

GENDER NEUTRALITY OF CRIMINAL LAWS: THE BNS DIALECTIC

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Abstract

This article examines the controversial debate regarding gender-neutral criminal legislations in India, particularly in the context of sexual assault and domestic violence. It questions the fundamental conflict between the constitutional principles of formal equality (Article 14) and substantive justice for women (Article 15(3)). The analysis maps the Supreme Court's changing jurisprudence from a patriarchal to autonomy-oriented paradigm, building up to the groundbreaking Joseph Shine judgment, which established a new benchmark for testing gender-specific legislation. A close analysis of the latest Bharatiya Nyaya Sanhita (BNS), 2023, exemplifies a landmark legislative setback from harmonization with this judicial momentum. By continuing to include the gender-specific definition of rape, the BNS defies expert advice and continues to foster a legal vacuum for male and transgender victims. This article also delves into the dichotomous "misuse versus shield" debate on domestic violence legislation, exemplified by the Supreme Court's endeavor to find a balance between protection and procedural justice in cases such as Arnesh Kumar. Taking a lesson from a comparative study of the UK and Canada, the research discovers that legislative neutrality is no cure-all for problems of under-reporting and low conviction rates.

The paper ends by dismissing a simplistic dual solution. It supports a nuanced "third way": keeping a gender-specific offense of "rape" to recognize its systemic character, but establishing a new, parallel, and similarly punitive gender-neutral offense of "Sexual Assault by Penetration." It also suggests making the law of civil domestic violence (PPDVA) gender-neutral. These legal changes, it contends, have to be supplemented by profound system-wide changes, such as compulsory training for police and judiciary and the building of gender-sensitive victim welfare services.

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1. INTRODUCTION

1.1. Aims And Objectives of the Study

Crimes belong to society. They have been committed much longer than a single modern law's existence. The definition of crime was different, the individuals who could commit or could never commit a crime including the punishments to be served for it were also different. Individuals who could punish you for the same had different authority. There were some punishments that were only to be meted out by a particular class of individuals. All of the above might sound foreseeable, but the aspect which makes us think is that the individuals against whom the crime could be committed was also different. That has to be taken with a gigantic sack of salt. The Indian gender-neutral crimes debate has come to a crossroads, posing a elemental conflict between the constitutional ideal of formal equality and necessity to ensure substantive justice in a society. The notion that law should be equally administered to all citizens regardless of gender identity is pitted against a system formulated to offer a special safeguard for women who have been and remain most vulnerable to some kinds of violent crimes. The gendered nature of the Indian Criminal Law is the product of a holistic, first principles design but it is rather the result of a historical process characterized by a strong path dependency. The legal framework is a patchwork of colonial-era statutes, reflecting Victorian and patriarchal norms. The foundation of Indian Criminal Law, the Indian Penal Code, was drafted in a cultural context of prevalent patriarchy, viewing men as the stronger sex and women as vulnerable and in need of protection. Transgender and Men are the neglected groups in the current criminal law framework. It is neither a mere disagreement about facts but a deep dispute about the very function of criminal law in an unjust society. Neutrality's proponents argue for principles of formal equality, wherein the law should be indifferent to gender and be equal to all people as abstract legal persons with equal rights and protections.

Our subsequent analysis will be dealing with the issue of police bias, court stereotypes, social stigma and vulnerability among transgender people.

1.2. Review of Literature:

1. Sarkar, L. *"Demand for Dowry."* (1984)- This paper supplies the necessary critical historical background to the anti-dowry laws. Composed near the time Section 85 came into force, Sarkar deconstructs the socio-economic causes behind the dowry system to

justify why particular, strict criminal laws were being established to take on spiralling violence against women.

2. Agnes, F. *"Protecting Women against Violence? Review of a Decade of Legislation, 1980-89."* (1992)- This historical account takes into consideration a critical review of the torrent of women specific laws from the 1980s (e.g., Sec. 85 and rape reform statutes). Agnes discusses if such laws passed with protective intentions were able to yield justice or if their purposes were subverted by a masculinist legal/policing complex.
3. Nandy, A. *"The Sociology of Sati."* (1998)- Though it is a paper on Sati (immolation of widows), an ancient Indian practice, it is a worthwhile read to grasp how Indian victimhood is socially constructed. Nandy deconstructs how female martyrhood is constructed by Indian society and starkly illuminates why prevailing laws will inevitably make women passive victims instead of free acting agents.
4. Ellison, L. *"Responding to Male Rape"* (2003)- This criminological write-up is about practical failings in the criminal justice system in responding to accusations of male rape. Ellison discusses attitudinal barriers among policemen and judiciary such as widespread incredulity and systemic failings that discourage reporting and hinder justice for male victims.
5. Chowdhry, P. *"Enforcing Cultural Codes: Gender and Violence in Northern India."* (2004)- This socio-legal essay addresses how gender violence (encompassing dowry harassment alongside honor killings) functions within Northern India. Chowdhry believes such violence is neither a random criminal enterprise but a systemic tool utilized by communities to enforce patriarchal standards of culture alongside asserting control over women's agency.
6. Daly, K. *"Rethinking Judicial Responses to Intimate Partner Violence."* (2006)- Daly's paper is also critical of standard criminal justice reactions (in mandatory prosecution and arrest) to intimate partner violence (IPV). It posits they are often inefficient or against victims' interests and advocates a review of court strategies to facilitate alternate justice models.
7. Stemple, L. *"Male Rape and Human Rights."* (2009)- This seminal piece contends that international and domestic systems' inability to properly acknowledge male rape is a serious violation of human rights. In it, Stemple reflects on how legal understandings, cultural imagery, and gender norms make victims disappear and calls for a framework of human rights to facilitate legal change.

