

International Journal Research Publication Analysis

Page: 01-09

GENDER NEUTRALITY IN INDIAN CRIMINAL LAW: GAPS AND CONSTITUTIONAL VALIDITY

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Article Received: 11 August 2026

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Article Revised: 01 September 2026

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Published on: 21 September 2026

DOI: <https://doi-doi.org/101555/ijrpa.9600>

ABSTRACT

Gender neutrality in criminal law means that legal protection, criminal liability, investigation, prosecution, and punishment should not depend unfairly on the sex or gender identity of the victim or offender. In India, the debate has become particularly crucial following the enactment of the Bharatiya Nyaya Sanhita, 2023 (BNS), which replaced the Indian Penal Code, 1860, with effect from 1 July 2024. Although the BNS introduces gender-neutral language in certain offences, its principal rape provision, Section 63, continues to define rape as an offence committed by "a man" against "a woman." This formulation excludes adult male, transgender, and non-binary survivors from the ordinary legal definition of rape and does not expressly recognise women or transgender persons as possible perpetrators of rape. This paper examines the gaps in gender neutrality within Indian criminal law and evaluates the constitutional validity of gender-specific sexual-offence provisions. It analyses Articles 14, 15, and 21 of the Constitution, along with the decisions in *National Legal Services Authority v. Union of India*, *Navtej Singh Johar v. Union of India*, and related constitutional jurisprudence. The paper also compares the gender-neutral approach under the Protection of Children from Sexual Offences Act, 2012 (POCSO), with the gender-specific approach under the BNS. It argues that protective legislation for women may be constitutionally justified where it addresses structural disadvantage, but a complete exclusion of other victims creates serious concerns regarding equality, dignity, bodily autonomy, and access to justice. The paper recommends a carefully drafted gender-neutral sexual-offences framework that preserves special protections for women and children while ensuring effective remedies for every survivor.

KEYWORDS: Gender neutrality; Indian criminal law; Bharatiya Nyaya Sanhita; rape law;

1. INTRODUCTION

Criminal law performs two central functions. First, it identifies conduct considered harmful to individuals and society. Second, it provides a legal mechanism through which victims obtain recognition, protection, and justice. A criminal-law system must therefore be sufficiently broad to protect all persons from serious harm. When the law assumes that only one gender can be a victim or only another gender can be an offender, it may fail to reflect the reality of crime.

The issue of gender neutrality is especially significant in relation to sexual offences. Sexual violence is often associated with men as offenders and women as victims. This pattern is undoubtedly connected with historical patriarchy, unequal power structures, and the widespread victimisation of women. However, the existence of a dominant pattern does not mean that other forms of sexual violence are legally or socially insignificant. Men, transgender persons, non-binary persons, and persons assaulted by female or transgender offenders may also experience serious physical and psychological harm.

The former Indian Penal Code reflected a highly gendered approach to rape. Section 375 described rape as an act committed by "a man" against "a woman." The BNS has retained this essential structure in Section 63. It provides that "a man is said to commit rape" where specified acts are committed against a woman in circumstances such as absence of consent, coercion, incapacity, or minority. The text of Section 63 therefore continues the male-offender and female-victim model.

At the same time, Indian law contains examples of gender-neutral legislation. POCSO applies to sexual offences against all children below eighteen years and does not restrict the victim or offender to one gender. The Supreme Court has also recognised that transgender persons fall within the expression "person" in Article 14 and are entitled to legal protection. These developments raise an important question: if Indian constitutional law recognises gender identity and equal protection, can adult sexual-offence law continue to exclude certain classes of survivors?

This paper studies that question through doctrinal legal research. It focuses on the following issues: What is the present position of gender neutrality under the BNS? What are the principal gaps in India's criminal-law framework? Is the gender-specific structure of rape law constitutionally valid? How can the law protect women without excluding male, transgender, and non-binary survivors? What reforms are necessary?

2. LITERATURE REVIEW

Academic literature on gender-neutral criminal law generally follows two broad approaches. The first approach supports gender neutrality as a constitutional requirement. According to this view, sexual violence is an offence against bodily integrity, dignity, autonomy, and consent, and these interests are not limited to women. A gendered legal definition may deny equal protection to male and transgender victims. Scholarly analysis has observed that the earlier IPC assumed that the victim of rape was a woman and the perpetrator was a man, leaving sexual assault against men and transgender persons outside the definition of rape.

