



A Critical Examination Of The Bharatiya Nyaya Sanhita's (Bns) Provisions On Rape: A Gendered Perspective

Author: Sandhya Devi S
Advocate

Abstract

The Bharatiya Nyaya Sanhita (BNS), India's new criminal code, has introduced major changes in the country's criminal laws. The provisions related to rape in BNS have been structured to protect female sexual assault victims. This has raised a concern about the gender-biased approach of this code. This research paper critically examines Bharatiya Nyaya Sanhita's provisions on rape from a gendered perspective, analysing whether the legal framework perpetuates gender bias and excludes male and non-binary victims of sexual violence. This paper calls for a shift in India's legal framework on rape to be gender-neutral for a more inclusive legal approach that ensures justice and support for all, regardless of their gender.

Keywords: gender-neutral, sexual violence, rape laws, BNS.

Introduction

Rape is a heinous crime that involves the sexual violation of another person's bodily autonomy which can affect both physically as well as mentally. A legal framework against rape is considered to be an important provision as it contributes to being a safer and more equitable society. In India, there is a gendered assumption of rape that men are perpetrators and women are victims¹. Therefore, the country's legislative framework is mainly focused on female victims. This perspective gave birth to the gender-biased rape provisions in this new code. Despite the growing sexual violence against men and non-binary individuals, the Indian legal system lacks adequate legal protection that needs immediate action².

The title of our research paper, "A Critical Examination of the Bharatiya Nyaya Sanhita's (BNS) Provisions on Rape: A Gendered Perspective", underscores that the BNS overlooks the lived realities of male and non-binary survivors, highlighting an essential gap in its provisions. While the world has progressed to adopt

¹ Section 375, Indian Penal Code, 1860

² Gupta, A., "Male Survivors of Rape in India: A Study of the Barriers to Justice," Indian Law Journal, 2018, 78.

gender-neutral codes on rapes, India's legal framework needs reformation to provide a more inclusive approach to addressing sexual violence.

This paper explores the limitations of gender-specific provisions on rape under the BNS, advocates for gender-neutral provisions, analyses international frameworks and proposes balanced safeguard to address concerns of misuse. As the author of this paper, I emphasise the urgent need for gender-neutral rape laws to ensure equal protection and support for all individuals, regardless of their gender.

Literature review

Research has shown that Indian rape laws are biased towards female victims, neglecting the experiences of male and non-binary survivors. Indian rape laws have been criticized for being gender-neutral in theory but gender-biased in practice (Kumar, V. 2014)³. This literature review examines the existing research on gender bias in the Indian legislature on rape and identifies the gaps in the current legal framework.

One of the earliest studies on rape laws in India was conducted by Baxi (The Rape Trial: A Critical Analysis of The Indian Penal Code, 2014), who argued that the Indian Penal Code provisions on rape were patriarchal assumptions and reinforced gender stereotypes⁴. Male survivors of rape face significant barriers to accessing justice (Gupta, A. 2018. Male Survivors of Rape in India: A Study of the Barriers to Justice)⁵. Studies have highlighted the limitations of the Indian Penal Code in defining rape, which excludes non-penile penetration and neglects the marginalised community (Kaur, R., 2019. The Definition of Rape in Indian Law: A Critical Analysis)⁶.

Non-binary survivors also experience high levels of marginalization and trauma due to the lack of recognition as well as protection under Indian legislation (Sharma, A., 2020. Non-binary Survivors of Rape in India: A Study of the Experiences of Marginalization and Exclusion)⁷. The BNS was introduced in 2023 to reform the Indian criminal justice system. However, critics argue that it perpetuates existing gender biases and fails to provide adequate protection for male and non-binary survivors of rape (Gupta, A., 2023. A Critical Analysis of Bharatiya Nyaya Sanhita: Gender Bias and Rape Laws)⁸.

Overall, the existing research highlights the need for reform in the Indian legal system on rape to make it more inclusive.

Methodology

The methodology used in this research article majorly utilises the Doctrinal method, also known as the top-down approach, for analysing legal principles and frameworks on rape. This study also employed thematic analysis to categorize the reviewed literature into themes such as "gender-specific provisions". Additionally, descriptive and analytical methods are used for a comprehensive analysis of this subject. The diagnostic research method is incorporated to propose recommendations. To examine the research questions, data are collected from secondary sources such as books, journals, articles, media reports and websites.

