marrying by suppressing identity), but the provision does not specify what evidence is required to prove the absence of an intention to marry at the time of the promise.⁵²
4. Exclusion of other forms of deceit: the provision focuses on the promise to marry and does not address other forms of sexual deceit (for example, deception about sexual health status or the use of contraception).⁵³

⁴⁸ Ziyun Wang, *Gender and Criminal Sentencing: A Comparative Analysis of Global Judicial Biases and Reform Efforts*, 42 J. EDUC. HUMAN. & SOC. SCI. 6 (2024), <https://doi.org/10.54097/8jkzs507>.

⁴⁹ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), § 69.

⁵⁰ Gupta, *supra* note 8.

⁵¹ RATANLAL & DHIRAJLAL, THE INDIAN PENAL CODE 2156-58 (K.T. Thomas & M.A. Rashid eds., 34th ed. 2014).

⁵² Gupta, *supra* note 8.

⁵³ *Id.*

Comparative perspective: most jurisdictions do not criminalize sexual intercourse obtained through a false promise of marriage, viewing it as a matter of civil law (breach of promise) rather than criminal law. However, some jurisdictions criminalize sexual intercourse obtained through fraud or impersonation in limited circumstances.⁵⁴

D. Marital rape exception: the unresolved legal gap

The most significant gap in the BNS's approach to sexual offences is the retention of the marital rape exception. Exception 2 to Section 63 BNS provides:

Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.⁵⁵

This exception means that a man cannot be prosecuted for raping his wife (if she is over eighteen), regardless of whether the sexual intercourse was consensual. The marital rape exception has been subject to sustained criticism from women's rights advocates, legal scholars, and international human rights bodies.⁵⁶

Constitutional concerns: the marital rape exception is arguably unconstitutional on several grounds:

1. Violation of Article 14 (equality): the exception creates an arbitrary classification between married and unmarried women, denying married women equal protection against sexual violence. The Supreme Court has held that classifications must be based on an intelligible differentia and bear a rational relation to the object sought to be achieved.⁵⁷ The marital rape exception fails this test: there is no rational basis for treating sexual violence differently on the basis of marital status.
2. Violation of Article 21 (life and dignity): the exception violates married women's right to life, dignity, bodily autonomy, and sexual autonomy, all of which are protected under Article 21.⁵⁸ The Supreme Court has recognized that sexual autonomy is an integral part of personal liberty and dignity.⁵⁹

⁵⁴ Sexual Offences Act 2003, c. 42, § 76 (UK) (conclusive presumptions about consent where the defendant intentionally deceived the complainant as to the nature or purpose of the act or impersonated a person known personally to the complainant).

⁵⁵ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), § 63, Exception 2.

⁵⁶ Gupta, *supra* note 8; Seema & Kulvinder, *supra* note 32, at 18-21.

⁵⁷ *State of W.B. v. Anwar Ali Sarkar*, AIR 1952 SC 75 (India), ¶ 32.

⁵⁸ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India), ¶ 184 (recognizing bodily autonomy and sexual autonomy as facets of Article 21).

⁵⁹ *Navtej Singh Johar*, *supra* note 10, ¶ 145.

3. Violation of Article 15 (non-discrimination): the exception discriminates against married women on the basis of marital status, which is prohibited under Article 15.⁶⁰

International human rights concerns: the marital rape exception is difficult to reconcile with India's obligations under international human rights law, including:

1. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Article 16 requires states to eliminate discrimination in marriage and family relations, including by ensuring equal rights in marriage.⁶¹
2. The Universal Declaration of Human Rights (UDHR): Article 16 recognizes the right to marry with free and full consent, which is incompatible with forced sexual intercourse within marriage.⁶²
3. The International Covenant on Civil and Political Rights (ICCPR): Article 23 protects the right to marry with free consent, and Article 7 prohibits cruel, inhuman, or degrading treatment.⁶³

Comparative perspective: most developed democracies have criminalized marital rape. England and Wales criminalized marital rape in 1991,⁶⁴ Canada in 1983,⁶⁵ and the Australian jurisdictions progressively from the 1970s to the 1990s.⁶⁶ India is increasingly anomalous in retaining the marital rape exception.

Pending litigation: the constitutionality of the marital rape exception was challenged before the Delhi High Court in *RIT Foundation v. Union of India*, filed in 2015. On 11 May 2022 the Division Bench delivered a split verdict, Shakhder J holding Exception 2 unconstitutional and Hari Shankar J upholding it, and granted leave to appeal. The challenge is now pending before the Supreme Court in the clubbed matter of *Hrishikesh Sahoo v. State of Karnataka*, in which the Union of India has filed an affidavit defending the exception.⁶⁷ A decision is awaited.

⁶⁰ INDIA CONST. art. 15.

⁶¹ Convention on the Elimination of All Forms of Discrimination Against Women art. 16, Dec. 18, 1979, 1249 U.N.T.S. 13.

⁶² G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 16 (Dec. 10, 1948).

⁶³ International Covenant on Civil and Political Rights arts. 7, 23, Dec. 16, 1966, 999 U.N.T.S. 171.

⁶⁴ *R v. R* [1992] 1 AC 599 (HL) (UK) (holding that the marital rape exemption was no longer part of the law of England and Wales).

⁶⁵ Criminal Law Amendment Act, 1980-81-82-83, S.C. 1980-81-82-83, c. 125, § 19 (Can.) (enacting Criminal Code §§ 246.1-246.8; spousal immunity removed by § 246.8).

⁶⁶ Crimes (Sexual Assault) Amendment Act 1981 (NSW) No 42 (Austl.) (inserting Crimes Act 1900 (NSW) s 61A(4)); similar reforms followed in the other Australian jurisdictions between 1976 and 1994.

⁶⁷ *RIT Found. v. Union of India*, 2022 SCC OnLine Del 1404 (Delhi HC May 11, 2022) (India) (split verdict in W.P.(C) 284/2015), appeal pending sub nom. *Hrishikesh Sahoo v. State of Karnataka*, SLP (Crl.) Nos. 4063-4064 of 2022 (India).

Arguments for retention (addressed in the counter-arguments below): proponents of retaining the marital rape exception argue that: (a) criminalization would destabilize marriages and families; (b) evidentiary difficulties make prosecution impractical; (c) the provision may be misused for false accusations; and (d) existing civil remedies (divorce, domestic violence protection) are sufficient.⁶⁸

Arguments for criminalization: advocates of criminalization argue that: (a) sexual violence is equally harmful regardless of marital status; (b) marriage does not constitute blanket consent to sexual intercourse; (c) evidentiary difficulties exist in all rape cases but do not justify non-criminalization; (d) procedural safeguards can address concerns about false accusations; and (e) civil remedies are inadequate for criminal conduct.⁶⁹

Offence	IPC provision	BNS provision	Key changes
Rape	s 375	s 63	Substantively identical; gendered language retained
Punishment for rape	s 376	ss 64-66	Ten-year minimum carried forward from the 2018 Amendment; death penalty for rape of a girl under twelve (s 65(2)) and for rape causing death or a persistent vegetative state (s 66)
Marital rape exception	s 375, Exception 2	s 63, Exception 2	Retained without modification
Sexual intercourse by deceit	No direct counterpart (case law on false promise of marriage)	s 69	New separate offence; 'deceitful means' given an inclusive definition
Sexual harassment	s 354A	s 75	Substantively similar; minor linguistic changes
Voyeurism	s 354C	s 77	Substantively similar
Stalking	s 354D	s 78	Substantively similar
Unnatural offences	s 377	Repealed	No equivalent provision in the BNS

Table 2: IPC and BNS sexual offence provisions compared

E. Counter-arguments and responses

This subsection engages counter-arguments against gender-neutral rape laws and the criminalization of marital rape, in the interest of scholarly balance and to address genuine concerns.

⁶⁸ See *RIT Found.*, *supra* note 67 (Union of India's submissions); RATANLAL & DHIRAJLAL, *supra* note 51, at 2098-2100.

⁶⁹ Gupta, *supra* note 8; Seema & Kulvinder, *supra* note 32, at 19-21.

i. Counter-argument one: gender-neutral language dilutes protections for women

Some feminist scholars argue that gender-neutral rape laws may dilute protections for women, who constitute the vast majority of sexual violence survivors. They contend that explicitly gendered provisions recognize the structural reality of male violence against women and the patriarchal context in which sexual violence occurs.⁷⁰

Response: this concern is legitimate but can be addressed through careful drafting. Gender-neutral language does not require ignoring structural inequalities or the gendered nature of most sexual violence. Laws can use gender-neutral language while: (a) recognizing in preambles or statements of purpose that women are disproportionately affected; (b) providing enhanced protections for vulnerable groups; (c) addressing structural inequalities through complementary measures (education, economic empowerment, social services); and (d) ensuring that gender-neutral provisions are not misused to target women or LGBTQIA+ individuals.⁷¹

Moreover, gender-neutral provisions can strengthen protections for women by: (a) recognizing female perpetrators, which is important for addressing sexual violence against children and vulnerable individuals; (b) protecting women in same-sex relationships; and (c) avoiding the infantilization of women implicit in provisions that treat them as inherently vulnerable.⁷²

ii. Counter-argument two: criminalizing marital rape will destabilize marriages and families

Opponents of the criminalization of marital rape argue that it will destabilize marriages, increase divorce rates, and undermine family stability. They contend that marriage involves a degree of mutual obligation and that criminalizing marital rape interferes with marital privacy.⁷³

Response: this argument is fundamentally flawed. First, it prioritizes institutional stability over individual rights and dignity. The state's interest in preserving marriages cannot justify tolerating violence within them.⁷⁴ Second, the argument assumes that marriages involving sexual violence are worth preserving, which is questionable. Third, the experience of jurisdictions that have criminalized marital rape does not support claims of widespread family destabilization.⁷⁵

⁷⁰ Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 445-48 (2016).

⁷¹ Gupta, *supra* note 8.

⁷² *Id.*

⁷³ See *RIT Found.*, *supra* note 67 (Union of India's submissions).

⁷⁴ Gupta, *supra* note 8.