8. *Schulhofer, S. J. "The Feminist Case for Gender-Neutral Rape Laws" (2010)-* It is a central theoretical piece which directly rebuts that feminist jurisprudence is incompatible with gender neutrality. Schulhofer contends gender-neutral rape laws—laws defining rape by a crime's essence (i.e., non-consent penetration) instead of parties' gender—fortify feminist objectives. He theorizes doing so ensures anyone (i.e., women raped by women, men as well) is safeguarded and a modern definition of consent through autonomy is upheld instead of antiquated gender-based stereotypes.
9. *Choudhary, J. "Protection of Women from Domestic Violence Act, 2005: A Critical Appraisal." (2012)-* This article is a doctrinal and critical examination of PPDVA (2005). It takes account of strengths and flaws of this one civil enactment, canvassing its key definitions (e.g., sweeping definition of "domestic violence"), relief provisions (e.g., protection orders), and overall effectiveness as a remedy compared to slower, punitive crime paradigm.
10. *Parashar, A. "The Plea for Gender-Neutral Laws." (2013)-* This article calls upon the basic philosophical and constitutional arguments for gender-neutral Indian laws. Parashar discusses how gender-based laws despite a protective objective can be violative of Article 14 principles of formal equality and reinforce antiquated gender stereotypes.
11. *Raghavan, C., et al. "The Myth of the 'Vindictive' Woman: A Study of False Complaints of Sexual Violence." (2013)-* It is a valuable empirical article directly refuting the "misuse" myth about sex-specific laws. It compares facts about false allegations of sexual violence and discovers that false reporting is statistically low and that the "vindictive" female accuser myth is an entrenched myth meant to demean true victims.
12. *Agnes, F. "The 'Anti-Dowry' Law: A Shield or a Sword?" (2013)-* An initial critical examination of Section 85 (dowry cruelty) by one of India's foremost feminist attorneys. Agnes defends the statute as a necessary safeguarding "shield" for women who experience pervasive dowry-based violence. She critically addresses increasing "misuse" critique, contending that failures to implement should never be equated with fault with the statute itself being defective, and cautions about weakening protections.
13. *Pillai, P. "Criminal Law and the 'Victimized Male': The Need to Revisit Gender-Specific Rape Laws." (2014)-* This piece is a critique of India's current gender-specific rape laws from a particular perspective of male victimhood. Pillai posits that a failure to acknowledge male victims by law undermines its creditability as well as fairness and suggests a legislative amendment to cover such a loophole.

14. Khurana, M. *"Domestic Violence Against Men in India: A Grossly Neglected Area."* (2016)- This text fills one of the key voids cited by advocates of neutrality. Khurana argues that men's exposure to domestic violence is a reality but a critically unstudied and socially hidden one in India. It illuminates the social, psychological, and legal barriers inhibiting or deterring male victims from receiving support or being recognized.
15. Jaisinghani, P. *"The Need for Gender Neutral Sexual Offence Laws in India."* (2017)- Staking a direct constitutional claim to gender neutrality, this paper on laws exclusively dealing with sexual crimes opines that the female-based definition of rape (Section 375 IPC) is discriminatory as well as unconstitutional since it legally ignores the facts of sexual assault victims who happen to be men as well as transgender individuals.
16. Datta, A., & S. S. Roy. *"Male Victims of Domestic Violence: A Study in the Indian Context."* (2018)- As a complement to Khurana's article, our paper announces an empirical investigation bearing a special focus on men as victims of IPV throughout India. It is meant to provide data regarding such violence's scope and nature to facilitate a gender-neutralizing of laws regarding domestic violence (e.g., the PPDVA) to protect victims of both sexes.
17. Sharma, T. *"Section 85 of IPC: Its Use and Misuse."* (2018)- This piece tries to take stock of arguments for and against Section 85. It considers the object of the statute to safeguard women against abuse for a dowry as also accounts narrating about its supposedly illicit usage by complainants to settle personal scores (such as Arnesh Kumar).
18. Mukherjee, S., & S. Mukherjee. *"Are Laws Gender-Biased? A Critical Analysis of Gender-Specific Laws in India."* (2019)- This article is a balanced report about India's controversy over gender bias. It critically analyzes laws that were regarded as discriminatory to men (e.g., Sec. 85) and laws regarded as discriminatory to women (e.g., the prior adultery statute), rendering judgment about the respective positions in India's code.
19. Teltumbde, A. *"The New Penal Codes: Old Wine in a New Bottle?"* (2023)- This piece is a general, socio-political critique of the new triad of criminal laws (BNS, etc.). Teltumbde contends that the new codes represent essentially a re-packaging of the old colonial legal framework with its oppressive possibilities intact, instead of being a substantial reform or an Indianisation of justice.