The second approach is more cautious. It argues that gender-specific protection for women is justified by the social reality of patriarchal violence. Women experience sexual violence on a large scale, often in circumstances involving economic dependence, social control, domestic hierarchy, and fear of stigma. A gender-neutral law, if drafted without sensitivity, might reduce the visibility of violence against women or weaken special procedural safeguards.

A balanced view does not require choosing between women's protection and gender neutrality. The real question is how to construct a law that recognises the specific historical vulnerability of women while ensuring that other survivors are not left without an appropriate remedy. Gender neutrality need not mean gender blindness. It may instead mean that the prohibited conduct is defined in gender-neutral terms, while aggravated forms, victim-support measures, and affirmative protections remain available where justified.

The literature also points to the contrast between POCSO and adult rape law. POCSO uses a gender-neutral framework for both victims and offenders. Government explanations describe the statute as protecting boys and girls below eighteen years and covering sexual assault, harassment, and pornography without making gender a condition of victimhood. This demonstrates that gender-neutral drafting is legally possible within the Indian system.

Recent commentary on the BNS has noted that the new law introduces "whoever" in certain offences, including assault or use of criminal force with intent to disrobe and voyeurism. However, Section 63 largely reproduces the gender-specific framework of the former IPC. This partial reform creates an inconsistency: some sexual offences recognise gender-neutral conduct, while the most serious penetrative sexual offence remains restricted to a male offender and female victim.

3. RESEARCH METHODOLOGY

This paper adopts a doctrinal and analytical research methodology. It examines constitutional provisions, statutory provisions, judicial decisions, and relevant legal scholarship.

The primary sources include the Constitution of India, particularly Articles 14, 15, and 21; the Bharatiya Nyaya Sanhita, 2023, especially Section 63 onwards; the Protection of Children from Sexual Offences Act, 2012; the Transgender Persons (Protection of Rights) Act, 2019; and judgments of the Supreme Court of India, including *NALSA v. Union of India* and *Navtej Singh Johar v. Union of India*.

Secondary sources include journal articles, law-reform materials, government publications, and scholarly commentary on gender-neutral sexual-offence laws.

The study uses a qualitative method. It analyses whether the classification created by Section 63 of the BNS bears a rational and constitutionally permissible relationship to the objective of preventing sexual violence. It also considers whether the provision imposes disproportionate exclusion on persons who do not fall within the categories of "man" and "woman" used in the statute.

4. MAIN BODY & DISCUSSION

4.1 Meaning of Gender Neutrality

Gender neutrality in criminal law has several dimensions: the victim should not be denied protection because of sex or gender identity; the offender should not escape liability merely because of gender; the definition of prohibited conduct should focus on the act, consent, and harm; investigative and procedural protections should be available to all survivors; and the law should recognise transgender and non-binary persons.

Gender neutrality does not necessarily require identical treatment in every circumstance. The Constitution permits reasonable classification. A law may provide additional protection to women or children where the classification responds to real disadvantage. However, the classification must not be arbitrary, overbroad, or unrelated to the purpose of the legislation.

4.2 The Position under Section 63 of the BNS

Section 63 of the BNS states that "a man is said to commit rape" when he performs specified sexual acts against a woman under circumstances such as lack of consent, coercion, incapacity, or minority. The provision contains several important elements: the offender is described as a man; the victim is described as a woman; the offence includes penile penetration as well as insertion of objects or body parts; lack of consent and coercive circumstances form the central basis of criminality; and the provision deals with penetrative sexual conduct.

The provision is broader in describing physical acts than a narrow historical understanding of rape. Nevertheless, it is not gender-neutral in its subjects. A male survivor may have suffered

forced anal, oral, or object-based penetration, but the conduct would not be classified as rape under Section 63 merely because the victim is male. Similarly, the statutory language does not clearly treat a woman or transgender person as the principal perpetrator of rape.

This results in three major exclusions. First, an adult male victim has no equivalent offence of rape based on the same penetrative conduct. Second, a transgender or non-binary victim faces uncertainty or exclusion where the person is not legally treated as a woman. Third, a female or transgender offender may fall outside the principal statutory formulation. Other provisions may sometimes apply, such as criminal force, assault, grievous hurt, or intimidation. However, these alternatives may not adequately represent the gravity and nature of penetrative sexual violence.