⁷⁵ *Id.*

Moreover, the argument conflates consent with obligation. Marriage may create mutual obligations, but it does not create an obligation to submit to non-consensual sexual intercourse. As the Supreme Court has recognized, sexual autonomy is an integral part of personal liberty and dignity, and it cannot be waived through marriage.⁷⁶

iii. Counter-argument three: evidentiary difficulties make marital rape prosecution impractical

Critics argue that marital rape is difficult to prove because it typically occurs in private without witnesses, and physical evidence may be ambiguous given the sexual relationship between spouses.⁷⁷

Response: evidentiary difficulties exist in all rape cases, not only marital rape. Most sexual violence occurs in private without witnesses, yet this has never been treated as a reason to decriminalize rape generally. Evidentiary challenges should be addressed through: (a) training for police, prosecutors, and judges on investigating and prosecuting marital rape; (b) the use of expert testimony on trauma and victim behavior; (c) corroboration through medical evidence, witness testimony about the relationship, and evidence of prior violence; and (d) procedural safeguards to protect both complainants and accused.⁷⁸

Moreover, the existence of evidentiary difficulties does not justify non-criminalization. It justifies careful investigation, rigorous evidentiary standards, and procedural protections, all of which are appropriate for any serious criminal offence.⁷⁹

iv. Counter-argument four: marital rape provisions may be misused for false accusations

Opponents argue that marital rape provisions may be misused by wives to make false accusations against husbands, particularly in the context of divorce or property disputes.⁸⁰

Response: the potential for false accusations exists for all criminal offences, not only marital rape. This concern should be addressed through: (a) rigorous investigation and evidentiary standards; (b) penalties for false accusations (already provided under Section 248 BNS for false charges made with intent to injure); (c) procedural safeguards such as a preliminary inquiry before arrest; and (d) judicial oversight.⁸¹

⁷⁶ *Puttaswamy*, *supra* note 58, ¶ 184.

⁷⁷ See *RIT Found.*, *supra* note 67 (Union of India's submissions).

⁷⁸ Gupta, *supra* note 8.

⁷⁹ *Id.*

⁸⁰ See *RIT Found.*, *supra* note 67 (Union of India's submissions).

⁸¹ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), § 248 (false charge of offence made with intent to injure).

Moreover, empirical evidence does not support claims of widespread false accusations in jurisdictions that have criminalized marital rape. Studies suggest that false rape accusations are rare (2-10% of reported cases), and there is no evidence that marital rape provisions are more susceptible to misuse than other rape provisions.⁸²

The concern about false accusations should not become a ground for denying protection to genuine survivors. The Supreme Court's own approach to vulnerable complainants, exemplified by its directions on procedural safeguards in *Sakshi v. Union of India*, has been to manage the risks of the trial process rather than to withhold justice from victims of sexual violence.⁸³

v. Counter-argument five: civil remedies are sufficient for marital rape

Some argue that existing civil remedies, namely divorce on the ground of cruelty and protection orders under the Protection of Women from Domestic Violence Act 2005, are sufficient to address marital rape without criminalization.⁸⁴

Response: civil remedies are inadequate for criminal conduct. Sexual violence is a serious crime that violates bodily integrity, autonomy, and dignity. It warrants criminal sanction, not merely civil remedies. Civil remedies may provide protection and compensation, but they do not: (a) recognize the criminal nature of the conduct; (b) provide deterrence through punishment; (c) vindicate the survivor's rights; or (d) express societal condemnation of the conduct.⁸⁵

Moreover, civil remedies place the burden on the survivor to initiate proceedings, whereas criminal prosecution is a state responsibility. Many survivors lack the resources, knowledge, or capacity to pursue civil remedies, particularly in the context of ongoing abuse.⁸⁶

VI. VICTIMOLOGY AND PROCEDURAL REFORMS

This section examines the procedural reforms that accompany the BNS, namely Zero FIR, e-FIR, and time-bound investigations, and evaluates their gender dimensions and implications for access to justice.

⁸² David Lisak, Lori Gardinier, Sarah C. Nicksa & Ashley M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1330 (2010) (finding a false-report rate of 5.9% in a study of 136 cases).

⁸³ *Sakshi v. Union of India*, (2004) 5 SCC 518 (India).

⁸⁴ Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India), § 3 (defining domestic violence to include sexual abuse).

⁸⁵ Gupta, *supra* note 8.

⁸⁶ *Id.*

A. Zero FIR and e-FIR mechanisms

The Bharatiya Nagarik Suraksha Sanhita (BNSS) 2023, which accompanies the BNS, introduces significant procedural innovations designed to facilitate access to justice for crime victims, including survivors of sexual offences.

Zero FIR: Section 173(1) BNSS provides that information relating to a cognizable offence may be given orally or by electronic communication to a police officer irrespective of the area where the offence was committed.⁸⁷ This ‘Zero FIR’ mechanism allows survivors to file complaints at any police station, not only the station with territorial jurisdiction. The Zero FIR is then transferred to the appropriate jurisdiction for investigation.⁸⁸

Rationale: the Zero FIR mechanism addresses a longstanding problem in Indian criminal justice: police refusal to register complaints on jurisdictional grounds. Survivors of sexual violence, particularly those who have been trafficked or assaulted while travelling, often face difficulty in determining which police station has jurisdiction, and police have historically used jurisdictional disputes to avoid registering complaints.⁸⁹ The Zero FIR mechanism removes this barrier by allowing complaints to be filed anywhere.

Gender dimensions: the Zero FIR mechanism is particularly beneficial for female survivors of sexual violence, who may face mobility constraints, safety concerns, or a lack of knowledge about jurisdictional boundaries. It also benefits male and transgender survivors, who may face additional barriers to reporting (stigma, fear of disbelief, lack of awareness of legal protections).⁹⁰

Implementation challenges: the Zero FIR mechanism nevertheless faces implementation challenges:

1. Awareness: many survivors and police officers are not aware of the Zero FIR provision. Public awareness campaigns and police training are needed.⁹¹
2. Police resistance: some police officers resist registering Zero FIRs, viewing them as additional paperwork or jurisdictional complications.⁹²

⁸⁷ Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), § 173(1).

⁸⁸ *Id.*

⁸⁹ NAT'L CRIME RECS. BUREAU, MINISTRY OF HOME AFFS., CRIME IN INDIA 2022 (2023); see also *Lalita Kumari v. Govt. of U.P.*, (2014) 2 SCC 1 (India) (holding the registration of a first information report mandatory where the information discloses a cognizable offence).

⁹⁰ Gupta, *supra* note 8.

⁹¹ Kowshikaa, *supra* note 6.

⁹² *Id.*

3. Transfer delays: Zero FIRs must be transferred to the appropriate jurisdiction, which can delay the investigation. Clear timelines and accountability mechanisms are needed.⁹³
4. Data gaps: there is currently no systematic data on how many Zero FIRs have been filed, for what offences, or with what outcomes. Data collection systems are needed to monitor implementation.⁹⁴

e-FIR: the same provision, Section 173(1) BNSS, allows information relating to a cognizable offence to be given by electronic communication, in which case it is to be taken on record on being signed within three days by the person giving it.⁹⁵

Rationale: the e-FIR mechanism allows survivors to file complaints online, reducing the need to visit police stations in person. This is particularly beneficial for survivors who face mobility constraints, safety concerns, or fear of the stigma associated with visiting police stations.⁹⁶

Gender dimensions: the e-FIR mechanism can benefit all survivors, but its accessibility depends on digital literacy, internet access, and the availability of devices. Women, particularly in rural areas, may have less access to digital technology than men. Transgender individuals may face additional barriers if e-FIR systems require a gender identification that does not recognize non-binary identities.⁹⁷

Implementation challenges:

1. Digital divide: many survivors, particularly in rural areas, lack the internet access or digital literacy needed to use e-FIR systems.⁹⁸
2. System design: e-FIR systems must be user-friendly, accessible in multiple languages, and designed to accommodate diverse gender identities.⁹⁹
3. Verification: e-FIRs require verification mechanisms to prevent misuse without creating barriers for genuine complainants.¹⁰⁰
4. Follow-up: e-FIRs must be followed by in-person investigation, medical examination, and evidence collection. Clear protocols are needed for the transition from e-FIR to investigation.¹⁰¹

⁹³ *Id.*

⁹⁴ Balakrishna, *supra* note 3.

⁹⁵ Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), § 173(1).

⁹⁶ Kowshikaa, *supra* note 6.

⁹⁷ Gupta, *supra* note 8.

⁹⁸ Balakrishna, *supra* note 3.

⁹⁹ *Id.*

¹⁰⁰ Kowshikaa, *supra* note 6.

¹⁰¹ *Id.*

B. Time-bound investigations

Section 193(2) BNSS requires that the investigation of the principal sexual offences under the BNS (Sections 64 to 68, 70, and 71) and under the Protection of Children from Sexual Offences Act 2012 be completed within two months of the date on which the information was recorded.¹⁰² The Sanhita does not itself provide a mechanism for extending this period on the Magistrate's approval; the two-month limit stands as a statutory direction to the investigating officer.¹⁰³

Rationale: time-bound investigations address the problem of delayed justice in India's criminal justice system. Delays in investigation and trial cause trauma for survivors, allow evidence to deteriorate, and enable accused persons to intimidate witnesses or abscond.¹⁰⁴

Gender dimensions: time-bound investigations are particularly important for survivors of sexual offences, who experience ongoing trauma from prolonged proceedings. However, the gender dimensions are complex:

1. Benefits for survivors: faster investigations reduce trauma, preserve evidence, and provide quicker access to justice and compensation.¹⁰⁵
2. Risks of rushed investigations: strict time limits may pressure police to complete investigations hastily, potentially compromising thoroughness. This could disadvantage survivors if evidence is not properly collected or witnesses are not adequately interviewed.¹⁰⁶
3. Resource constraints: time-bound investigations require adequate police capacity, forensic resources, and coordination with medical and social services. Resource constraints may make the timelines unrealistic.¹⁰⁷

Implementation challenges:

1. Capacity constraints: police lack adequate personnel, training, and resources to complete investigations within the prescribed timelines, particularly in rural areas.¹⁰⁸
2. Forensic delays: forensic analysis (DNA testing, medical examination reports) often takes months, making a two-month investigation timeline unrealistic.¹⁰⁹

¹⁰² Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), § 193(2).

¹⁰³ *Id.*

¹⁰⁴ Balakrishna, *supra* note 3.

¹⁰⁵ *Id.*

¹⁰⁶ Kowshikaa, *supra* note 6.