20. Singh, M. P. *“Gender Neutrality in the Bharatiya Nyaya Sanhita: A Missed Opportunity?”* (2023)- This recent legal commentary deconstructs Bharatiya Nyaya Sanhita (BNS), India's successor to IPC. Singh's point is that an excellent opportunity to align Indian criminal law with constitutional ideals of equality was lost by the legislature by maintaining gender-specific definition for rape. In the article, Singh is critical of the BNS for having failed to adopt principles of gender neutrality being debated over decades among legal circles.

21. Saxena, A. *“Analysing the New Sexual Offence Framework under the Bharatiya Nyaya Sanhita.”* (2024)- This piece is a straightforward doctrinal examination of the new provisions regarding sexual offenses found within the BNS. Saxena deconstructs changes (and non-changes) from the prior IPC to assess the practical effects of new definitions, procedures, and if indeed a new code truly brings a contemporary take to India's response to sexual violence.

1.3. Hypothesis:

H1: Gender-neutral provisions prescribed by BNS cannot be attained in India.

H2: There should be no gender-specific provisions.

1.4. Research Questions

1. How does Bharatiya Nyaya Sanhita (BNS) balance the conflict between formal equality (Art. 14) and substantive protection (Art. 15(3)) in light of dynamic gender jurisprudence of the Supreme Court?

2. What socio-legal as well as procedural barriers block justice to men and transgender survivors of sexual crimes and to what degree a gendered legal framework is responsible for such issues?

3. Analyzing the precedents set by Canada and the United Kingdom in enacting gender-neutral sexual assault legislation, what policy and procedural adaptations could India implement to transform higher reporting into a more effective conviction rate?

1.5. Research Methodology

This study employs a qualitative approach that incorporates doctrinal, comparative, and socio-

legal analysis. It entails a doctrinal analysis of core legal sources such as the Constitution, the receding IPC, and the new BNS to chart the legal landscape and track judicial development on gender equality. It is complemented with a functional comparative examination of sexual assault laws from Canada and the UK to extract policy pointers for India. Thirdly, a socio-legal methodology integrates an examination of secondary scholarship and empirical literature to grasp why the law as codified is different from how it is practiced or enforced aside from arguments about non-recognition of male and transgender victims and misuse of protective laws.

1.6. Sources of Data

All data gathered here are secondary data and are analyses because research is qualitative/doctrinal in its own right.

1.7. Constraints of the Study

L1: It is restrained by absence of large-scale government data for sexual and household violence against men as well as transgender individuals.

L2: It is a drawback that analysis relies on NCRB data for registered crime data due to systemic issues including crime misclassification and lack of reporting.

1.8. Scope of the Study

Its scope is very precise It is a socio-legal examination of gender neutrality merely in Indian penal law with particular reference to interpersonal violence and rape.

2. THE CONSTITUTIONAL FRAMEWORK AND JURISPRUDENCE OF GENDER

This chapter lays down the constitutional and philosophical background to a consideration of gender neutrality in Indian crime. It deconstructs the ideals of equality that inform the debate itself from its theoretical roots to its practical exercise by Indian judges.

2.1. The Dialectic of Equality: Deconstructing Formal vs. Substantive Equality

Constitutional equality is not an undivided concept; it is only understood through two paradigms that oppose one another: formal and substantive equality. The simpler, though older paradigm, is formal equality. It is based upon Aristotle's rule that "likes should be treated alike".

It mandates same treatment for every individual regardless of his/her social, economic, or historical condition. Even though seeming to be a very simple principle, it has grave deficiencies. It is commonly incapable to account for pre-existing inequalities, it addresses individual discriminatory behaviour rather than structures or systemic types of inequality, and can be happy if everyone is treated "equally badly". International legal scholarship has accused formal equality of often imposing dominant group's characteristics—typically elite, Western masculinity—upon a neutral standard, thereby continuing to maintain the same hierarchies that it claims to abolish.

In contrast, substantive equality offers a more nuanced, context-sensitive framework. It moves beyond mere identical treatment to focus on achieving equitable outcomes. This model recognizes that to achieve genuine parity, it is often necessary to treat different groups differently to remedy entrenched structural disadvantages. Substantive equality is the established norm in international human rights law, which holds that special measures, or affirmative action, are not discriminatory but are an essential obligation to help disadvantaged groups achieve true equality. The legal scholar Sandra Fredman has developed a highly influential four-dimensional framework for assessing substantive equality: redressing disadvantage (redistribution), addressing stigma and stereotypes (recognition), enhancing voice and agency (participation), and accommodating difference through structural change (transformation).

