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# **BRIDGING THE LEGAL GAP: GENDER NEUTRALITY AND THE INDIAN JUSTICE SYSTEM**

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## **ABSTRACT**

Sexual violence in India has long been perceived through a narrow gendered lens, recognising only women as victims and men as perpetrators. Despite the evolution of legal systems and human rights discourse, Indian criminal law now codified under the *Bharatiya Nyaya Sanhita, 2023* (BNS) continues to follow this outdated binary. Section 63 of the BNS, replacing Section 375 of the IPC, defines rape exclusively in terms of a male offender and a female victim, thereby excluding male and transgender survivors from legal protection. This paper critically examines the absence of gender-neutral rape laws in India and highlights the constitutional inconsistency such exclusion creates with Articles 14, 15, and 21 of the Indian Constitution. Drawing upon case law, comparative analysis with jurisdictions like Canada, Sweden, and the United Kingdom, and empirical data from the *Ministry of Women and Child Development (2007)* and the *National Human Rights Commission*, the study exposes the legal vacuum faced by male survivors. It argues that the continued silence of Indian law on sexual violence against men undermines the principles of equality and justice. The paper concludes that adopting gender-neutral rape laws is not merely a matter of reform but an urgent constitutional, social, and moral necessity to ensure equal access to justice for every individual, irrespective of gender.

## **INTRODUCTION**

The term ‘sexual violence’ is an all encompassing non legal term refer to crimes like assault, rape and sexual abuse, among these ‘rape’ is one of the heinous crime. *Bharatiya Nyaya Sanhita, 2023* (BNS) defines ‘Rape’ under Section 63, it says “sexual intercourse by a man with a woman without her consent or with consent obtained through force, threat or deceit. It also includes instance where the woman is incapable of giving consent due to age (under 18), unsoundness of mind, or intoxication, making the act non-consensual and constituting rape.”<sup>2</sup>

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<sup>2</sup> *Bharatiya Nyaya Sanhita*, 2023, § 63, No. 45, Acts of Parliament, 2023 (India)

In India laws are made for the protection of women from sexual harassment or rape but there is no such legislation for the protection of man from sexual harassment or rape. Chapter 5<sup>th</sup> of the BNS which deals with offences against women and child but the BNS is silent on the sexual violence against men, previously some protection is granted to men under Section 377 of Indian Penal Code, 1860 (IPC) which defines unnatural offence as “whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with the imprisonment of either for a term which may extend to ten years, and shall also be liable to fine.”<sup>3</sup> But this provision was struck down by the Supreme Court in *Navtej Singh Johar v. Union of India*<sup>4</sup>.

There is no doubt that sexual violence against females are increasing expeditiously across the world, the scope of sexual offence is not limited to the offence against women but it also covers offence against men. Now a day society thinks that the sexual violence can be happened to women only but the truth is the men are also survivor of sexual violence. It is unjust that minimal attention is paid to the crime committed on men or the inequalities faced by them in the society. Due the absence of gender neutral laws in India it shows biasness against men. In India, only women are considered to be a victim of sexual violence and men are consider to be perpetrator. In case where a man is victim of sexual violence it in not consider as an offence under Indian laws. The foreign countries like United kingdom<sup>5</sup>, Canada<sup>6</sup> & some state of Australia having gender neutral laws, most of the laws presently prevailing in India are borrowed from united kingdom but Indian laws doesn't have any provision regarding gender neutral laws.

Recently a new criminal law is passed on 1 July, 2024 during the parliamentary debate on the new criminal laws Mr. Asaduddin Owaisi (Member of Parliament) raised an argument that “*Don't men get raped, stalked ?*”<sup>7</sup> despite having a serious issue raised in parliament, still the criminal law is silent on gender neutral rape laws. Existing in a society where rights to equality promoted on a great level even than man face biasness in rape laws.

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<sup>3</sup> Indian Penal Code, No. 45 of 1860, § 377 (India)

<sup>4</sup> *Navtej Singh Johar & Ors. v. Union of India*, 2018 10 SCC 1

<sup>5</sup> Sexual Offences Act, 2003 (UK), c. 42, §§ 1–4.

