

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced, stored, transmitted, or distributed in any form or by any means, whether electronic, mechanical, photocopying, recording, or otherwise, without prior written permission of the Managing Editor of the *International Journal for Legal Research & Analysis (IJLRA)*.

The views, opinions, interpretations, and conclusions expressed in the articles published in this journal are solely those of the respective authors. They do not necessarily reflect the views of the Editorial Board, Editors, Reviewers, Advisors, or the Publisher of IJLRA.

Although every reasonable effort has been made to ensure the accuracy, authenticity, and proper citation of the content published in this journal, neither the Editorial Board nor IJLRA shall be held liable or responsible, in any manner whatsoever, for any loss, damage, or consequence arising from the use, reliance upon, or interpretation of the information contained in this publication.

The content published herein is intended solely for academic and informational purposes and shall not be construed as legal advice or professional opinion.

**Copyright © International Journal for Legal Research & Analysis.
All rights reserved.**

ABOUT US

The *International Journal for Legal Research & Analysis (IJLRA)* (ISSN: 2582-6433) is a peer-reviewed, academic, online journal published on a monthly basis. The journal aims to provide a comprehensive and interactive platform for the publication of original and high-quality legal research.

IJLRA publishes Short Articles, Long Articles, Research Papers, Case Comments, Book Reviews, Essays, and interdisciplinary studies in the field of law and allied disciplines. The journal seeks to promote critical analysis and informed discourse on contemporary legal, social, and policy issues.

The primary objective of IJLRA is to enhance academic engagement and scholarly dialogue among law students, researchers, academicians, legal professionals, and members of the Bar and Bench. The journal endeavours to establish itself as a credible and widely cited academic publication through the publication of original, well-researched, and analytically sound contributions.

IJLRA welcomes submissions from all branches of law, provided the work is original, unpublished, and submitted in accordance with the prescribed submission guidelines. All manuscripts are subject to a rigorous peer-review process to ensure academic quality, originality, and relevance.

Through its publications, the *International Journal for Legal Research & Analysis* aspires to contribute meaningfully to legal scholarship and the development of law as an instrument of justice and social progress.

PUBLICATION ETHICS, COPYRIGHT & AUTHOR RESPONSIBILITY STATEMENT

The *International Journal for Legal Research and Analysis (IJLRA)* is committed to upholding the highest standards of publication ethics and academic integrity. All manuscripts submitted to the journal must be original, unpublished, and free from plagiarism, data fabrication, falsification, or any form of unethical research or publication practice. Authors are solely responsible for the accuracy, originality, legality, and ethical compliance of their work and must ensure that all sources are properly cited and that necessary permissions for any third-party copyrighted material have been duly obtained prior to submission. Copyright in all published articles vests with IJLRA, unless otherwise expressly stated, and authors grant the journal the irrevocable right to publish, reproduce, distribute, and archive their work in print and electronic formats. The views and opinions expressed in the articles are those of the authors alone and do not reflect the views of the Editors, Editorial Board, Reviewers, or Publisher. IJLRA shall not be liable for any loss, damage, claim, or legal consequence arising from the use, reliance upon, or interpretation of the content published. By submitting a manuscript, the author(s) agree to fully indemnify and hold harmless the journal, its Editor-in-Chief, Editors, Editorial Board, Reviewers, Advisors, Publisher, and Management against any claims, liabilities, or legal proceedings arising out of plagiarism, copyright infringement, defamation, breach of confidentiality, or violation of third-party rights. The journal reserves the absolute right to reject, withdraw, retract, or remove any manuscript or published article in case of ethical or legal violations, without incurring any liability.

"THE GENDER PARADOX IN BNS, 2023: MALE VICTIMHOOD, FEMALE PERPETRATION, AND THE LIMITS OF SELECTIVE PROTECTION"

AUTHORED BY - TANISHKA SINGH & SERRA AUGUSTINE

Abstract

The Bharatiya Nyaya Sanhita, 2023 (BNS), which serves as India's decolonised criminal code, merely replicates the same gender framework found in the Indian Penal Code, 1860, which it seeks to replace. Section 63 of the BNS criminalizes rape by defining it strictly as an act committed by "a man" on "a woman" an exact replica of the language found in the colonial Indian Penal Code's Section 375 based on Victorian biological determinism and colonial criminal anthropology that saw "men as aggressors and women as victims."

This study identifies three significant structural flaws. First, male victims are omitted from the BNS framework as section 63 excludes them from being possible victims of rape, while other provisions (sections 75, 115, and 116, POCSO, and the IT Act) are insufficient. The non-retention of section 377 of the IPC shows regression in providing adequate legal protection. Second, there are no provisions covering female-perpetrated sexual violence. No BNS provisions categorise them as rape due to the unfounded assumption of women's inability to commit an offence. Lastly, these provisions can be described as one of "selective protection." All victims under sections 63, 69, and 70 fall under this scheme, as these sections provide protection to all female victims without male victims and offenders.

In using cases like *K.S. Puttaswamy v. Union of India*, *Navtej Singh Johar v. Union of India* and *Joseph Shine v. Union of India* as the basis for this analysis, it will be shown that Section 63 of the Indian Penal Code is unconstitutional according to Articles 14, 15(1), and 21. Using the gender-neutral approach adopted by the United Kingdom, South Africa, and Canada, this study reveals that reforming the law in question is both mandatory and realistic. The approach to redefine Section 63 from a gender-neutral perspective is not a novel concept, but one that was recommended by the Justice Verma Committee in 2013 and rejected twice by Parliament.

Keywords: BNS 2023, Section 63, male victimhood, female perpetration, selective protection, gender binary, Article 14, Article 21, gender neutral law,

Chapter 1: Introduction

1.1. The Doctrinal Gap

The Indian Parliament in 2023 enacted the Bharatiya Nyay Sanhita, which was presented as a statute that will reform the criminal laws of India and will shed the ideology of British Colonial Government, they inherited and will replace it with a framework rooted in constitutional values of justice, equality and dignity. Five years after the Supreme Court recognised LGBTQ + in *Navtej Singh Johar v. Union of India (2018)*¹ as constitutional subjects who are entitled to dignity and equal protection, and a decade after the Justice J.S. Verma Committee² explicitly recommended gender neutral sexual assault provisions and decades after the Constitution of India guarantees equality to every person regardless of their sex, Parliament enacted section 63 of BNS 2023³ which defines rape with the gender binary similar to that of section 375 of the Indian Penal Code, 1860.⁴ According to Indian Criminal Laws, a man who rapes another man is not a rapist and a woman who instigates a man into sexual intercourse through intoxication, misrepresentation or coercion isn't a rapist. A woman who holds the victim while a man rapes her isn't liable for rape or gang rape under constructive liability. This is what BNS,2023 serves even after being credited for bringing a reform in Indian Criminal Laws. Exactly presenting British Colonial Government's ideology again, in furtherance of IPC, 1860. This is selective protection disguised in new legislative language. This paper critically analyses the definitional architecture and constitutionally challenges the structural design of sexual offences chapter of BNS 2023.

1.2. The Central Research Problem

BNS 2023 not only fails to protect the male victims but also helps the female perpetrators out of their liability. This critically deepens the gender selective architecture of IPC, 1860 that it says to have replaced and reformed. The central research problem this paper addresses is the deliberate distribution of legal safeguards on the gender rather than the harm caused and the gravity of the situation. This phenomenon spreads across three interconnected dimensions: Firstly, Male Victimhood, Section 63 of BNS, 2023⁵ explicitly defines rape as an act where only a man can be the perpetrator, and a woman can be the victim making gender of the parties

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

² Justice JS Verma, Leila Seth and Gopal Subramaniam, Report of the Committee on Amendments to Criminal Law (23 January 2013) (Verma Committee Report) 62-63.

³ *Bharatiya Nyaya Sanhita 2023*, s 63.

⁴ *Indian Penal Code 1860*, s 375.

⁵ *BNS*, s 63.

an essential element of the offence rather than the nature and harm of the act. A man who has suffered the same as mentioned in section 63 of BNS would not be considered a victim or have said to be raped but if the same happens with a woman, it is considered a heinous crime whose punishment extends till death. A man doesn't have any remedy present in BNS, 2023 but is offered alternatives which are general provisions like assault (section 76)⁶, hurt and grievous hurt (section 115⁷ and 116⁸) but don't recognise the sexual nature of the act, none of the provisions consists punishments which are proportionate to the trauma and harm caused by such acts, moreover, none of these provisions treats him with the legal gravity as it would have been if there was a woman in his place. The POCSO Act, 2012⁹ extends gender neutral protection to penetrative sexual assault victims which shows that Indian legislature can enact gender neutral rape equivalent provisions. As soon as the male turns eighteen and his transition from POCSO, 2012 to BNS, 2023 happens, the protection is snatched away from him. This is not just a gap but a choice that legislature has taken throughout its opportunities to reform.

Secondly, Female Perpetrators, liability of rape is extended to all the members of the group who act in furtherance of a common intention to commit rape under section 70 of BNS, 2023¹⁰ i.e. gang rape. This was made to ensure collective accountability. However, since section 63 of BNS, 2023 follows a gender binary, section 70's constructive liability is only for men and if a woman does the same or facilitates in doing so, she won't be held as much as a man will be. The Supreme Court in *Priya Patel v. State of Madhya Pradesh* (2006) held that a woman cannot be convicted of rape even as a facilitator. BNS, 2023 retained the same structural loophole which silently endorsed the female perpetrator's exemption.

Thirdly, Selective Protection, they are not just doctrinal problems but a statute that has placed gender as the major aspect for protection rather than harm which leads to the protection of only those whom the law recognises and ignorance of those whom it doesn't. BNS recognises only one identity in its sexual offences chapter which are the heterosexual female victims. Every other victim finds the door of law and protection closed. This is selective protection as a coherent system. Furthermore, BNS, 2023 scrapped the last remedy available for males by repelling section 377 from IPC, 1870. The position of male victims is worse in present times than it was in Colonial Government Laws.

⁶ Bharatiya Nyaya Sanhita 2023, s 76.

⁷ Bharatiya Nyaya Sanhita 2023, s 115.

⁸ Bharatiya Nyaya Sanhita 2023, s 116.

⁹ POCSO 2012, ss 3-5 (gender-neutral penetrative sexual assault protection for persons under 18).

¹⁰ Bharatiya Nyaya Sanhita 2023, s 70.

1.3. Research Questions

This paper is structured around four principal research questions.

1. Does BNS 2023 provide protection to everyone irrespective of their gender in its sexual offences framework or does it distribute protection based on gender of the victim?
2. Does the gender binary followed by BNS, 2023 under section 63 i.e. rape create any constitutional challenges?
3. Does the constructive liability framework work the same for everyone in the case of gang rape regardless of the perpetrators gender?
4. Does BNS, 2023 show a genuine legislative reform of IPC's framework in context of sexual offences or does its deletion of section 377 IPC without replacement constitute a regression from the residual protections that existed in IPC, 1870?

1.4. Thesis

Even after being presented as a reformative law, BNS 2023 perpetuates or even deepens the gender selective structure of its predecessor statutes, constructing the framework around male perpetrators and female victims that leaves adult male victims without any rape - equivalent protection, exempts female perpetrators from accountability and again establishes a colonial era gender binary whose ideological roots extend from Victorian biological essentialism through the Criminal Tribes Act, 1871 to the post - Nirbhaya codification of selective protection in 2013 leading to the violation of Articles 14, 15 and 21 of the Constitution of India and direct contradiction of the constitutional principles established in Puttaswamy, Navtej Singh Johar and Joseph Shine v. Union of India (2019).

1.5. Chapterization

The paper proceeds across eight sections, each serving different purpose in the construction of central argument.

Chapter 2 sets out the research methodology including the doctrinal approach, primary and secondary sources, review of existing literature, the five identified research gaps and the paper's original contribution to the existing discourse.

Chapter 3 traces the historical and ideological foundation of the gender binary of sexual offences framework under BNS, 2023 that inherits from the Victorian cult of domesticity and biological essentials, Darwin's evolutionary theory and social Darwinism, colonial anthropological thought including Crooke and Thruston, the Criminal Tribes Act 1871 and its construction of male as perpetrator and administrative eraser of male vulnerability, pre-

colonial antecedents in Roman law, Canon law, Mughal jurisprudence and Kautilya's Arthshastra to the post-independence retainment of the gender binary and the Nirbhaya case as the moment of codification of selective protection, established that BNS's gender binary as the structural inheritance not an accident.

Chapter 4 analysis the mail victimhood under BNS 2023 across 8 sections including the critical analysis of section 63 and the deliberate exclusion of male victims, the societal stigmas and its reinforcement by the legal framework, the ignored scenarios of male victimization, the alternate remedies and their inadequacies, the relevant case laws, the constitutional challenges, the IPC to BNS regression produced by the deletion of section 377 and comparative analysis with gender neutral framework in contemporary world.

Chapter 5 examine the structural exemption and invisibility of female perpetrators under BNS 2023 including the statutory ignorance of section 63, the ideological myths of female physical and psychological incapacity, the judicial culture reinforcing it, the empirical dimensions of female perpetration including the NCRB measurement problem and the self-report survey evidence, comparative jurisprudence and the constitutional arguments for reform.

Chapter 6 collects the findings of chapter 4 and 5 under the unified concept of selective protection showing that male victims and female perpetrators exemption are not independent doctrinal gap but two different aspects of a single structural problem which runs through section 63, 69 and 70 read together and also exposes the constitutional misconception of article 15 (3) as a justification for selective protection.

Chapter 7 states legislative, judicial and institutional recommendations for reform towards a gender-neutral, consent based and constitutionally accurate sexual offence framework for India.

Chapter 8 concludes the paper by showing that the paper has proved ideological foundation is colonial and not constitutional, males are structurally excluded as victims, female perpetration is made legally invisible, selective protection is a systematic failure and not a collection of gaps. Moreover, it also shows that this hasn't changed because of the societal stigmas, political pressure and legislative ignorance.

1.6. Scope and Limitation

This paper restricts its initial analysis to the provisions of the sexual offences in BNS, 2023 specifically section 63, 69, 70, 74, 75 and 76 and their constitutional dimensions under article 14, 15 and 21 while not examining the gender asymmetry that may exist outside the sexual offences chapter such as provisions relating to dowry or cruelty which requires independent

research beyond the scope of this paper.

This paper only analyses the specific question of whether the rape and sexual assault laws are gender neutral in countries whose legal systems are structurally similar to India's common law tradition. This paper is not a complete study of sexual offence law in these countries.

This paper hasn't conducted any research of its own regarding how many men are sexually violated or how many women are perpetrators but has used the statistics and survey data such as from the findings of US National Intimate Partner and Sexual Violence Survey 2011 only to strengthen the legal arguments not as standalone research findings.

Moreover, BNS 2023 has been recently enacted and its judicial interpretations and proceedings are still nascent. Several constitutional challenges mentioned are yet to be exposed to the judicial engagement. This is a natural limitation but does not decrease the validity of arguments advanced.

Chapter 2: Research Methodology and Review of Literature

2.1. Research Methodology

This paper uses doctrinal legal research as its primary methodology. Doctrinal research, here, is the deep analysis of legal texts, constitutional provisions and judicial precedents to identify, analyses and evaluate law and it is the most useful methodology for this research because the central argument of the paper is established through textual analysis of statutory provisions, constitutional interpretation and judicial reasoning rather than through data collection or field observation.

The research is analytical, historical and critical at the same time. It does not only describe the law as it stands but also traces the ideological foundation of gendered criminal law of framework from Roman and canon law through Victorian biological essentialism and colonial anthropological thought to the Post India legislative trajectory of India's, establishing the gender binary mentioned in BNS 2023, is not just a drafting failure but a structural inheritance of centuries of ideological sedimentation. Then it evaluates how the current framework challenges the constitutional standards that it is obliged to meet, the reformatory provisions and then the comparative models that show the practicality of a gender-neutral alternative. This is layered methodology consisting of historical, doctrinal, constitutional and comparative and gives the paper's central thesis its depth and distinguishes it from existing scholarship on the subject.

- Primary Sources

They are the foundational material of this research which include the bare act of BNS 2023, specifically sections 63, 69, 70, 74, 75 and 76 and the Bharatiya Nagarik Suraksha Sanhita, 2023 ; the Indian Penal Code, 1860 specifically sections 375, 376 and 377 ; the Criminal Law Amendment Act, 2013 ; the Protection of Children from Sexual Offences Act, 2012 ; the Transgender Persons Act, 2019 ; the Information Technology Act, 2000 ; the Criminal Tribes Act, 1871 ; and the Constitution of India with specific references to Article 14, 15 and 21. Judicial primary sources include *K.S. Puttaswamy v. Union of India* (2017), *Navtej Singh Johar v. Union of India* (2018), *NALSA v. Union of India* (2014), *Priya Patel v. State of Madhya Pradesh* (2006), *State of Punjab v. Gurmit Singh* (1996), *Joseph Shine v. Union of India* (2019), *Fazal Rab Choudhary v. State of Bihar* (1983) and *R v. Ewanchuk* (1999). International comparative legislative sources include the UK Sexual Offences Act 2003, the South Africa Criminal Law Amendment Act 32 of 2007, the Canadian Criminal Code R.S.C 1985, and the updated FBI definition of rape 2012.