4.3 Comparison with POCSO

POCSO offers a useful model. It protects children below eighteen years from sexual assault and related offences without making the gender of the child or offender decisive. This approach focuses on prohibited sexual acts, recognises that boys can be victims, covers abuse by offenders of different genders, provides child-friendly procedures, and avoids forcing the victim into a narrow male/female legal category.

The distinction between POCSO and adult sexual-offence law is difficult to justify in principle. If sexual violence against a male child is recognised as a serious offence, the law should also recognise sexual violence against an adult male. The difference in age may justify different procedures and punishments, but it does not justify treating the underlying harm as legally invisible.

4.4 Constitutional Framework

Article 14 guarantees equality before the law and equal protection of the laws. It does not prohibit every classification. A classification is ordinarily valid if it is based on an intelligible differentia and that differentia has a rational connection with the objective of the law. The gender-specific structure of rape law may be defended on the ground that women face disproportionate and systematic sexual violence. However, the constitutional difficulty arises when the classification provides no legal remedy at all for other survivors of comparable sexual violence.

The issue is not simply whether women and men are biologically identical. The relevant issue is whether the State may deny a serious criminal remedy to a person who suffers the same invasion of bodily integrity merely because that person is male or transgender. If the objective is to punish non-consensual penetrative sexual conduct, excluding certain victims may lack a rational connection with that objective.

The Supreme Court in *NALSA v. Union of India* recognised that transgender persons are included within the expression "person" in Article 14 and are entitled to equal protection of law. This principle creates a strong constitutional basis for challenging laws that fail to account for transgender persons.

Article 15 prohibits discrimination on grounds including sex. Indian constitutional interpretation has moved beyond a narrow biological understanding of sex. In *NALSA*, the Supreme Court connected gender identity with constitutional equality and dignity. Later constitutional jurisprudence has recognised that discrimination on the ground of sex includes discrimination based on gender identity.

A statutory provision that excludes transgender persons from protection may therefore raise a direct Article 15 concern. The same applies to a law that assumes that men can only be offenders and never victims of rape. Although Article 15 permits special provisions for women and children under Article 15(3), that enabling power should not be interpreted as permitting the complete exclusion of other victims from criminal protection. Article 15(3) supports special laws designed to address women's historical disadvantage, but it does not necessarily authorise the State to leave male and transgender survivors without an equivalent remedy.

Article 21 protects life and personal liberty. The Supreme Court has interpreted it to include dignity, privacy, bodily autonomy, decisional freedom, and protection against degrading treatment. Gender identity and self-determination have also been recognised as connected with constitutional dignity and personal liberty. Sexual violence directly violates bodily autonomy and dignity. When criminal law fails to acknowledge the harm suffered by a category of survivors, it may produce secondary victimisation.

4.5 Constitutional Validity of Gender-Specific Rape Law

The constitutional validity of Section 63 cannot be assessed in a simplistic manner. The provision has a legitimate objective: preventing rape and protecting women from a form of violence that is widespread and historically under-prosecuted. A court may therefore uphold the provision as a protective measure, particularly because Article 15(3) permits special provisions for women.

However, constitutional validity may be questioned in relation to the provision's exclusionary consequences. First, the provision makes gender an essential element of the offence even though the harm consists primarily of non-consensual sexual penetration. Second, the provision does not provide an equivalent offence for male, transgender, or non-binary victims. Third, the provision may be inconsistent with the Supreme Court's recognition of

gender identity as part of constitutional equality and dignity.

Courts generally avoid rewriting penal statutes because creating a new offence is a legislative function. If Section 63 is challenged, a court may interpret related provisions expansively where possible, but a complete gender-neutral rape offence would probably require parliamentary amendment. The stronger constitutional argument may therefore be directed toward legislative reform rather than judicial replacement of the statutory text.

4.6 Transgender Persons and Criminal Law

The Transgender Persons (Protection of Rights) Act, 2019 recognises sexual abuse of transgender persons as an offence. Section 18 provides punishment for conduct that harms or endangers a transgender person and includes physical and sexual abuse; the punishment is imprisonment of not less than six months and up to two years, along with a fine.