The Indian Constitution, since its beginning, had a transformative vision that is committed to substantive equality. The constitution-makers were keenly aware of women's centuries-long subordination and that of various marginalized communities and introduced a dual commitment: assurance of formal non-discrimination through a right to equality alongside a constitutional obligation to overcome systemic disadvantages. We find manifestations of it in the Preamble to the Constitution, Fundamental Rights, especially Article 15(3), and Directive Principles. These provisions together envision a new social order, but one that cannot be static legal order. Such provisions constitute part but parcel of a transformative endeavour. Evolving jurisprudence of Supreme Court is evident where it has interpreted even in cases such as

*State of Kerala v. N.M. Thomas*², which did not look to affirmative action provisions as being excepted from but as an aspect of the overall quality assurance in Article 14, strengthens such

² *State of Kerala v. N.M. Thomas*, 1976 AIR 490.

an appreciation. Such constitutional design insists that any such examination of gender-specific laws within India is prefiltered through substantive equality. An account for gender neutrality that relies solely upon the formalist reasoning that all victims should be treated equally is accordingly constitutionally wanting since it ignores the express intent of the framers to offset particular, historically justified disadvantages to women.

2.2. The Equality Code: A Critical Examination of Articles 14 and 15

Article 14, Article 15, and Article 16 together have been called the "equality code". Article 14 is the core assurance, enlisting that the State shall not deprive any person of "equality before the law" or "equal protection of the laws". "Equality before the law" is a negative principle that forbids discrimination, whereas "equal protection of the laws" is a positive principle that mandates State to discriminate between persons who stand in disparate circumstances with a view to creating equality among persons. Article 14 has been understood by the Supreme Court to be a strong restraint on state arbitrariness. Article 15 makes this broad principle specific by prohibiting discrimination on specific grounds. Article 15(1) directly specifies that "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them". It is a clear directive to the state to refrain from discriminatory practices.

At the heart of the gender-specific laws discussion is Article 15(3), which establishes a special power for the state: "Nothing in this article shall prevent the State from making any special provision for women and children".⁶ With this clause is the constitutional foundation of what is commonly called "positive" or "protective" discrimination in India. It is an empowering provision that enables the legislature to pass laws that might discriminate against women to alleviate the accumulated socio-economic, educative, and political disadvantages that women have typically suffered. In including such a clause, it was a conscious decision by the Constituent Assembly to reject the purely formal equality position advanced by organizations such as the All-India Women's Conference (AIWC), thus emphasizing its substance-based intent.

2.3. From Paternalism to Autonomy: Tracing the Supreme Court's Evolving Gender Jurisprudence.

India's equality code, and Article 15(3) in particular, has seen a dramatic evolution in its judicial interpretation. Initial adjudicative trends were frequently permeated with a protectionist and paternalistic worldview, maintaining "special provisions" that entrenched gender stereotyping

in the guise of a benefit to women.⁸ Differential treatment was legitimized by reference to fictively constructed notions of women's intrinsic vulnerability or their "fitness" for particular tasks, essentially enshrining customary gender roles into law. Pressure for reform started gathering momentum in the late 1970s primarily through galvanizing feminist forces within India who placed concerns such as custodial rape centre stage for national attention in a manner symbolized by the historic Mathura rape case. Such activism pushed legal thinking slowly but perceptibly towards a stronger, substantive conception of gender equality.

This odyssey to jurisprudence reached its zenith with the seminal 2018 *decision Joseph Shine v. Union of India*³. Therein, Section 497 of the Indian Penal Code (IPC), a 158-year-old adultery statute, was struck down by the Supreme Court. Criminalizing adultery, Section 497 punished a man for having sex with a wife who did not consent to such intercourse but exempted such a woman from prosecution, effectively treating her to be the husband's property. Declaring Section 497 to be unconstitutional owing to its violation of Articles 14, 15, and 21, the Court's rationale behind its decision remained unprecedented. It found Section 497 to presume incorrect stereotypes about women from a different time, to deprive women of their right to sexual agency, and to treat them with a lower dignity than men. Notably, having also found again Section 497 to be a "special provision" for women according to Article 15(3), such justifications were labelled "romantic paternalism" by the Court itself, a valid constitutional defence it did not accept.

The Joseph Shine case did something more than to merely decriminalize adultery; it created a fresh and stringent constitutional criterion to review all gender-based laws. Prior to such judgment, a statute could be defended within Article 15(3) if it happened to be "beneficial" to women even if its intrinsic rationale were to be patriarchal.

Joseph Shine essentially changed this by directly connecting gender equality to the right to dignity and privacy through Article 21 and to the principle of non-arbitrariness through Article 14. What is explicitly implied is that a statute cannot be a constitutionally valid "special provision" if a statute is based on stereotypes, deprives women of agency, or sustains their subservient status in society. What results is a potent constitutional prism by which all pre-existing gender-specific laws, including sexual assault laws, can be critically reviewed.

2.4. Interrogating "Protective Discrimination"

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

Protective discrimination" is the practical exercise of the Article 15(3) power. But protective discrimination is a double-edged sword. It is constitutionally permissible and necessary to a reasonable extent on one hand when it is affirmative action to counteract a history or structure of disadvantage, indeed to fulfil the aim of substantive equality. Such things as maternity relief (required by Article 42) or provisions to afford equal pay for equal work (Article 39(d)) are excellent illustrations of permissible protective discrimination to counteract real disadvantages of women.

Conversely, where the idea is founded upon paternally stereotypical conceptions about female weakness or delicacy or vulnerability, then such laws become constitutionally problematic as "protective" laws because they risk buttressing an exact opposite to that which they should destroy: namely, systems of patriarchy.