- Secondary Sources

They include the report of Justice J.S. Verma Committee on Amendments to Criminal Law 2013, historical texts including William Acton's *Functions and Disorders Of The Reproductive Organs* (1857), Jean Jacques Rousseau's *Emile* (1762), Sir Mathew Hale's *Historia Placitorum Coronae* (1736), William Crooke's *The Tribes And Castes Of The North-Western Provinces And Oudh* (1896), Edgar Thurston's *Castes And Tribes Of Southern India* (1909), and Kautilya's *Arthashastra*. Empirical secondary sources include the US National Intimate Partner and Sexual Violence Survey 2011 and National Crime Records Bureau's *Crime in India* reports which was specifically diploid to interrogate the circular statistical argument that gender-neutral reform is unnecessary because female perpetration is statistically rare.

2.2. Review of Existing Literature

The literature regarding gender asymmetry in sexual offences chapter of Indian Criminal Laws have developed primarily along two trajectories which are feminist legal scholarships advocating stronger protection for female victims and historical scholarships tracing the colonial ideological foundation of the Indian Penal Code.

Feminist legal literatures in India which were represented by the work of Flavia Agnes in *Law and Gender Inequality* (Oxford University Press) and Pratiksha Baxi in *Public Secrets of Law* (Oxford University Press, 2014) have produced foundational critiques of the IPC's rape provisions, the cultures of rape trials and patriarchal assumptions embedded in the judicial

interpretation of consent. These works were helpful in shaping the Justice J.S. Verma Committee's recommendations in 2013. However, it only analyses the perspectives of female victims and present constitutional challenges on their behalf, not including the deliberate exclusion of male victims and exemption of female perpetrators.

Historical and socio-legal literatures which include Radhika Singha's *A Despotism of Law* (Oxford University Press, 1998) and Tanika Sarkar's *Hindu Wife, Hindu Nation* (Permanent Black, 2001) have traced the ideological roots of the IPC's gendered criminal framework which extends to the Victorian and Colonial era. They establish that males as only perpetrators was a deliberate colonial construction rather than a neutral legislative choice. However, these are historical in nature and do not analyze whether the retention of this paradigm is constitutionally sustainable or not in future statutes like BNS, 2023.

Comparative analysis of contemporary world legal framework on gender neutral sexual offence law was done with the UK Sexual Offences Act 2003, South Africa's Criminal Law Amendment Act 2007, and Canadian Criminal Code which has established that countries trend towards consensual nature of rape rather than the gender of victim and perpetrator. This comparison has been used in passing but has not been systematically applied to show constitutional challenges of BNS 2023's specific provisions.

2.3. Research Gap

Section 2.2 shows that gender asymmetry has been acknowledged by the scholars, but the specific dimensions of this paper addresses have been largely unexamined.

Firstly, the most significant gap in existing literature is the absence of any work that examines male victimhood and female perpetrator exemption together as two aspects of a single structural design within BNS 2023 framework specifically. Existing literature either addresses them independently or confines them to IPC or doesn't address them at all, which doesn't capture the architectural nature of the problem.

Second, no existing work has addressed the concept of selective protection which is deliberate distribution of legal safeguards based on the gender of the victim rather than the harm suffered, along with constitutional backing of Article 15(3). No existing literature connected the male victimhood vacuum, female perpetrator impunity and the misreading of Article 15(3) under a unified constitutional argument.

Third, no existing work has analysed the deletion of section 377 of IPC, 1870 without any replacement in BNS as a major regression in the male victim protection. Literature present on section 377 exclusively focuses on the decriminalization of consensual same sex conduct in

Navtej Singh Johar case (2018) but no separate doctrinal attention has been paid to the erasure of the residual protection available to the male victims.

Fourth, while historical scholarship has traced the colonial ideological construction of male victimhood impossibility, no existing work has drawn a connection between this historical analysis and the constitutional challenges of BNS 2023 under Articles 14, 15 and 21. These streams of scholarship have developed in parallel rather than in dialogue.

This paper addresses all these gaps by advancing the first comprehensive doctrinal analysis of selective protection in BNS 2023's sexual offence framework not only as structural failure but also as a constitutional failure and in doing so, makes an original contribution to the existing literature on gender neutrality in Indian criminal law.

Chapter 3: Historical and Legal Context

To acknowledge the paradox, we need to investigate the mindset of the colonial law makers which is still prevalent in today's world. The Indian Penal Code was constructed on the strong Victorian assumption that only men could perform severe crimes, and women were naturally quiet and passive. After Independence the Indian did not change the outdated laws but ended up strengthening them. After the Nirbhaya Case it strengthened the narrative of a male perpetrator and female victim and missed the chance to expand the offences to all genders. At the same time, because colonial laws exclusively recognized men and women, transsexual individuals were utterly excluded from the legal system. Even while the new BNS and the 2019 Transgender Act seek to correct historical wrongs, they largely offer phrase adjustments rather than offering meaningful, equal protection.

3.1. Evolution of the Gender Binary: Colonial Foundations, the Nirbhaya Catalyst, and the BNS

3.1.1 The Colonial IPC vs. Independent India

Thomas Babington Macaulay drafted the Indian Penal Code and was enacted in 1860, it was fundamental tool of imperial governance, its primary objective was to maintain colonial order. Crimes against human were treated as secondary; these came under private or domestic sphere. It was founded on two interconnected Victorian dogmas that significantly moulded Indian criminal law: the inherent criminality of native males and the passive vulnerability of native females. The British colonial state saw indigenous social institutions as superior, required a legal framework to discipline the native population. The British colonial state saw indigenous social systems through the perspective of inherent superiority, demanding a legislative

mechanism to discipline the local people. The British built a hierarchical model of justice by defining males as the sole possessors of crimes and women were viewed as vulnerable beings which needed protection. This binary built was critical for maintaining imperial supremacy because it defended the unjust policing of males and public places while also controlling females and their movement under the pretext of protection, thereby establishing a gendered structure that modern laws still struggle to remove.

However, after independence, India experienced a paradigm shift in legislative objectives. The newly autonomous state sought legitimacy by participating in social change, shifting from being an impartial colonial arbiter to a paternalistic defender of underprivileged groups, particularly women. This shift resulted in targeted revisions that carved out certain offenses under the IPC like:

- Dowry deaths (Section 304A)
- Cruelty by husband or his relatives (Section 498A)

These amendments were necessary for acknowledging women's oppression in patriarchal society and they also established a strict legal binary: the state formally acknowledged women as unsafe and passive victims and men as active perpetrators.

3.1.2. Independent India: Continuity and the Paradigm of Selective Protection

When India gained independence in the year 1947, the constitution ensured that every person, regardless of their gender, had equal rights, freedom, and dignity. The Indian Penal Code remained the main laws for criminal activities which was essentially preserved intact, upholding the gendered and moral standards of the colonial state. The post-colonial state did not demolish colonial gender logic; rather, it incorporated it into a new nationalist framework in which the "Indian woman" was elevated to a symbol of national dignity, necessitating strict state protection. In this fresh approach, the "Indian man" evolved from a colonial danger to the primary suspect in domestic and sexual offenses. The law continued to consider males as possible criminals, denying their ability to be victims of intimate partner abuse or sexual assault. This continuity demonstrates that the post-colonial legislature found the colonial architecture of selective protection extremely convenient, opting to reinforce a paternalistic state apparatus that "protected" women without addressing the underlying sexist assumption that women lacked criminal agency and men lacked vulnerability.

3.1.3. The Nirbhaya Case (2012) and the Codification of "Selective Protection"

The violent gang rape and murder of a young lady in Delhi in December 2012 which is known as the Nirbhaya case, and it served as the "rarest of the rare" case. It shattered the Indian criminal justice system's complacency and inciting enormous public indignation. The Criminal

Law (Amendment) Act of 2013¹¹ was an emergency legislative response to the protests, which called on the government to address the system which failed to protect women.

This amendment made significant and important changes and introduced new offenses like

1. Acid Attack (Sections 326A/326B)
2. Stalking (Section 354D)
3. Voyeurism (Section 354C)

Under Section 375 of the Indian Penal Code where rape is defined, it expanded its definition and included oral rape and rape by any external object. But driven by their urgent emotional need to safeguard women, they passed a law which, in effect, set up a system of “selective protection”. Ignoring Justice Verma Committee’s recommendation for gender neutral sexual offences after recognizing that sexual offences are not strictly done by a male to female but vice versa too. The legislature specified the only a male can be the perpetrator and female would be the victim. It created a legal blind spot by solidifying this dichotomy in statutory language which made making female perpetration and male victimhood legally undetectable.

3.1.4. Analysing the BNS Through the Lens of Colonial and Post-Nirbhaya Legacies

The Bhartiya Nyay Sanhita (BNS), 2023 framed by the union government it acted as a major shift from old criminal laws promising to decolonize Indian Criminal justice system and give justice to people rather than just punishing.

BNS seems far more continuous than transformative when viewed through the dual spheres of colonial roots and post-Nirbhaya reform. The most basic offences which are offences against state and offences against human body are there just with some linguistic changes. Critics describe it as “old wine in a new bottle” rather than a major shift. The Criminal Law (Amendment) Act of 2013 had elaborated the definition of rape and introduced new crimes like staking and voyeurism. It also increased the punishments making it harder. By maintaining the mainly concept of male perpetrator and female victim paradigm and the exemption of marital rape. BNS effectively builds this framework in Sections 63-70, dismissing long-standing feminist and victimological concerns about gender-neutral protection and marital liberty. However, feminist and criminological studies reveal that the BNS, as well as the post-Nirbhaya amendments, fail to take into account the structural issues that regulate the process by which victims can seek justice, including impunity for the police, evidence that favours certain narratives and patriarchal notions of modesty and honour, even in the case of the BNS, that uses colonial morality about the chastity of women. Unlike the nineteenth-century IPC and

¹¹ Criminal Law (Amendment) Act 2013 (Act 13 of 2013).

post-2013 amendments, the BNS seems to perpetuate a hierarchical, police-dominated and patriarchal penal system through an Indian nomenclature.

3.2. Victorian Morality and Biological Essentialism

3.2.1. The 'Cult of Domesticity' and the Ontological Impossibility of the Female Aggressor

The 'separate spheres' idea, which guided Victorian gentry social life, was more than just a description of how men and women lived. It was a moral and scientific argument concerning the underlying nature of men and women. The domestic world designated to women was more than just a physical location; it was a constellation of traits thought to be inherently, innately, and biologically feminine: passivity, spiritual purity, emotional receptivity, and, most importantly, the lack of disruptive sexual desire. The public space allotted to men was characterized by rational agency, physical dominance, economic production, and an acknowledged but ethically dangerous sexual desire. This idea had its most important medical expression in William Acton's work, whose *Functions and Disorders of the Reproductive Organs* (1857) declared as clinical fact that "the majority of women (fortunately for them) are not very much troubled with sexual feelings of any kind. Acton's argument was not perceived as contentious by the general Victorian reading public; rather, it was interpreted as validation of what respectable society already knew. Its importance in legal architecture cannot be overstated: if the medically authoritative position was that women could not meaningfully experience sexual desire, the category of female sexual aggressor was not only ethically questionable, but also physiologically absurd. Even if someone has the ability to be hostile, they cannot do so.¹²

3.2.2. The Historical Depth of the Male Perpetrator Paradigm: Pre-Victorian and Cross-Cultural Antecedents

It is wrong to attribute the male-perpetrator paradigm's beginnings only from the Victorian Era. Understanding the ideological depth and longevity of the construction that the IPC inherited and codified demand an awareness of the deeper foundations of the identification of men as the primary or exclusive perpetrator of sexual crime in Western legal and theological history.

3.2.2.1. Roman and Canon Laws

Rape, or *stuprum per vim*, was defined by Roman law as a crime in which a male criminal acts upon a female body. Roman law supplied the vocabulary and conceptual framework for the civilian legal traditions that eventually influenced British jurisprudence. In addition to failing

¹² William Acton, *Functions and Disorders of the Reproductive Organs* (John Churchill 1857) 112.

to include female perpetration, the Roman legal system conceptualized rape in a way that made such consideration fundamentally impossible. Rape was viewed through the prism of property and honour: a man offended the honour of another man by abusing a woman who was under that man's care, such as his wife, daughter, or slave. Fundamentally, the crime was an offense against male ownership of female gender rather than an offense against the woman's dignity. This framework was strengthened and theologized by canon law, which regulated sexual offenses throughout most of medieval Europe and had a significant impact on how common law handled such cases. Male sexuality was viewed through the lens of active potency, whereas female sexuality was viewed through the lens of receptivity by Augustine¹³ and Thomas Aquinas¹⁴, whose ideas shaped medieval Catholic sexual ethics. According to both theological and natural-philosophical traditions, male action and female passivity constituted the natural order of sexual relations. Because it went against the divinely mandated directionality of sexual energy, sexual aggression by a woman was not only illegal but also an inversion of the natural order and a type of what Aquinas referred to as "unnatural vice."

These theological presuppositions became common law through canonist mediation and the work of the great commentators. The IPC drafters quoted Sir Matthew Hale's *Historia Placitorum Coronae* (1736), is the most authoritative English treatise on criminal law. It defines rape as male perpetration without any argument. Hale's famous and historically contentious statement that a husband could not rape his wife was founded on the notion that female sexuality was male property: by marrying, a woman granted irrevocable consent to the exercise of her husband's natural sexual authority. This was not Hale's eccentricity; it reflected the essential concepts of common-law sexual law.¹⁵

3.2.2.2. The Enlightenment and the Consolidation of Biological Determinism

The Enlightenment did nothing to the male-perpetrator paradigm but rather it reframed and strengthened it by linking it to gendered hierarchy to nature rather than theology. The medieval legal and theological traditions depended on the divine and natural teleology to explain male superiority. They investigated physiology biology and emerging life sciences.

In *Emile* (1762), Jean-Jacques Rousseau maintained that sexual passivity and moral reliance were natural states for women, based on physiological truths of reproduction. Rousseau characterized a woman's nature as her capacity for motherhood, which entailed receptivity, care, and emotional sensitivity rather than the active logical agency that Rousseau assigned to

¹³ Augustine of Hippo, *De Civitate Dei* (c AD 413–426)

¹⁴ Thomas Aquinas, *Summa Theologiae* (1265–1274)

¹⁵ Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (Professional Books 1971 [1736]) vol 1, 628.

males. This Rousseauian paradigm, transposed into nineteenth-century biology and medicine, served as the ideological underpinning for Victorian biological essentialism, which found legal embodiment in the IPC.¹⁶

The Scottish Enlightenment legal theorists which included Lord Kames. Adam Smith's instructor Francis Hutcheson and John Millar they establish a 'stadial' or progressive view of history that emphasized sexual relationships as the driving force behind civilizational evolution. According to their framework, the treatment of women was a reliable indicator of a society's level of civilisation: barbarous societies were defined by male sexual predation and female subjugation, whereas civilised societies were defined by the refinement of male sexual desire and the elevation of women to the domestic sphere of respectability and moral authority.

3.3. Biological Essentialism in Nineteenth-Century Science and its Legal Consequences

3.3.1. From Moral Philosophy to Medical Sciences: The Naturalisation of Gendered Criminality

It is during the mid-nineteenth century when the ideas about criminality based on gender differences, which had earlier been discussed in theological and philosophical terms, were reconsidered and formulated anew with the help of the rhetoric of the emerging natural and medical sciences. Indeed, the use of the rhetoric of the emerging natural and medical sciences provided greater validity to this ideology since it relied upon scientific reasoning rather than theological or philosophical discussion and hence enjoyed a much more enduring influence than previous ideas about criminality based on gender.

The idea that physical appearance reveals an individual's character and criminal nature emerged within the framework of the physiognomic tradition initiated by Johann Kaspar Lavater and expressed in his book *Essays on Physiognomy* published in 1778. As early as the beginning of the nineteenth century, the practice of phrenology had expanded and formalized this tradition by suggesting that certain aspects of an individual's mental nature related to the form of the skull.¹⁷ Indeed, phrenologists such as Gall and Spurzheim believed that the brain is the organ of the mind and the development of its various parts determines the presence of different mental

¹⁶ Jean-Jacques Rousseau, *Emile, or On Education* (Allan Bloom tr, Basic Books 1979) 358-365.