Although this provision is important, it does not fully solve the problem. It provides a comparatively limited and general offence rather than a detailed framework for penetrative sexual violence equivalent to rape. The lower punishment may also produce an unjustified hierarchy between victims based on gender identity. A transgender survivor may face misgendering by police or medical personnel, lack of appropriate shelter and support services, fear of social stigma and institutional discrimination, difficulty in recording the offence, and uncertainty about the application of gendered provisions.

4.7 Arguments against Gender-Neutral Rape Law

Opponents of gender-neutral rape law argue that women are disproportionately affected by sexual violence and that gender-neutral drafting could dilute special protections. There may also be concerns about misuse of criminal complaints, although the possibility of misuse exists in relation to many criminal offences and cannot by itself justify denying protection to genuine victims.

Some sexual offences involve gender-specific patterns of coercion. Pregnancy, reproductive control, and patriarchal domestic violence may require targeted protection for women. This concern is valid, but it does not logically require an exclusionary definition of rape. Gender-specific aggravated provisions can coexist with a gender-neutral basic offence.

4.8 Arguments for Reform

A gender-neutral sexual-offence framework would protect all survivors of non-consensual sexual violence; make consent the central legal principle; recognise female, male, transgender, and non-binary offenders where facts support liability; improve reporting and access to compensation; align criminal law with Articles 14, 15, and 21; and bring adult sexual-offence law closer to the gender-neutral model of POCSO.

Gender neutrality should not mean removing women-specific offences or safeguards. The law may retain aggravated offences involving pregnancy, trafficking, custodial abuse, marital violence, pregnancy-related harm, or abuse arising from gender-based discrimination. The basic sexual-violence offence, however, should be drafted around conduct and consent.

5. CONCLUSION AND RECOMMENDATIONS

Indian criminal law has made some progress toward gender neutrality, but its framework remains incomplete. The BNS introduces gender-neutral terminology in selected offences, and POCSO provides a strong example of gender-neutral protection for children. Yet Section 63 of the BNS continues to define rape through a binary model in which the offender is a man and the victim is a woman.

This creates serious legal and constitutional gaps. Adult male, transgender, and non-binary survivors may not receive a remedy that accurately reflects the gravity of the harm they suffered. The framework also does not clearly impose rape liability on female or transgender offenders. Although special protection for women can be justified under Article 15(3), complete exclusion of other survivors is difficult to reconcile with Articles 14, 15, and 21, particularly after *NALSA* and later constitutional decisions recognising gender identity, dignity, and bodily autonomy.

RECOMMENDATIONS

- 1. Adopt a gender-neutral basic offence of rape or penetrative sexual assault:** The offence should apply to any person who commits specified sexual acts against another person without free and valid consent.
- 2. Use conduct-based drafting:** The law should focus on penetration, coercion, incapacity, abuse of authority, and absence of consent rather than assuming the gender of the victim or offender.
- 3. Retain women-specific aggravated protections:** Special provisions may continue for pregnancy, custodial violence, trafficking, domestic abuse, and other forms of gender-based violence disproportionately affecting women.
- 4. Recognise transgender and non-binary persons expressly:** The statute should define "person" broadly and respect self-identified gender, while ensuring that protection does not depend on legal documentation.
- 5. Create equivalent remedies for adult male survivors:** Male victims should have access to the same level of criminal recognition, investigation, compensation, and support as female

victims.

6. Harmonise the BNS with POCSO: The gender-neutral principles already accepted for children should guide reform of adult sexual-offence law.

7. Improve police and judicial training: Officials should be trained in gender identity, consent, trauma-informed investigation, and handling complaints by male and transgender survivors.

8. Ensure survivor-centred procedures: Medical examination, reporting, shelter, counselling, and compensation systems should be available without discrimination.

9. Collect reliable data: National crime statistics should record sexual violence against all genders while protecting privacy and avoiding stigmatisation.

10. Undertake constitutional review: Parliament should review Section 63 in light of Articles 14, 15, and 21 and the Supreme Court's gender-identity jurisprudence.

Gender neutrality is not an attempt to minimise violence against women. Properly designed, it strengthens the entire criminal justice system by ensuring that the protection of bodily integrity and dignity belongs to every person. The constitutional goal should be a framework that is gender-sensitive where social inequality demands it, but gender-neutral where the underlying harm is universally human.

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