¹⁰⁷ Balakrishna, *supra* note 3.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

3. Accountability: there are currently no clear consequences for failure to meet the timelines, and no systematic monitoring of compliance.¹¹⁰
4. Balancing speed and thoroughness: timelines must balance the need for swift justice with the need for thorough investigation. Overly strict timelines may compromise quality.¹¹¹

C. Victim compensation and support

Section 395 BNSS empowers the court to order a convicted offender to pay compensation to the victim.¹¹² In addition, Section 396 BNSS provides for victim compensation schemes to be prepared by the State Governments.¹¹³

Rationale: victim compensation recognizes that survivors of crime suffer financial, physical, and psychological harm that warrants redress. Compensation can help survivors to access medical care, counseling, legal assistance, and economic support.¹¹⁴

Gender dimensions: victim compensation is particularly important for female survivors of sexual violence, who may face economic dependence on perpetrators (particularly in cases of domestic violence or marital rape), loss of employment owing to trauma or stigma, and the costs of medical care and counseling.¹¹⁵ Male and transgender survivors also need compensation but may face additional barriers to accessing it owing to a lack of awareness or discriminatory attitudes.¹¹⁶

Implementation challenges:

1. Awareness: many survivors are not aware of compensation schemes or of how to access them.¹¹⁷
2. Adequacy: compensation amounts are often inadequate to cover survivors' actual costs and losses.¹¹⁸

¹¹⁰ Kowshikaa, *supra* note 6.

¹¹¹ *Id.*

¹¹² Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), § 395 (order to pay compensation).

¹¹³ Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023 (India), § 396 (victim compensation scheme).

¹¹⁴ U. Saleena, Pelasur Chandrakumar Swamy & N.K. Kumar, *Judicial Response to the Question of Sexual Violence and Protection of Women in India*, 13 J. RSCH. HUMAN. & SOC. SCI., no. 3, 2025, at 6, <https://doi.org/10.35629/2895-14030611>.

¹¹⁵ *Id.*

¹¹⁶ Gupta, *supra* note 8.

¹¹⁷ Saleena et al., *supra* note 114.

¹¹⁸ *Id.*

3. Delays: compensation is often delayed, sometimes for years, reducing its effectiveness.¹¹⁹
4. Accessibility: application procedures are often complex and require legal assistance, which many survivors cannot afford.¹²⁰
5. Discrimination: compensation schemes may discriminate against male and transgender survivors if they are designed primarily for female victims.¹²¹

D. Gender dimensions of procedural reforms

The procedural reforms introduced by the BNSS 2023 are formally gender-neutral, in that they apply to all crime victims regardless of gender. However, their practical impact may vary by gender because of structural inequalities and differential access to resources.

Benefits for female survivors:

- Zero FIR reduces mobility barriers and jurisdictional complications.
- e-FIR reduces the need to visit police stations, addressing safety and stigma concerns.
- Time-bound investigations reduce the trauma of prolonged proceedings.
- Victim compensation addresses economic dependence and the costs of care.

Benefits for male survivors:

- Zero FIR and e-FIR reduce the stigma associated with reporting sexual violence.
- Time-bound investigations reduce trauma.
- Victim compensation addresses the costs of care and counseling.

Benefits for transgender survivors:

- Zero FIR and e-FIR reduce exposure to discriminatory attitudes at police stations.
- Time-bound investigations reduce trauma.
- Victim compensation addresses economic vulnerability.

Risks and limitations:

- The digital divide may limit access to e-FIR for women, rural populations, and economically disadvantaged groups.
- Time-bound investigations may compromise thoroughness if resources are inadequate.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Gupta, *supra* note 8.

- Victim compensation may be inaccessible to marginalized groups because of complex procedures.
- Procedural reforms do not address the substantive gaps in legal protection (the gendered rape definition and the marital rape exception).

Reform	Provision	Purpose	Benefits	Implementation challenges
Zero FIR	BNSS s 173(1)	Allow complaints at any police station	Reduces jurisdictional barriers; increases access	Awareness gaps; police resistance; transfer delays
e-FIR	BNSS s 173(1)	Allow complaints by electronic communication	Reduces the need for in-person reporting; addresses safety and stigma concerns	Digital divide; system design; verification; follow-up protocols
Time-bound investigations	BNSS s 193(2)	Complete investigations of sexual offences within two months	Reduces trauma; preserves evidence; faster justice	Capacity constraints; forensic delays; risk of rushed investigations
Victim compensation	BNSS ss 395, 396	Provide financial support to victims	Addresses economic harm; supports recovery	Awareness gaps; inadequate amounts; delays; complex procedures

Table 3: Procedural reforms summary

VII. TRANSGENDER AND NON-BINARY INDIVIDUALS: CONSTITUTIONAL PROMISE VERSUS LEGISLATIVE GAP

This section examines the BNS's treatment of transgender and non-binary individuals, evaluating whether the law implements the constitutional vision articulated in the *NALSA* judgment. It concludes with an intersectional analysis of how gender intersects with caste, class, and disability.

A. The *NALSA* judgment and constitutional recognition

The Supreme Court's landmark judgment in *National Legal Services Authority v. Union of India* (*NALSA*) in 2014 recognized transgender persons as a 'third gender' and affirmed their fundamental rights under Articles 14, 15, 16, 19, and 21 of the Constitution.¹²² Sikri J described the issue of transgender persons as 'not merely a social or medical issue' but one calling for a human rights approach, and Radhakrishnan J held that transgender persons:

¹²² *Nat'l Legal Servs. Auth.*, *supra* note 9.

fall within the expression ‘person’ and, hence, entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country.¹²³

The *NALSA* judgment established several key principles:

1. Right to self-identified gender: transgender persons have the right to identify their gender as male, female, or third gender, without any requirement of medical or surgical intervention.¹²⁴
2. Right to equality and non-discrimination: transgender persons are entitled to equal protection under Articles 14 and 15, and discrimination on the basis of gender identity is prohibited.¹²⁵
3. Right to dignity and autonomy: transgender persons’ right to dignity, bodily autonomy, and sexual autonomy is protected under Article 21.¹²⁶
4. Affirmative action: the state is obliged to take affirmative action to address the historical discrimination and marginalization of transgender persons.¹²⁷
5. Legal recognition: transgender persons are entitled to legal recognition of their self-identified gender in all official documents and records.¹²⁸

The *NALSA* judgment was a watershed moment for LGBTQIA+ rights in India, providing constitutional recognition and protection for transgender persons. However, its implementation has been incomplete and inconsistent.

B. Repeal of Section 377 IPC: a retrograde step

Section 377 IPC criminalized ‘carnal intercourse against the order of nature’, which was interpreted to include consensual same-sex sexual activity as well as non-consensual anal and oral sex.¹²⁹ In *Navtej Singh Johar v. Union of India* (2018), the Supreme Court partially struck down Section 377, decriminalizing consensual same-sex sexual activity between adults while retaining the criminalization of non-consensual acts.¹³⁰

¹²³ *Id.* ¶¶ 111 (Sikri, J.), 54 (Radhakrishnan, J.).

¹²⁴ *Id.* ¶¶ 69, 129(2).

¹²⁵ *Id.* ¶¶ 54-60.

¹²⁶ *Id.* ¶¶ 68-69.

¹²⁷ *Id.* ¶¶ 60, 129(3).

¹²⁸ *Id.* ¶ 129(2)-(3).

¹²⁹ Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India), § 377.

¹³⁰ *Navtej Singh Johar*, *supra* note 10, ¶ 601.

The BNS 2023 repeals Section 377 in its entirety without replacing it with any provision criminalizing non-consensual anal or oral sex against persons other than women.¹³¹ This creates a significant legal gap:

1. Male survivors unprotected: men and boys who experience non-consensual anal or oral sex are not protected under Section 63 BNS (which defines rape as penetrative acts committed by a man upon a woman). With Section 377 repealed, there is no provision specifically criminalizing non-consensual anal or oral sex against males.¹³²
2. Transgender survivors unprotected: transgender individuals who experience non-consensual anal or oral sex are similarly unprotected.¹³³
3. Non-penetrative sexual violence: the repeal of Section 377 without replacement leaves gaps in protection against non-penetrative sexual violence, particularly against male and transgender individuals.¹³⁴
4. Retrograde step: the complete repeal of Section 377 represents a retreat from the Supreme Court's approach in *Navtej Singh Johar*, which decriminalized consensual acts while retaining protection against non-consensual acts.¹³⁵

Comparative perspective: the UK's Sexual Offences Act 2003, Canada's Criminal Code, and Australian state laws all criminalize non-consensual anal and oral sex under gender-neutral sexual assault provisions.¹³⁶ India's failure to do so is anomalous and leaves significant gaps in protection.

C. Transgender Persons (Protection of Rights) Act 2019

The Transgender Persons (Protection of Rights) Act 2019 was enacted to implement the *NALSA* judgment and provide legal protections for transgender persons.¹³⁷ However, the Act has been widely criticized by transgender rights advocates for several reasons:

1. Certification of gender identity: the Act requires a transgender person to apply to the District Magistrate for a certificate of identity, and requires a further medical

¹³¹ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India) (containing no provision corresponding to Indian Penal Code § 377).

¹³² Gupta, *supra* note 8.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Sexual Offences Act 2003, c. 42, §§ 1-4 (UK); Criminal Code, R.S.C. 1985, c. C-46, §§ 271-273 (Can.); Crimes Act 1900 (NSW) ss 61I-61J (Austl.).

¹³⁷ Transgender Persons (Protection of Rights) Act, 2019, No. 40, Acts of Parliament, 2019 (India).

certificate for a change of gender to male or female after surgery, undermining the *NALSA* principle of self-identification.¹³⁸

2. Inadequate penalties: the Act prescribes minimal penalties (six months to two years' imprisonment) for sexual abuse of transgender persons, compared with the much higher penalties for offences against women under the BNS.¹³⁹
3. Lack of integration with criminal law: the Act does not integrate with the BNS or the BNSS, creating confusion about which provisions apply to transgender survivors of sexual violence.¹⁴⁰
4. No marital protections: the Act does not recognize transgender persons' right to marry or provide protection against domestic violence within transgender relationships.¹⁴¹
5. Implementation gaps: the Act has not been effectively implemented, with many states failing to establish welfare boards, provide healthcare, or ensure access to education and employment.¹⁴²

Interaction with the BNS: the relationship between the Transgender Persons Act 2019 and the BNS 2023 is unclear. Key questions include:

- Do the BNS sexual offence provisions apply to transgender survivors? If so, how is 'woman' in Section 63 to be interpreted?
- Do the Transgender Persons Act's sexual offence provisions (with their lower penalties) override the BNS provisions?
- How are transgender perpetrators treated under BNS provisions that specify 'a man' as the offender?