¹⁷ Johann Kaspar Lavater, *Physiognomische Fragmente zur Beförderung der Menschenkenntnis und Menschenliebe* (4 vols, Weidmanns Erben und Reich 1775–1778); translated as *Essays on Physiognomy, Designed to Promote the Knowledge and the Love of Mankind* (Thomas Holcroft tr, 3 vols, G G J and J Robinson 1789–1798).

faculties.¹⁸

It is important to recognize that both disciplines had very gendered implications for their practices. In terms of physiognomy and phrenology, it is vital to note that the concept of 'the criminal' as outlined in both disciplines' texts was always a male one. Criminality, as characterized by features such as a large jawbone, low forehead, coarse body, thick eyebrows – all of which were seen as characteristics of male physical development – made it impossible for women to ever be capable of committing criminal acts of will and physical violence. The physiology of women – which also made them nurture and morally pure – shielded them from criminal action even while making them potential victims of crime.

3.3.2. Darwin, Spencer and the Evolutionary Legitimation of Gendered Crime

The publication of *On the Origin of Species* by Charles Darwin in 1859, one year before the enforcement of the IPC, marked a new period in the biological justification of social stratification, including gender stratification.¹⁹ The Social Darwinist theory created by Herbert Spencer as a synthesis of evolutionary biology and sociology claimed that race, class, and gender hierarchies represented the result of evolutionary natural selection. This meant that men had developed greater powers of reasoning and domination since these attributes had helped them compete successfully for survival. In turn, women had been evolutionarily equipped with nurturing and receptive attributes to ensure successful reproduction and parenting.

In other words, Social Darwinism justified the Victorian male perpetrator paradigm. Aggressiveness among men, including sexually aggressive behaviour, was not anymore perceived as a moral or religious transgression but the manifestation of a man's biological makeup. Men were naturally aggressive since aggressiveness was the key attribute enabling men to win in the battle for life throughout their evolutionary history. Likewise, women were naturally passive if passiveness enabled them to successfully complete their reproductive mission. Therefore, sexual assault could only be seen as an exaggeration of aggressive instincts in males.

The implication for legal theory was the increased naturalization and reinforcement of the male perpetrator model. Since male aggressiveness was a result of evolutionary biology, the classification of men as the natural and anticipated perpetrators of sexual offenses could not simply be considered a cultural construction, but rather a biological reality. Similarly, if female

¹⁸ Franz Joseph Gall and Johann Gaspar Spurzheim, *The Physiognomical System of Drs Gall and Spurzheim, Founded on an Anatomical and Physiological Examination of the Nervous System in General, and of the Brain in Particular* (Baldwin, Cradock and Joy 1815).

¹⁹ Charles Darwin, *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life* (John Murray 1859).

passivity was also a result of evolutionary biology, then the classification of women as the natural and anticipated victims of sexual offenses could not be considered a cultural construction, but rather a biological reality.

3.3.3. The IPC's Legal Architecture: How Ideology Became Statute

It is worth noting that all four of these ideological currents, i.e. the cult of domesticity, the ideology of separate spheres, biological essentialism and the evolutionary theories of social Darwinism, were not introduced into the IPC via some conduit, whether by any one person or in any one argument. Rather, these ideologies informed the legal code within the broader intellectual discourse into which its authors had immersed themselves, providing underlying assumptions rather than overt arguments.

What resulted from this combination of factors was a series of statutory provisions which institutionalised, on multiple levels, the male-perpetrator paradigm. On one hand, in the most explicit terms, Section 375 established rape as an act carried out by a man against a woman. In other words, the definition of this crime implied the impossibility of either a female perpetrator or male victim. However, the gendered nature of the code was not confined to the single section outlined above. All provisions regarding outraging modesty (Section 354)²⁰, kidnapping and abduction (sections 359-374)²¹ were designed under certain presuppositions of gender and marital status that reflect the Victorian attitude towards females' vulnerability to males' aggression.

Just as crucially, what was absent from the Code was its absence. There was no clause in the code which treated the rape of a man by a woman or by a man without his consent as a criminal act. There was no clause that recognized the vulnerability of men in terms of sexual exploitation. The section dealing with the crime of 'carnal intercourse against the order of nature' had nothing to do with the protection of the male from being sodomized; instead, it was a clause that criminalized same-sex behaviour — an assault on the male body that had to be controlled.

3.4. Colonial Anthropology and the Administrative Erasure of Male Vulnerability

An essential query emerges here: Why did the colonial state automatically assume the primacy, even the exclusivity, of men as perpetrators of crime? This is linked to the legacy of colonial anthropological thought and the realities of crushing opposition to colonial rule during the

²⁰ Indian Penal Code 1860 (Act 45 of 1860), s 354 (assault or criminal force to woman with intent to outrage modesty).

²¹ Indian Penal Code 1860 (Act 45 of 1860), ss 359–374 (kidnapping and abduction).

nineteenth century. For the British, the nomadic, wandering, or recalcitrant males within indigenous communities constituted a threat to colonial power through their sheer presence. It led to the enactment of the Criminal Tribes Act (CTA), introduced in 1871.²² This act classified certain tribes or communities as 'hereditary criminals', whose criminal behaviour was considered biologically determined rather than socially constructed.

3.4.1. The Colonial Encounter and the Gendering of Danger

It must be noted, however, that the colonial enterprise in India gave rise, from its very beginnings to a particular and important representational complex: that of the dangerous Indian male. Indeed, this representation of the Indian male as potentially threatening, as physically imposing, sexually aggressive, and morally uncontrolled played an ideologically crucial role in three major aspects: first, in justifying the entire enterprise of colonial government and 'civilisation' in India; second, in explaining away the violent nature of colonialism itself; third, in formulating the basic assumptions about Indians on which the colonial legal system rested. One should note, moreover, that this representational strategy has a much older history than that of the actual British colonial state in India. As seen from the writings of the early European visitors and merchants to India, from the Portuguese Duarte Barbosa to the Englishman Thomas Roe, all attempts to describe India as 'other' involved, at the same time, representations of Indian males either as physically threatening (martially aggressive Rajput or Mughal warriors) or morally degenerate (luxury-loving court officials). In neither case does this representation allow for the possibility of a vulnerable Indian male.

It was the imposition of official rule through the East India Company that defined and structured these patterns of representation. For the purposes of administration under the East India Company, the Indians had to be classified. This process of classification centred primarily on the issue of risk. Which groups of people were dangerous in a military sense? Which were economic threats to British interests? Which resisted the payment of taxes, which were key to colonial administration? Each time, the answer came back as men belonging to certain communities, who would later be classified as criminal tribes.

3.5. The Criminal Tribes Act (1871)

3.5.1. The Pre-history of Criminal Tribes Act: Thug Campaigns and the marketing of colonial criminology

In the direct line of institutional evolution leading to the Criminal Tribes Act was the

²² Criminal Tribes Act 1871 (Act 27 of 1871).

suppression of Thuggee – a form of ritualistic murder and robbery associated with a hereditary criminal caste termed the Thugs – which the colonial regime carried out with remarkable vigour during the 1820s and 1840s. The significance of the Thuggee crusade, led by William Henry Sleeman on behalf of the Thuggee and Dacoity Department, lay not only in its concrete consequences, namely the apprehension and deportation of hundreds of Thugs, but in the precedents it set.

Indeed, it was the Thuggee campaign that made the idea of hereditary criminal communities' part of its ideology, the idea that criminality was passed from father to son as part of one's biological and religious heritage, rather than learned behaviour. And this idea was itself contentious; indeed, some commentators at the time – even within the ranks of colonial administrators – argued that the evidence on which the case against Thuggery was based had been collected under extreme coercion and that what Sleeman had identified was less a discovery than a creation of the colonial administration, designed to explain resistance and economic disruption without having to address underlying structures.

Of key importance is the fact that Thuggery itself was always a gendered idea: Thugs were men; women in Thuggee communities took on ambiguous roles in the colonial literature, alternately described as accessories to their brothers' crimes or victims of their communities' organisation. However, their role as such in Thuggery was never a central one; women in these communities were always defined in terms of relationships to criminal men, not criminal.

3.5.2. The CTA's Statutory Architecture and its Gendered Presumptions

The Criminal Tribes Act of 1871 expanded upon the notion of hereditary criminality to include a much larger set of groups whose lifestyles were not conducive to the goals of the colonial state administration. This Act empowered the provincial government to notify any 'tribe, gang, or class of persons' who were 'habitually addicted to the systematic commission of non-bailable offences' as criminal tribes and placed restrictions on their mobility and required them to register and settle down in designated areas.²³

In practice, the implementation of the CTA was heavily focused on male adults who were members of notified communities. Under the terms of registration, each member above a certain age was required to provide their name, description, and residence address with the police, and although this applied equally to men and women, there was a greater effort made toward enforcing the registration of men than women. Roll calls at police stations, whether daily or weekly, were designed to control the movements of men and locate men who had gone

²³ Criminal Tribes Act 1871 (Act 27 of 1871).

missing. Notified community members were required to live in physical settlements based on the labour provided by men within the community, who were required to do farm or factory work under colonial supervision.

The pattern that emerges through colonial records relating to the implementation of the CTA was that the activities and movements of men in the community were almost always the focus of these documents, while women only existed in relation to the men in their family. These women were only mentioned as the reproductive bodies of these communities and were noted based on whether or not they would produce future criminals that needed to be controlled. In other words, the notion of the woman being considered a criminal-tribe member as an agent of her own crime is very rarely, if at all, present in colonial records.

It is not simply out of practical necessity that the administration targeted the criminality of men. In fact, it is because the very ideology behind the criminality assumed crime to be an activity intrinsic to the maleness of the criminal tribe, that the administration focused on the males. Robbery needed brute force, itinerant criminality needed movement, and gang criminality needed organization. These three characteristics were seen as masculine strengths. The women of the criminal tribe could be accomplices in criminal activity, but only as assistants to male criminals, not principals.

3.6. Colonial Ethnography and the Creation of the Male Criminal Type

3.6.1. Crooke, Thurston, and the Racial Taxonomy of Criminality: An Ethnographic Perspective

The intellectual underpinning of the CTA's classification of criminal tribes rested on colonial ethnography, which was the scientific effort to classify, describe, and explain the racial and social traits of India's varied people. The two principal ethnographic works from the last decades of the nineteenth century, William Crooke's *The Tribes and Castes of the North-Western Provinces and Oudh* (1896)²⁴ and Edgar Thurston's *Castes and Tribes of Southern India* (1909)²⁵, gave considerable focus to communities classified as criminal tribes or those capable of being criminalized, and their depiction of such tribes highlights clearly the theoretical presuppositions of colonial criminal anthropology.

In the case of these texts, the adult males from criminal tribes are defined mainly in terms of physical characteristics as well as their criminal abilities — their physical strength, agility,

²⁴ William Crooke, *The Tribes and Castes of the North-Western Provinces and Oudh* (Office of the Superintendent of Government Printing 1896).

²⁵ Edgar Thurston, *Castes and Tribes of Southern India* (Government Press 1909).

weaponry, techniques, disguises, and tricks. Women who belong to these same communities are defined by their domestic organization, sexual behaviour, and reproductive activities. While the body of the man is the body of criminal activity, that of the woman is that of domestic duty. The bodies of both men and women in the given texts are never portrayed as victims since the body of the man is an aggressor and the body of the woman is involved in something different from criminal activity.

Equally illuminating is the representation of those communities where the speciality in crime was thought to be some sort of deception or fraud rather than actual bodily violence, communities who were classified as professional swindlers, forgers, and con men. In these instances, too, it remains the case that the gendered identity of the criminal agent is defined exclusively in terms of maleness. While women in such communities perform an essential function as camouflage and distraction, or keep house when the men are away, they do not assume any direct role as criminal minds

3.6.2. Anthropometry and Race Science: Measuring the Criminal Male

The practice of collecting ethnographic information about the criminal tribes was intimately connected with the developing field of physical anthropology, which relied heavily on the measurement of the human body. The practice of systematically measuring the cranial, facial, limb, and other bodily dimensions of members of the criminal-tribes carried out by agents of the colonial government and documented in ethnographic and police sources helped to establish the connection between the idea of the criminal capacity and the male body.

In anthropometric descriptions of the criminal tribes, the physical traits used as markers of criminal type – such as those used to identify a certain type of skull, facial angle, chest circumference, and muscular power – were traits found in the bodies of males. If females appeared in anthropometric descriptions at all, they were usually characterised in terms of physiological traits related to reproduction rather than criminal morphology. The implication was that criminality was embodied in males, not women, and was confirmed by biological facts.

3.6.3. The suppression of anti-colonial resistance: political threat as criminal heredity.

What is most clear now, after decades of historical research, is that the groups who have suffered most systematic and sustained repression by the CTA were not simply the groups which exhibited higher than normal crime rates under any objective measure but rather those whose lifestyles posed the greatest obstacles to colonial control and administration: nomadic groups who were hard to tax and difficult to monitor because of their mobility, groups which had resisted colonialism through anti-colonial insurrection, and groups whose traditional means

of subsistence – herding, forest-dwelling, traveling commerce – did not fit the paradigm of a colonial settlement economy.

Defining resistance against colonial rule as a matter of genetic predisposition to crime, rather than of politics, was more than just an exercise in ideology; it was an act of strategy. By criminalizing resistance, by categorizing the groups that resisted colonial economic and bureaucratic pressures as genetically criminal instead of politically oppositional, the colonial state managed to accomplish several things at once. They devalued resistance by taking it out of the realm of politics and putting it into the realm of pathology. They legitimized the use of more oppressive techniques of observation and incarceration by positioning them as a response to criminal behaviour. And they covered up the real reasons for conflict, by reducing the behaviours of those who were oppressed by the colonial system to genetics rather than context. Such strategies of criminalization were highly gendered. Resistance to colonialism, whether armed or non-armed, was conceived of as something that could only be done by males – carried out by the bodies of men, organized by their brains, and reflecting the male predilection for violence and chaos. Colonial administrators' responses to such resistance therefore had to involve targeting male bodies: arresting men, deporting them, subjecting them to surveillance, disrupting their networks of solidarity and organization, and settling them into compounds. Females who lived among these resisting communities were for the most part invisible within the machinery set up by colonial powers – not due to lack of involvement on their part, but because of the impossibility of the colonial imagination accommodating the idea of the politically conscious woman.

3.6.4. The epistemological consequence: male victimhood as conceptual impossibility.

The net result of these ideological currents as discussed in this section was that at the very core of colonial thinking regarding law and administration, the dichotomy emerged where the male body became the criminal actor while the female body became the possible victim. This dichotomy was never formulated by the colonizers as a conscious choice or a deliberation; rather, it formed the cornerstone of their thinking regarding criminal anthropology and was manifested physically through the measurements of ethnographic science and legally through the laws of CTA and IPC.

In this binary system, the experience of male victimhood did not just remain unnoticed; it was unimaginable. A body that has been categorically marked as an agent of criminal activity cannot at the same time be imagined as a victim of criminality. The same characteristics – the qualities which defined the male criminal body according to colonial ethnography – constituted an obstacle preventing the male body from being a victim of violence. Victimization is always

associated with weakness and passivity; qualities which, in colonial binaries, have been categorically defined as exclusively feminine.

This epistemological construction resulted in serious practical implications for men living in communities who had been victims of violence, exploitation, sexual assault, or dispossession perpetrated by the colonial state or social elites. For these individuals, the law did not provide a mechanism whereby they could declare themselves as victims. Rather, these men were assumed to be possible perpetrators of crime, rather than possible victims of crime. In situations where these individuals found themselves to have been violated, the reaction of the law was not to determine how they had been wronged, but what actions on their part had caused them to be wronged. This was not therefore, an omission in the colonial legal system. On the contrary, it was a structural feature of it, arising out of the necessity imposed by the very classifications that underlay this legal system. Male bodies had become classified as dangerous bodies and could not at the same time be considered innocent bodies. The very nature of the law had criminalised the male and made him impossible to classify as a victim.

3.7. Historical Roots of Gendered Justice

3.7.1. The Historical Record: Pre-Colonial and Comparative Perspectives

However, it is vital not to overlook the fact that such conceptions exist even before the advent of the British colonial era within the pre-existing law of India, as well as in legal traditions throughout antiquity and the Middle Ages, thus negating any attempt at suggesting that the paradigm of the male perpetrator was a colonial creation unique to British India. This was made evident through the Arthashastra of Kautilya, which is the ancient Indian state manual for governing, where sexual misconduct is described under assumptions of male aggression and female victimization, thereby mirroring the social and sexual beliefs present in the IPC.²⁶

The legal system of medieval Islam, which had considerable impact on the legal framework of the Mughal Empire that preceded the British colonial era in large parts of India, also recognized sexual violence through a lens where men committed acts of rape. The Hanafi school of law's handling of zina (forbidden sexual relations) and the burden of proof needed for prosecuting those who commit rape were reflective of the paradigm of sexual dominance on the part of men and passivity on the part of women, and the evidence rules made prosecuting rape nearly impossible.