³ Kumar, V., "The Indian Penal Code and Rape Laws: A Critical Analysis", Journal of Crime and Justice, 2014, p. 47.

⁴ Baxi, "The Rape Trial: A Critical Analysis of the Indian Penal Code", Journal of Indian Law and Society, 2014.

⁵ Gupta, A., "Male Survivors of Rape in India: A Study of the Barriers to Justice", 2018.

⁶ Kaur, R., "The Definition of Rape in India: A Critical Analysis", Journal of Indian Law and Society, 2019.

⁷ Sharma, A., "Non-binary Survivors of Rape in India: A Study of the Experiences of Marginalization and Exclusion", 2020.

⁸ Gupta, A., "A Critical Analysis of Bharatiya Nyaya Sanhita: Gender Bias and Rape Laws", Journal of Criminal Law and Policy, 2023, p. 92.

Research Objectives

1. To critically evaluate the BNS definition of rape and examine whether it perpetuates gender bias and excludes male and non-binary survivors.
2. To propose legal and policy reforms by suggesting amendments to the BNS provisions and other Indian rape laws to make them more inclusive.

Research question

Does the BNS definition of rape, which primarily focuses on female victims, perpetuate gender bias and ignore the experiences of male and non-binary survivors?

Statistical Analysis of Rape Cases

Everyone should accept that the rape cases against women in India are a significant concern. The National Crime Records Bureau recorded 31,677 rape cases in 2021, with an average of 86 cases daily⁹. In India, the traditional masculinity norms discourage men from reporting rape as it may portray them as weak. So, the relevant statistical data on rape against men is scarce. According to a survey conducted by the Centre for Civil Society, 16.1% of men reported being forced into sex by a woman, while 2.1% experienced this by another man (S. G. Smith, 2017)^{10 11}. There are limited data available on rape cases against non-binary individuals in India. Transgender and non-binary individuals report high rates of sexual violence, with studies indicating that 47% have experienced some form of sexual assault in their lifetime¹². Considering the number of rape cases against women, it's understandable why the government policies and laws are majorly focused on women from preventing sexual violence. However, it's important to understand that the rape can affect anyone regardless of gender.

The Evolution and Gender Bias in India's Rape Laws

Indian rape laws, particularly Section 375 of the IPC define rape exclusive as a crime by a man against a woman, as an outcome of the patriarchal mindset of that time¹³. The 172nd Law Commission Report (2000) as well as Justice Verma Committee Recommendations (2013) recommended the inclusion of gender-neutral provisions in rape laws, but the legislation retained gender-specific terminology, focusing on women as victims¹⁴. Despite these recommendations, subsequent amendments including 2013 as well as BNS, remained gender-specific. The Delhi High Court mentioned that there is a need for IPC to include protection for male rape victims in the case of Smt. Sudesh Jhaku vs K. C. J. (1996)¹⁵, one of the first judgments to speak about gender neutrality in India. The Delhi High Court held that the POCSO Act applies to children

⁹ National Crime Records Bureau, Crime in India Report, 2021, p. 225

¹⁰ Centre for Civil Society, "Survey on Gender-Neutral Rape Laws", 2013, p. 12.

¹¹ S. G. Smith, "Gender and Sexual Violence in India", Journal of Social Justice, 2017, p. 56.

¹² National Human Rights Commission, "Violence Against Transgender Persons: A Critical Review", 2021, p. 10.

¹³ Section 375, Indian Penal Code, 1860.

¹⁴ Justice Verma Committee, Reports on Amendments to Criminal Law, 2013, p. 85.

¹⁵ Smt. Sudesh Jhaku V. K. C. J., (1996) 62 DLT 563.

irrespective of gender in *Rakesh Vs State of NCT of Delhi* (2023)¹⁶. Under the Transgender Persons (Protection of Rights) Act, 2019, sexual offences against transgender individuals are penalized. The punishment is imprisonment for 6 months to 2 years which is much less than the punishment mentioned in BNS¹⁷. While India's rape laws have evolved from patriarchal origins under the IPC, the recent BNS continues to retain gender-specific provisions. This raises questions about inclusivity and justice for all genders.