These ambiguities create legal uncertainty and may deter transgender survivors from reporting sexual violence.¹⁴³

¹³⁸ *Id.* §§ 5-7; Gupta, *supra* note 8.

¹³⁹ Transgender Persons (Protection of Rights) Act, 2019, No. 40, Acts of Parliament, 2019 (India), § 18(d) (six months to two years); compare Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), § 64(1) (minimum ten years for rape).

¹⁴⁰ Gupta, *supra* note 8.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

D. Intersectional analysis: caste, class, and disability

Gender does not operate in isolation. It intersects with other axes of identity and inequality, particularly caste, class, and disability, to create compounded marginalization and differential experiences of sexual violence and access to justice.¹⁴⁴

i. Caste intersections

India's caste system creates a hierarchical social stratification that intersects with gender to produce differential vulnerability to sexual violence and differential access to justice. Key issues include:

1. Dalit women: Dalit (formerly 'untouchable') women face compounded marginalization based on caste and gender. They experience high rates of sexual violence, including caste-based sexual violence used as a tool of oppression.¹⁴⁵ Dalit women face barriers to reporting (fear of police indifference or complicity, lack of resources, social stigma) and to accessing justice (discriminatory attitudes of police and courts, lack of legal representation, economic dependence).¹⁴⁶
2. Adivasi women: Adivasi (indigenous or tribal) women face a similar compounded marginalization, with additional barriers related to geographic isolation, linguistic difference, and lack of awareness of legal rights.¹⁴⁷
3. Caste-based sexual violence: sexual violence is often used as a tool of caste oppression, with dominant-caste men assaulting Dalit and Adivasi women to assert dominance and punish perceived transgressions of caste boundaries.¹⁴⁸ The BNS does not explicitly recognize caste-based sexual violence as an aggravated offence, though it may be prosecuted under the general provisions and under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989.¹⁴⁹

¹⁴⁴ Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

¹⁴⁵ NAT'L CRIME RECS. BUREAU, *supra* note 89 (tabulating crimes, including rape, against Scheduled Caste women).

¹⁴⁶ HUM. RTS. WATCH & CTR. FOR HUM. RTS. & GLOB. JUST., HIDDEN APARTHEID: CASTE DISCRIMINATION AGAINST INDIA'S "UNTOUCHABLES" 45-67 (2007).

¹⁴⁷ *Id.* at 68-82.

¹⁴⁸ Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, No. 33, Acts of Parliament, 1989 (India), § 3(1)(w) (as substituted by the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, No. 1, Acts of Parliament, 2016 (India)); § 3(2)(v).

¹⁴⁹ *Id.*

4. Transgender persons from marginalized castes: transgender persons from Dalit and Adivasi communities face a triple marginalization based on gender identity, caste, and often economic status. They experience higher rates of violence and discrimination and face greater barriers to accessing legal protection.¹⁵⁰

ii. Class intersections

Economic class intersects with gender to create differential vulnerability and differential access to justice:

1. Economic dependence: women from economically disadvantaged backgrounds often depend on male family members or partners for economic survival, making it difficult to leave abusive relationships or report sexual violence.¹⁵¹
2. Access to legal resources: economically disadvantaged survivors lack the resources to hire lawyers, access medical care, or navigate complex legal procedures. While legal aid is available in principle, it is often inadequate or inaccessible.¹⁵²
3. Procedural barriers: procedural reforms such as e-FIR may be inaccessible to economically disadvantaged survivors who lack internet access, digital literacy, or devices.¹⁵³
4. Victim compensation: compensation schemes may be inaccessible to economically disadvantaged survivors because of complex procedures, documentation requirements, and the lack of legal assistance.¹⁵⁴
5. Transgender economic vulnerability: transgender persons face high rates of unemployment, poverty, and economic exclusion owing to discrimination in education and employment. This economic vulnerability increases their risk of sexual violence (particularly violence associated with sex work) and reduces their ability to access justice.¹⁵⁵

iii. Disability intersections

Disability intersects with gender to create heightened vulnerability to sexual violence and barriers to justice:

¹⁵⁰ Gupta, *supra* note 8.

¹⁵¹ Saleena et al., *supra* note 114.

¹⁵² *Id.*

¹⁵³ Balakrishna, *supra* note 3.

¹⁵⁴ Saleena et al., *supra* note 114.

¹⁵⁵ Gupta, *supra* note 8.

1. Higher rates of violence: women and girls with disabilities experience sexual violence at substantially higher rates than women without disabilities.¹⁵⁶ They face particular vulnerability because of physical dependence on caregivers, communication barriers, and social isolation.¹⁵⁷
2. Credibility barriers: survivors with intellectual or psychosocial disabilities face credibility barriers in the criminal justice system, with police, prosecutors, and courts often dismissing their testimony as unreliable.¹⁵⁸
3. Procedural barriers: criminal justice procedures are often inaccessible to persons with disabilities. Police stations, courts, and forensic facilities may lack physical accessibility; complaint procedures may not accommodate communication disabilities; and evidence rules may not account for cognitive or communication differences.¹⁵⁹
4. Lack of support services: survivors with disabilities often lack access to appropriate support services, including accessible counseling, medical care, and legal assistance.¹⁶⁰
5. Transgender persons with disabilities: transgender persons with disabilities face compounded marginalization and heightened vulnerability to violence, with minimal legal protection or support services.¹⁶¹

iv. The BNS response to intersectionality

The BNS 2023 does not explicitly address intersectional inequalities. While it provides enhanced penalties for sexual offences against certain vulnerable groups (children, pregnant women), it does not recognize:

- caste-based sexual violence as an aggravated offence;
- economic vulnerability as a factor warranting enhanced protection; or
- disability as a factor warranting enhanced protection or procedural accommodation.

This failure to address intersectionality limits the BNS's ability to achieve substantive gender justice for marginalized communities.¹⁶²

¹⁵⁶ WORLD HEALTH ORG., Violence Against Women with Disabilities (Fact Sheet, 2012).

¹⁵⁷ *Id.*

¹⁵⁸ Gupta, *supra* note 8.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

Recommendations: the BNS should be amended to:

1. recognize caste-based sexual violence as an aggravated offence with enhanced penalties;
2. provide procedural accommodations for survivors with disabilities (accessible complaint procedures, alternative communication methods, and expert testimony on disability and credibility);
3. ensure that victim compensation schemes are accessible to economically disadvantaged survivors;
4. mandate training for police, prosecutors, and judges on intersectional inequalities and their impact on sexual violence and access to justice; and
5. establish specialized support services for survivors facing compounded marginalization.

VIII. INTERNATIONAL COMPARATIVE ANALYSIS

This section examines gender-neutral criminal law frameworks in the United Kingdom, Canada, and Australia, including their implementation experiences, and draws lessons for India.

A. United Kingdom: Sexual Offences Act 2003

The Sexual Offences Act 2003 (SOA 2003), which applies in England and Wales, represents a comprehensive reform of sexual offence law, introducing gender-neutral provisions and a consent-based framework.¹⁶³ Its key features are:

1. Gender-neutral rape definition: Section 1 SOA 2003 defines rape as the intentional penetration of the vagina, anus, or mouth of another person with a penis, without consent and without a reasonable belief in consent.¹⁶⁴ The provision is gender-neutral as to victims (any person can be a victim) but requires that the perpetrator penetrate with a penis, thus excluding female perpetrators from the offence of rape itself, though they may be charged with other sexual offences.¹⁶⁵
2. Assault by penetration: Section 2 SOA 2003 criminalizes the penetration of the vagina or anus with any part of the body or any object, without consent.¹⁶⁶ This provision is fully gender-neutral and covers acts that would not constitute rape (for example, penetration by a female perpetrator).

¹⁶³ Sexual Offences Act 2003, c. 42 (UK).

¹⁶⁴ *Id.* § 1.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* § 2.

3. Sexual assault: Section 3 SOA 2003 criminalizes sexual touching without consent, covering non-penetrative sexual violence.¹⁶⁷
4. Consent framework: the SOA 2003 defines consent as agreement by choice where the person has the freedom and capacity to make that choice.¹⁶⁸ It establishes evidential and conclusive presumptions about the absence of consent in certain circumstances (for example, violence, threats, unconsciousness, deception).¹⁶⁹
5. Marital rape: the marital rape exemption was abolished in 1991 by the House of Lords' decision in *R v. R*.¹⁷⁰ The SOA 2003 contains no marital rape exception.

Implementation experience:

1. Increased reporting: in the years following the SOA 2003, the reporting of sexual offences increased, notably by male victims. Police-recorded rapes of males rose from roughly 850 in 2003-04 to about 2,500 (victims aged sixteen and over) in the year ending March 2020.¹⁷¹
2. Charging and conviction challenges: despite increased reporting, outcomes remain poor. Only about 1.6% of police-recorded rapes in the year ending March 2020 resulted in a charge or summons.¹⁷² This reflects challenges in evidence collection, jury attitudes, and attrition at various stages of the criminal justice process.
3. Consent framework challenges: the consent framework has been subject to extensive judicial interpretation, with ongoing debate about what constitutes a 'reasonable belief' in consent and how to balance complainant protection with the rights of the accused.¹⁷³
4. Male victim recognition: the gender-neutral provisions have facilitated the recognition of male victims, though stigma and under-reporting remain significant problems.¹⁷⁴

¹⁶⁷ *Id.* § 3.

¹⁶⁸ *Id.* § 74.

¹⁶⁹ *Id.* §§ 75-76.

¹⁷⁰ *R v. R*, *supra* note 64.

¹⁷¹ OFF. FOR NAT'L STAT., SEXUAL OFFENCES IN ENGLAND AND WALES OVERVIEW: YEAR ENDING MARCH 2020 (Mar. 18, 2021).

¹⁷² *Id.*

¹⁷³ See, e.g., *R v. Bree* [2007] EWCA (Crim) 804 (Eng.) (intoxication and consent); *R v. Jheeta* [2007] EWCA (Crim) 1699 (Eng.) (deception and consent).

¹⁷⁴ OFF. FOR NAT'L STAT., *supra* note 171.

Lessons for India:

1. Gender-neutral provisions can increase reporting by male and LGBTQIA+ survivors.
2. Consent-based frameworks require extensive judicial interpretation and public education.
3. Gender-neutral language alone does not ensure high conviction rates; institutional capacity and societal attitudes are critical.
4. Separate offences for penetrative and non-penetrative sexual violence can provide comprehensive protection.

