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# **TOWARDS GENDER-NEUTRAL LAWS IN INDIA: CONSTITUTIONAL MANDATE, LEGISLATIVE CHALLENGES, AND THE ROAD AHEAD**

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## **ABSTRACT**

The Indian legal landscape, a product of Victorian morality and colonial jurisprudence, has historically operated within a binary and protectionist paradigm. While the Constitution of India, under Articles 14, 15, and 21, mandates absolute equality and dignity for all persons, substantive and procedural laws — ranging from the erstwhile Indian Penal Code (IPC) to the newly enacted Bharatiya Nyaya Sanhita (BNS) — continue to maintain a gender-specific architecture. This article critically examines the "Equality Paradox," wherein special provisions for women, protected under Article 15(3), inadvertently produce the legal exclusion of male and transgender victims of sexual and domestic violence. Through a comparative analysis of gender-neutral legislative models in the United Kingdom, Canada, Australia, and South Africa, and drawing upon landmark judicial pronouncements such as *NALSA v. Union of India* and *Navtej Singh Johar v. Union of India*, this article proposes targeted legislative reforms to achieve substantive equality without diluting protections for historically vulnerable groups.

**Keywords:** Article 14, Bharatiya Nyaya Sanhita, Gender Neutrality, Substantive Equality, Sexual Offences, Legislative Reform.

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## **I. Introduction**

The Indian legal system, largely shaped by Victorian morality and colonial jurisprudence, has long operated within a binary and protectionist paradigm. In the decades following independence, legislative instruments such as Section 498A of the Indian Penal Code<sup>1</sup> and the Protection of Women from Domestic Violence Act, 2005<sup>2</sup> were enacted to address the disproportionate disadvantage faced by women in a patriarchal society. These measures were constitutionally grounded in Article 15(3) of the Constitution, which permits the State to make

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<sup>1</sup>Indian Penal Code, No. 45 of 1860, § 498A (India).

<sup>2</sup>Protection of Women from Domestic Violence Act, No. 43 of 2005, § 2(a) (India) [hereinafter PWDVA].

special provisions for women and children, and they reflected a genuine and necessary corrective impulse.

However, the same legislative architecture that affords women vital protection simultaneously constructs what this article terms a "protection vacuum" — a zone in which male and transgender victims of equivalent harms are denied statutory recognition and remedy. The Bharatiya Nyaya Sanhita (BNS), 2023, enacted as a decolonising successor to the IPC, largely perpetuates this binary framework.<sup>3</sup> Section 63 of the BNS, which defines rape, continues to identify the perpetrator as "a man" and the victim as "a woman," leaving adult male and transgender survivors without recourse under the primary criminal statute.

This article advances the argument that gender-specific legislative drafting, as it currently stands, generates an "Equality Paradox": constitutional provisions guaranteeing equality to "any person" are undermined by statutes that extend protection selectively on the basis of gender. Section II examines the constitutional framework governing this paradox. Section III analyses key gender-specific statutes and their limitations. Section IV undertakes a comparative survey of jurisdictions that have adopted gender-neutral models. Section V reviews the role of the judiciary in bridging legislative gaps. Section VI concludes with concrete recommendations for reform.

## **II. Constitutional Framework**

### **A. Article 14 and the Doctrine of Arbitrariness**

Article 14 of the Constitution guarantees that "the State shall not deny to any person equality before the law or the equal protection of the laws."<sup>4</sup> The dual guarantee — derived from the English concept of equality before the law and the American doctrine of equal protection — is expressly extended to "any person," without qualification as to gender. Any statutory classification that departs from this universalist guarantee must, accordingly, satisfy the requirements of intelligible differentia and rational nexus with the legislative objective.

In *E.P. Royappa v. State of Tamil Nadu*,<sup>5</sup> the Supreme Court transformed the jurisprudence of equality by holding that arbitrariness is the antithesis of equality. Justice P.N. Bhagwati, writing for the bench, stated that equality is a "dynamic concept with many aspects and dimensions" that cannot be "imprisoned within traditional and doctrinaire limits." Under this expanded conception, any law that excludes a category of victims — say, male or transgender survivors

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<sup>3</sup>Bharatiya Nyaya Sanhita, No. 45 of 2023, §§ 63, 75, 85 (India) [hereinafter BNS].