Analysing Rape Provisions under Bharatiya Nyaya Sanhita

Firstly, the rape was classified under Chapter V of the BNS, which is 'Offences Against Women and Children. Even the classification itself is gender-biased. Rape is an offence against humanity as a whole, not just against women.

Section 63 of the BNS defines rape as "A Man is said to commit rape". Even the first line shows the traditional mentality of men are perpetrators. It's a social stigma that needs to be eradicated. Section 63 clearly explains rape as penetration into a woman's vagina, mouth, urethra or anus, only a woman, not a man. Here, the legal right of a man against rape is still a question mark. The whole section protects the bodily autonomy of a woman extensively.

Also, sections like 67, 68, 69 and 70 are woman-centric and designed to protect women from sexual violence. This might lead to discrimination against men, especially in cases where they may be genuine victims of sexual assault. It's important to consider that the BNS aims to protect Women's rights but it should also ensure that the men's rights are not being compromised.

The Need for Gender-Neutral Rape Laws in India

Indian rape laws are aimed to protect women from sexual violence, they overlook men and non-binary individuals, who may also face the same.

1. Constitutional Mandate: Equality Before the Law

Article 14 of the Constitution guarantees equality before the law and equal protection and Article 15 prohibits discrimination based on gender¹⁸. While current rape laws violate these principles by protecting one gender. Whereas, gender-neutral laws can ensure protection for all genders and also align with the constitutional principle.

2. A Call for Inclusive Justice

Men also can be the victims of rape and sexual assaults across the world. Gender-specific rape laws fail to acknowledge their victimhood. Cases of abuse against men are often underreported due to the lack of legal protection as well as social stigma around men. Members of the LGBTQ+ community are often the victims of sexual violence, even by their family members. A transgender individual can seek justice against rape under the Transgender Persons (protection of rights) Act, 2019. The punishments for rape against a transgender person in this act are comparatively lesser than that of Section 64 of BNS.

¹⁶ Rakesh V. State of NCT of Delhi, SCC Online Del 1056 (2023).

¹⁷ Section 18(d), The Transgender Persons (Protection of Rights) Act, 2019.

¹⁸ Article 14 and Article 15, Indian Constitution, 1950.

Gender-neutral laws can reduce the underreporting of sexual assaults against men and non-binary person by creating a safer and more inclusive legal measure for all survivors.

3. Global Trends Towards Gender Neutrality

As per Centre for the Civil Society Research 2013, out of 96 countries studied, 63 were found to have gender-neutral rape laws. Countries across the world are transforming towards gender-neutral legislatures as a reflection of the evolving sexual violence¹⁹. Several countries, including the United Kingdom, the United States, Canada, Australia, Germany, and South Africa have updated their laws focusing on the act of sexual violence rather than the gender. The UN recommends gender-neutral laws to promote inclusivity. India's current approach to rape laws needs modernization²⁰. By adopting gender-neutral rape laws, India as a fast-growing nation can meet up with global standards.

India needs gender-neutral laws to promote inclusivity, to safeguard human rights, and to ensure justice for all genders.

Concerns and Challenges in Gender-Neutral Reforms

1. Risks women's Rights

Statistical pieces of evidence show that women are the major victims of sexual violence in India. This has led the legislature to focus more on women's protection. One of the major concerns surrounding the implementation of gender-neutral laws in India is the potential dilution of the protection of women. As a patriarchal society, historically India faced struggles of gender inequality and the legislature opted for a women-centric approach to combat social oppression. The Indian government has introduced various schemes to protect and empower women rape victims, recognizing the injustice and inequalities they have faced. Despite these efforts, many fear that the introduction of gender-neutral rape laws may shift focus away from the injustice faced by women which weakens women's exclusive rights.

2. Fear of Misuse: Risk of False Allegations

Critics of gender-neutral rape laws argue that this could lead to an increase in false cases, particularly against women²¹.

3. Legal challenges

Enacting gender-neutral rape laws in India would need significant amendments to the BNS and other criminal codes. Aligning all the related legal provisions to accommodate gender neutrality requires rewriting legal principles without diluting protections for women who are the primary victims of sexual violence.