B. Canada: gender-neutral Criminal Code reforms

Canada criminalized marital rape and introduced gender-neutral sexual assault provisions in 1983 through the Criminal Law Amendment Act.¹⁷⁵ The key features of the Canadian framework are:

1. Three-tier sexual assault framework: Canada's Criminal Code establishes three levels of sexual assault: sexual assault (the basic offence, Section 271); sexual assault with a weapon, threats to a third party, or causing bodily harm (Section 272); and aggravated sexual assault (Section 273).¹⁷⁶
2. Fully gender-neutral: all provisions use gender-neutral language ('every one who commits sexual assault') and protect all persons regardless of gender.¹⁷⁷
3. Consent framework: Section 273.1(1) defines consent as the voluntary agreement of the complainant to engage in the sexual activity in question.¹⁷⁸ Section 273.1(2) specifies circumstances in which no consent is obtained (for example, where agreement is expressed by the words or conduct of a person other than the complainant, where the complainant is incapable of consenting, or where the accused induces the complainant to engage in the activity by abusing a position of trust, power, or authority).¹⁷⁹
4. No marital rape exception: Canada abolished the marital rape exception in 1983.¹⁸⁰

¹⁷⁵ Criminal Law Amendment Act, 1980-81-82-83, S.C. 1980-81-82-83, c. 125, § 19 (Can.) (enacting Criminal Code §§ 246.1-246.8; spousal immunity removed by § 246.8).

¹⁷⁶ Criminal Code, R.S.C. 1985, c. C-46, §§ 271-273 (Can.).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* § 273.1(1).

¹⁷⁹ *Id.* § 273.1(2).

¹⁸⁰ Criminal Law Amendment Act, 1980-81-82-83, S.C. 1980-81-82-83, c. 125, § 19 (Can.) (enacting Criminal Code §§ 246.1-246.8; spousal immunity removed by § 246.8).

5. Mistaken belief in consent: Section 273.2 provides that a belief in consent is no defence where the accused's belief arose from self-induced intoxication, recklessness, or wilful blindness, or where the accused did not take reasonable steps to ascertain consent.¹⁸¹

Implementation experience:

1. Increased gender equality: Canada's gender-neutral provisions are widely viewed as promoting gender equality and recognizing diverse forms of sexual violence, although early commentary warned that judicial attitudes could blunt their effect.¹⁸²
2. Male victim recognition: male victims of sexual assault are recognized and protected, though reporting rates remain lower than for female victims because of stigma.¹⁸³
3. LGBTQIA+ protections: gender-neutral provisions have facilitated the protection of LGBTQIA+ individuals, including in same-sex relationships.¹⁸⁴
4. Ongoing challenges: despite gender-neutral provisions, only a small fraction of sexual assaults (about 5% in the 2014 General Social Survey) are reported to the police, conviction rates remain low, and survivors face barriers to reporting and accessing justice. The challenges include police attitudes, prosecutorial discretion, jury biases, and evidentiary difficulties.¹⁸⁵
5. Judicial interpretation: Canadian courts have developed an extensive jurisprudence on consent, including the 'affirmative consent' principle (consent must be actively communicated, not merely inferred from silence or passivity; there is no defence of implied consent).¹⁸⁶

Lessons for India:

1. Fully gender-neutral provisions can promote equality and protect diverse survivors.
2. A three-tier framework allows proportionate sentencing based on severity.
3. A consent-based framework requires a clear definition and extensive judicial interpretation.

¹⁸¹ Criminal Code, R.S.C. 1985, c. C-46, § 273.2 (Can.).

¹⁸² Elizabeth A. Sheehy, *Canadian Judges and the Law of Rape: Should the Charter Insulate Bias?*, 21 OTTAWA L. REV. 741 (1989).

¹⁸³ Shana Conroy & Adam Cotter, STAT. CAN., *Self-Reported Sexual Assault in Canada, 2014*, JURISTAT (Cat. No. 85-002-X, July 11, 2017), tbl. 3.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *R v. Ewanchuk*, [1999] 1 S.C.R. 330 (Can.), ¶ 31.

4. Abolition of the marital rape exception is feasible and has not led to widespread false accusations or family destabilization.
5. Gender-neutral provisions alone do not ensure high conviction rates; institutional and societal change is essential.

C. Australia: state-level gender-neutral frameworks

Australia has no federal criminal code for sexual offences; instead, each state and territory has its own criminal law. Most Australian jurisdictions have adopted gender-neutral sexual assault provisions, though with variation in approach.¹⁸⁷

The New South Wales example:

1. Gender-neutral sexual assault: Section 61I of the Crimes Act 1900 (NSW) defines sexual assault as sexual intercourse with another person without consent, knowing that the person does not consent or being reckless as to consent.¹⁸⁸ The provision is fully gender-neutral.
2. Aggravated sexual assault: Section 61J provides enhanced penalties in aggravated circumstances (for example, a victim under sixteen, the infliction of actual bodily harm, deprivation of liberty, or breaking and entering).¹⁸⁹
3. Consent framework: Sections 61HF to 61HK define consent and specify the circumstances in which there is no consent (for example, force, fear, unconsciousness, substantial intoxication, mistaken identity), together with the knowledge requirement, including recklessness and the duty to take reasonable steps.¹⁹⁰
4. No marital rape exception: New South Wales abolished the marital rape exception in 1981.¹⁹¹

Implementation experience:

1. Gender equality: gender-neutral provisions are viewed as promoting equality and recognizing diverse forms of sexual violence.¹⁹²
2. Male victim recognition: male victims are recognized and protected, though reporting rates remain low.¹⁹³

¹⁸⁷ MODEL CRIM. CODE OFFICERS COMM. OF THE STANDING COMM. OF ATT'YS-GEN., MODEL CRIMINAL CODE, CHAPTER 5: SEXUAL OFFENCES AGAINST THE PERSON, REPORT (1999).

¹⁸⁸ Crimes Act 1900 (NSW) s 61I (Austl.).

¹⁸⁹ *Id.* s 61J.

¹⁹⁰ *Id.* ss 61HF-61HK.

¹⁹¹ Crimes (Sexual Assault) Amendment Act 1981 (NSW) No 42 (Austl.).

¹⁹² N.S.W. L. REFORM COMM'N, CONSENT IN RELATION TO SEXUAL OFFENCES ¶ 2.15 (Report No. 148, 2020).

¹⁹³ AUSTL. BUREAU OF STAT., PERSONAL SAFETY, AUSTRALIA, 2016 (Cat. No. 4906.0, Nov. 8, 2017), tbl. 8.

3. Conviction challenges: as in the UK and Canada, conviction rates remain low despite gender-neutral provisions, reflecting institutional and societal barriers.¹⁹⁴
4. State variation: variation across the Australian states creates complexity and inconsistency, though most states have converged on gender-neutral approaches.¹⁹⁵

Lessons for India:

1. Gender-neutral provisions are feasible and promote equality.
2. State-level variation (as in Australia) can create complexity; a uniform national approach (as in Canada) may be preferable.
3. Consent-based frameworks require a clear definition and judicial interpretation.
4. Abolition of the marital rape exception is feasible and has not led to widespread problems.

D. Comparative implementation experiences

Across the UK, Canada, and Australia, several common implementation experiences emerge:

1. Increased reporting by male and LGBTQIA+ survivors: gender-neutral provisions have facilitated increased reporting by male and LGBTQIA+ survivors, though reporting rates remain lower than for female survivors because of stigma, lack of awareness, and fear of disbelief.¹⁹⁶
2. Low conviction rates persist: despite gender-neutral provisions, conviction rates for sexual assault remain low across all three jurisdictions (typically 5-15% of reported cases result in a conviction).¹⁹⁷ This reflects challenges in evidence collection, jury attitudes, attrition at various stages of the criminal justice process, and the inherent difficulty of proving non-consent in cases that typically occur in private without witnesses.
3. Institutional capacity is critical: gender-neutral provisions alone do not ensure effective protection. Institutional capacity, including police training, prosecutorial resources, forensic capacity, and judicial awareness, is critical for implementation.¹⁹⁸
4. Societal attitudes matter: societal attitudes toward sexual violence, gender roles, and LGBTQIA+ individuals significantly affect reporting, investigation, prosecution, and

¹⁹⁴ *Id.* tbl. 12.

¹⁹⁵ MODEL CRIM. CODE OFFICERS COMM., *supra* note 187, at 45-67.

¹⁹⁶ See OFF. FOR NAT'L STAT., *supra* note 171; Conroy & Cotter, *supra* note 183; AUSTL. BUREAU OF STAT., *supra* note 193.

¹⁹⁷ See sources cited *supra* note 196.

¹⁹⁸ Wang, *supra* note 48.

conviction. Legal reform must be accompanied by public education and social change.¹⁹⁹

5. Criminalizing marital rape is feasible: all three jurisdictions have criminalized marital rape without widespread false accusations or family destabilization. Concerns about evidentiary difficulties and misuse have not materialized to the extent predicted by opponents.²⁰⁰
6. Consent frameworks require interpretation: consent-based frameworks require extensive judicial interpretation and public education. Courts must develop jurisprudence on what constitutes consent, reasonable belief in consent, and the circumstances negating consent.²⁰¹
7. Procedural safeguards are important: procedural safeguards, including rules on evidence, cross-examination, and victim support, are critical for balancing complainant protection with the rights of the accused.²⁰²

E. Lessons for India

Drawing on the comparative analysis, several lessons emerge for India:

1. Gender-neutral provisions are feasible and beneficial: the UK, Canada, and Australia demonstrate that gender-neutral sexual assault provisions are feasible, promote equality, and facilitate the protection of diverse survivors. India should adopt similar provisions.
2. A comprehensive framework is needed: India should adopt a comprehensive framework that includes a gender-neutral rape or sexual assault definition covering all forms of penetrative sexual violence; separate offences for non-penetrative sexual violence; a clear consent-based framework with a definition of consent and of the circumstances negating consent; abolition of the marital rape exception; enhanced penalties for aggravated circumstances; and procedural safeguards balancing the rights of complainant and accused.
3. Implementation capacity is critical: legal reform must be accompanied by police training on gender-neutral provisions, consent, and sensitivity to diverse survivors; prosecutorial training and resources; forensic capacity for evidence collection and

¹⁹⁹ *Id.*

²⁰⁰ Gupta, *supra* note 8.