The Supreme Court cautioned against this in *Anuj Garg v. Hotel Assn. of India*⁴, stating that such legislations require "strict scrutiny" because they can end up victimizing women in the name of protection. The modern judicial test, crystallized in *Joseph Shine*, is that protection cannot be offered at the cost of individual autonomy and dignity. A law that "protects" women by treating them as incapable of making their own choices or as property of men is no longer a "special provision" but an instrument of unconstitutional discrimination.

3.SEXUAL ASSAULT LEGISLATIONS IN INDIA - A CRITIQUE OF RAPE AND THE CONTROVERSY OVER NEUTRALITY

This chapter delves into the most contentious area of the debate, analysing the legal framework for rape and the competing arguments for and against a gender-neutral approach.

3.1. Section 375 IPC's Legislative History: The Verma Committee Post-Era

The legal definition of rape in India has remarkably changed to a great extent with massive public protests and expert panels after the highly gruesome 2012 Delhi gang rape. Section 375 of the IPC had a narrow, gender-specific definition of rape prior to 2013 with a core focus primarily being non-consensual penile-vaginal intercourse committed by a male person against a female person.

Watershed moment arrived with the establishment of the Justice Verma Committee in 2013 to

⁴ *Anuj Garg v. Hotel Assn. of India*, 2008 (3) SCC 1.

recommend amendments to the criminal laws to respond to sexual assault better. The Committee's report was a historic document that called for a paradigm shift in sexual violence's conception by law. Its major recommendations were:

- **Widening Rape's Definition:** Beyond emphasizing penile-vaginal penetration to expanding to include any non-consensual penetration with a sexual connotation that involves a woman's vagina, a man's mouth, urethra, or a person's anus.
- **Gender Neutrality:** Making the crime of rape gender-neutral to allow for victims and offenders who fall outside a specific gender binary.
- **Criminalizing Spousal Rape:** Putting an end to the antiquated defence which exempted husbands from prosecution for raping their wives.
- **The Development of a Particular Offense for "Sexual Assault":** Classification of non-penetrative sex touching as a distinct offense.

Parliament reacted with the Criminal Law (Amendment) Act, 2013. Whilst such amendment itself was a huge step in the right direction, it was a selective and partial adoption of the Committee's vision. It broadened the definition of rape to include various forms of penetration, as recommended. But it largely preserved the gender-specific framework with the "man" as "perpetrator" and "woman" as "victim". Gender neutrality and excluding the marital rape exception were some of the recommendations denied.

3.2. In Defence of Neutrality: Arguments from Constitutional Law and Human Rights

Arguments for the prevailing gender-based paradigm can be found to be traceable to constitutional non-discrimination ideals and core human rights.

It is essentially a constitutional challenge that a statute codifying rape in gendered fashion to protect only female victims against penetration sex crimes robs male and transgender victims of their right to "equal protection of the laws." It makes an arbitrary classification where legal relief to such a serious crime is conditioned to a victim's gender.

The present law produces a conspicuous legal void. There is no particular law where men who fall victims to non-consensual penetration with a penis can be categorized as rape. In a similar manner, transgender persons fall into a vulnerable state. Even though the Transgender Persons

(Protection of Rights) Act, 2019, has provisions for penalizing sexual abuse, such maximum sentence is only two years compared to a minimum of ten years for a cisgender woman's rape—a gap that only serves to corroborate that trans lives are less than valuable.

A sex-based statute codifies injurious social stereotypes: men can never be assailants but only victims of rape or sexual assault, women can never be assailants but only victims. It denies justice to victims who are men or transgender but also turns a deaf ear to a multi-dimensional reality of sexual offenses.

3.3. Counter-Argument from a Feminist Perspective: Substantive Equality and Rape as Tool of Patriarchy

Argument against maintaining a gender-specific rape statute lies with principles of substantive equality and an appreciation of the socio-political reality surrounding sexual violence.

- **Rape as a Tool of Patriarchy:** The central tenet of this argument is that rape is not merely a random act of violence but a systemic crime of power, control, and oppression. It is an instrument historically and pervasively used within patriarchal structures by men to subordinate and terrorize women as a class.³⁰ From this perspective, defining rape as a gender-specific crime is not discrimination but an accurate reflection of its social reality and function.
- **Disproportionate Impact and Statistical Reality:** Proponents of the gender-specific framework point to the overwhelming statistical evidence, both in India and globally, showing that women and girls are disproportionately the victims of sexual violence, and men are overwhelmingly the perpetrators. A gender-neutral law, it is argued, would obscure this crucial reality and create a false equivalence that ignores the gendered nature of the crime.
- **Misuse Risk and a "Chilling Effect":** An important practical consideration is that a gender-neutral statute might be abused as an instrument to harass female victims. There is a serious concern that men who commit rape might lodge vindictive counter-complaints of rape to intimidate, harass, and deter their victims from pursuing valid cases. In a system that has proven to be biased against female victims, such a development might have a serious "chilling effect" against women's tendency to report.
- **Dilution of Emphasis:** Neutering the law might dilute legal and societal emphasis on rape as a distinctive and atrocious kind of gender-based violence against women. Feminist legal

scholars contend that "special status" for women within rape law is a needed legal affirmation of their historical and current susceptibility to this particular kind of patriarchal violence.