<sup>6</sup> Criminal Code of Canada, RSC 1985, c C-46, §§ 271–273.

<sup>7</sup> PTI, *New criminal bills threat to civil liberty*, rights of people, DECCAN HERALD (Dec. 20, 2023, 15:31 IST), <https://www.deccanherald.com/india/new-criminal-bills-threat-to-civil-liberty-rights-of-people-owaisi-2818917>.

## Sexual violence against man

Sexual offence can happen to any soul, irrespective of age, caste and gender etc. Justice Krishna Iyer in the case of Rafiq v. State of Uttar Pradesh<sup>8</sup>, gave a statement which state, “*a murderer kills the body, but a rapist kills the soul*”. we hear the cases about sexual violence against woman, number of legislations are been enacted and several guidelines (Vishakha Guidelines) are laid down by the Supreme Court for the protection of women from sexual violence but the laws are totally silent when it comes to man. In India, only woman are consider as a victim of sexual violence and at the same time, only a man is consider as perpetrator. In case where man is the victim is not at all considered as a crime under BNS, 2023.

## Sexual violence against man and its consequences

Sexual violence against man can take many forms, including rape, sexual assault, sexual battery, sexual coercion, and sexual abuse. These acts can be committed by stranger, acquaintances, or even intimate partners. Perpetrator may use physical force, emotional manipulation, or exploitation of power dynamics to carry out these crimes.

Prison rape, hazing and imitation rituals are common forms of sexual violence against men. Additionally men may experience sexual abuse by authority figures, such as coaches or teachers. Intimate partner’s sexual violence can occur, where a partner forces or coerces someone into sexual activity without their consent.

It’s essential to recognize that sexual violence can happen to anyone irrespective of gender. Where a man suffers with the trauma of sexual violence and no relief is granted to the victim it create a feeling of inferiority amongst men and prevent them from attaining justice. It may cause an effect on an individual health and behavior. It may have different manifestation in individuals’ health such as physical, psychological, social and economic. If inadequate attention is paid, it may lead to habit of alcoholism, stress, frustration, suicide and many more.

## Violation of Right to Equality

In India, Article 14 of our constitution guarantees ‘Right to equality’ it states as “*The state shall not deny to any person equality before law or the equal protection of law within the territory*

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<sup>8</sup> 1980 SCC (4) 262.

of India”<sup>9</sup> this article was violated because our legislation is silent on the issues of sexual violence against men, women will get the remedy under many legislation but men are exclude from such legislation. Contrarily, children of all genders are covered under the “*Protection of Children from Sexual Offences Act, 2012*”<sup>10</sup>

Indian society and Judiciary talk about the equal rights for man and woman. These dismissal to make legislation for the sexual violence against men shows the violation of Article 14. Indian judiciary and legislation work hard for the protection of woman from sexual violence, but it totally neglect the men which is also a subject of sexual violence.

In Indian constitution there are many article which deals with the equality among man and woman –

1. Article 15<sup>11</sup> which prohibit the discrimination on ground of gender, caste, class and religion,
2. Article 39A it states ‘*that the citizens, men and women equally, have right to an adequate means of livelihood.*’<sup>12</sup>
3. Article 39D deals with the equal pay for equal work for man and women<sup>13</sup>.

The above articles of the constitution shows that’s the Indian laws are equal for men and woman but when we look into the sections of BNS, 2023 particularly which deals with the offence of rape there is no such provision at all which provide justice to a man if he is the victim of sexual violence.

### **Laws related to sexual violence in India**

#### **Section 63 of Bharatiya Nyaya Sanhita, 2023**<sup>14</sup>

A man is said to commit “Rape” if he penetrate his penis or insert any object into the vagina, mouth, urethra, or anus of a woman without her consent or against her will. This includes manipulating any part of the body of woman to cause penetration without consent, applies his mouth to vagina, anus or urethra of a woman is said to constitute an offence of Rape if he fails under any of the six following descriptions.

1. Against her will.

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<sup>9</sup> INDIA CONST. art. 14,

<sup>10</sup> **The Protection of Children from Sexual Offences Act, No. 32 of 2012, Act of Parliament (2012).**

<sup>11</sup> INDIA CONST. art. 15.