²⁰¹ *Id.*

²⁰² *Id.*

analysis; judicial training on gender equality, LGBTQIA+ rights, and consent; and public education on sexual violence, consent, and legal rights.

4. Societal change is essential: legal reform alone is insufficient. Societal attitudes toward gender, sexuality, and violence must change through public education campaigns; school curricula on consent, gender equality, and healthy relationships; media engagement to challenge stereotypes and stigma; and community mobilization and advocacy.
5. Monitoring and evaluation are needed: implementation should be monitored through the collection of data on case statistics, disaggregated by victim gender, offence type, and outcome; regular evaluation of implementation challenges and outcomes; stakeholder consultations with survivors, advocates, and criminal justice professionals; and longitudinal research on trends and impacts.
6. Criminalizing marital rape is urgent: the comparative experience demonstrates that the criminalization of marital rape is feasible and necessary. India should abolish the marital rape exception with appropriate procedural safeguards.
7. An intersectional approach is needed: while the UK, Canada, and Australia have adopted gender-neutral provisions, India must also address the intersectional inequalities (caste, class, disability) that compound marginalization and affect access to justice.

IX. IMPLEMENTATION CHALLENGES

This section identifies the key challenges to implementing gender-neutral criminal law reforms in India, including institutional barriers, sociocultural resistance, and resource constraints.

A. Institutional and forensic barriers

i. Police capacity and training

Indian police forces face significant capacity constraints that hinder the effective implementation of criminal law reforms.

Understaffing: India has one of the lowest police-to-population ratios in the world (approximately 150 police personnel per 100,000 population in post, compared with 300 or more in many developed countries).²⁰³ Understaffing leads to high workloads, delayed investigations, and inadequate attention to individual cases.

²⁰³ BUREAU OF POLICE RSCH. & DEV., MINISTRY OF HOME AFFS., DATA ON POLICE ORGANISATIONS (AS ON 1 JANUARY 2022) (2023), tbl. 1.1.

Lack of training: most police officers lack training on gender-neutral provisions, consent, sensitivity to diverse survivors (particularly male and transgender survivors), and LGBTQIA+ rights.²⁰⁴ This leads to discriminatory attitudes, inappropriate questioning, and failure to register complaints.

Infrastructural deficits: many police stations lack the basic infrastructure for investigating sexual offences, including private interview rooms, female officers, and facilities for medical examination.²⁰⁵

Attitudinal barriers: police officers often hold patriarchal attitudes and gender stereotypes that affect their response to complaints of sexual violence. Male and transgender survivors face scepticism and disbelief.²⁰⁶

ii. Forensic capacity

Forensic capacity is critical for investigating sexual offences, but India faces significant deficits.

Limited forensic laboratories: India has too few forensic laboratories to handle the volume of cases. As of 2022, the Directorate of Forensic Science Services operated seven central forensic science laboratories, and the States roughly thirty principal laboratories supplemented by regional units, for a population of 1.4 billion.²⁰⁷

Backlogs: forensic laboratories face massive backlogs, with DNA analysis often taking six to twelve months or longer.²⁰⁸ This delays investigations and trials, causing trauma for survivors and allowing evidence to deteriorate.

Quality concerns: the quality of forensic analysis varies significantly across laboratories, with concerns about contamination, chain of custody, and the reliability of results.²⁰⁹

Lack of specialized expertise: few forensic laboratories have expertise in analyzing evidence from male or transgender survivors, particularly in cases of non-penile-vaginal sexual violence.²¹⁰

iii. Prosecutorial capacity

Prosecutors face capacity constraints that affect their ability to prosecute sexual offences effectively.

²⁰⁴ Balakrishna, *supra* note 3.

²⁰⁵ *Id.*

²⁰⁶ Gupta, *supra* note 8.

²⁰⁷ NAT'L CRIME RECS. BUREAU, *supra* note 89.

²⁰⁸ Balakrishna, *supra* note 3.

²⁰⁹ *Id.*

²¹⁰ Gupta, *supra* note 8.

High caseloads: prosecutors handle extremely high caseloads, limiting the time and attention they can devote to individual cases.²¹¹

Lack of specialization: few prosecutors specialize in sexual offences or have training on gender-neutral provisions, consent, or sensitivity to diverse survivors.²¹²

Resource constraints: prosecutors lack resources for expert witnesses, victim support, and case preparation.²¹³

iv. Judicial capacity

Courts face capacity constraints that contribute to delayed justice.

Judicial vacancies: as on 1 December 2024, roughly one-third of the sanctioned posts in the High Courts and about one-fifth of those in the district judiciary were vacant.²¹⁴ This contributes to massive case backlogs.

Case backlogs: Indian courts face a backlog of about 50 million pending cases, with sexual offence cases often taking years to reach trial.²¹⁵

Lack of training: many judges lack training on gender-neutral provisions, consent, LGBTQIA+ rights, and sensitivity to diverse survivors.²¹⁶

B. Sociocultural resistance and judicial attitudes

i. Patriarchal attitudes

Indian society remains deeply patriarchal, with attitudes that affect responses to sexual violence.

Gender stereotypes: stereotypes that men are inherently perpetrators and women inherently victims make it difficult for male and transgender survivors to be recognized and believed.²¹⁷

Victim-blaming: survivors, particularly female survivors, often face victim-blaming attitudes that question their behavior, clothing, or presence in certain spaces.²¹⁸

Stigma: sexual violence carries significant stigma, particularly for male and LGBTQIA+ survivors, deterring reporting and support-seeking.²¹⁹

²¹¹ Balakrishna, *supra* note 3.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ DEP'T OF JUST., MINISTRY OF L. & JUST., Vacancy Position of Judges in the Supreme Court, High Courts and District & Subordinate Courts (as on Dec. 1, 2024).

²¹⁵ NAT'L JUD. DATA GRID, National Judicial Data Grid Dashboard (Ministry of Law & Justice, Government of India).

²¹⁶ Balakrishna, *supra* note 3.

²¹⁷ Gupta, *supra* note 8.

²¹⁸ Saleena et al., *supra* note 114.

²¹⁹ Gupta, *supra* note 8.

ii. Resistance to the criminalization of marital rape

The criminalization of marital rape faces significant sociocultural resistance.

Traditional views of marriage: many Indians view marriage as creating mutual obligations, including sexual obligations, making it difficult to conceptualize marital rape.²²⁰

Family privacy: there is a strong cultural emphasis on family privacy and a reluctance to involve the state in marital matters.²²¹

Fear of family destabilization: concerns about family destabilization and increased divorce rates fuel resistance to criminalization.²²²

iii. LGBTQIA+ stigma

Despite legal progress (*NALSA, Navtej Singh Johar*), LGBTQIA+ individuals face significant stigma and discrimination.

Social attitudes: many Indians view homosexuality and transgender identity as immoral, unnatural, or Western imports. In the Pew Research Center's 2019 survey, only 37% of Indian respondents said that homosexuality should be accepted by society.²²³

Family rejection: LGBTQIA+ individuals often face family rejection, violence, and economic exclusion.²²⁴

Institutional discrimination: LGBTQIA+ individuals face discrimination in education, employment, healthcare, and criminal justice.²²⁵

iv. Judicial attitudes

Judicial attitudes significantly affect the implementation of gender-neutral provisions.

Gender stereotypes: some judges hold patriarchal attitudes and gender stereotypes that affect their interpretation of evidence and their assessment of credibility.²²⁶

Victim-blaming: some judicial decisions reflect victim-blaming attitudes, questioning survivors' behavior or credibility on the basis of stereotypes.²²⁷

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ PEW RSCH. CTR., THE GLOBAL DIVIDE ON HOMOSEXUALITY PERSISTS (June 25, 2020) (reporting that 37% of Indian respondents surveyed in 2019 said that homosexuality should be accepted by society).

²²⁴ Gupta, *supra* note 8.

²²⁵ *Id.*

²²⁶ Saleena et al., *supra* note 114.

²²⁷ *Id.*

Resistance to change: some judges resist progressive interpretations of gender-neutral provisions or constitutional principles, preferring traditional approaches.²²⁸

C. Resource and capacity constraints

i. Financial resources

Implementing gender-neutral criminal law reforms requires significant financial investment.

Police infrastructure: upgrading police stations, providing training, and hiring additional officers require substantial funding.²²⁹

Forensic capacity: establishing additional forensic laboratories, hiring qualified personnel, and procuring equipment require significant investment.²³⁰

Judicial infrastructure: filling judicial vacancies, establishing fast-track courts, and providing training require funding.²³¹

Victim support services: establishing comprehensive victim support services (counseling, medical care, legal aid, shelters) requires sustained funding.²³²

ii. Human resources

India faces shortages of qualified personnel across the criminal justice system.

Police officers: there is a shortage of police officers, particularly female officers and officers trained in the investigation of sexual offences.²³³

Forensic experts: there is a shortage of qualified forensic scientists, particularly those with expertise in DNA analysis and sexual assault examination.²³⁴

Prosecutors: there is a shortage of prosecutors, particularly those specializing in sexual offences.²³⁵

Judges: there is a shortage of judges at all levels, contributing to case backlogs.²³⁶

Counselors and social workers: there is a shortage of qualified counselors and social workers to provide victim support.²³⁷

²²⁸ *Id.*

²²⁹ Balakrishna, *supra* note 3.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ BUREAU OF POLICE RSCH. & DEV., *supra* note 203, tbl. 2.3.

²³⁴ NAT'L CRIME RECS. BUREAU, *supra* note 89.

²³⁵ Balakrishna, *supra* note 3.

²³⁶ DEP'T OF JUST., *supra* note 214.

²³⁷ Balakrishna, *supra* note 3.

iii. Coordination challenges

Effective implementation requires coordination across multiple agencies and levels of government.

Central-state coordination: criminal law is on the Concurrent List, requiring coordination between the central and state governments.²³⁸

Inter-agency coordination: investigation and prosecution require coordination among police, forensic laboratories, prosecutors, courts, and victim support services.²³⁹

Lack of protocols: many jurisdictions lack clear protocols for inter-agency coordination, leading to delays and gaps.²⁴⁰

X. RECOMMENDATIONS FOR REFORM

This section provides detailed, actionable recommendations for achieving gender neutrality in Indian criminal law, including proposed statutory language, procedural safeguards, institutional reforms, and an implementation monitoring framework.