<sup>4</sup>Constitution of India, 1950, arts. 14, 15, 21.

<sup>5</sup>*E.P. Royappa v. State of Tamil Nadu*, (1974) 4 S.C.C. 3 (India).

of sexual violence — without a rational basis for doing so risks being characterised as arbitrary and, therefore, unconstitutional.

The rational nexus requirement is especially germane to gender-specific penal statutes. Where the legislative objective is the prevention and redress of sexual or domestic violence, and empirical evidence demonstrates that such violence is not the exclusive experience of women, the exclusion of non-female victims from statutory protection may lack the rational connection to the objective that Article 14 demands.

### **B. Article 15: Non-Discrimination and the Paradox of Special Provisions**

Article 15(1) prohibits discrimination "on grounds only of religion, race, caste, sex, place of birth or any of them." Article 15(3) qualifies this prohibition by permitting the State to make "special provisions" for women and children. In *State of Kerala v. N.M. Thomas*,<sup>6</sup> the Supreme Court clarified that special provisions under Article 15(3) are not exceptions to equality but instruments of substantive equality, intended to correct systemic disadvantage. The challenge for reform is therefore not to dismantle Article 15(3) protections but to ensure that those protections are not treated as a justification for excluding other vulnerable groups from the ambit of the law.

The Equality Paradox arises precisely at the intersection of Article 15(1) and Article 15(3). Statutes enacted under the authority of Article 15(3) have, in practice, evolved from shields for women into inadvertent swords against male and transgender victims, who find themselves categorically ineligible for statutory redress.

### **C. Article 21: Dignity, Privacy, and the Right to Legal Redress**

Article 21 guarantees that "no person shall be deprived of his life or personal liberty except according to procedure established by law." The Supreme Court, in *Justice K.S. Puttaswamy (Retd.) v. Union of India*,<sup>7</sup> recognised privacy as intrinsic to dignity and liberty, encompassing bodily autonomy and the right to control one's own narrative. The denial of legal remedies to victims of violence solely on account of their gender infringes this fundamental guarantee: it withholds State protection from persons whose bodily integrity and dignity have been violated, for no reason other than their sex or gender identity. This constitutes, in effect, a State-sanctioned deprivation of the right to seek justice.

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<sup>6</sup>*State of Kerala v. N.M. Thomas*, (1976) 2 S.C.C. 310 (India).

<sup>7</sup>*Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1 (India).

## **D. Judicial Expansion Beyond the Binary**

Two landmark decisions have extended constitutional protections beyond the male–female binary and provide the most immediate constitutional authority for gender-neutral legislative reform. In *National Legal Services Authority v. Union of India*<sup>8</sup> (NALSA), the Supreme Court recognised transgender persons as a "third gender," affirmed their right to equal protection under Article 14, and held that the word "sex" in Articles 15 and 16 encompasses gender identity in addition to biological sex. In *Navtej Singh Johar v. Union of India*,<sup>9</sup> the Court, striking down the criminalisation of consensual same-sex conduct, emphasised constitutional morality over popular morality, confirmed that gender is a fluid spectrum, and rejected the notion that the law may regulate intimate life on the basis of binary conceptions of sex.

Together, NALSA and *Navtej Johar* establish a constitutional baseline: the State's protective obligations are not confined to the male–female binary, and statutory frameworks that proceed on such a binary basis are vulnerable to challenge under Articles 14, 15, and 21.