Yet while these precedents from before the arrival of British rule in India cannot be used as

²⁶ Kautilya, *The Arthashastra* (LN Rangarajan ed and tr, Penguin Books 1992) bk III, ch 3.

justification for the extent to which male perpetrators were codified through colonial laws, they are nonetheless significant for how they frame our interpretation of events. The IPC certainly brought about changes within Indian law; however, it should be noted that the introduction of the perpetrator being a man into the Indian laws did not occur entirely out of nowhere. Rather, it is the case that there were various elements within previous Indian laws that informed what would later become a part of the IPC.

3.7.2. Post-Colonial Persistence: Why the Paradigm Survived Independence

The issue of why postcolonial India preserved and even strengthened the sexual structure of the IPC was an issue that could not be explained by mere lack of knowledge and/or administrative laziness. The makers of the constitutional order of India were highly knowledgeable and aware of the fact that the IPC was rooted in the colonial period and had a vision for transforming the law and justice system of India into something better than its colonial roots.

However, the gender binary of the IPC did exist. The reason for its existence is partly related to the legitimacy of the priorities that had emerged. Ensuring the protection of women against sexual crimes was an immediate necessity in the case of post-partition India; therefore, the maintenance and improvement of the laws regarding rape were seen as one of the most obvious ways of achieving this goal. At the same time, the survival of the gender binary is related to the internalisation of the Victorian discourse about the passivity of women and their need for state protection. The ideology underlying the commitment of the post-colonial state to protecting women remained the same.

The paradigm prevented one from recognizing the aspects of vulnerability on the part of men, women's involvement as perpetrators of violence, and structural elements of the problem – how poverty, caste hierarchies, police impunity, and institutional discrimination contributed to this picture of sexual violence. While the perpetrator-is-male paradigm was not felt to be an imposition by colonial powers that needed to be rejected, but rather something achieved through feminist struggle, in that misalignment of colonial ideology and feminist aspiration lied the most significant inheritance of the ideological foundation laid by the IPC.

Chapter 4: Males as victims- A Blindspot in BNS, 2023

When it comes to sexual offences the Bhartiya Nyaya Sanhita 2023 still operates on its foundational assumption that only a man can rape, and a woman can only be the victim of rape which finds its roots from the colonial era where a woman was considered weaker than a man. There were gender specified roles to be performed but with the changing scenario those

stereotypes are totally changed now women and men are considered equal in the society they both do the same work and there are no gender specific rolls to be performed but the Bhartiya Nyaya Sanhita 2023, even after being called reformative law still follows this generational old ideology which is deeply embedded in definitional structure of section 63 of BNS 2023 i.e. rape where not only a legal identity is given to the victim of being a female but also there is avoidance of the fact that a male can be a victim as well . Thus, males are given no safeguards. This section analyses the same in six ways:

4.1. Analysis of section 63: Structural Exclusion of Male Victims

Section 63 of the Bhartiya Nyay Sanhita states that rape as a sexual violation done by a man against a woman through penile penetration and manipulation of any part of the body of a woman or inserting any object in private parts of a woman or by applying mouth to any of those areas make her to do such as with him or any other person under circumstances of non-consent misrepresentation, undue influence and intoxication. The provision reads the act of rape from the lenses of male as a perpetrator and female as a victim. These genders are fixed by the statutory language itself. There are three implications of this.

- Rape is not only considered a non-consensual sexual violation but also has gender pacify to the roles of victim and the perpetrated that is of a woman and the man simultaneously. The provision ceases to apply even if there is a little deviation from the binary totally ignoring the gravity of the act committed.
- The male as perpetrator and female as victim is a deliberate retention of IPC. The criminal law amendment enacted in the aftermaths of the Nirbhaya case expanded the acts constituting rape but did not disturb the binary. The BNS 2023 which was a reformative law still held to that binary with no reforms but only an expansion of punishment provisions.
- This section totally ignores the fact that a man can face the same sexual violation by being forced to involve in a sexual act by a woman or can be harassed or sexually assaulted. The law does not protect males from such acts and even if done will not recognize them as victim because section 63 says that rape can only be committed by a man against a woman.

Men don't have any safeguards which is not just a gap in the law but a big hole which doesn't even try to protect its citizens rather violate their right to live with dignity and right to equality.

4.2. Societal Stigma

This binary is a result of a long grown societal narrative that a man is controller, actor and dominator in the society which reflects the societal belief that men are powerful and incapable of being overpowered in the same way as a woman can be. A male as a symbol of aggression and a vulnerability makes the idea of males being victims as baseless and hence, have also affected the legal framework. This ideology is harmful because:

- It ignores that a man can be a victim as well.
- Discourages male survivors from reporting assaults
- And somehow instils a perception that the man has failed at masculinity.
- It enforces them to bear that is a heinous crime when it comes to a woman.

Being physically powerful doesn't change the psychological trauma and sufferings of any sexual offence. It enforces the perspective that "the more powerful you are, the more burden you have to bear of injustice."

4.3. Ignored Scenarios

The following scenarios that are totally realistic fall outside the ambit of section 63.

- Non-consensual penetration by a man against a man.
- A man forced into sexual activity by a woman through threat, coercion and intoxication.
- A man sexually assaulted by a group regardless of the gender of the perpetrator.
- Taking consent of a man for any sexual act through a fake promise to marry, whereas, in the same scenario a woman is given protection.

If a man isn't in this heterosexual binary, he experiences a more powerful hit by the law because not only they are not recognised by the law but also the gender in which they lie isn't recognised as victims. Situations of the same may constitute:

- Gay man being sexually assaulted by another man.
- Bisexual man being sexually violated by a same sex person.

They have no protection because males are not considered as victims, moreover, their identities make that gap wider and wider which will be further discussed in chapter VI.

4.4. Alternate Remedies and their Inadequacies

The Indian law offers various alternative remedies rather than rape. Here we will demonstrate how all of them are inadequate:

4.4.1. Section 75 BNS - Sexual Harassment

Section 75²⁷ penalises unwelcome and explicit sexual overtures, sexual favours, showing pornography and making sexually coloured remarks. While this offence is gender neutral on the part of the victim, still the perpetrator is a man disregarding the fact that a woman can also ask a man for the same. Even on the part of being a man as the victim, the punishment for this offence only extends to 3 years which is totally disproportionate to the gravity of what a male victim may have suffered. A man suffering forceful penetration is offered the same remedy as someone who is involved in just unwelcomed remarks.

4.4.2. Section 115 and 116 BNS - Hurt and Grievous Hurt

Section 115 and 116²⁸ address the crime that arises from infliction of intention injury by the offender on the victim. It covers bodily injuries mostly related to limbs and joints, but section 116 also includes emasculation in the ambit of grievous hurt. However, emasculation is also an injury to a male's reproductive organ which may be an outcome of sexual assault but still doesn't address the psychological trauma, violation of dignity and bodily autonomy, a person suffers after rape. Rape being prosecuted under hurt provisions itself ignores the gravity of the situation. Moreover, the punishment is only for the result of the sexual assault not for the sexual assault itself.

4.4.3. POCSO Act, 2012

The Prevention of Children from Sexual Offences Act, 2012²⁹ provides gender neutral protection from penetrative sexual assault but it only protects a male below 18 years of age and as soon as he turns 18 that protection is taken away while for females, concept of consent is there, if no consent then it is rape. However, the law doesn't consider "consent" of males as important and their protection is taken away the very next day, they turn 18.

4.4.4. IT ACT 2000 - section 66E and 67A

These sections are also gender - neutral but provide protection only against non-consensual publication of private images or explicit sexual content of any person, digitally. These provisions do provide protection but only for digital sexual offences and not for sexual violation physically and can't be taken as a substitute for rape.³⁰

All these provisions do provide protection in one or the other sense but none of these provide protection to male victims against the sexual violation, violation of dignity, psychological trauma caused due to such an act. Moreover, these provisions don't provide any such

²⁷ BNS, s 75 (sexual harassment: maximum punishment 3 years).

²⁸ BNS, ss 115, 116 (hurt and grievous hurt).

²⁹ POCSO 2012, ss 3-5 (gender-neutral penetrative sexual assault protection for persons under 18).

³⁰ IT Act 2000, ss 66E (violation of privacy), 67A (publishing sexually explicit material).

punishment which understands the gravity of the act as it is provided under section 63 and 64. Males do not get the same recognition and justice for such an act which is considered heinous for females with punishment extended up to death.

4.5. Violation of Constitution

Protection of females under section 63 selectively, violates the constitutionally guaranteed fundamental rights of male victims.

4.5.1. Article 14 - Right to Equality

Article 14 of the Constitution of India provides for equality before law or the equal protection of the laws within the territories of Indian states. It prohibits any kind of discrimination and discrimination here refers to treating anyone less favourably over others in the same situation.³¹ Men, here, are not only discriminated but also are not given equal protection of laws. They have no provisions in their favour if they face any sexually violative act. The Honourable Supreme Court of India has timely held that if there is any different treatment being given, it shall have satisfied two tests: First, the classification should be done on intelligible differentia and second, that differentia must have a rational nexus to the object of the legislation. The object of the legislation here is protection from non-consensual sexual assault, preserve bodily integrity and punish those who violate it. The classification done only protects female victims, but it is nowhere impossible for a man to suffer the same and thus, this has no rational nexus to this object. This classification fails the rational nexus test and results in the classification being not justifiable.

4.5.2. Article 21 - Right to Bodily Integrity and Sexual Dignity

The Supreme Court in *K.S. Puttaswamy v. Union of India*, 2017 held that bodily autonomy and privacy are fundamental rights under article 21 to everyone regardless of their gender, caste or creed. Bodily autonomy, here, means protection from physical intrusion and having control over one's own body.³² The state has the obligation to protect those fundamental rights while it only gives protection to female victims if their bodily autonomy is violated and if the same happens to a man, it will only be treated with general assault provisions which is a failure of constitutional obligation.

4.5.3. Article 15(1) - Prohibition of Discrimination on the Grounds of Sex

Article 15(1) states that there should not be any discrimination of citizens on the grounds of sex. While Article 15(1) permits the state to make special provisions for women and children,

³¹ Constitution of India, art 14.

³² Constitution of India, art 21.

it doesn't mean that the state should deny basic protection to men as well³³. Sexual violation is not something to make special provisions for because it is something that happens frequently in society and to everyone as well. The state can give extra protection to females and children but can't deny protection to males. Here, the men are being totally excluded from the ambit of section 63. Special provisions never defend exclusion rather they motivate and mandate extra protection of certain groups.

4.6. Case Laws

There is a lack of direct sexual abuse case laws because of the legislative failure and rigid societal stereotypes but that doesn't mean males are never the victim. When law can't protect them and the society may question their masculinity, male victims choose silence. The following case laws represent the engagement of Indian judicial system with male sexual abuse and their inadequacies.

4.6.1. Fazal Rab Choudhary v. State of Bihar (1983)

This is earliest instance of judicial system recognising non-consensual sexual acts under Section 377 of IPC. The court upheld conviction under section 377 for non-consensual sexual assault against male victims. But its framing constituted it as “unnatural offence” which viewed it through the lens that it is an offence which is done against the rules of nature against males, females or any animal. They viewed it as something against the morality and hence must be punished. This has two implications to it; Firstly, unlike rape, it does not consider the bodily integrity, psychological harm caused and sexual violation as injury of dignity as but only as something that is morally wrong. Secondly, it only considers unnatural offences where there is same sex sexual abuse or sexual assault against animals not offences which may happen in the natural course of connections like a man and a woman, where a woman could have been a perpetrator.³⁴

4.6.2. K.S. Puttaswamy v. Union of India (2017)

The court in this case upheld that privacy and bodily autonomy are fundamental rights under Article 21 belonging to every citizen without any discrimination and the state has positive obligation to protect that right but the legislative provisions only protecting female victims while sidelining male victims showcases not only a policy failure but a major constitutional breach.³⁵

³³ Constitution of India, art 15(1).

³⁴ Fazal Rab Choudhary v State of Bihar (1983) 3 SCC 9.

³⁵ Puttaswamy (n 4), [127] per Chandrachud J: "Bodily integrity is part of the right to privacy... no person may be deprived of it."

4.6.3. State of Punjab v. Gurmit Singh (1996)

In this case, court said rape strikes at the most crucial aspect of a woman's dignity and the law must give them maximum protection to these rape victims. Since, dignity is the core interest of rape protection laws and it universal to all under article 21, dignity of males should also be respected. Rape strikes the most crucial aspect of women's dignity, as per the court and it also does the same in males. The state has to protect it but it only protects bodily autonomy and dignity of females disregarding the males in this ambit in its entirety. The judgement when read with K.S. Puttaswamy v Union of India and Article 21, advocates for male victim protection itself.

4.7. From IPC to BNS - What changed?

BNS was introduced as a reformative law brought up to change colonial laws and bring news laws to keep up with contemporary world and new societal changes. The transition from IPC to BNS wasn't direct but also contained the Criminal Law Amendment Act, 2013. However, only the name of the statute changed while the architecture remained the same in context of male sexual abuse protection. The minor protection that was given through section 377 of IPC was also repealed, snatching away the very little protection they had. The Indian Penal Code, 1860 which was brought under colonial rule and was raised from the stereotype of women as weak and men as dominant in the society because of which the definition of rape was also affected and set in the binary of male as perpetrator and female as victim rather than protection of anyone who is sexually abused. The definition of rape under IPC section 375 refers to a sexual act done by a man against a woman under situation of non-consent, coercion, fraud or misrepresentation. Male victimhood did exist, but the legislative provisions didn't extend to it because of societal stigmas. The opportunity to reform this provision and widen its architectural base came with the Criminal Law Amendment Act 2013, that came in the aftermath of the Nirbhaya gang rape case. The Justice Verma Committee was set up to research and recommend reforms who later came up with a progressive and expansive report which notably included rape provisions to be gender neutral because sexual abuse is not exclusively against women but can be against anyone. However, The Parliament decided to expand only the acts constituting rape under IPC section 375 while retaining the gender binary and ignoring the gender-neutral rape protection provision's recommendations. It did bring a partial reform by expanding the ambit of rape but kept intact the gender architectural base. Secondly, came BNS as a reformative law in 2023 which has the benefit of the Verma Committee and judicial proceedings from K.S. Puttaswamy and Navtej Singh Johar case but still failed its potential, in

its entirety, to bring a much-needed reform. The section 63 of BNS which replaced section 375 of IPC retained gender binary word by word. Thus, the second opportunity was wasted as well. BNS 2023 is not merely a failed attempt to bring reforms but also a regression of what little protection existed. Section 377 of IPC did give protection, even if in an improper manner, to non-consensual same sex sexual abuse victims after Navtej Singh Johar case which too was taken away. This regression made the position of male adult victims worse than what it was in IPC. This regression is constitutionally significant as it reduced the protection available to a class of victims in the name of reform and modernization. BNS 2023, specifically, in the context of male sexual abuse victims' protection did not just fail to reform but moved more backward. IPC section 377 still worked as an accidental protection which was removed in BNS 2023. The only conclusion of this trajectory is the intentional avoidance regarding male sexual assault victims in the legal framework as it was not only ignored from the Justice Verma committee's recommendation report but the little accidental protection present in IPC 1860 was too removed in the name of reform.

4.8. Provisions for Male Victims in Other Countries: A Comparative Analysis

4.8.1. United Kingdom - Sexual Offences Act, 2003

United Kingdom provides protection of male sexual assault victims through the Sexual Offences Act, 2003 in which section 1, rape states that any person with a penis can commit rape through penial penetration in vagina, anus and mouth of any person³⁶ which makes the victim gender neutral while there are other provisions as well including section 2 (Assault by Non- penile Penetration) and section 3 (Sexual Assault) which provide protection to males even if the perpetrator is a female³⁷. These provisions take the trauma and violation of bodily autonomy suffered by the victim into account and thus provide rape - equivalent punishments.

4.8.2. South Africa - Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

South Africa protects the rights and dignity of males with gender neutral provisions which include section 3, rape which is defined as unlawful intentional sexual penetration of any person regardless of their gender³⁸ and Section 5, sexual assault which covers any intentional sexual violation or touching without consent³⁹. These provisions don't follow any gender binary

³⁶ SOA 2003 (n 13), s 1 (rape by penile penetration of vagina, anus or mouth of "another person").

³⁷ SOA 2003 (n 13), ss 2-3 (assault by penetration and sexual assault: gender neutral as to both perpetrator and victim).