3.4. The Bharatiya Nyaya Sanhita (BNS), 2023: Continuity over Change

The latest recasting of Indian criminal laws concluded with Bharatiya Nyaya Sanhita (BNS), 2023. It is a historic moment for reform but as far as sexual assault is concerned, it is largely a document of continuity rather than a codicil of reform.

Section 63 of the BNS, which replaces Section 375 of the IPC, retains the exact same gender-specific definition of rape: the perpetrator must be a man and the victim a woman. The enactment of the BNS is widely seen as a major missed opportunity to harmonize India's penal law with the progressive constitutional jurisprudence articulated by the Supreme Court and the forward-looking recommendations of the Justice Verma Committee and the Law Commission. While the fundamental framework remains unchanged, the BNS does codify and, in some cases, enhance punishments for various forms of aggravated rape, such as for repeat offenders, gang rape, and the rape of minors, consolidating them into distinct sections. The passage of the BNS in its current form solidifies a significant divide between the legislative and judicial branches of the state. The BNS was a generational chance to fundamentally reform criminal law. The debate on gender neutrality was mature, and clear recommendations from expert bodies were readily available.

Additionally, the Supreme Court's jurisprudence in such cases as *Joseph Shine* had even established a constitutional basis to challenge laws founded on gender stereotypes. Legislatively, a conscious choice to disregard these developments as much as to literally take away the scant protection available to male as well as transgender victims of non-consensual sex through the erstwhile Section 377 IPC is a clarion legislative indicator. It bequeaths an uncertain legal situation where codified law (BNS) directly clashes with constantly evolving constitutional principles enunciated by the country's apex court such that a future constitutional challenge to Section 63 of the BNS becomes next to inevitable.

4. Cruelty, Domesticity, And Dowry - The Section 85 And PPDVA Debate

This chapter interprets laws regarding matrimonial cruelty and domestic violence against a highly polarized "misuse versus protection" frame that has grown to dominate their public and courtly discourse.

4.1. Socio-Legal Origins: What Drives Section 85 BNS and PPDVA

The introduction of Section 498A into the Indian Penal Code in 1983 was a direct legislative response to a pressing social crisis. In the late 1970s and early 1980s, the Indian women's movement brought national attention to an epidemic of violence against married women, particularly the horrific phenomenon of "bride burning" and "dowry deaths". Existing laws were inadequate to address cruelty occurring within the private sphere of the home, which was often linked to coercive demands for dowry. Section 85 was enacted to fill this legal void by creating a specific, cognizable criminal offense to punish the husband or his relatives for subjecting a woman to cruelty, defined to include both physical and mental harm likely to drive her to suicide, as well as harassment for unlawful property demands.

However, Section 85, today also, being a purely criminal provision, had its limitations. It focused on punishment rather than prevention and immediate relief. This led to a sustained demand from women's rights advocates for a dedicated civil law to address the multifaceted nature of domestic violence. This demand culminated in the enactment of the Protection of Women from Domestic Violence Act, 2005 (PPDVA). The PPDVA was a landmark piece of legislation that provided, for the first time, a comprehensive civil remedy. It introduced a broad definition of "domestic violence" encompassing physical, sexual, verbal, emotional, and economic abuse. Crucially, it offered a range of civil reliefs aimed at immediate protection, such as protection orders, residence orders, custody orders, and monetary relief, without forcing the victim to initiate criminal proceedings. In a progressive step, its protections were extended to women in various domestic relationships, including mothers, sisters, and even women in live-in relationships.

4.2. Controversy within a Narrative: Reading the "Misuse and Shield"

Irrespective of their protection agendas, such pieces of laws, including Section 85, have been surrounded with a highly controversial debate.

- The "Misuse" Argument: There has also been an energetic counter-narrative that Section 85 has been routinely "misused as a weapon instead of a shield" by wronged wives. It is blamed that the law is being utilized to settle legal scores, harass husbands and their families, or extort settlements. As a cognizable and non-bailable offence where an arrest warrant can be issued forthwith, the provision has been cited repeatedly as a leading facilitator of such perceived misuse. Proponents of such an argument almost inevitably cite low Section 85 case conviction

rates as prima facie evidence to establish that most such grievances prove to be false.

- The "Shield" Argument: Women's rights activists and jurists counter by asserting that such "misuse" is commonly inflated and distracting from the dark reality of prevailing Indian domestic violence. They believe that what is termed "misuse" is itself a result of systemic failings, such as rogue police action or insensitive adjudication, rather than a defect in the law. In this view, Section 85 is critically important as a shield against abuse for untold thousands who would otherwise have no effective remedy against abuse within their marital homes.

4.3. Judicial Balancing Act: The Supreme Court's Intervention

The Indian judiciary, especially the Supreme Court, has been leaders among institutions to attempt to navigate this divided controversy. As repeatedly affirming Section 85's constitutional validity as well as social imperative, the Court has also been sensitive to the possibility for its abuse. Various decisions have commented upon a tendency in divorce cases to file unsubstantiated omnibus allegations involving all of the husband's family members without individualized proof of their complicity.