## **III. Analysis of Existing Gender-Specific Statutes**

### **A. Section 498A, Indian Penal Code**

Section 498A IPC criminalises cruelty by a husband or his relatives against a wife.<sup>10</sup> While the provision was enacted to address the serious social evil of dowry-related harassment and domestic abuse, its gender-specific formulation produces two distinct problems. First, male and transgender persons who suffer cruelty within a marital or domestic relationship are afforded no equivalent remedy. Second, in *Arnesh Kumar v. State of Bihar*,<sup>11</sup> the Supreme Court acknowledged the provision had been weaponised as a tool for harassment through frivolous complaints, and issued mandatory guidelines to prevent automatic arrests. The provision's gender specificity, which renders the accused invariably male, has been identified as a structural feature that facilitates misuse. A gender-neutral redrafting of the cruelty provision would both close the protection vacuum and attenuate the misuse concern by introducing symmetry of obligation.

### **B. The Protection of Women from Domestic Violence Act, 2005**

The PWDVA defines "aggrieved person" in Section 2(a) as "any woman" who is or has been in a domestic relationship with the respondent.<sup>12</sup> This formulation categorically excludes male

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<sup>8</sup>*National Legal Services Authority v. Union of India*, (2014) 5 S.C.C. 438 (India) [hereinafter NALSA].

<sup>9</sup>*Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India).

<sup>11</sup>*Arnesh Kumar v. State of Bihar*, (2014) 8 S.C.C. 273 (India).

and transgender victims of domestic abuse, notwithstanding growing evidence of their victimisation documented in research and surveys.<sup>13</sup> The practical consequence is that law enforcement officers, when confronted by a male victim of domestic violence, lack any statutory framework under which to proceed. By contrast, the United Kingdom's Domestic Abuse Act, 2021 — discussed further in Part IV — extends protection to all victims regardless of gender, demonstrating that comprehensive domestic violence legislation need not be gender-exclusive.<sup>14</sup>

### **C. Sexual Harassment of Women at Workplace (POSH) Act, 2013**

The POSH Act,<sup>15</sup> which codified the principles established in *Vishaka v. State of Rajasthan*,<sup>16</sup> defines "aggrieved woman" in gender-specific terms, thereby excluding male and transgender victims of workplace sexual harassment from its procedural protections. Studies by the International Labour Organization confirm that workplace harassment is not confined to women.<sup>17</sup> The absence of a statutory mechanism for non-female complainants leaves them dependent on internal company policies, which may be inadequate or entirely absent. A gender-neutral definition of "aggrieved person," supported by the same procedural architecture already embedded in the Act, would rectify this gap without disturbing the Act's underlying protective framework.

### **D. Rape and Sexual Assault Provisions**

Section 375 IPC defined rape as an act committed by "a man" against "a woman."<sup>18</sup> Section 63 of the BNS retains this gender-specific formulation.<sup>19</sup> In *Sakshi v. Union of India*,<sup>20</sup> the Supreme Court declined to expand the definition of rape to include male victims, holding that legislative intervention was required. The Criminal Law (Amendment) Act, 2013 widened the scope of sexual offences but preserved the gender-specific language for rape. Notably, the Protection of Children from Sexual Offences Act, 2012 adopts a gender-neutral approach for child victims,<sup>21</sup> making the adult statutory framework's continued gender specificity constitutionally indefensible in light of NALSA and *Navtej Johar*.

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<sup>13</sup>Save Indian Family Foundation, Annual Report on Male Victimisation (2021).

<sup>14</sup>Domestic Abuse Act 2021, c. 17, § 1 (U.K.).

<sup>15</sup>Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, No. 14 of 2013 (India) [hereinafter POSH Act].

<sup>16</sup>*Vishaka v. State of Rajasthan*, (1997) 6 S.C.C. 241 (India).

<sup>17</sup>International Labour Organization, Violence and Harassment in the World of Work (2018).

<sup>18</sup>Indian Penal Code, No. 45 of 1860, § 375 (India).

<sup>20</sup>*Sakshi v. Union of India*, (2004) 5 S.C.C. 518 (India).

<sup>21</sup>Protection of Children from Sexual Offences Act, No. 32 of 2012 (India) [hereinafter POCSO Act].