<sup>12</sup> INDIA CONST. art. 39A.

<sup>13</sup> INDIA CONST. art. 39D.

<sup>14</sup> Bharatiya Nyaya Sanhita, 2023, § 63, No. 45, Acts of Parliament, 2023 (India)

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

This section begin with ‘A man is said to commit rape’ which makes it clear that rape is not a gender neutral offence in India, under this section a perpetrator is always a man and women are always treated as a victim.

#### Section 75 of Bharatiya Nyaya Sanhita, 2023<sup>15</sup>

A man committing any of the following acts-

- i. Physical contact and advances involving unwelcome and explicit sexual overtures; or
- ii. A demand or request for sexual favours; or
- iii. Showing pornography against the will of woman; or
- iv. Making sexually coloured remarks,

Shall be guilty of the offence of sexual harassment.

This section again start with ‘A man committing any of the following acts shall be guilty of the offence of sexual harassment’ which shows this section is also a gender biased and it doesn’t cover the sexual harassment against man.

#### Section 76 of Bharatiya Nyaya Sanhita, 2023<sup>16</sup>

Whoever assault or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven

<sup>15</sup> Bharatiya Nyaya Sanhita, 2023, § 75, No. 45, Acts of Parliament, 2023 (India)

<sup>16</sup> Bharatiya Nyaya Sanhita, 2023, § 76, No. 45, Acts of Parliament, 2023 (India)

years, and also be liable to fine.

Under the old criminal law *Indian Penal Code, 1860* this section begin with ‘A man who assault or uses criminal force’ which shows a biasness towards man but it was amended by the BNS, 2023 the word ‘A Man’ is replaced with ‘Whoever’ which shows a little equality under this section, but still here victim is a woman, which shows that assault or use of criminal force can be happen only to women.

#### Section 77 of Bharatiya Nyaya Sanhita, 2023<sup>17</sup>

Whoever watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

This section yet again start with ‘Whoever watches’ which shows slightly equality in gender, it means a perpetrator can be a man or a woman but again here the victim is a woman which shows a biasness under this section, it means voyeurism can only be happen to woman, if victim of voyeurism is a man than it is not a crime at all under Bharatiya Nyaya Sanhita, 2023.

#### Section 78 of Bharatiya Nyaya Sanhita, 2023<sup>18</sup>

Any man who-

- i. follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or
- ii. monitors the use by a woman of the internet, e-mail or any other form of electronic communication,

Commits the offence of stalking.

<sup>17</sup> Bharatiya Nyaya Sanhita, 2023, § 63, No. 77, Acts of Parliament, 2023 (India)

<sup>18</sup> Bharatiya Nyaya Sanhita, 2023, § 78, No. 45, Acts of Parliament, 2023 (India)

This section yet again starts with ‘A man said to commit stalking’ thus even this section is not gender neutral since it does not include the stalking of a man by a female as an offence.

All these sections of BNS, 2023 discussed above shows the biasness of legislation against man, these section recognize male as a perpetrator and female as a victim while the reality is that these offence can be committed to any soul, only woman should not be consider as a victim men are also survivor of sexual violence they should get the remedy by the legislation.

### **Sexual violence against man in prison**

Sexual contact between men is common in male prison around the world. Estimate very considerably. In a report of Prison and AIDS<sup>19</sup> it published by United Nation Acquired Immunodeficiency syndrome (UNAIDS) it was found that in 1993 a survey at Rio de Janeiro, Brazil, suggested that 73% of male prisoner had sex with other man in prison, while recent surveys in Zambia, Australia, and Canada have come up with figures of between 6% and 12%. The sex may be consensual, but may also be coerced, to greater or lesser degree. Sexual violence, including rape, is a serious issue in certain prison environment. It is sometime reported as a common, and in some cases, it takes the form of institutionalized initiation such as gang rape.

Sexual activity between men in prison often involve anal intercourse, this may be more or less common, according to the particular place. Unprotected sex significantly increases the risk of Human Immunodeficiency Virus (HIV) transmission. Particularly when lubricant is not used and when the act is non-consensual, such as in cases of rape. Access to condoms is generally not provided in prison, further focusing on the risk of AIDS.