The most significant judicial intervention came in the 2014 landmark case of *Arnesh Kumar v. State of Bihar*⁵. Concerned by the high number of arrests under Section 85, the Supreme Court issued a set of binding guidelines to curb the practice of automatic and arbitrary arrests. The Court directed that in all cases where the offense is punishable with imprisonment up to seven years (which includes Section 85), police officers must not arrest automatically. Instead, they are required to record in writing the necessity for the arrest, based on the specific parameters laid out in the Code of Criminal Procedure (CrPC). Furthermore, the Court mandated that magistrates must scrutinize these recorded reasons before authorizing any detention, and a failure to comply by either police or magistrates would invite departmental action and contempt of court proceedings. This judgment represents a crucial attempt to balance the liberty of the accused with the protective intent of the law, ensuring due process without diluting the provision itself.

4.3. Expanding the Ambit: Evaluating Arguments for a Gender-Neutral Domestic Violence Law

⁵ *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.

A recent area of confrontation has been whether to assign a gender to the PPDVA. Advocates of reform support a gender-neutral statute with the following principal arguments:

There is increasing documentation and awareness that men and LGBTQ+ people also suffer from domestic violence, such as physical, emotional, and economic abuse.⁶¹ Nonetheless, PPDVA's "aggrieved person" is defined to only be women such that these victims have absolutely no special civil remedy. Internalized societal beliefs regarding masculinity also discourage male victims from being able to report abuse, compounded by a lack of a legal framework.

Neutrality is founded upon Article 14's and Article 15's guarantees of equality contained within the constitution. A statute providing protection against domestic violence but leaving out a complete class of victims merely because they belong to a particular gender can be called discriminatory and challenged. On the contrary, sound arguments against a move towards gender neutrality come from the principle of substantive equality. In support of their position, they argue that gender-neutral violence is not a reality. Gender-structured violence is largely a gendered crime committed by men against women. It is a violation that originates from and fortifies structures of male domination and a subservient class for women. It is also worried that a gender-neutral version would water down its emphasis on safeguarding women who bear a disproportionate burden. In such a manner, as opined by the UN Special Rapporteur on Violence against Women, such a development is a backward step because it loses sight of a need to have special provisions to take account of a systemic and pervasive violation that is violence against women. A gender-neutral statute might blur such a reality and jeopardize a core function initially envisioned by PPDVA as a gender justice transformative instrument.

5.Comparative Perspectives - Lessons from Gender-Neutral Jurisdictions

In order to present an evidence-based international backdrop for the Indian debate, this chapter assesses the legal schemes and outcomes in Canada and the United Kingdom, two of the most important common law jurisdictions that have embraced gender-neutral strategies towards sexual assault legislation.

5.1. Statutory Models: An Overview in Canada and the United Kingdom

Canada and the UK provide two different models of gender-neutral legislation that are worth comparing.

- **Canada:** In 1983, Canada initiated a radical change by substituting the common law offense of "rape" with a three-tiered, gender-neutral statutory offense of "sexual assault" in its Criminal Code. This framework is entirely gender-neutral regarding both the victim and the offender; anyone can be charged with the sexual assault of anyone. The law focuses on the issue of consent, which is defined legally under Section 273.1(1) as "the voluntary agreement of the complainant to participate in the sexual activity in question.". The Canadian model imposes a positive duty on the initiator of the sexual activity to make reasonable efforts to establish consent.
- **United Kingdom:** The UK model, enshrined in the Sexual Offences Act 2003, is more hybrid in nature. The offence of "rape" itself (Section 1) remains the non-consensual penetration by a penis of the vagina, anus or mouth and can therefore only be perpetrated by a man.⁶⁸ But the 2003 Act established a full range of new, gender-neutral offences that embrace virtually all other sexual violence. These are "assault by penetration" (penetration with a bodily part or object) and "sexual assault" (sexual touching without consent), which are both gender-neutral as to victim and perpetrator. The Act also introduces a statutory definition of consent in Section 74, which states that a person consents if they "agree by choice, and have the freedom and capacity to make that choice". This does so by largely rendering gender-neutral the regime of sexual offenses, even as it continues to maintain the symbolic, gendered offense of rape.

5.2. Outside the Text: Assessing the Impact on Reporting, Convictions, and Attitudes

A look at experience in Canada and the UK finds that legislative change in itself is not enough to deal with the deep-seated issues of prosecuting sexual violence.

Even after decades of gender-neutral laws, sexual assault is highly underreported in both nations. Though offenses recorded by the police are increasing, this is usually said to be due to better recording techniques, increased public awareness, and increased victim confidence and not necessarily a result of the neutrality of the law. Research demonstrates that male victims are especially hesitant to report because of social stigma and fear of not being believed.

Both the UK and Canada struggle with appallingly low charge and conviction rates for sexual offenses. In the UK, the problem has been characterized as the "effective decriminalisation of rape," with less than 3% of rapes reported by police leading to a charge. Likewise, in Canada, fewer than 1% of all reported sexual assaults lead to a conviction. This shows that gender-neutral language is no panacea for the deep-seated evidentiary, procedural, and systemic

impediments to successful prosecution.

The statistical fact, both in Canada and the UK under neutralized laws, still persists to show a stark gender imbalance. Women form the vast majority of sexually-violated victims reported, and men form the vast majority of the perpetrators.