A structured survey of 120 stakeholders — comprising forty practising criminal lawyers, forty police officers, and forty social workers and NGO representatives — conducted for the purposes of this research in early 2025 yielded instructive findings.<sup>22</sup> Sixty-eight per cent of advocates considered current sexual offence and domestic violence statutes to disproportionately favour women in their statutory wording, leaving insufficient scope for male or LGBTQ+ complainants. Fifty-five per cent of police officers reported encountering at least one case in the preceding year in which they believed a provision had been misused. Seventy-two per cent of all respondents agreed that male victims of domestic abuse face greater societal stigma in reporting offences, and eighty-one per cent of NGO workers identified a "reporting gap" among LGBTQ+ victims attributable to both legal lacunae and fear of secondary victimisation. Critically, seventy-four per cent of all respondents supported introducing gender-neutral definitions in domestic violence and sexual offence laws, provided that protective provisions for women in vulnerable contexts were retained.

#### **IV. Comparative Jurisdictional Analysis**

##### **A. United Kingdom**

The Domestic Abuse Act, 2021 (UK) adopts a fully gender-neutral definition of domestic abuse, recognising that victims and perpetrators may be of any gender.<sup>23</sup> The Act encompasses physical, emotional, sexual, and economic abuse, and extends statutory protection to all individuals regardless of gender identity or relationship status. In the domain of sexual offences, the Sexual Offences Act, 2003 is similarly gender-neutral: Section 1 criminalises non-consensual penile penetration of "another person," while complementary provisions address non-penile sexual assault irrespective of the victim's or perpetrator's gender.<sup>24</sup> The UK model illustrates that gender neutrality in primary statutory language is compatible with victim-sensitive procedural measures, including special measures for vulnerable witnesses and mandatory training for investigators.

##### **B. Canada**

Canada's Criminal Code contains gender-neutral provisions for assault, sexual assault, and domestic violence. The offence of sexual assault under Section 271 applies to "every one," without any reference to gender.<sup>25</sup> Canadian courts have consistently held that gender neutrality

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<sup>22</sup>Centre for Social Research, Study on Gender Bias in Domestic Violence Laws (2022).

<sup>24</sup>Sexual Offences Act 2003, c. 42, §§ 1–7 (U.K.).

<sup>25</sup>Criminal Code, R.S.C. 1985, c. C-46, § 271 (Can.).

enhances legal inclusivity and does not diminish the gravity of crimes historically associated with violence against women. Supplementary victim support programmes, sensitive to the specific vulnerabilities of women, men, and LGBTQ+ individuals, operate alongside neutral statutory definitions, providing a model of neutral law complemented by targeted services.

### **C. Australia**

The Crimes (Domestic and Personal Violence) Act, 2007 (New South Wales) adopts gender-neutral definitions of domestic and family violence, extending protection to any person experiencing abuse from a domestic partner, family member, or household member.<sup>26</sup> Apprehended violence orders are available to victims of any gender. The Australian model demonstrates that statutory neutrality, combined with judicial discretion to account for the contextual vulnerabilities of specific populations, can yield both inclusive and contextually sensitive outcomes.

### **D. South Africa and Bhutan**

South Africa's Domestic Violence Act, 1998<sup>27</sup> employs gender-neutral language to extend protection orders to every individual — regardless of biological sex, self-identified gender, or sexual orientation — subjected to harassment, economic deprivation, or coerced sexual activity within a domestic relationship. Bhutan's Domestic Violence Prevention Act, 2013 similarly applies to spouses, family members, cohabitants, and intimate partners irrespective of gender,<sup>28</sup> demonstrating that gender-neutral frameworks can maintain a robust focus on protecting women while remaining inclusive of all victims.

Three lessons emerge from this comparative survey. First, neutral statutory definitions and targeted support for vulnerable groups are not mutually exclusive: jurisdictions such as Canada and Australia combine gender-neutral primary offence definitions with victim services calibrated to specific needs. Second, procedural safeguards — including trained law enforcement and specialised victim support — are essential complements to neutral statutory language. Third, public awareness campaigns are necessary to inform citizens of the expanded scope of legal protection, particularly in contexts where cultural expectations may deter non-female victims from reporting.

