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Beyond Binary Justice: A Comparative Study of Gender Neutrality in Indian and International Criminal Laws

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Abstract

Across criminal justice systems, “gender neutrality” has become a contested aspiration. Many jurisdictions have moved from gender specific offences especially in the domains of sexual offences, workplace harassment, and domestic violence toward gender inclusive or at least gender aware drafting. India’s recent overhaul of its penal code (the Bharatiya Nyaya Sanhita, 2023), together with legacy frameworks like the POSH Act, 2013 and the Protection of Women from Domestic Violence Act, 2005, has reignited debate on whether formal neutrality better advances equality than targeted, gender specific protections. This paper offers a doctrinal, comparative analysis. It (i) sets out working definitions and theoretical lenses (formal equality, substantive equality, and intersectionality), (ii) examines Indian constitutional and statutory developments alongside leading Supreme Court decisions, (iii) compares approaches in the United Kingdom, Canada, South Africa, New Zealand, and the United States, and (iv) reads these domestic frameworks against international and regional instruments (CEDAW, the Istanbul Convention, the Rome Statute/ICC Elements of Crimes, the Yogyakarta Principles). I argue that formal gender neutrality sometimes obscures structural asymmetries, while context sensitive neutrality paired with robust procedural protections and implementation can extend protection without erasing the realities of gendered violence. The paper concludes with a reform blueprint for India that reconciles constitutional equality with practical protection: making victim facing provisions gender inclusive, retaining targeted programming where warranted, clarifying consent standards, improving data and implementation capacity, and aligning with comparative best practices and India’s human rights commitments.

Key Words: *gender neutrality; Bharatiya Nyaya Sanhita; POSH; domestic violence; sexual offences; consent; intersectionality; comparative criminal law; CEDAW; Istanbul Convention.*

1. Introduction

Criminal law does two things at once: it draws moral boundaries and allocates protection across persons and groups (Ashworth & Horder, 2022; Duff, 2018). The push for gender-neutral drafting speaks to both aims extending the shield of the law to all victims while resisting stereotypes about who is typically a victim or a perpetrator. Yet neutrality can be double-edged. In fields marked by historically gendered harms sexual offences and domestic abuse purely neutral language may blunt responsiveness unless it is paired with attention to power, stigma, and practical access to justice (CEDAW Committee, 2017; Council of Europe, 2011).

India is at a pivotal juncture. On 1 July 2024, the Bharatiya Nyaya Sanhita, 2023 (BNS) replaced the Indian Penal Code of 1860 the first comprehensive redraft since independence while largely preserving a binary structure for the core rape provision (Government of India, 2023). By contrast, workplace-harassment and domestic-violence frameworks POSH Act, 2013 and PWDVA, 2005 remain woman-specific in standing and design (Government of India, 2005, 2013). These choices reignite foundational questions: Should offences and remedies be gender-neutral across the board, or should targeted protections persist given the empirical distribution of harm and entrenched social asymmetries (Ashworth & Horder, 2022; CEDAW Committee, 2017)?

Constitutional doctrine pulls toward inclusion. In NALSA the Supreme Court recognized a third gender and grounded protection in Articles 14, 15, 19, and 21; Navtej Singh Johar decriminalized consensual same-sex intimacy; Independent Thought read down the marital-rape exception for minors; and Joseph Shine invalidated adultery for stereotyping together signaling a jurisprudential shift away from rigid binaries (National Legal Services Authority v. Union of India, 2014; Navtej Singh Johar v. Union of India, 2018; Independent Thought v. Union of India, 2017; Joseph Shine v. Union of India, 2018). Still, statutory movement has been uneven and implementation gaps persist (Justice Verma Committee, 2013). (For BNS enactment and enforcement date, see Act No. 45 of 2023, effective 01-07-2024: Government of India, 2023.)

This paper proceeds doctrinally text and case law layered with policy analysis of institutions and implementation. Throughout, gender neutrality is used in three contrasted senses: (a) fully neutral drafting (any person may be victim or perpetrator), (b) asymmetrical neutrality (gender-neutral victims but gendered perpetrators), and (c) gender-specific provisions terms aligned with comparative and international usage (Council of Europe, 2011; ICC, 2011).