Sodomy and forced homosexuality are rampant in jail across India. A bench of the Supreme Court consist of Justice K.M. Joseph and Hrishikesh Roy, while hearing a plea by Bhima Koregaon accused Gautam Navlakha highlighting the condition at Taloja Central Prison where he is currently lodge stated: *“Due to such issues that prison inmates face, they come out as even more hardened criminals filled with revenge”*<sup>20</sup>.

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<sup>19</sup> UNAIDS, Prisons and AIDS, Joint United Nations Programme on HIV/AIDS 1997, 4 (1997), <https://www.unodc.org/documents/hiv-aids/UNAIDS%20prison%20and%20AIDS.pdf> .

<sup>20</sup> Express Web Desk, *Sodomy, forced homosexuality in jail inmates come out filled with revenge*, The Indian Express (Sep. 23, 2022, 10:47 AM IST), <https://indianexpress.com/article/india/supreme-court-sodomy-homosexuality-jails-8181794/> .

“Same-sex rape or sodomy is one of the main reasons behind suicide in jails”<sup>21</sup>. This has been brought out in an extensive report prepared by panel’s fact-finding team and it covers cases from 2007 to 2011, said former National Human Rights Commission (NHRC) former Chief Justice K.G. Balakrishnan.

### Comparative Analysis

According to the Criminal Code of Canada, Sexual Assault is defines as any non-consensual sexual activity that violates the sexual integrity of the victim<sup>22</sup>. The law emphasizes consent as a crucial element, meaning that any sexual contact without voluntarily agreement constitute sexual assault. By the definition of sexual assault it is specified that Canada has gender neutral rape laws, whereas India laws recognize man as a perpetrator.

Criteria	INDIA	SWEDEN
Perpetrator	Only men can be charged with rape under Section 63 of BNS,2023	Anyone can be charged, regardless of gender.
Victim	Only women are recognized as rape victims.	Any person including men, women and non-binary individuals.
Definition of Rape	Penile-vaginal, penile-anal, or penile-oral penetration without consent.	Any non-consensual sexual act involving, penetration, irrespective of gender.
Protection for Transgender/Non-Binary Individuals	Not covered under rape law.	Fully protected as both potential victims and perpetrators.
Scope of law	Gender specific (focused on women as victim and men as perpetrators).	Gender neutral (focused on the act and consent not on gender).

### Parliament on new criminal laws (BNS, 2023)

In Two Hundred Forty Seventh Report on the Bharatiya Nagarik Suraksha Sanhita, 2023<sup>23</sup> presented by Parliament of India Rajya Sabha, it is noted in some other issues worth

<sup>21</sup> Imran Ahmad Siddiqui, *Sodomy Behind Jail Suicide*, The Telegraph Online (June 4, 2015, 12:00 AM), [https://www.telegraphindia.com/india/sodomy-behind-jail-suicides/cid/1511773#goog\\_rewarded](https://www.telegraphindia.com/india/sodomy-behind-jail-suicides/cid/1511773#goog_rewarded) .

<sup>22</sup> Criminal Code of Canada, RSC 1985, c C-46, §§ 271–273.

<sup>23</sup> **Department-related Parliamentary Standing Committee on Home Affairs**, *Two Hundred Forty-Seventh Report on the Bharatiya Nyaya Sanhita, 2023; the Bharatiya Nagarik Suraksha Sanhita, 2023; and the Bharatiya Sakshya Bill, 2023, Rajya Sabha, 261st Session*, (2023) (India).

considering the issue of removal of Section 377 of IPC, 1860. The Supreme Court in *Navtej Singh Johar* case had struck down the Section 377 IPC but only to the extent it decriminalizes consensual sex. However, Section 377 is still applicable if the offence is committed without consent. As per BNS, 2023 these acts are not offences, it means the victim of sodomy and buggery etc. will have no remedy under it. So if a man is 'raped' by another man no remedy is awarded to the victim.

It is noted by The Economic Times<sup>24</sup> that In a parliamentary debate on new criminal law Lok Sabha MP Asaduddin Owaisi, raised a concern over new criminal laws. Mr. Owaisi questioned Centre over the men's rights in the newly-introduced laws.