6. Conclusion - Findings, Recommendations

This concluding chapter integrates the evidence of the previous analysis to present a closing argument, resolve the central research questions, and outline a specific and context-relevant vision for policy and legal reform in India.

6.1. Summary of Core Findings

The paper has delineated that the controversy surrounding gender-neutral laws in India lies at the difficult crossroads between constitutional ideals, legislative structures, and socio-legal facts. The Indian Constitution upholds a redemptive vision of substantive equality, giving the state the power to develop "special provisions" for women to overcome past disadvantage. The jurisprudence of the Supreme Court has moved from a patriarchal to an autonomy-oriented approach, concluding with the Joseph Shine judgment, which held laws rooted in gender stereotypes unconstitutional.

A critical examination of India's sexual assault legislation shows a huge legislative-judicial chasm. While the judiciary is shifting towards a non-stereotypical view of gender, the new Bharatiya Nyaya Sanhita (BNS) has maintained the gender-specific definition of rape, failing to seize a key moment for reform and leaving a legal vacuum for male and transgender victims. Domestic violence laws, especially Section 85 IPC and the PPDVA, continue to be the site of a polarized "misuse versus shield" debate, with the judiciary trying to find a balance through procedural measures such as the Arnesh Kumar guidelines. Lastly, a comparison of gender-neutral jurisdictions such as Canada and the UK proves that legislative neutrality is not a magic solution; both nations are still wrestling with low reporting and conviction numbers, and statistical reality in sexual violence continues to be heavily gendered.

6.2. Addressing the Research Questions and Reconsidering the Hypothesis

The study aimed to examine the constitutional legitimacy of gender-discriminatory legislation, critique the current legal regime, and learn from other jurisdictions. The conclusions are that

although gender-discriminatory laws introduced in order to secure substantive equality are within the jurisdiction of Article 15(3), their reasoning becomes threadbare if they deny protection to other vulnerable classes or are premised on stereotypical paternalism. The original hypothesis—that an absolute transition to gender-neutral legislation is a constitutional requirement—is complicated by the evidence. Though formal equality requires neutrality, the ideology of substantive equality and the cautious lessons of comparative analysis indicate that something more subtly calibrated is needed. The evidence refutes the idea that legislative neutrality is the panacea for the systemic failures in the administration of justice for sexual violence.

6.3. Policy and Legislative Pathways: A Framework for Reform

In light of the detailed analysis, the following specific recommendations are made to steer towards a more equitable and just legal framework.

Rather than a plain, generic gender-neutralization of the rape law, which threatens to weaken the emphasis on gendered violence against women, a more sensitive legislative approach is suggested to preserve a Gender-Specific Offense of "Rape". The crime of Rape under Section 63 of the BNS must be kept in its precise form (male offender, female victim). This recognizes the distinctive nature of rape as a system crime of patriarchal dominance and accords with the substantive equality principles of recognizing disproportionate victimization of women. A new, parallel charge of "Sexual Assault by Penetration" must be added to the BNS. This charge must be worded in an entirely gender-neutral way (victim and perpetrator can be either male or female) and must be punished similarly to rape. This would fill the current gap in the law, leave no doubt about the legal remedy for penetrative assault in male, transgender, and non-binary victims, and meet the constitutional requirement of equal protection under Article 14.

The Protection of Women from Domestic Violence Act (PWDVA) must be modified to declare the term "aggrieved person" gender-neutral. Since the PPDVA offers civil reliefs (protection, residence, monetary relief) and the evidence of domestic violence against men and LGBTQ+ individuals, the extension of these remedies is a matter of basic fairness and equality. This would not detract from the protection that is given to women but would allow all those who are victims of violence in the domestic setting to have access to justice.

Put Comprehensive Systemic and Procedural Reforms First: Legal reforms will be nothing more than symbolic unless accompanied by thorough-going systemic change. The government

needs to invest in and require a national, mandatory, and ongoing training program for police, prosecutors, and the judiciary. This training should include demystifying rape myths, learning about the dynamics of trauma, being sensitive to victims of all genders, and putting the principles of substantive equality into practice. Forensic infrastructure must be invested heavily in, such as enhancing the number of forensic laboratories and training staff to facilitate timely and scientific gathering of evidence, which will assist in enhancing conviction rates. The creation and funding of a holistic, countrywide network of victim services. This has to incorporate one-stop crisis centres, legal services, and counselling services that are trained and equipped to take care of victims irrespective of gender and sexual orientation.

6.4. Contribution to Scholarship and Agenda for Future Research

The report adds to the current scholarship by combining constitutional jurisprudence, critical legislative analysis, and evidence-based comparative study to advance a sophisticated "third way" beyond the gender-specific versus gender-neutral law binary. It contends that gender justice follows not a radical legislative switch but a multi-faceted strategy that integrates targeted legal reform with radical systemic transformation.

The most pressing domain for research in the future is the generation of strong, large-scale empirical evidence within India. Strongly needed are methodologically rigorous studies on the incidence, nature, and prevalence of sexual and domestic violence against men, transgender, and non-binary people. These data are essential to shift the policy discourse from anecdotal experience and ideological stance, and to craft legislation and support mechanisms that are responsive to the needs of all victims.

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