A. Statutory amendments with proposed language

i. Amend Section 63 BNS to adopt a gender-neutral rape definition

Current language: Section 63 BNS provides that ‘a man’ commits rape if he performs any of the specified penetrative acts upon ‘a woman’ in any of the specified circumstances.

Proposed language:

Whoever commits penetrative sexual assault against another person under circumstances falling under any of the following descriptions shall be guilty of rape: (a) against that person’s will; (b) without that person’s consent; (c) with that person’s consent, when such consent has been obtained by putting that person or any person in whom they are interested, in fear of death or of hurt; (d) with that person’s consent, when the perpetrator knows that such consent is given because the person believes the perpetrator to be another person to whom they are or believe themselves to be lawfully married or in a committed relationship; (e) with that person’s consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the perpetrator personally or through another of any stupefying or unwholesome substance, that person is unable

²³⁸ INDIA CONST. sched. VII, list III, entry 1.

²³⁹ Balakrishna, *supra* note 3.

²⁴⁰ *Id.*

to understand the nature and consequences of that to which they give consent; (f) with or without that person's consent, when that person is under eighteen years of age.

Explanation 1: 'Penetrative sexual assault' means: (a) penetration of the vagina, anus, or mouth of another person with a penis; (b) penetration of the vagina or anus of another person with any object or any part of the body other than the penis; (c) manipulation of any part of the body of another person so as to cause penetration of the vagina, anus, or mouth of that person or of the perpetrator; (d) application of the mouth to the vagina, anus, or penis of another person.

Explanation 2: 'Consent' means voluntary, informed, and unequivocal agreement by words or conduct to engage in the specific sexual activity in question. Consent may be withdrawn at any time. Consent to one sexual activity does not constitute consent to another sexual activity. Consent on a previous occasion does not constitute consent on the present occasion.

Explanation 3: Consent is absent where: (a) the person is unconscious or asleep; (b) the person is unable to communicate consent due to physical disability; (c) the person is under the influence of alcohol or drugs to the extent that they are unable to understand the nature and consequences of the act; (d) the perpetrator abuses a position of trust, power, or authority; (e) the person is subjected to force, threat, coercion, or intimidation.

Exception: Sexual intercourse or sexual acts between spouses, where both spouses are above eighteen years of age and consent is present, is not rape. [Note: this exception removes the blanket marital rape exception while recognizing consensual marital sexual activity.]

Rationale: this proposed language:

- uses gender-neutral terms ('whoever', 'another person') to protect all individuals regardless of gender;
- defines 'penetrative sexual assault' broadly to include all forms of penetrative sexual violence;
- provides a clear definition of consent and of the circumstances negating consent;
- removes the blanket marital rape exception while recognizing consensual marital sexual activity; and

- aligns with international best practice (the UK, Canada, Australia).

ii. Amend Section 64 BNS to apply gender-neutral punishments

Proposed language:

Whoever commits rape as defined in Section 63 shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine, which shall be paid to the victim as compensation.

Enhanced punishments shall apply in the following circumstances: (a) where the victim is under eighteen years of age: minimum twenty years, which may extend to life imprisonment; (b) where the victim is under sixteen years of age: minimum twenty years, which may extend to life imprisonment or death; (c) where the victim is under twelve years of age: minimum twenty years, which may extend to life imprisonment or death; (d) where the rape causes death or a persistent vegetative state: life imprisonment or death; (e) where the rape causes grievous hurt: minimum fifteen years, which may extend to life imprisonment; (f) where the rape is committed by a person in a position of trust, power, or authority over the victim: minimum fifteen years, which may extend to life imprisonment; (g) where the rape is gang rape: minimum twenty years, which may extend to life imprisonment; (h) where the rape is committed against a person with a disability: minimum fifteen years, which may extend to life imprisonment; (i) where the rape is caste-based sexual violence: minimum fifteen years, which may extend to life imprisonment.

Rationale: this proposed language:

- applies punishments gender-neutrally to all victims;
- retains enhanced punishments for aggravated circumstances;
- adds new aggravating factors (disability, caste-based violence, position of trust); and
- mandates victim compensation.

iii. Introduce a new Section 63A BNS for non-penetrative sexual assault

Proposed language:

Whoever commits sexual assault against another person without consent shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation 1: ‘Sexual assault’ means intentional sexual touching of another person without consent, including: (a) touching the genitals, anus, breasts, or any other intimate part of another person’s body; (b) compelling another person to touch the perpetrator’s genitals, anus, breasts, or any other intimate part of the perpetrator’s body; (c) any other act of a sexual nature that violates the bodily integrity and sexual autonomy of another person.

Explanation 2: ‘Consent’ has the same meaning as in Section 63.

Rationale: this provision:

- criminalizes non-penetrative sexual violence in gender-neutral terms;
- provides comprehensive protection against all forms of sexual assault; and
- fills the gap left by the repeal of Section 377 IPC.

iv. Amend Section 69 BNS to use gender-neutral language

Proposed language:

Whoever, by deceitful means or by making a promise of marriage or committed relationship without any intention of fulfilling the same, and has sexual intercourse with another person, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Explanation: ‘Deceitful means’ includes but is not limited to: (a) false promise of marriage or committed relationship; (b) concealment of existing marriage or committed relationship; (c) concealment of sexually transmitted infection; (d) deception about use of contraception; (e) impersonation of another person known to the victim.

Rationale: this proposed language:

- uses gender-neutral terms to protect all individuals;
- broadens the statutory Explanation of ‘deceitful means’; and
- expands beyond the promise to marry to include other forms of sexual deceit.

B. Procedural safeguards

To address concerns about false accusations and evidentiary difficulties, the following procedural safeguards should be implemented:

1. Preliminary inquiry before arrest in marital rape cases: the police should conduct a preliminary inquiry to assess the prima facie evidence before arresting the accused spouse; the inquiry should be completed within seven days; and arrest should require the approval of an officer not below the rank of Deputy Superintendent of Police.
2. In-camera trials: all sexual offence trials should be conducted in camera to protect the privacy of complainant and accused, and media reporting should be restricted to protect identities.
3. Victim support during investigation and trial: complainants should have the right to a support person of their choice during police questioning and court proceedings; free legal aid should be provided to complainants who cannot afford representation; and counseling should be provided throughout the investigation and trial.
4. Evidence rules: the complainant's past sexual history should be inadmissible except in limited circumstances with the court's approval; corroboration should not be required for conviction, the complainant's testimony alone sufficing if credible; and expert testimony on trauma, victim behavior, and consent should be admissible.
5. Cross-examination restrictions: cross-examination of the complainant should be conducted with sensitivity; aggressive, repetitive, or humiliating questioning should be prohibited; and the court should have the power to intervene to protect the complainant from harassment.
6. Penalties for false accusations: the existing provision penalizing false charges (Section 248 BNS) should be rigorously enforced; however, failure to prove rape should not automatically result in prosecution for a false accusation, which should require evidence of deliberate falsehood.
7. Time-bound trials: sexual offence trials should be completed within six months of the filing of the charge-sheet, with extensions requiring the approval of the High Court.

C. Institutional capacity building

i. Police training

- Mandatory training for all police officers on gender-neutral provisions and their interpretation; consent and the circumstances negating consent; sensitivity to diverse survivors (male, transgender, non-binary); LGBTQIA+ rights and terminology; intersectional inequalities (caste, class, disability); trauma-informed interviewing techniques; and evidence collection and preservation.

- Specialized training for officers investigating sexual offences.
- Training conducted by experts in gender, sexuality, and criminal law.
- Training that is ongoing, not one-time.

ii. Prosecutorial training

- Mandatory training for prosecutors on gender-neutral provisions and their interpretation; consent and the circumstances negating consent; sensitivity to diverse survivors; LGBTQIA+ rights; intersectional inequalities; trial advocacy in sexual offence cases; and the use of expert witnesses.
- Establishment of specialized sexual offences prosecution units in each district.

iii. Judicial training

- Mandatory training for judges on gender-neutral provisions and their interpretation; consent and the circumstances negating consent; the constitutional principles of equality and dignity; LGBTQIA+ rights; intersectional inequalities; trauma-informed judging; and the evaluation of evidence in sexual offence cases.
- Training conducted by the National Judicial Academy and the State Judicial Academies.
- Training that is ongoing.

iv. Forensic capacity enhancement

- Establishment of additional forensic science laboratories in each state.
- Hiring of qualified forensic scientists, particularly those with expertise in DNA analysis and sexual assault examination.
- Procurement of modern equipment and technology.
- Development of protocols for analyzing evidence from male and transgender survivors.
- Reduction of forensic analysis timelines to a maximum of thirty days.

v. Victim support services

- Establishment of One-Stop Centres in every district providing medical examination and treatment; counseling and psychological support; legal aid and assistance; temporary shelter; and police assistance for the filing of complaints.
- Centres staffed by trained professionals (doctors, counselors, lawyers, social workers).

- Centres accessible to all survivors regardless of gender, sexual orientation, or gender identity.
- Services provided in multiple languages.

D. Implementation monitoring framework

To ensure effective implementation and identify challenges, the following monitoring framework should be established.

i. Data collection system

- Establishment of a centralized database tracking the number of sexual offence complaints filed, disaggregated by victim gender, offence type, and jurisdiction; the number of Zero FIRs and e-FIRs filed; investigation timelines and outcomes; prosecution rates and outcomes; conviction rates and sentencing patterns; victim compensation amounts and timelines; and demographic data on complainants and accused (gender, age, caste, class, disability status).
- Data publicly accessible, with appropriate privacy protections.
- Data analyzed annually to identify trends and challenges.

ii. Evaluation metrics

- Access to justice: the number of complaints filed by male and transgender survivors; the percentage of complaints registered (as against refused); and the average time from complaint to FIR registration.
- Investigation quality: the percentage of investigations completed within the prescribed timelines; the percentage of cases in which forensic evidence was collected; and the percentage of cases charge-sheeted.
- Prosecution outcomes: the percentage of cases prosecuted; conviction rates; the average time from charge-sheet to conviction; and sentencing patterns.
- Victim support: the number of survivors accessing One-Stop Centres; survivor satisfaction with services; and the average victim compensation amount and timeline.
- Institutional capacity: the number of police officers, prosecutors, and judges trained; the number of forensic laboratories operational; and forensic analysis timelines.

iii. Annual reporting

- The Ministry of Home Affairs should publish an annual report on BNS implementation, including statistical data on sexual offence cases, analysis of trends

and challenges, evaluation of institutional capacity, and recommendations for improvement.