### Statistics

In a report prepared by National Human Rights Commission on highlighting the finding on jail suicide the period of 2007-2011, it was found that the same sex rapes (Sodomy) by fellow is the main reason for suicide. "In interview with inmate who were prevented from committing suicide, many of them said they had been raped or coerced for sexual favours"<sup>25</sup>.

The national crime statistics show 10% of rape victims or 1 in 33 men (3%) have experienced rape<sup>26</sup> with 75% of incidents occurring before age 18 and 48% before age 12 (Tjaden & Thoennes, 2000)<sup>27</sup>. By age 18, 1 in 4 girls and 1 in 6 boys experience sexual assault (Finkelhor, Hotaling, Lewis & Smith, 1990)<sup>28</sup>.

In a study on Child Abuse: INDIA 2007<sup>29</sup> conducted by Ministry of Women and Child Development Government of India, In order to examine the incidence of physical abuse among young adults, the questionnaire was administered to 2324 respondents in the age group of 18-24 years. Among the total respondents in this category, 48.8%

<sup>24</sup> ET Online, *Don't men suffer this crime*, The Economics Times (Dec. 23, 2023, 1:25 PM IAT), <https://economictimes.indiatimes.com/news/politics-and-nation/dont-men-suffer-this-crime-asaduddin-owaisi-raises-concerns-over-new-criminal-laws/videoshow/106230590.cms?from=mdr>.

<sup>25</sup> Imran Ahmad Siddiqui, *Sodomy Behind Jail Suicide*, The Telegraph Online (June 4, 2015, 12:00 AM), [https://www.telegraphindia.com/india/sodomy-behind-jail-suicides/cid/1511773#goog\\_rewarded](https://www.telegraphindia.com/india/sodomy-behind-jail-suicides/cid/1511773#goog_rewarded).

<sup>26</sup> J. Finn & P. Hughes, *Internet-Delivered Therapeutic Interventions in Human Services* 102-07 (Routledge, London 2014).

<sup>27</sup> Patricia Tjaden & Nancy Thoennes, *Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* (U.S. Dep't of Justice, Nat'l Inst. of Just., NCJ 183781, 2000), <https://www.ojp.gov/pdffiles1/nij/183781.pdf>.

<sup>28</sup> David Finkelhor et al., *Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors*, 14 *Child Abuse & Neglect* 19, 19-28 (1990).

<sup>29</sup> Ministry of Women & Child Dev., Gov't of India, *Study on Child Abuse: India 2007* (2007), <https://wcd.nic.in/sites/default/files/childabuse.pdf>.

reported physical abuse when they were children, out of which 52.7% were males and 47.3% females.

### Conclusion and Suggestions

Extensive research has been done on sexual violence against men is being country wide with several countries having gender new rape laws. India too has to recognize the seriousness of sexual violence against men and introduce the legislation for the protection of men from sexual offences.

People speak up when injustice is done to women, but when it happens to a man than no one stands in support of man. Some of the namely cases like R.G. Kar Medical College<sup>30</sup> case and Nirbhaya<sup>31</sup> case these cases shake the whole nation people are protesting for the justice of woman, same should be done by the society when these offences are committed with a man. Society should stand with the victim without showing biasness among male and female, every individual should be treated equally by the society or law.

The following changes should be made for the protection of men from sexual offences.

- There must be gender neutral laws in place of gender specific laws.
- Awareness should be spread regarding sexual violence against men through article, campaign, reports etc.
- There must be a specific section which deals with the sexual violence against men including sodomy.
- Male and female should be treated equally no matter victim is male or female.
- Male and female should be punished equally without any discrimination.
- Proper awareness will be provided in schools and colleges so that victim get the courage to speak for himself and fought for justice.

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<sup>30</sup> *In Re: Alleged Rape and Murder Incident of a Trainee Doctor in R.G. Kar Medical College & Hospital, Kolkata and Related Issues v. Union of India & Ors.*, SMW (CrI) No. 2 of 2024, [2024] 8 S.C.R. 1047: 2024 INSC 613 (S.C. Aug. 20, 2024).

<sup>31</sup> *Mukesh & Anr. v. State (NCT of Delhi) & Ors.*, (2017) 6 SCC 1 (India).