³⁸ SORMA 2007 (n 14), s 3 (rape defined as sexual penetration of "a complainant" by "any person").

³⁹ SORMA 2007 (n 14), s 5 (sexual assault: gender-neutral).

and believe that a perpetrator and a victim both can be of any gender.

4.8.3. Canada

Unlike other countries, Canada removed the term 'rape' from the Criminal Code of Canada in 1985 and replaced it with sexual assault which is categorised into three categories varying based on their severity ranging from unwanted touch to aggravated sexual assault. Sexual assault uses the word 'person' which refers to any person regardless of their gender. The Criminal Code of Canada focuses on the aspect of non-consensual nature of the act rather than the gender of the victim.⁴⁰

4.8.4. India's Standing

While the above mentioned countries have reformed their traditional gender biased approaches towards sexual violation and have moved towards uplifting the dignity of their citizens, India is still following the specific gender binary of males as perpetrators and females as victims and instead of moving ahead, they moved backwards in the mask of reforms by removing the only improper protection Section 377 of IPC in BNS 2023. The current approach of India is not violative of rights and constitution but is also globally backward.

Chapter 5: The Invisible Aggressor: Female Perpetration

5.1. The Statutory Silence Mapping Female Perpetration in BNS,2023

5.1.1. The BNS as a missed opportunity: Continuity not reform

An analysis of the BNS provisions regarding sexual offenses demonstrates that, in its most crucial aspect, such a transformation claim is untenable. Not only did the BNS reproduce the gender framework of the IPC, but it did so without any significant amendment. Section 63 of the BNS, which acts as the defining provision for rape in place of Section 375 of the IPC, characterizes the offense as an act performed by 'a man' against 'a woman.' The wording of the provision is unequivocally gender-specific; its subject is exclusively male, and its object exclusively female. The BNS does not provide any equivalent or analogous provision regarding sexual assault performed by a woman against a man, woman, or non-binary individual.

This lack of inclusion of female perpetrators in Section 63⁴¹ is not compensated elsewhere in the BNS. The sexual assault of a person in authority, as provided under Section 68, BNS (which is equivalent to Section 376C of IPC)⁴², has a male perpetrator. Stalking (Section 78)⁴³ and

⁴⁰ Criminal Code RSC 1985 (n 15), s 271 ("every person who commits a sexual assault").

⁴¹ Bharatiya Nyaya Sanhita 2023, s 63.

⁴² Indian Penal Code 1860 (Act 45 of 1860), s 375.

⁴³ Bharatiya Nyaya Sanhita 2023, s 77 (voyeurism).

voyeurism (Section 77)⁴⁴ are gender-neutral offences in their language; however, they have been interpreted judicially as well as drafted with an understanding that they are committed by men against women. The 'outraging of the modesty of a woman', as defined in Section 74, is a gendered offence by default.⁴⁵

The provision in IPC which criminalized carnal intercourse against the order of nature with either a man, woman, or animal was Section 377, which was most gender neutral. In *Navtej Singh Johar v. Union of India*, the Supreme Court made it legal for two consenting adults to have intercourse regardless of their sexuality.⁴⁶ The BNS did not include Section 377 of the IPC in its provision. The result has been the creation of a legal vacuum since non-consensual sexual activities, which do not qualify as rape under Section 63, are not defined anywhere in the BNS.

5.1.2. The Definitional Consequence: What falls outside Section 63

The gendered definition of rape under Section 63 creates a series of categories of sexual offences which are effectively invisible in the eyes of the law, not because they do not exist, but simply because the construction of the rape offence precludes their existence. Such categories include penetration of a man by a woman with an object, or the coerced penetration of a woman by a man; sexual coercion of a man by a woman through intimidation or threats; sexual abuse of a boy by a woman; and sexual abuse of a woman by another woman.

The first of this coerced penile penetration, known in comparative law literature as 'rape by envelopment', or 'made to penetrate' is arguably the most important category from a doctrinal perspective.⁴⁷ The use of force, or threat of force, or any other form of compulsion (such as the administration of drugs), for the purpose of coercing a woman into having sexual intercourse with a man constitutes no offence under Section 63, as it is a male-centric section. The accused might face charges such as wrongful confinement, assault, or even administering drugs to the woman in question, but she will never face the charge of rape.

The above-discussed doctrinal deficit is not just an academic issue. There have been instances where women used force, deceit, or even drugs to force men into having sex with them, and these cases have appeared in Indian courts and scholarly literature dealing with sexual offences.

⁴⁴ Bharatiya Nyaya Sanhita 2023, s 78 (stalking).

⁴⁵ Bharatiya Nyaya Sanhita 2023, s 74

⁴⁶ Indian Penal Code 1860 (Act 45 of 1860), s 377 (repealed by Bharatiya Nyaya Sanhita 2023 without replacement). *Navtej Singh Johar v Union of India* (2018) 10 SCC 1, [383] per Chandrachud J (reading down s 377 to exclude consensual same-sex acts between adults; non-consensual acts remained criminal).

⁴⁷ Matthew J Breiding and others, 'Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization — National Intimate Partner and Sexual Violence Survey, United States, 2011' (2014) 63 *Morbidity and Mortality Weekly Report* 1, 18.

It is due to the gender-biased provisions of Sections 63 and 375 of the IPC that the courts cannot label this act as rape.

5.2. Why Women are not considered perpetrators: A multidimensional analysis

5.2.1. The Ideological Foundation: Chastity, Passivity and the Impossibility of female sexual agency

The core of the issue of why the female perpetrator is legally invisible can be found in the ideological construction of femininity that has been analysed in the previous sections of this thesis. The Victorian 'cult of domesticity,' which defined femininity through sexual passivity and purity, made it impossible to think of women as sexually active agents of violence within the legal tradition that created the Indian Penal Code⁴⁸, and which the BNS has unfortunately preserved until today.

The ideology of femininity functioned on two planes simultaneously. Descriptively, it argued that women simply cannot have an active or aggressive sexuality, as is inherent to masculinity.⁴⁹ Normatively, it claimed that women should approach sex only as a recipient and guardian of virtue, never as a pursuer. As a result, since women were supposed to be sexually passive, any evidence of sexual aggression on the part of women could only be explained through pathology, deviation, or manipulation by men.

For criminal law, however, it meant that the idea of female sexual agency, especially violent female sexual agency, became one which was not necessarily defined in law. A crime had to have an agent, and sexual agency was a quality which belonged to men alone. This was not stipulated legislatively but taken for granted as a natural phenomenon. And since it was taken for granted as such, it was not questioned, argued over, or modified at any point during the legislative history of the Indian Penal Code's sexual crimes.⁵⁰

5.2.2. The socio-legal construction of female incapacity: Myth, Stereotype and judicial reinforcement

5.2.2.1. The Myth of physical incapacity

Perhaps the most common defence of the gendered notion of rape is that it is simply physiologically impossible for a woman to engage in sexual acts with a man, as the act of sexual penetration requires a penis and can thus occur only when committed by a male

⁴⁸ Indian Penal Code 1860 (IPC 1860), s 375.

⁴⁹ William Acton, *Functions and Disorders of the Reproductive Organs* (John Churchill 1857).

⁵⁰ IPC 1860, s 375 (legislative history from 1860 to Criminal Law (Amendment) Act 2013, retaining the male-perpetrator/female-victim binary throughout).

perpetrator against a female victim.⁵¹ Although such an argument has frequently been put forward by legislators, jurists, and legal scholars in India and elsewhere as a defence of male-only definitions of rape, it is false on more than one count.

The primary problem with this assertion is the presupposition that sexual intercourse between a rapist and his victim must involve penile-vaginal penetration. Contemporary understanding of what constitutes rape not only includes penetrative sexual acts performed on unwilling victims with objects but also those in which other parts of the body are used.⁵² A woman, therefore, has no problem in raping a man as she is equally physically able to commit rape using any or all the above methods of sexual penetration.

5.2.2.2. The Myth of psychological incapacity

The second and more nuanced version of the argument based on female incapacity refers to psychological rather than physical inability. According to this argument, women, due to their inherent nature or socialisation, are not capable of being sufficiently aggressive, predatory, or sexually driven enough to commit rape. The rarity of reported cases of sexual assaults committed by women, when compared to those committed by men, becomes a piece of evidence backing up this theory.

However, this type of reasoning appears to be circular in nature and is yet to be properly disclosed by the legal discourse. The rarity of reported female rape cases cannot be used as an independent fact proving that rapes committed by women are rare as this fact becomes possible due to the same mechanisms making female rape unreported.⁵³ When law considers female-perpetrated acts sexual assault, they become unreportable, as they cannot legally constitute rape. As for the male victims of such rapes, they will be even less likely to report their trauma because of their assumption that no rape can happen to them and because they cannot use the term "rape" as they are not its proper subjects.

Further, the psychological justification makes use of empirical arguments regarding women's psychology that are not supported by existing data. Specifically, cross-cultural studies of sexual assault, including those carried out by means of the US NISVS large surveys and the comparative literature on sexual offending, demonstrate the presence of a considerable proportion of cases of sexually violent acts performed by women, which are not recorded as

⁵¹ This argument is critiqued in the Law Commission of England and Wales, *Setting the Boundaries: Reforming the Law on Sex Offences* (Home Office 2000) [3.5.2]– [3.5.4], which led to the gender-neutral victim provisions of the Sexual Offences Act 2003 (England and Wales), ss 1–3.

⁵² BNS 2023, s 63 (defining rape to include penetration by 'any object or a part of the body' and application of mouth, thereby extending beyond penile-vaginal penetration).

⁵³ BNS 2023, s 63; National Crime Records Bureau (India), *Crime in India* (Ministry of Home Affairs, annual) (statistical undercount produced by legal definition).

such because of the way they are defined legally for statistical purposes.⁵⁴

5.2.2.3. The maternal exception and the child sexual abuse context

The significance of women's invisibility as perpetrators is none greater, and none more empirically disputed, than in relation to child sexual abuse. The entrenched stereotype in society about women and sexual abuse of children is that, unlike men, they are not sexually abusive towards children because they have a protective instinct rather than being exploitative toward their children.

This assumption about women and their relationship with children as sexually non-abusive has been challenged by empirical studies on child sexual abuse. Empirical studies on child sexual abuse show that there are many instances when female perpetrators commit sexual violence against children. While the range of percentages provided in the literature is quite wide, between 5% and 25%, where female perpetrators have been identified as committing sexual abuse of children, the percentage rises when studies employ broader definitions of sexual abuse as well as methods where women can be interviewed anonymously. The Protection of Children from Sexual Offences Act, 2012 (POCSO) is one such example that recognizes the gender capacity of women for committing child sexual abuse.⁵⁵ However, the Indian Penal Code (IPC) and the proposed Bill on Naturalization and Sexual Offences Against Adult Victims do not recognize that possibility.

5.2.3. The judicial culture: How courts have reinforced the paradigm

The judiciary cannot be said to have been a passive recipient of the gender binary constructed within legislation. Rather, it has actively produced and further entrenched the belief that acts of sexual violence by women hold no legal consequence in its various decisions that led to the evolution of sexual offences law in India.

One such decision involves the persistent interpretation of the 'consent' conditions in the legal definition of rape. For instance, the judicial test of consent in rape as contained in Sections 375 of the IPC and now 63 of the BNS have been developed throughout decades of case laws based on a background of male perpetrator and female victim. In other words, what are the questions being asked by the court? Did the woman consent? Was the consent free? Was she able to give consent? Such questions simply cannot apply where the woman is the perpetrator of sexual coercion, and the man is being examined for his consent.

⁵⁴ Matthew J Breiding and others, 'Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization — National Intimate Partner and Sexual Violence Survey, United States, 2011' (2014) 63 *Morbidity & Mortality Weekly Report* 1.

⁵⁵ Protection of Children from Sexual Offences Act 2012 (POCSO 2012), s 3 (penetrative sexual assault — gender-neutral as to both perpetrator and victim).

It produces a culture within the judiciary wherein the very existence of female sexual aggression goes unacknowledged. Legal cases where male individuals have attempted to classify their own experiences of non-consensual sex acts committed against them by women as sexual violations have either received judicial rejection or, worse yet, have had the acts themselves reclassified as being entirely consensual. The opposition that the courts offer does not arise necessarily from the idea of female sexual perpetration itself but from other sources within the legal system.

5.3. Comparative Jurisprudence: How other Jurisdictions have addressed female perpetration

5.3.1. England and Wales

However, the most substantial piece of legislation that addresses the issue of female perpetrators in the common law system is the Sexual Offences Act 2003 (SOA 2003) of England and Wales.⁵⁶ The SOA 2003 superseded the Sexual Offences Act 1956,⁵⁷ whose definition of rape as an offense committed by men persisted from the common law definition. The process of drafting the Sexual Offense Bill 2003 by the Law Commission had addressed itself thoroughly to the issue of female perpetrators and concluded that such legislation was necessary.

The SOA 2003 Section 1 defines rape as “the penetration of the vagina, anus or mouth of another person with the penis of the perpetrator without their consent.” Although the definition is limited to penile penetration, it is gender-neutral with respect to the victim because a man may be a victim of rape.⁵⁸ The SOA 2003 Sections 2 and 3 establish ‘assault by penetration’ and ‘sexual assault,’⁵⁹ respectively, for instances of sexual assault where there was no penile penetration. Both the sections are gender-neutral with respect to both the perpetrator and the victim, thus allowing for prosecution of a woman on charges of assault by penetration or sexual assault and the rape of a man via gender-neutral law on forced use of his penis.

5.3.2. South Africa

The Sexual Offences and Related Matters Amendment Act of South Africa, 2007 (SORMA) provides one of the most comprehensive gender-neutral definitions of rape offenses in the

⁵⁶ Sexual Offences Act 2003 (England and Wales) (SOA 2003).

⁵⁷ Sexual Offences Act 1956 (England and Wales), s 1 (defining rape as an act committed by a man).

⁵⁸ SOA 2003, s 1.

⁵⁹ *ibid* (s 2 covering assault by penetration with any part of the body or anything else; s 3 covering any intentional sexual touching — both gender-neutral as to perpetrator and victim).

world.⁶⁰ In Section 8 of SORMA it is given that 'rape means any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B.' Rape as defined by the provision above refers to an offence committed by 'any person' on another 'any person.' In other words, rape is a completely gender-neutral offense under the provision, and therefore women can be perpetrators of rape offenses.

SORMA resulted from a consultation by the Law Reform Commission of South Africa that clearly took into consideration the constitution of the country and the evidence of female involvement in sexual acts of rape.⁶¹ According to the findings of the report, it was evident that the gendered definition of rape was contrary to the constitution of the country.

5.3.3. Canada

The Canadian law concerning criminal acts, via several reforms leading up to its present-day Criminal Code, R.S.C. 1985, c. C-46, has always had a gender-neutral outlook on sexual offences.⁶² Sexual Assault in Section 271 of the Criminal Code concerns an act committed by 'any person' against 'another person.'⁶³ The Canadian Supreme Court has repeatedly stated in several rulings that the gender-neutral concept of sexual assault is necessary both legally and factually. In the case of *R v. Ewanchuk* (1999) 1 SCR 330. The accused, who was a man, contended that there was 'implied consent' to sexually touch the victim. The Court ruled that there was no such thing as implied consent to sexual acts within the realm of Canada's criminal laws. The Court also developed an approach to sexual consent which is, from its nature, gender neutral⁶⁴; i.e., an approach applicable to sexual assaults committed by any person against any other person. Although the facts of the case related to a man committing the offence, the approach set out in *Ewanchuk* regarding the concept of consent to sexual activity and the implied consent myth is also applicable to females in the context of the gender-neutral regime in Canada.

5.3.4. The United States

The United States is even more complicated when it comes to comparison. FBI's updated definition of rape, which took effect in 2012, is a gender-neutral one: it considers rape as 'any physical penetration of the vaginal or anal opening, regardless of how minimal, with any body

⁶⁰ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (South Africa) (SORMA).

⁶¹ South African Law Reform Commission, *Sexual Offences: Adult Prostitution* (Issue Paper 19, Project 107, 2002); South African Law Reform Commission, *Project 107: Sexual Offences* (Discussion Paper 85, 1999).

⁶² Criminal Code RSC 1985 c C-46 (Canada). The term 'rape' was removed from the Criminal Code and replaced with gender-neutral sexual assault provisions by the Criminal Law Amendment Act SC 1972 c 13 and further reformed by Bill C-127, An Act to Amend the Criminal Code in Relation to Sexual Offences SC 1980-81-82-83 c 125.

⁶³ Criminal Code RSC 1985, s 271.