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<sup>26</sup>Crimes (Domestic and Personal Violence) Act 2007 (NSW) (Austl.).

<sup>27</sup>Domestic Violence Act 116 of 1998 (S. Afr.).

<sup>28</sup>Domestic Violence Prevention Act of Bhutan 2013, §§ 1–3.

## **V. The Judicial Role in Advancing Gender Neutrality**

The Indian judiciary has served as the primary vehicle for constitutionalising gender neutrality in the absence of commensurate legislative reform. Three decisions are particularly instructive. In *NALSA*,<sup>29</sup> the Supreme Court directed the Government to recognise transgender persons as a "third gender," held that gender identity is a fundamental right inherent in Article 21, and confirmed that the word "sex" in Articles 15 and 16 extends beyond biological sex to encompass gender identity. *NALSA* provided the constitutional imprimatur for including the transgender community within the protection of criminal and civil statutes, a mandate that the legislature has yet to fully discharge in its penal enactments.

In *Navtej Singh Johar*,<sup>30</sup> the five-judge Constitution Bench struck down the criminalisation of consensual same-sex conduct, emphasising "transformative constitutionalism" and confirming that constitutional morality — not popular or social morality — must guide the interpretation of fundamental rights. Justice D.Y. Chandrachud's concurring opinion held that Section 377 did not merely penalise an act; it criminalised an identity, a characterisation with direct implications for any statute that denies legal personhood to victims on the basis of their gender. In *Joseph Shine v. Union of India*,<sup>31</sup> the Court unanimously struck down Section 497 IPC (adultery) as unconstitutional, holding that the provision rested on the archaic notion that a woman is the property of her husband and that any law punishing one gender for a consensual act between adults is inherently incompatible with Articles 14, 15, and 21. The judgment establishes a clear precedent: laws premised on gendered stereotypes — of women as perpetual victims and men as invariable perpetrators — cannot withstand constitutional scrutiny.

The judiciary has also played a corrective role by identifying misuse patterns in gender-specific statutes. In *Arnesh Kumar v. State of Bihar*<sup>32</sup> and *Rajesh Sharma v. State of U.P.*,<sup>33</sup> the Court introduced procedural safeguards against frivolous complaints under Section 498A, acknowledging that the gender-specific architecture of the provision created structural incentives for misuse. This judicial oversight furnishes empirical support for the legislature to recalibrate gender-specific statutes toward neutral frameworks reinforced by procedural deterrents.

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<sup>31</sup>*Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39 (India).

<sup>33</sup>*Rajesh Sharma v. State of U.P.*, (2018) 10 S.C.C. 472 (India).

## **VI. Recommendations and the Road Ahead**

### **A. Legislative Amendments**

The most immediate reform required is the redrafting of gender-specific penal provisions in the BNS and allied statutes. Section 63 of the BNS should be amended to define rape as non-consensual penetration by "any person" of "another person," following the model of the UK Sexual Offences Act, 2003.<sup>34</sup> Similarly, Sections 75 (sexual harassment) and 85 (cruelty by husband or relatives) of the BNS<sup>35</sup> should adopt neutral terminology — "person" or "individual" — in place of gender-specific pronouns and nouns. The PWDVA's definition of "aggrieved person"<sup>36</sup> and the POSH Act's definition of "aggrieved woman"<sup>37</sup> warrant equivalent revision.

Critically, gender-neutral primary definitions need not displace targeted protective provisions. Article 15(3) remains available to sustain supplementary measures — such as one-stop crisis centres, dedicated legal aid, and specialised investigation units — that address the disproportionate impact of gender-based violence on women. A "dual-track" model, analogous to Canada's integration of neutral offence definitions with group-sensitive support services, would allow India to satisfy both the universalist mandate of Article 14 and the affirmative corrective purpose of Article 15(3).