Recommendations for Inclusive Rape Laws

1. Ensure Women's protection remains intact: while making BNS gender-neutral, retain additional protection for women under specific sections to safeguard women's rights. Make sure that the gender-neutral provisions are supplements, not replacements.
2. Introduce safeguards against misuse: enacting robust penalties for false accusations can create a fear of misuse without discouraging genuine survivors. Misuse of law is possible, such cases are rare and

¹⁹ Centre for Civil Society, Survey on Gender-Neutral Rape Laws, 2013, p. 12.

²⁰ Amnesty International, "The Global Need for Gender-Neutral Rape Laws", accessed June 25, 2024, <https://www.amnesty.org>

²¹ National Human Rights Commission, "Barriers Faced by Male and LGBTQ+ Survivors in India", 2021, p. 15.

strict legal initiatives can prevent that. Misuse of legal provisions is a broader concern, but it should not obstruct justice for real victims.

3. The judiciary plays a major role by delivering judgments that recognise gender-neutral interpretation. Clear legislative intent and judicial interventions can minimize legal confusion.

Other than these, creating public awareness programs, strengthening Judicial and Law enforcement training and regular review and revision of law in India can ensure that all survivors of sexual violence regardless of gender have access to justice.

Limitations

This study has several limitations. Firstly, the analysis is limited to the BNS provisions on Rape not any other sections in BNS or other laws and policies related to sexual violence. Secondly, the study relies on a critical discourse analysis approach, which may be subjective.

Towards Inclusive Justice: Concluding Thoughts

Indian rape laws, especially BNS should consider sexual violation as a violation of personal dignity and bodily autonomy, irrespective of gender. The introduction of gender-neutral rape provisions in BNS has the potential for equal protection and justice for all. Through detailed examination, this paper highlights the urgent need for gender-neutral rape provisions in BNS, which need a new and more inclusive definition of rape in India. Lawmakers should also consider the potential consequences of such laws to mitigate any negative impacts.

Ultimately, by enacting gender-neutral provisions, India creates a more inclusive and equitable legal system, where all individuals are protected from sexual violence and have access to justice which is not determined by gender but by the act of violation itself. By prioritising the safety and well-being of all individuals, the nation can ensure that no survivor is left unheard or unprotected.

References

1. Gupta, A., "Male Survivors of Rape in India: A Study of the Barriers to Justice," Indian Law Journal, 2018.
2. Kumar, V., "The Indian Penal Code and Rape Laws: A Critical Analysis", Journal of Crime and Justice, 2014.
3. Baxi, "The Rape Trial: A Critical Analysis of the Indian Penal Code", Journal of Indian Law and Society, 2014.
4. Gupta, A., "Male Survivors of Rape in India: A Study of the Barriers to Justice"., 2018.
5. Kaur, R., "The Definition of Rape in India: A Critical Analysis", Journal of Indian Law and Society, 2019.
6. Sharma, A., "Non-binary Survivors of Rape in India: A Study of the Experiences of Marginalization and Exclusion", 2020.
7. Gupta, A., "A Critical Analysis of Bharatiya Nyaya Sanhita: Gender Bias and Rape Laws", Journal of Criminal Law and Policy, 2023.
8. National Crime Records Bureau, Crime in India Report, 2021.
9. Centre for Civil Society, "Survey on Gender-Neutral Rape Laws", 2013.

10. S. G. Smith, "Gender and Sexual Violence in India", Journal of Social Justice, 2017.
11. National Human Rights Commission, "Violence Against Transgender Persons: A Critical Review", 2021.
12. Justice Verma Committee, Reports on Amendments to Criminal Law, 2013.
13. Smt. Sudesh Jhaku V. K. C. J., (1996) 62 DLT 563.
14. Rakesh V. State of NCT of Delhi, SCC Online Del 1056 (2023).
15. Amnesty International, "The Global Need for Gender-Neutral Rape Laws", accessed June 25, 2024, <https://www.amnesty.org>
16. National Human Rights Commission, "Barriers Faced by Male and LGBTQ+ Survivors in India: A Critical Review", 2021.
17. United Kingdom, Sexual Offences Act, 2003, Section 1.
18. United States, Title IX Regulations on Sexual Assault, Federal Law, 2021.