⁶⁴ *R v Ewanchuk* [1999] 1 SCR 330 (Supreme Court of Canada).

parts, or by objects, or oral sex with the sex organ of an individual, without the consent of the victim.⁶⁵ This definition acknowledges women as offenders and men as victims. But criminal laws at the state level in the United States differ greatly. A few states still have male-specific definitions of rape or sexual assault; thus, they form the patchwork of legal provisions which, at the sub-national level, reflect the loopholes in Indian laws. There has been a lot of scholarly and activist discussion in the US on the concept of 'made to penetrate' which is a case of female offender forcing the male victim to have penile-vaginal intercourse and have determined that this is a scenario not properly handled by those jurisdictions which still have penetration- and gender-specific rape definitions.

5.4. Empirical Dimensions

5.4.1. The Measurement problem: Why official statistics undercount female perpetration

An empirical evaluation of the incidence of sexual violence perpetrated by women begins with an important methodological point: data on the number of sexual violence offenses based on registered complaints and convictions cannot capture the real incidence of sexual violence.⁶⁶ If female perpetrators cannot be defined as rapists according to the law, such as the BNS, the male victim of female sexual violence will be unable to file complaints for rape. The cases will not be classified as rapes in any data. The claim, often put forward during legislative discussions, that gender neutrality is unneeded because female sexual violence is rare statistically, is thus a circular argument.

This caveat in methodology has been taken into consideration by the National Crime Records Bureau (NCRB), which publishes annual reports titled Crime in India, in which it is mentioned that figures of sexual crimes only include registered complaints and cannot be considered reliable indicators of actual cases of such crime.⁶⁷ NCRB data regarding sexual abuse faced by men is virtually non-existent when it comes to rape statistics because of how rape has been defined.

⁶⁵ Federal Bureau of Investigation (US), *Uniform Crime Reporting: Revised Rape Definition* (2012) (expanding the definition beyond the 1927 'carnal knowledge' definition to include all genders as victims and perpetrators).

⁶⁶ Lara Stemple and Ilan Meyer, 'The Sexual Victimization of Men in America: New Data Challenge Old Assumptions' (2014) 104 *American Journal of Public Health* e19, e20 (discussing methodological limitations of official crime statistics in capturing male victimisation and female perpetration).

⁶⁷ National Crime Records Bureau (India), *Crime in India* (Ministry of Home Affairs, annual) (NCRB Report) (standard methodological caveat reproduced in each annual edition that figures represent registered complaints only).

5.4.2. Self-Report Surveys and Clinical Evidence

The best source for information regarding women as perpetrators of sexual violence is research involving self-report studies where participants provide information on non-consensual sexual interactions without having it framed by legal terms.⁶⁸ In India, research conducted using this method, such as self-reporting surveys conducted among male victims of sexual violence by NGOs and clinical reports from psycho-sexual professionals, shows that there are a considerable number of men who have experienced non-consensual sexual acts committed by women.⁶⁹

International survey data based on self-reports is an interesting benchmark for comparison purposes. The US National Intimate Partner and Sexual Violence Survey (NISVS, 2011) reports that 1.1% of men in the US population had been "made to penetrate" someone else at least once in their life – which amounts to around 1.3 million men in the US. An additional 0.7% of American men have been subjected to completed or attempted rape in their lives.⁷⁰ Similar studies conducted in the UK, Australia, and Canada have arrived at very comparable results. Even after making considerable allowances for the differences between cultural and societal settings in India and the developed countries, the application of those ratios to the Indian male population would indicate that hundreds of thousands of men have been victims of sexual violence perpetrated by women in India.

5.4.3. The Marital and Intimate Partner Context

Another aspect of sexual violence perpetrated by women that is almost completely ignored in Indian legal scholarship concerns the marital and intimate-partner setting. Under the BNS, in Section 63 Exception 2, the marital rape exception remains – sexual intercourse between husband and wife (where the wife is not less than 18 years of age) is exempted from being treated as rape.⁷¹ This exception has been extensively criticized by scholars and activists, but the critique has only centred on the need for wives to be protected from rape by their husbands. The issue of sexual coercion by wives against husbands, or sexual coercion by women intimate partners against their male partners, has not even been considered in this debate.

⁶⁸ Callie Marie Rennison, 'Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992–2000' (Bureau of Justice Statistics, US Department of Justice 2002) NCJ 194530, 1 (establishing that self-report methodologies capture significantly higher rates of sexual victimisation than official complaint-based data).

⁶⁹ See generally iCall (Tata Institute of Social Sciences), *Men's Experience of Sexual Violence* (iCall 2019) (Indian NGO report documenting male victimisation through self-report methodology); see also Purnima Mane and Peter Aggleton, 'Gender and HIV/AIDS: What Do Men Have to Do with It?' (2001) 12 *Current Sociology* 23 (discussing underreporting by male victims in South Asian contexts).

⁷⁰ Matthew J Breiding and others, 'Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization — National Intimate Partner and Sexual Violence Survey, United States, 2011' (2014) 63 *Morbidity & Mortality Weekly Report* 1, 4–5 (US NISVS 2011).

⁷¹ BNS 2023, s 63, Exception 2.

Such an omission stems from the ideological assumption discussed earlier in this chapter – that sexual coercion in intimate relationships can only come from men towards women. Clinical research on intimate partner violence does not conform to this assumption. Research on sexual coercion in intimate relationships has found that sexual coercion by women against their male partners is a common occurrence, but underreported due to the sharp contradiction with social expectations regarding gender and sexual coercion within relationships.

5.5. The Constitutional Arguments for reform: Equality, Dignity and the limits of Protective Discrimination

5.5.1. Article 14 and the Equality Guarantee

The best constitutional rationale for making changes in the sexual offence section of the BNS in a gender-neutral way lies in Article 14 of the Constitution of India, which promises equality before law and equal protection of laws to all individuals.⁷² In its consistent interpretation, the Supreme Court has made it clear that under Article 14, legislative classifications must have a reasonable nexus with the objective of the statute and should be based on intelligible differentia.⁷³

The gender-based classification of the offence of rape in Section 63 of the BNS is based on gender for purposes of defining who can commit rape and who can suffer rape as the victim of rape.⁷⁴ Under Article 14, the relevant issue in such a case would be if there is any reasonable nexus between the gender-based classification and the objective of protecting the public against sexual violation. There is no doubt, from an objective point of view, that there is no such nexus between the classification and the objective of the law as sexual violation is not less severe or painful when suffered by a man or committed by a woman.

5.5.2. Article 21 and the Right to Sexual Autonomy

The affirmation of a right to sexual autonomy under Article 21 of the Constitution in a series of cases starting from *Puttaswamy v. Union of India* (2017) and reaching upto *Navtej Singh Johar v. Union of India* (2018), is another layer of constitutional justification that supports the reforms toward gender neutral criminal law statutes. Since it is established that every citizen has a right to bodily integrity, privacy in relation to their own body, their sexual relationships and their sexual life and intercourse-as guaranteed in Article 21-they consequently must have

⁷² Constitution of India 1950, art 14.

⁷³ *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75 [26] (first articulating the two-pronged test of intelligible differentia and rational nexus under art 14); *Ram Krishna Dalmia v Justice SR Tendolkar* AIR 1958 SC 538 [11]– [14] (consolidating the test).

⁷⁴ *Bharatiya Nyaya Sanhita 2023* (BNS 2023), s 63.

a fundamental right to get those rights violated in such a manner that violation of the right gets recognised by criminal law and compensated. A system of law that allows right to sexual autonomy of women against men perpetrators but not the right to sexual autonomy of males against women perpetrators is discriminatory. In *KS Puttaswamy v. Union of India*,⁷⁵ a nine-judge constitutional bench of Supreme Court was approached to resolve whether any part of the Indian Constitution carries within its fold a right to privacy or not. The bench, unanimously held that right to privacy is a fundamental right under Article 21 of the Constitution of India and the right to privacy, also subsumes within it right to bodily integrity, autonomy and the freedom to make intimate choices regarding one's own life and one's own body, the lives and bodies of other persons related to them etc. Therefore, an argument asserting the existence of a fundamental right to bodily integrity and sexual autonomy has been provided a constitutional foundation in *Puttaswamy*. In terms of criminal law, this means any act which violates bodily integrity must be recognized as an offense, regardless of the perpetrator and the victim. The gender specific definition of rape in Section 63 BNS appears to be against this fundamental right to bodily integrity as enshrined in *Puttaswamy*. In *Joseph Shine v. Union of India* (2019).⁷⁶ The Constitutional bench of the court was approached to answer whether Section 497 IPC which criminalises adultery if committed by a man with a married woman without her husband's consent, while does not criminalize if committed by a woman is constitutional or not. In landmark judgment of the court it was held that Section 497 IPC has been declared unconstitutional on the grounds that the provision regards women as property of men and hence does not concede them legal subjectivity and the court reiterated that, "It is clear that any provision that does not recognize the same subjective approach to offenses, one with criminal liability while absolving the other with not even civil liability cannot stand constitutional scrutiny" and it was decided that criminal law can't be applied in a gender specific manner if the damage itself is gender neutral. *Joseph Shine* appears to be the relevant precedent as far as criminal offenses related to sex are concerned in relation to gender neutrality. The ratio decided by the court on the fact that criminal provision can't preserve criminal responsibility to only one sex in case of non-gender specific damage is applicable to Section 63 BNS.

⁷⁵ *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1 (*Puttaswamy*).

⁷⁶ *Joseph Shine v Union of India* (2019) 3 SCC 39 (*Joseph Shine*).

Chapter 6: Selective Protection

The basis of any criminal statute in a constitutional democracy is to provide protection to the people based on the severity and consequences of the harm done, not who is being harmed. However, BNS 2023 violates this promise by providing specific and rigid protection to females leaving males without any remedy because BNS 2023⁷⁷, while dealing with sexual offences doesn't consider its non-consensual nature rather makes it narrower by majorly focusing on its gender aspect. This lack of remedy simultaneously protects those women who participate in sexual abuses from the accountability it imposes on the men who do the same. Chapter 4 establishes the vacuum of male as victims while Chapter 5 establishes the females as perpetrators and their respective dimensions and constitutional violations.⁷⁸ This section views a deeper question that what happens if these failures not just co-exist but arise from the same structural design? This section advances the answer to it as selective protection, which refers to deliberately providing legal safeguards because of victim gender rather than the harm caused, and is the greatest constitutional failure of BNS 2023.

6.1. Selective Protection - Beyond Surface Level

In chapter 4 and 5, nature of male victim protection provisions and exemption of female perpetrators has been individually examined as doctrinal failures. Individually, they are serious but if addressed together they resonate with failure of the legislature itself who couldn't protect its own citizens.

These failures do not originate from different statutes, they are two different aspects of a single structural design followed throughout the sexual offences chapter of BNS,2023 i.e. protection depends on victim's gender rather than the harm. The law asks who the victim is rather than analysing what was done to the victim. If the victim is a woman, these statutory provisions will protect them with full force but if the victim is a man, the law responds with comparatively insignificant provisions that don't even take the sexual nature of the violation into consideration. Even if the female is a perpetrator, the law exempts them from a principal offence like rape regardless of whatever she did.

This is what is considered as selective protection as a legal concept where protection is selectively distributed on personal attribute i.e. gender rather than based on harm to address which the law is supposedly designed and this is what constitutional challenges in chapter 4

⁷⁷ Bharatiya Nyaya Sanhita 2023 (BNS 2023), s 63 (restricting rape protection to female victims) read with ss 69, 70.

⁷⁸ See Ch 4 (male victimhood) and Ch 5 (female perpetration) of this paper.

and 5 couldn't completely focus on.

6.2. The Architecture of Selective Protection

Selective Protection doesn't account for any section but spreads along a series of sections including section 63, section 69 and section 70 as a unified design and these provisions must be read together to know what the legislature built.

Section 63 uses a gender binary in which females are the centre of rape law and can be only victims. Section 70, gang rape extends rape liability to all the members involved doing any sort of action facilitating rape but, since section 63 explicitly mentions that a rape can only be committed by a man, section 70 is against only male participants, exempting female participants from the equivalent accountability. Also, section 69 talks about deceiving women into sexual intercourse through fake promises or fake promises to marry by men while there is no remedy if any man is deceived into the same by a woman.⁷⁹ If we read these provisions individually, we get to know that these provisions follow a gender binary but if we read them altogether, they present a systematic loophole where they only protect female victims while closing off if there is any male at the same spot.

This sets a very narrow protection ambit where only a woman, if violated, is inside the ambit of justified statutory provision with section 63, section 69 and section 70 operating in her favour with serious criminal charges against the perpetrator.⁸⁰ However, a man is set out of this ambit, he only has general provisions as hurt and grievous hurt in the name of protection which don't even consider the gravity and sexual nature of the act. Also, the sentencing frameworks don't take the gravity of the situation into consideration. Furthermore, a woman who perpetrates is also outside this ambit as a perpetrator who is exempted from accountability. This system goes negatively both ways by exempting female perpetrators from accounts while excluding male victims from protection.

This is what makes selective protection a systematic problem rather than just some gaps which could have been recovered with some amendments. But this systematic problem needs architectural rethinking which is what BNS 2023 requires.

6.3. The misconception of Article 15(3)

The major defence used in the case of gender specific sexual protection is Article 15(3) of the

⁷⁹ BNS 2023, s 69 (criminalising sexual intercourse by a man with a woman through deceitful means including false promise of marriage — gender-specific in both perpetrator and victim).

⁸⁰ BNS 2023, ss 63, 69, 70 (read together establishing gender as the operative axis of protection).

Constitution which permits states to make special provisions for women and children.

It is the only justification available for selective protection and its failure is central to the thesis of the paper.

Article 15(3) enables the state to do more for targeted and specific protection for vulnerable groups like women. The base of this provision is that women are at systematic disadvantage in the society and need legislative intervention and protection more than the general provisions already provide. This is constitutionally justified.

But what Article 15(3) of the Indian Constitution doesn't justify and is done through selective protection is using special provisions as a justification for denying protection to men while special provisions aim at extending specific protection of targeted groups but not giving any protection to the other groups. This has turned an enabling clause into an exclusion clause. This provision, which is basically used to extend protection, is used for contracting it. This reading finds no support in context of Article 15(3) in any debate or judicial proceedings.

This reading becomes even more constitutionally wrong when applied to section 70's⁸¹ female perpetrators exemption. Article 15(3) places women as a category which is at social disadvantage but still it doesn't read that it can protect any female from legal consequences of being a perpetrator. A provision which exempts and protects the criminals like female gang rape facilitators from liability of rape or men-like accountability cannot be a special provision under Article 15(3). It is immunity to women from punishments and accountability for any sexual offence they do rather than just protecting them from sexual offences. In this way, article 15(3) promotes gender-based discrimination in criminal liability also which violates article 14, the right to equality.

6.4. Selective Protection - A systematic inequality

All these constitutional failures of Article 14, Article 15(3) and Article 21 are all byproduct of a single underlying issue: a statute that prefers gender as an axis for protection over harm caused.

It doesn't merely present a drawback for those who are outside of this gender but also creates a system which is incapable of providing justice to all the people equally. Every judgement based on this gender binary will, by the same logic, will impose accountability when the male is a perpetrator while exempt when the perpetrator is female. It is systematic malfunctioning because it can't be solved by individual amendments. The axis itself must change its focus from

⁸¹ Bharatiya Nyaya Sanhita 2023 (BNS 2023), s 70.

gender to harm caused, from identify to consent, from who the victim is to what harm has been inflicted upon him.

BNS 2023, doesn't merely fail to provide justice in section 70, it doesn't merely fail male victims in section 63 but also fails the Constitution of India by violating article 14, 15 and 21 in its criminal provisions.

A statute which still follows traditional ideology and denies protection to all its people based on that cannot be identified as a reform. This is what the legislature has been constantly choosing i.e. no gender-neutral protection while taking away even the last shed of protection males had in name of section 377 of IPC, 1860⁸². This shows systematic choice and identifies it as selective protection as advocated in this paper.

The solution of all the issues converges on a single topic, i.e. legislative reform. The following section discusses various recommendations that could be implemented to align the BNS 2023 sexual offences framework.