- The report should be tabled in Parliament and the state legislatures.

iv. Stakeholder consultations

- Annual consultations with survivors and survivor advocacy organizations; LGBTQIA+ rights organizations; women's rights organizations; criminal justice professionals (police, prosecutors, judges); forensic experts; legal aid providers; and counselors and social workers.
- Consultations should inform policy adjustments and capacity-building efforts.

v. Independent evaluation

- An independent evaluation of BNS implementation should be conducted every three years by the Law Commission of India, the National Commission for Women, the National Human Rights Commission, and academic researchers.
- The evaluation should assess whether gender-neutral provisions are achieving their intended outcomes; whether male and transgender survivors are accessing protections; whether the criminalization of marital rape (if implemented) is functioning effectively; whether procedural reforms are facilitating access to justice; whether institutional capacity is adequate; and whether intersectional inequalities are being addressed.
- The evaluation should include quantitative data analysis and qualitative research (interviews, case studies).

vi. Accountability mechanisms

- Clear accountability for failure to implement the provisions: police officers who refuse to register complaints should face disciplinary action; prosecutors who fail to prosecute cases without justification should face review; and judges who exhibit bias or insensitivity should receive additional training.
- A complaints mechanism for survivors who face discrimination or denial of their rights.
- Oversight by the National Human Rights Commission and the State Human Rights Commissions.

E. Prioritization and sequencing

Given resource constraints and implementation challenges, reforms should be prioritized and sequenced.

Phase 1 (immediate, 0 to 12 months):

1. Amend Section 63 BNS to adopt a gender-neutral rape definition.
2. Introduce Section 63A BNS for non-penetrative sexual assault.
3. Establish the data collection system for monitoring.
4. Initiate police, prosecutorial, and judicial training programmes.
5. Launch a public awareness campaign on gender-neutral provisions and consent.

Phase 2 (short term, 12 to 24 months):

1. Abolish the marital rape exception with procedural safeguards.
2. Amend Section 64 BNS to include additional aggravating factors (disability, caste-based violence).
3. Establish One-Stop Centres in all districts.
4. Enhance forensic capacity (additional laboratories, personnel, equipment).
5. Conduct the first annual evaluation of implementation.

Phase 3 (medium term, 24 to 36 months):

1. Amend Section 69 BNS to use gender-neutral language and clarify ‘deceitful means’.
2. Integrate the Transgender Persons Act 2019 with the BNS provisions.
3. Establish specialized sexual offences prosecution units.
4. Expand victim compensation schemes.
5. Conduct an independent evaluation of implementation.

Phase 4 (long term, 36 months and beyond):

1. Address intersectional inequalities through targeted provisions and programmes.
2. Expand public education on consent, gender equality, and LGBTQIA+ rights.
3. Strengthen accountability mechanisms.
4. Conduct longitudinal research on trends and impacts.
5. Consider further reforms in the light of evaluation findings.

Estimated costs:

- Police training: ₹500 crore over three years.
- Prosecutorial training: ₹100 crore over three years.
- Judicial training: ₹100 crore over three years.

- Forensic capacity enhancement: ₹2,000 crore over three years.
- One-Stop Centres: ₹1,500 crore over three years.
- Data collection and monitoring: ₹200 crore over three years.
- Public awareness campaigns: ₹300 crore over three years.
- Total estimated cost: ₹4,700 crore over three years.

Funding sources:

- Central government budget allocation.
- State government budget allocations.
- The Nirbhaya Fund (established for women's safety initiatives).
- International development assistance.
- Public-private partnerships.

XI. CONCLUSION

The Bharatiya Nyaya Sanhita 2023 represents a significant moment in India's legal history: the first comprehensive criminal law reform since independence. The law's stated philosophy of transition from 'Dand' (punishment) to 'Nyaya' (justice) reflects an aspiration towards a more victim-centric, rehabilitative, and equitable criminal justice system. However, this study's critical examination reveals that the BNS falls short of achieving genuine gender neutrality, perpetuating historical inequities while introducing selective reforms.

A. Key findings

1. Selective gender neutrality: the BNS introduces gender-neutral language in certain provisions (kidnapping, defamation, some sexual offences) but retains explicitly gendered language in the core rape definition (Section 63), which specifies that only men can be perpetrators and only women can be victims. This selective approach undermines the law's claim to gender neutrality.
2. Persistent gendered framework: the retention of the female-centric rape definition, the marital rape exception, and the complete repeal of Section 377 IPC without replacement create significant gaps in protection for male, transgender, and non-binary survivors of sexual violence. These gaps are inconsistent with the constitutional principles of equality (Articles 14 and 15) and dignity (Article 21), and with the Supreme Court's vision in *NALSA* and *Navtej Singh Johar*.

3. Procedural reforms with limitations: the BNS and BNSS introduce valuable procedural reforms (Zero FIR, e-FIR, time-bound investigations, victim compensation) that can facilitate access to justice. However, these reforms face implementation challenges related to awareness, the digital divide, capacity constraints, and resource limitations. Their practical impact on gender neutrality depends on effective implementation.
4. Constitutional promise unfulfilled: the BNS fails to implement fully the constitutional vision articulated in *NALSA*, which recognized transgender persons' fundamental rights and called for legal protection in all spheres. The law's ambiguous treatment of transgender survivors, combined with the inadequacies of the Transgender Persons Act 2019, leaves significant gaps in protection.
5. Intersectional inequalities unaddressed: the BNS does not explicitly address how gender intersects with caste, class, and disability to create compounded marginalization and differential experiences of sexual violence and access to justice. This failure limits the law's ability to achieve substantive equality for marginalized communities.
6. International divergence: India's retention of a gendered rape definition and a marital rape exception is increasingly anomalous in comparative perspective. The UK, Canada, and Australia have all adopted gender-neutral sexual assault provisions and criminalized marital rape, demonstrating that such reforms are feasible and beneficial.

B. Formal versus substantive gender neutrality

This study's central analytical distinction between formal gender neutrality (linguistic) and substantive gender justice (protective outcomes) reveals that the BNS achieves neither comprehensively. The law uses gender-neutral language in some provisions but not in the core sexual offence provisions. More critically, even where gender-neutral language is used, substantive equality is not ensured, because of implementation challenges, institutional barriers, and sociocultural resistance.

Achieving substantive gender justice requires not only gender-neutral statutory language but also: (a) recognition of diverse forms of sexual violence; (b) protections for marginalized groups; (c) procedural mechanisms facilitating access; (d) institutional capacity for implementation; and (e) societal attitudes supportive of survivors. The BNS makes progress on

some of these dimensions (procedural mechanisms) but falls short on others (recognition of diverse survivors, institutional capacity, societal attitudes).

C. Path forward

This study proposes a comprehensive reform agenda to achieve genuine gender neutrality in Indian criminal law:

1. Statutory amendments: amend Section 63 BNS to adopt a gender-neutral rape definition covering all forms of penetrative sexual violence against all persons; introduce new provisions for non-penetrative sexual assault; abolish the marital rape exception with appropriate procedural safeguards; and amend other provisions to use gender-neutral language and recognize diverse survivors.
2. Procedural safeguards: implement procedural safeguards to address concerns about false accusations and evidentiary difficulties, including a preliminary inquiry before arrest in marital rape cases, in-camera trials, victim support, evidence rules, cross-examination restrictions, and time-bound trials.
3. Institutional capacity building: invest in police, prosecutorial, judicial, and forensic capacity through training, personnel, infrastructure, and resources, and establish One-Stop Centres providing comprehensive victim support services.
4. Implementation monitoring: establish data collection systems, evaluation metrics, annual reporting, stakeholder consultations, independent evaluation, and accountability mechanisms to monitor implementation and identify challenges.
5. Intersectional approach: address intersectional inequalities through targeted provisions recognizing caste-based sexual violence, procedural accommodations for survivors with disabilities, accessible victim compensation, and training on intersectionality.
6. Societal transformation: complement legal reform with public education campaigns, school curricula on consent and gender equality, media engagement, and community mobilization to transform societal attitudes toward gender, sexuality, and violence.

D. Empirical research imperative

This study acknowledges a critical limitation: the absence of empirical data on BNS implementation. The law's recent enactment (July 2024) precludes an assessment of how its provisions are being interpreted and applied in practice, whether male and transgender survivors

are accessing protections, what outcomes are being achieved, and what unintended consequences may be emerging.

Future empirical research is essential to complement this doctrinal analysis. Proposed research includes: (a) quantitative analysis of case statistics disaggregated by victim gender, offence type, and outcome; (b) qualitative interviews with stakeholders (police, prosecutors, judges, survivors, advocates); (c) case studies of judicial interpretation; (d) comparative implementation research examining the experiences of the UK, Canada, and Australia; and (e) longitudinal monitoring of trends and impacts.

This paper provides a foundation for such empirical research by identifying key questions, gaps, and areas requiring investigation. It establishes a framework for evaluating whether the BNS achieves gender neutrality in practice and proposes metrics for assessment.

E. Concluding reflection

The Bharatiya Nyaya Sanhita 2023 represents both progress and missed opportunity. The law's procedural reforms, selective gender-neutral language, and victim-centric provisions reflect genuine efforts towards modernization and equality. However, its retention of a gendered rape definition and the marital rape exception, and its inadequate protection of LGBTQIA+ individuals, perpetuate historical inequities and fail to realize the constitutional vision of equality and dignity for all.

The true measure of the BNS's success will be not its statutory language but its practical impact on survivors' lives. Will male survivors of sexual violence be recognized and protected? Will transgender and non-binary individuals obtain access to justice? Will survivors of marital rape receive protection? Will intersectional inequalities be addressed? Will societal attitudes change?

These questions can be answered only through sustained implementation, monitoring, evaluation, and reform. The BNS should be viewed not as a final achievement but as a starting point for continuing efforts towards genuine gender neutrality and substantive justice. Legal reform is necessary but insufficient; it must be accompanied by institutional capacity building, societal transformation, and an unwavering commitment to equality and dignity for all.

As India continues its journey from colonial legacies towards constitutional ideals, the criminal law must evolve to protect all individuals regardless of gender identity or expression. The BNS 2023 takes steps in this direction but does not complete the journey. The path forward requires the courage to confront patriarchal norms, the wisdom to learn from international experience, the resources to build institutional capacity, and the compassion to centre survivors' voices and experiences.