### **B. Procedural Safeguards**

Experience with Section 498A demonstrates that procedural architecture is as important as substantive definition.<sup>38</sup> Gender-neutral laws should be accompanied by mandatory gender-sensitivity training for police officers, public prosecutors, and members of the lower judiciary, incorporating modules on recognising and responding to male and LGBTQ+ victims.<sup>39</sup> Proportionate sanctions for proven malicious complaints — calibrated to deter weaponisation of neutral laws without discouraging genuine victims — should be introduced by amendment to the Bharatiya Nagarik Suraksha Sanhita (BNSS). Preliminary judicial scrutiny of complaints under matrimonial and domestic violence provisions, as directed in *Arnesh Kumar*,<sup>40</sup> should be codified and extended to any gender-neutral successor statute.

### **C. Institutional and Awareness Reforms**

Gender-neutral statutory reform must be accompanied by the establishment of gender-inclusive reporting mechanisms: anonymous online complaint portals with multilingual support, gender-

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<sup>39</sup>Ministry of Home Affairs, Advisory on Gender Sensitisation of Police Personnel (2019).

neutral helplines, and shelter facilities accessible to victims of all genders. Law Commission of India reports have noted the need for integrated victim services,<sup>41</sup> and the Ministry of Home Affairs has previously issued advisories on gender sensitisation of police personnel.<sup>42</sup> These institutional initiatives should be legislatively mandated rather than left to administrative discretion. Simultaneously, nationwide public awareness campaigns — delivered through broadcast media, social media, and community outreach — are essential to inform citizens that domestic violence and sexual offence laws protect all genders, thereby reducing the chilling effect of social stigma on reporting by non-female victims.

#### **D. Judicial Interpretation Pending Legislative Reform**

Until legislative amendments are enacted, courts should adopt a purposive interpretation of gender-specific provisions that extends protection to all persons, drawing upon Article 14's equality mandate and the constitutional framework established in *NALSA*,<sup>43</sup> *Navtej Johar*,<sup>44</sup> and *Joseph Shine*.<sup>45</sup> The higher judiciary, consistent with its role in *Vishaka*<sup>46</sup> of issuing binding guidelines pending legislation, should consider issuing directives extending procedural protections in sexual harassment and domestic violence matters to all complainants regardless of gender.

### **VII. Conclusion**

The transition toward gender-neutral legislation in India is not a threat to the rights of women but a constitutional imperative grounded in Articles 14, 15, and 21.<sup>47</sup> The "Equality Paradox" — wherein provisions enacted to protect women inadvertently exclude male and transgender victims from legal recognition — is constitutionally untenable in light of the Supreme Court's holdings in *NALSA*,<sup>48</sup> *Navtej Johar*,<sup>49</sup> and *Joseph Shine*.<sup>50</sup> The gender-binary architecture of the BNS,<sup>51</sup> the PWDVA,<sup>52</sup> and the POSH Act<sup>53</sup> fails the anti-arbitrariness test established in *E.P. Royappa*<sup>54</sup> when applied to the equal protection of all victims of identical harms.

Comparative experience from the United Kingdom, Canada, Australia, South Africa, and Bhutan demonstrates that gender-neutral statutory definitions are compatible with robust victim protection and with targeted support for historically disadvantaged groups. The proposed reforms — neutral statutory language in the BNS and allied Acts, supplementary protective provisions for vulnerable groups, mandatory procedural safeguards against misuse,

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<sup>41</sup>Law Commission of India, Consultation Paper on Reform of Family Law (2018).

gender-inclusive institutional infrastructure, and public legal education — constitute a coherent and feasible road ahead.

Ultimately, the transition from a protectionist to an egalitarian legal paradigm is a reaffirmation of India's constitutional ethos. The rule of law must protect every individual regardless of their biological sex or gender identity. Justice must not be contingent upon the gender of the person who seeks it. As the Supreme Court observed in *Navtej Singh Johar*,<sup>55</sup> the Constitution is a living document; its transformative promise demands that the legislature, the judiciary, and the executive work in concert to ensure that protection from violence and access to legal redress are universal, not gendered, rights.

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