Chapter7: Recommendations

The foregoing chapters have developed a complex, multi-faceted criticism of the BNS 2023 in respect to sexual offenses. The development of ideological heritage of the male perpetrator-female victim binary from Victorian morality, biological essentialism and criminal anthropology of the colonial era to the continuation of selective protection even after independence and failure of reform under the post-Nirbhaya Criminal Law Amendment Act, 2013, has been discussed in Chapter 3. Chapter 4 has highlighted that there is a structural exclusion of males as victims from Section 63 of the BNS and that the alternative provisions suggested by the Supreme Court—namely Sections 75, 115, 116, the Protection of Children from Sexual Offenses Act, and the relevant sections of the Information Technology Act—are completely inadequate to mitigate the severity of the injury. Chapter 5 has emphasized that the act of sexual violence committed by women against men is rendered legally invisible in the BNS, that the reasons advanced ideologically, pseudoscientifically, and judicially for such invisibility are empirically unsound, and that comparable jurisdictions—the United Kingdom, South Africa, Canada, and the United States—have adopted gender-neutral approaches without any constitutional impediment. Selective protection is discussed next in Chapter 6 to combine these two failings. It is shown that the BNS sexual offences system is not merely made up of

⁸² Indian Penal Code 1860, s 377 (repealed by BNS 2023 without replacement — removing the residual protection available to male victims of non-consensual same-sex sexual violence after *Navtej Singh Johar* read s 377 down to apply to non-consensual acts).

some random deficiencies, but a consistent pattern wherein the distribution of protection is based on the gender of the victim instead of the damage caused. The result of this has been the conversion of Article 15(3)'s empowering clause into its limiting counterpart.

7.1. Addressing the Colonial Ideological Inheritance: Decolonising the Conceptual Foundation

The argument put forward by Chapter 3 is that the binary notion of gender enshrined in the BNS is not just a preference for legislation, but a sedimentation of Victorian morality, biological essentialism, colonial criminal anthropological thinking, and administrative denial of the vulnerability of the man. The BNS saw itself as one that decolonized. As shown by Chapter 3, it was, within the context of sexual offenses, a process of recolonization—a replication, but under the new label, of the very same ideological edifice that the colonial state constructed.

7.1.1. Formal Legislative Acknowledgement of the Ideological Origins of the Gender Binary

In its Statement of Objects and Reasons for any amending legislation, Parliament will have to clearly state that the gendered design of the rape offence, as specified in Section 63, stems from colonial biological essentialism and colonial criminal anthropology and does not constitute any constitutional principle of independent India. This is no mere rhetorical flourish. Legislative statements of objects and reasons play an important role in judicial interpretation. It will change the whole interpretative environment in which the amended sections will be applied if Parliament admits that the gender binary framework in Indian criminal law is a colonial legacy that must be undone and not justified on principles of legislative autonomy.

There is a precedent for such a legislative exercise in self-reflection. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 starts with a Statement of Objects, which refers to the historic discrimination against castes and tribes as the justification for the enactment. Likewise, in a similar statute to rectify colonial legacies, Parliament must admit the fact of the colonial origins of the gender binary.

7.1.2. Removal of Phrase 'Modesty of a Women' and Colonial Moral Language from the BNS

As has been indicated in Chapter 3, the use of colonial moral language such as the 'modesty of a woman' in Section 74 cannot be justified on constitutional grounds because the colonial language reflects Victorian values concerning female sexual chastity instead of constitutional principles of bodily autonomy. This colonial language must be substituted with constitutionally

based terms like dignity, bodily integrity, and consent. These amendments include:

Re-title Section 74 to read 'Sexual Harassment' and substitute its relevant language to read 'intentional non-consensual sexual behaviour towards any individual in such a way as to infringe upon the dignity of the individual.' The substitution is intended to rid Section 74 of its gender-biased colonial terminology while also making it gender neutral regarding both the harasser and the victim.

7.2. Addressing the Structural Exclusion of Male Victims Closing the Gap in Section 63

The victimization of men as victims is highlighted from six different perspectives in Chapter 4: First, structural exclusion within Section 63; second, societal stigmatization along with legal silencing; third, ignored instances of violence outside all statutory provisions; fourth, the insufficiency of the other available remedial measures; fifth, constitutional violations of Articles 14, 15, and 21; and lastly, regression from the IPC perspective due to non-re-enactment of Section 377 in the BNS.

7.2.1. Gender Neutral Amendment of Section 63, BNS

This reform, which is crucial, involves changing the definition of rape in Section 63, BNS, where currently rape is defined in terms of being committed by a man against a woman, to one that would include non-consensual sexual penetration of any person.

Firstly, as explained in Chapter 4, there are three reasons based on constitutional law for introducing this amendment. Firstly, based on the principle laid down by the Supreme Court in the case of *Joseph Shine v. Union of India* ((2019) 3 SCC 39), the current classification in Article 14 cannot pass the rational nexus test since the purpose of the enactment is to provide protection against sexual abuse, while the gender-based classification has no nexus to the said purpose as both males and females may be subject to the same harm from sexual violation. Secondly, the denial of male victims' protection under Section 63 offends the positive duty of the State in fulfilling its constitutional obligation under Article 21 in light of *Puttaswamy*. Finally, in the Justice Verma Committee that was formed after the Nirbhaya case, recommendations were made for the inclusion of gender neutrality in rape laws in view of the fact that sexual violation may also be done by men against women. This recommendation was ignored by the parliamentarians who failed to amend the law again.

7.2.2. Insertion of Section 63 A: Sexual Assault by Compelled Penetration

Section 4.3 of Chapter 4 recognizes a case in which a man is compelled to have sex with a woman under duress or by threats or by means of intoxication as one of the most serious unaccounted for cases beyond Section 63. The case in question, penile penetration of the

assailant by the victim, necessitates its own section since it is a unique injury, even when Section 63 is gender neutral

7.2.3. Restoring Protection Lost by the Non- Re-enactment of Section 377, IPC

The failure to re-enact Section 377, IPC under Chapter 4.7 amounts to a step backwards. Prior to the reading down of Section 377, IPC in *Navtej Singh Johar v. Union of India* ((2018) 10 SCC 1), Section 377 itself offered some form of protection against non-consensual sexual offences on males. Following the reading down of Section 377 by *Navtej Johar* to only cover non-consensual acts and those involving minors, there remained some scope for constitutional protection in the BNS, which ought to have been retained. But failing that, the BNS has not even made any provision for this. In that respect, the gender-neutral amendment of Section 63 under Recommendation 8.2.1 would plug much of the gap. However, the following specific situations outlined under Chapter 4.3 need to be considered:

- Same sex male assault – Rape of one male by another male without his consent can be totally included under the newly proposed section 63 that is not gender-based with respect to [A] and [B].
- Victims who are Bisexual or LGBTQ+ individuals – By removing gender from consideration, this gender-neutral approach avoids the further issue of discrimination that is raised in chapter 4.3 – the discrimination faced by gay and bisexual men who have been victimized.
- False pretences to marry men – As noted under Chapter 4.3, while the provisions of Section 69 BNS give protection to women who are lured into sex based on fake marriage promises, the same kind of protection is not available for men. This Section should be modified to include the phrase ‘any person’ instead of ‘any woman’.

7.2.4. Upgrading the Alternative remedies identified in Chapter 4.4

As discussed in Chapter 4.4, there are four alternative solutions, which are not viable. The following changes would rectify the shortcomings in the identified sections.

Under Section 75, BNS (sexual harassment), the section must be modified to include a gender-neutral perpetrator clause, and the maximum punishment should be raised to seven years for sexual harassment involving compulsory physical interaction of a sexual nature. As highlighted in Chapter 4.4.1, the current maximum punishment of three years is totally out of place when compared to the seriousness of the crime of sexual harassment involving physical interaction. Under Sections 115 and 116, BNS (hurt and grievous hurt), a new provision must be added which takes into account the psychological and dignitary aspects of sexual violence apart from the bodily injury aspect. It is rightly pointed out in Chapter 4.4.2 that considering rape-like

conduct as only an offence causing hurt overlooks the violation of dignity, bodily integrity, and psychological integrity as the essence of the crime of sexual assault as identified in State of Punjab v. Gurmit Singh ((1996) 2 SCC 384).

It is therefore essential that the POCSO Act, 2012 should be construed together with the proposed gender-neutral Section 63 in order to avoid the existence of an age eighteen gap as stated in Chapter 4.4.3. The present situation where there exists gender-neutral protection for boys under 18 under POCSO Act, but there is none for men under Section 63 is unconstitutional.

7.3. Addressing the Legal Invisibility of Female Perpetrators

In Chapter 5, the invisibility of the female perpetrator within the BNS is explained to be the result of three systems working together – the ideology of female submissiveness and her inability to exercise sexual agency; the myths of physical and psychological incompetence strengthened through judicial culture; and the legislative silence of Section 63. The recommendations here deal specifically with each system.

7.3.1. Statutory Dismantling of the Myth of Female Physical and Psychology Incapacity

Two myths that reinforce the invisibility of female sexual aggression in the legal system are discussed in chapter 5.2.2. These include women are physically incapable of penetrating men sexually; women do not have the psychology necessary to sexually assault someone else.

An amendment should be made to the Bharatiya Sakshya Adhiniyam, 2023 (BSA), adding the following provision: Explanation [amendment to the BSA; chapter on Sexual Offences:] (i) In the case of any offence related to sexual assault under the BNS, physical penetration need not involve penetration by the penis. Any act of penetration with any part of the body or an object shall constitute penetration, and anyone irrespective of gender is physically able to carry out the act. (ii) Any evidence of the complainant being sexually excited, erect, or having ejaculated in the course of the assault will not, in isolation or in conjunction with other evidence, constitute evidence of having consented.

7.3.2. Extending Section 67, BNS to Female Persons in Position of Authority

Section 67 of BNS is covered in Chapter 5.1.1, which criminalizes sexual exploitation of persons in authority such as public servants, prison authorities, hospital personnel, and custodians. It uses language to refer to the offender as male. Such provision should be amended to make it refer to any person who is in a position of power. There is a direct justification of the amendment within the POCSO provisions since Sections 5(f) and 6 of POCSO provide for a gender-neutral offense of aggravated sexual assault by a person in position of trust or

authority and it has been successfully applied to cases involving women.

7.3.3. Gender Neutral Amendment of Gang Rape

Section 70, BNS (Gang Rape), is used as an illustration of selective protection in Chapter 6.2 as an example of how selective protection can work through the operation of provisions together and not by itself. Inasmuch as Section 63 limits the definition of rape to male perpetrators only, it follows logically that Section 70's liability for participation in gang rape will also necessarily apply to men only because the actus reus in Section 70 is defined by the actus reus under Section 63, which can only be committed by men.

A gender-neutral revision of Section 63 will automatically solve the problem presented above, since Section 70 will apply to every participant in a gang rape irrespective of gender as long as Section 63 applies equally to men and women. To eliminate any confusion, however, it would be better if Section 70 was independently revised to read thus: 'Where rape as defined under Section 63 is committed by a group of persons, every person in that group who commits, facilitates, or otherwise participates in the commission of that rape, irrespective of gender, shall be guilty of gang rape and punished accordingly.'

7.4. Addressing the Constitutional Architecture of Selective Protection

Chapter 6 constitutes the theoretical crux of the paper. This chapter shows that the male victimization gap discussed in Chapter 4 and the female perpetration gap in Chapter 5 do not stand independently as separate failings of doctrine; instead, they constitute manifestations of one structure, known as selective protection, which grants legal protections based on the gender of the victim instead of the injury suffered. Moreover, this chapter goes on to show that the defence of selective protection under Article 15(3) of the Constitution is constitutionally indefensible.

7.4.1. Constitutional Litigation: Article 32 Petition Challenging Section 63 and Section 70, BNS

Civil society organizations, lawyers, and aggrieved persons need to come together and file a petition for a writ of mandamus against Sections 63 and 70, BNS, using Article 32 of the Constitution on the following grounds, which are taken straight out of the discussion of the constitution in chapters 4, 5, and 6 of this paper.

- Article 14- Section 63's classification based on gender lacks rational nexus in accordance with Supreme Court standards. The objective behind the statute is to protect against the violation of a person through a sexual act without consent. The classification

(which only protects women as victims and males as offenders) does not have a rational nexus with the objective since men are subjected to the same violation and women can commit such violation.

- Article 15(1)- Section 63 is discriminatory towards men in its denial of protection afforded by rape laws on the grounds of their sex. Section 6.3 of this chapter shows that despite the provision in Article 15(3) for special treatment of women, this should not amount to total exclusion of other citizens such as men from the statute.
- Article 21- The State's obligation to ensure protection of every individual's physical integrity and sexual autonomy from being interfered with, as provided in Puttaswamy, is breached by Section 63 because men cannot be protected under rape laws.
- Section 70- The automatic limitation of the application of Section 70 to cases where only males are involved in gang rape because of the gender specification of Section 63 is itself an additional violation of Article 14, as females in cases of gang rape do not share similar liabilities.

There is need for the matter to be taken up by way of a reference before the Constitution Bench under Article 145(3) since the case deals with important issues of constitutional law pertaining to Articles 14, 15, and 21 of the Constitution. The petition filed should refer to the Puttaswamy trilogy in Navtej Johar and Joseph Shine as the precedent and should ask the Court to direct the legislature to make an amendment to Section 63 within a stipulated period.

7.4.2. Clarificatory Legislation on the Limits of Article 15(3)

The misapplication of Article 15(3), which forms the key constitutional basis for selective protection, is pointed out in Chapter 6.3 and shown to be invalid. In order to ensure that the same misapplication does not recur in any future debate on legislation, the Statement of Objects and Reasons for the amending bill must read as follows:

The amendments made to the Bharatiya Nyaya Sanhita, 2023 by this Act have been made in exercise of the powers conferred under Articles 14, 15 and 21 of the Constitution of India. The gender-neutral provisions enacted by this Act are in consonance with the provisions of Article 15(3) of the Constitution of India. Under Article 15(3), the State is empowered to make special provisions for women and children. It does not empower the State to make special provisions that exclude others from the protection provided by the criminal law. Such special provisions under Article 15(3) enhance the existing protection and cannot derogate from any other citizen's right to protection.

Such clarification, made in the Statement of Objects and Reasons, will serve as guidance for judges interpreting the newly enacted law provisions, and there will be no further attempts at

claiming that gender-neutral laws on rape are not compatible with the constitutional provision regarding women-specific laws.

7.4.3. Repeal of the Marital Rape Exception Section 63, Exception 2

Under Exception 2 to Section 63, BNS, having sexual intercourse with one's wife, who is not below the age of eighteen, is not considered rape. This exception represents yet another example of selective protection discussed in Chapter 6. While it provides protection to the wife from rape at the hands of strangers and known persons, it denies her this protection when the rapist turns out to be her own husband. At the same time, it grants immunity from liability to the husband that any other person committing the same crime cannot claim.

The exception needs to be abrogated. The constitutional justification for its repeal, as indicated in Chapter 5.4.3, has been provided by Justice Shakhder in *RIT Foundation v. Union of India* (2022 SCC OnLine Del 1308), who declared it unconstitutional as being in violation of Articles 14, 15, and 21. The issue is currently sub judice before the Supreme Court.

The amendment to Section 63 made based on Recommendation 7.2.1 should also include the case mentioned in Chapter 5.4.3, where the wife sexually coerces the husband within marriage. With the amendment of Section 63, being gender-neutral, it will automatically include the above-mentioned case without needing further amendments, once the gender binary is done away with.

7.5. Addressing Institutional and Data Failures

The invisibility of male victims and female perpetrators within the BNS is further exacerbated by institutional and statistical problems that have enabled the issue to continue without resolution. As discussed in Chapter 4.6, the paucity of legal precedent on cases involving male sexual abuse may be attributed in part to the failure of legislation and societal discrimination rather than the lack of the phenomenon itself. As stated in Chapter 5.4.1, the NCRB's statistical anomaly stems from the fact that only complaints registered within legally defined categories are counted, leading to a self-fulfilling scarcity of female sexual assault.

7.5.1. Mandatory Police Training and FIR Registration Obligations for Male Complaints

It is imperative that the Bureau of Police Research & Development (BPR&D) formulates and implements a training program for all policemen on the following topics: the legal position under the current legislation, as well as any amendments thereto, concerning male victims of sexual violence; the mandatory requirement as held in *Lalita Kumari v. Government of Uttar Pradesh* ((2014) 2 SCC 1) that the FIR shall be registered for all cognizable offenses, irrespective of whether the complainant and/or the accused are male or female; the challenges

in registering complaints against male victims of sexual assault, such as stigma, disbelief, and shame over failure to live up to their machismo, as discussed in Chapter 4.2; the psychology of women offenders; and the scientific understanding that male arousal does not equate to consent. The policemen who decline to register FIRs from male victims of sexual assault on the basis that Section 63 mandates the presence of a male offender shall be informed that such an act constitutes a criminal offense under Section 218, BNS (failure of duty by a public servant).

7.5.2. NCRB Data Reforms: Disaggregated Recording of Male Victim Complaints and Female Perpetrator Cases

It is imperative that the National Crime Records Bureau be mandated by the Ministry of Home Affairs to include the following new categories of data in their annual Crime in India reports: sexual assault complaints received from males and transgender individuals categorized by crime type; complaints rejected by police for registration of FIRs related to rape on the basis of gender of either the complainant or the accused; POCSO trials of women accused in a separate category; and cases filed under Section 75, 115, 116, 122, and BNS charges where there was a claim of sexual violence by a woman against a man in the complaint. Such changes are consistent with the theoretical argument made in Chapter 5.4.1 about the structural inability of official data to record cases of sexual violence by females according to the present definition, which, in turn, explains why the circular argument about the rarity of female perpetration makes gender-neutral reforms seem redundant.

7.5.3. Victim Support Infrastructure Extended to Male Survivors

It should be noted that the current mechanism of support infrastructure for the victims of sexual violence, including one-stop centres, rape crisis helplines (Dial 181), legal aid, and compensation to victims provided for under Section 395 of BNSS, has been formulated to serve mainly women who fall into the category of victims. It appears from Chapter 4.2 that the male victims have to face two kinds of stigma; firstly, owing to their own failure to perform their role of a masculine character; secondly, owing to the society's disbelief in their story and because of which the male victims have to maintain silence on account of which even the existing mechanisms of support become ineffective for them.

In order to ensure justice to male survivors of sexual violence, it should be ensured that all the one-stop centres will serve male survivors of sexual violence with the services of well-trained staff. A helpline solely for the benefit of male survivors of sexual violence should be set up. Executive instructions should be issued directing State Legal Services Authorities to extend provisions of Section 395 of BNSS to male survivors of sexual violence.

7.5.4. Judicial Education National Judicial Academy Curriculum Reforms

National Judicial Academy and all State Judicial Academies are required to integrate the following material in their programs: constitutional jurisprudence on sexual autonomy, bodily integrity, and gender neutrality in Puttaswamy, Navtej Johar, Joseph Shine, and State of Punjab v. Gurmit Singh; scientific literature on sexual violence perpetrated by women and victims being men; forensic medical principles regarding non-volitional arousal and how irrelevant such arousal is to obtaining consent; and comparative legal principles on sexual crimes based on gender neutrality from the UK, South Africa, and Canada. There is special emphasis required to debunk the two stereotypes described in Chapter 5.2.2 – the stereotype about female inability to physically rape a man and the stereotype about men's arousal as implied consent. There should be case studies of sexual violence where the perpetrator is a woman, and the victim is a man. In *Medha Kotwal Lele v. Union of India* ((2013) 1 SCC 297), it was held that sensitivity training on sexual violence is an absolute constitutional requirement.

7.6. Phased Implementation Roadmap

7.6.1. Phase 1: Immediate

The following actions may be undertaken immediately by executive directive or litigation without any changes being made to the BNS. Firstly, the BPR&D should issue new training guidelines to the State police forces regarding their obligations in the registration of the FIR when male victims seek help from the police citing *Lalita Kumari*. Secondly, the State Legal Services Authorities should be instructed by the National Legal Services Authority to make provisions for the compensation of male victims of sexual violence. Thirdly, the Ministry of Home Affairs should instruct the NCRB to start collecting the data variables as per Recommendation 7.5.2 in the next round of *Crime in India* publication. Lastly, the joint Article 32 petition contesting Sections 63 and 70, BNS should be filed and a Constitution Bench referred to.

7.6.2. Phase 2: Legislative Reform

These statutory amendments shall be consolidated into one act, which is the Criminal Law (Gender Equality) Amendment Act and submitted for introduction in Parliament. Such amendment is designed to carry out gender neutral reform in Section 63 based on Recommendation 7.2.1; insert Section 63-A, compulsory sexual penetration, based on Recommendation 7.2.2; repeal Exception 2 to Section 63 based on Recommendation 8.4.3; modify Section 67 by providing for female persons in authority based on Recommendation 7.3.2; modify Section 69 to make it gender neutral based on Recommendation 7.2.3; modify

Section 70 to include participation of females based on Recommendation 7.3.3; and amend Section 74 to take away colonial morality based on Recommendation 7.1.2.

7.6.3. Phase 3: Institutional and Data Infrastructure

In addition, the below listed structural modifications need to be undertaken over the course of 3-7 years:

- b. The creation of forensic guidelines for sexual assault cases involving men developed by the ICMR to be made mandatory for all government hospitals;
- c. Gender-neutral sexual offences law to be included in NJA education according to Recommendation 8.5.4;
- d. Extending POSH Act provisions to include protection to male and transgender victims;
- e. Undertaking biennial national self-report survey on sexual victimization using gender neutral definitions; and
- f. Setting up specialized assistance programs for male survivors in all states and UTs.

7.7. From Selective Protection to Universal Justice

The above-mentioned chapters have proven that Bharatiya Nyaya Sanhita, 2023, in its approach to the sexual offences, does not reflect decolonisation of Indian criminal laws, but continues the colonially inspired ideological framework. The male-female dichotomy is not an innocuous legislative choice; rather, it is a continuation of Victorian biology, the cult of domesticity, colonial criminal anthropology, the link between maleness and crime established by the Criminal Tribes Act, and finally, incomplete legal reforms following the Nirbhaya case. The Bharatiya Nyaya Sanhita had multiple chances to overcome such heritage; the report of the Verma Committee suggested gender-neutral amendments, Puttaswamy and Navtej Johar jurisprudence was available to the drafters of the BNS, and finally, there is much to be learned from comparative legislation of UK, South Africa, and Canada.

These recommendations rest on the understanding that the choice made here is reversible and should be reversed. These recommendations are not drastic measures; they are simply logical deductions from doctrinal principles that have been developed by the Supreme Court for over two decades. Criminal law, which begins with the question as to whose rights need to be protected, is no criminal law within the constitutional ambit of the term. As Chapter 6 has revealed, it is selective protection, an entitlement conferred according to gender and not an entitlement arising out of an injury suffered.

The success of the Bill of Rights, in other words, would lie neither in its drafting nor in its use of Indian language and terminology. Its success will lie only in the ability of every single

woman who has been violated in her right to sexual autonomy and bodily integrity in India to point to the section of the criminal law that recognises this violence against her, condemns it, and punishes it with the rigour of the law.

Chapter 8: Conclusion

The purpose of this paper was to explore a paradox. The Bharatiya Nyaya Sanhita, 2023, which is touted as a radical departure from the colonial criminal code, echoes the exact ideological construct of the statute it seeks to replace. The IPC of 1860 was premised upon Victorian biological determinism and colonial criminal anthropology. The BNS was passed in 2023 – following the landmark rulings by the Supreme Court in Puttaswamy, where it held bodily integrity to be a fundamental right; Navtej Johar, where it affirmed sexual autonomy as a constitutional value; and Joseph Shine, where it declared gendered criminal liability to be unconstitutional; and following the recommendations of the Justice Verma Committee more than a decade ago.

What the Paper has Proved

The Ideological Foundation is Colonial and not Constitutional

The gender binary built into Section 63, BNS does not come out of any constitutional principle of India after independence. It comes from the Victorian culture of ‘domesticity’ which had conceived femininity to be passive and asexual and masculinity to be aggressive and predatory, and from colonial criminal anthropology which saw the male body as being synonymous with crime and thus made it impossible for males to be victims. This lineage has been discussed in Chapter 3 through William Acton’s 1857 medical writing, the Criminal Tribes Act of 1871 to post-independence nationalist discourse. In its definition of rape as being committed by “a man” upon “a woman”, Section 63 is repeating an assumption that was built into the IPC way back in 1860.

Males Are Structurally Excluded as Victims

This was illustrated through Chapter 4 analysis showing that Section 63’s exclusion of male victims is indeed an inclusion. The section intentionally excludes men from the scope of the term ‘victim’. In addition to the inadequate alternate remedies, Section 75 (maximum three years, male offender assumed), Sections 115 and 116 (only physical injuries without regard to the mental and dignity-based harm), POCSO (protection limited until eighteen years old), and IT Act provisions (only covers digital offenses), these provisions are unable to meet the gravity of the sexual violation faced by the male victim. The BNS has even retrogressed from the IPC, failing to re-enact Section 377 and thus taking away any chance of providing protection for

male victims to homosexual assaults. Exclusion based on this premise infringes upon Article 14 (no rational nexus between protection against sexual violation and exclusion of male victims), Article 21 (positive duty under Puttaswamy to protect all individuals from harm), and Article 15(1).

Female Perpetration is Made Legally Invisible

Chapter 5 demonstrated the fact that no part of the BNS recognizes sexual violence perpetrated against men by women as rape or any similar criminal act. The myths responsible for the invisibility of such acts – the physical incapability of women to sexually penetrate another individual and the psychological incapability to be sexually aggressive – are scientifically baseless and logically flawed. The apparent rarity of sexual violence perpetrated by women can easily be attributed to the nature of the existing laws that make these acts unreportable rather than the true rarity of such cases. In the United States, NISVS data indicates that 1.1 percent of all men have been 'made to penetrate' in their lifetimes, which amounts to hundreds of thousands of Indian men, but with no legal recourse.

Selective Protection is a Systemic Failure and not a collection of Gaps

The analysis provided in Chapter 6 forms the core of the paper. Sections 63, 69 and 70, when combined, produce a structure whereby a violated woman is included fully within the protective fold of criminal laws, whereas a violated man is kept completely outside its ambit. Under Section 63, rape is defined as an act committed by males only. Section 69 extends protection to only women who have been tricked into sexual intercourse through fraudulent representations. Female participants in gang rape cases are automatically absolved under Section 70 since rape under Section 63 could not possibly have been perpetrated by them. What the law seeks to ask is, 'who is the victim?'. The constitutional obligation requires asking, 'What harm was done and was it non-consensual?'. It is impossible to defend the above structure through Article 15(3) of the Constitution. Article 15(3) allows the State to provide special protection to women; it does not allow the State to deny protection to men or exemption to women for their harmful conduct.

Why Has This Not Changed?

In other words, the constitutional case for reform has been made, the comparative legal precedent has been set, and the Justice Verma Committee has offered the blueprint in legislation for more than a decade. The answer that comes out of the analysis presented in this paper is straightforward: the preservation of the binary is neither ignorance nor negligence. It is a conscious decision, with the recommendation of the Justice Verma Committee known and deliberately ignored by Parliament. Despite having access to the Puttaswamy and Navtej Johar

decisions, the BNS deliberately omitted Section 377, thereby leaving male victims of homosexual violence completely unprotected.

The explanation for this political reality is simple: the male perpetrator/female victim binary has become so ingrained in the rhetoric of nationalism in the context of women's protection that challenging it is equated to threatening women's security – even if it isn't. Comparative jurisprudence proves that it isn't, but the political economics of gendered protection make the idea of reforming the law without gender feel like a compromise rather than a progress.

The Constitutional Mandate

Puttaswamy, Navtej Johar, and Joseph Shine individually make up the required constitutional mandate for reform. Puttaswamy states that bodily integrity is a basic right of every individual irrespective of gender. Navtej Johar states that sexual autonomy is a value under the Constitution, the violation of which must be made cognizable in the criminal law system regardless of the gender of the offender. On his part, Joseph Shine states that the definition of an act of a crime, in terms of the criminal law provision, cannot limit the perpetrator's capacity with respect to gender, in cases where the underlying act of crime does not require gender specification. Sexual violation without consent is an act that does not require gender specification.

Final

The paradox identified in the title of this paper is one where the legislation which was introduced as decolonization and which reflects the core presupposition underlying colonial law; the legislation which was enacted in the wake of constitutional rulings making the physical integrity of all people a fundamental right yet which only ensures the physical integrity of certain people; and the legislation which claimed to enhance rape law by stripping it of the one section which safeguarded a group of rape victims. Such a paradox is no coincidence but instead is a result of the two centuries of ideological sedimentation which have resulted in the belief that gender binary is a matter of nature as opposed to legislative fiat.

Neither the intricacies of a nation's criminal statutes nor the indigenous naming of the criminal acts can provide the true test of the efficacy of a nation's laws. What defines an ideal legal system is a provision within its criminal law that gives voice to every individual who has suffered harm in the violation of their bodily and sexual rights and guarantees them the right to pursue the full remedy under the criminal law. Only then will be BNS able to claim itself as a decolonised law.

All necessary constitutional groundwork for reform is ready. There is no lack of comparative legislation for guiding the law makers. In fact, the Justice Verma Committee report has

provided Parliament with all the essential information to move ahead with the reforms more than a decade ago now. What is left now is the political will. Gender Paradox of BNS, 2023 is neither a theoretical issue nor is it a mere academic problem. It is a failure of our constitution, which must be addressed

Bibliography

Indian Cases:

- *Fazal Rab Choudhary v State of Bihar* (1983) 3 SCC 9
- *Joseph Shine v Union of India* (2019) 3 SCC 39
- *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1
- *Lalita Kumari v Government of Uttar Pradesh* (2014) 2 SCC 1
- *Medha Kotwal Lele v Union of India* (2013) 1 SCC 297
- *National Legal Services Authority v Union of India* (2014) 5 SCC 438
- *Navtej Singh Johar v Union of India* (2018) 10 SCC 1
- *Priya Patel v State of Madhya Pradesh* (2006) 6 SCC 263
- *Ram Krishna Dalmia v Justice SR Tendolkar* AIR 1958 SC 538
- *RIT Foundation v Union of India* 2022 SCC OnLine Del 1308
- *State of Punjab v Gurmit Singh* (1996) 2 SCC 384
- *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75

International Cases:

- *R v Ewanchuk* [1999] 1 SCR 330 (Supreme Court of Canada)

Legislation:

Indian Legislation-

- Bharatiya Nagarik Suraksha Sanhita 2023
- Bharatiya Nyaya Sanhita 2023
- Bharatiya Sakshya Adhinyam 2023
- Constitution of India 1950
- Criminal Law (Amendment) Act 2013
- Criminal Tribes Act 1871
- Indian Penal Code 1860
- Information Technology Act 2000

- Protection of Children from Sexual Offences Act 2012
- Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989
- Transgender Persons (Protection of Rights) Act 2019

Foreign Legislation-

- Criminal Code RSC 1985 c C-46 (Canada)
- Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (South Africa)
- Sexual Offences Act 1956 (England and Wales)
- Sexual Offences Act 2003 (England and Wales)

Books:

- Acton W, *Functions and Disorders of the Reproductive Organs* (John Churchill 1857)
- Agnes F, *Law and Gender Inequality: The Politics of Women's Rights in India* (Oxford University Press 1999)
- Aquinas T, *Summa Theologiae* (1265–1274)
- Augustine of Hippo, *De Civitate Dei* (c AD 413–426)
- Baxi P, *Public Secrets of Law: Rape Trials in India* (Oxford University Press 2014)
- Crooke W, *The Tribes and Castes of the North-Western Provinces and Oudh* (Office of the Superintendent of Government Printing 1896)
- **Darwin C, *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life* (John Murray 1859)**
- Gall FJ and Spurzheim JG, *The Physiognomical System of Drs Gall and Spurzheim, Founded on an Anatomical and Physiological Examination of the Nervous System in General, and of the Brain in Particular* (Baldwin, Cradock and Joy 1815)
- Hale M, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (Professional Books 1971) (first published 1736)
- Kautilya, *The Arthashastra* (LN Rangarajan ed and tr, Penguin Books 1992)
- Lavater JK, *Essays on Physiognomy, Designed to Promote the Knowledge and the Love of Mankind* (T Holcroft tr, G G J and J Robinson 1789–1798) (first published as *Physiognomische Fragmente zur Beförderung der Menschenkenntnis und Menschenliebe*, Weidmanns Erben und Reich 1775–1778)

- Rousseau J-J, *Emile, or On Education* (A Bloom tr, Basic Books 1979) (first published 1762)
- Sarkar T, *Hindu Wife, Hindu Nation: Community, Religion, and Cultural Nationalism* (Permanent Black 2001)
- Singha R, *A Despotism of Law: Crime and Justice in Early Colonial India* (Oxford University Press 1998)
- Thurston E, *Castes and Tribes of Southern India* (Government Press 1909)

Articles and Book Chapters:

- Breiding MJ and others, 'Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization — National Intimate Partner and Sexual Violence Survey, United States, 2011' (2014) 63 *Morbidity & Mortality Weekly Report* 1
- Rennison CM, 'Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992–2000' (Bureau of Justice Statistics, US Department of Justice 2002) NCJ 194530
- Stemple L and Meyer I, 'The Sexual Victimization of Men in America: New Data Challenge Old Assumptions' (2014) 104 *American Journal of Public Health* e19

Reports and Official Documents:

- Federal Bureau of Investigation (US), *Uniform Crime Reporting: Revised Rape Definition* (2012)
- National Crime Records Bureau (India), *Crime in India* (Ministry of Home Affairs, annual)
- South African Law Reform Commission, *Project 107: Sexual Offences* (Discussion Paper 85, 1999)
- Verma JS, Seth L and Subramaniam G, *Report of the Committee on Amendments to Criminal Law* (23 January 2013)