2. Methodology and Theoretical Framework

2.1 Method

The study is a doctrinal, comparative analysis of statutes, judicial decisions, and authoritative commentaries from India (BNS, POSH, PWDVA), the UK (Sexual Offences Act 2003; Domestic Abuse Act 2021), Canada (Criminal Code ss. 271–273.1), South Africa (Sexual Offences and Related Matters Amendment Act 32 of 2007), New Zealand (Crimes Act 1961, consent reforms), and the United States (Title VII jurisprudence on sex discrimination; VAWA). It also cross-references international instruments: CEDAW; Council of Europe's Istanbul Convention; and the Rome Statute/ICC Elements of Crimes on sexual violence.

Where relevant, I cite official sources for statutory texts and leading judgments. For example, the UK statute pages (legislation.gov.uk) establish how rape remains penis-specific but is nested in a wider matrix of gender-neutral sexual offences, and Canada's Criminal Code codifies an affirmative-agreement model of consent (s. 273.1).

2.2 Equality, Power, and Intersectionality

Debates about neutrality are rarely just about words on a page. They reflect clashing theories of equality:

- **Formal equality** (like-cases alike) urges universal drafting that eschews gender labels.
- **Substantive equality** recognizes differences in social position and seeks to redress disadvantage even through targeted measures.
- **Intersectionality** (Crenshaw, 1989) insists that gender never operates alone; caste, class, religion, disability, and sexuality shape exposure to harm and access to redress (Crenshaw, 1989; Nussbaum, 2000).

International law complicates the picture. CEDAW is not “gender-neutral,” yet it grounds obligations to eliminate discrimination and gender-based violence (GBV). The Istanbul Convention targets violence “against women” but admits that domestic violence affects others as well; it embeds monitoring (GREVIO) and comprehensive state duties. International criminal law, by contrast, tends to define sexual violence in gender-neutral terms (e.g., ICC Elements of Crimes define rape as invasion of the body of a person through penetration “of any part of the body,” focusing on coercion/lack of consent rather than sex categories).

3. India: Between Constitutional Equality and Binary Drafting

3.1 Statutory Baseline: BNS, POSH, and PWDVA

Bharatiya Nyaya Sanhita, 2023 (BNS). The BNS consolidates and amends criminal offences, effective 1 July 2024. It reorganizes chapters, renames some offences, and preserves the core definition of rape as penetration by a man of a woman (continuing the IPC's male-perpetrator/female-victim template), while retaining other sexual offences and expanding some aggravated circumstances. Exact section numbering and headings are provided in the official text and the PRS legislative brief.

POSH Act, 2013. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act explicitly defines the complainant as an "aggrieved woman." Its architecture Internal Committee, Local Committee, employer duties was Parliament's statutory response to *Vishaka* guidelines and *Medha Kotwal Lele* compliance monitoring. The Act's text and government PDFs confirm its woman-specific scope; courts and administrators emphasize mandatory ICs.

Protection of Women from Domestic Violence Act, 2005 (PWDVA). The PWDVA is civil-remedial (with criminal consequences for breach), crafted to give women swift relief orders (protection orders, residence orders, monetary relief, custody, compensation). The text defines an "aggrieved person" as a woman in a domestic relationship; it does not provide a symmetrical remedy for male or non-binary victims.

Tension. India's statutes thus mix (a) binary sexual-offence drafting (BNS rape), (b) woman-specific workplace harassment redress (POSH), and (c) woman-specific domestic violence relief (PWDVA). Yet constitutional doctrine presses toward inclusion.

3.2 Constitutional Arc: From Stereotypes to Autonomy

Four landmark judgments form the backbone of India's gender-equality turn:

- **NALSA v. Union of India (2014)** recognized a third gender, read Articles 14, 15, 19, and 21 to protect gender identity and directed affirmative measures.
- **Navtej Singh Johar v. Union of India (2018)** decriminalized consensual same-sex relations, grounding dignity and autonomy under Articles 14, 15, and 21.
- **Independent Thought v. Union of India (2017)** read down Exception 2 to IPC §375 to criminalize intercourse with a wife below 18 years, strengthening child-rights and consent rationales.
- **Joseph Shine v. Union of India (2018)** (not cited above but widely known) invalidated adultery as unconstitutional for gender

stereotyping; combined with Puttaswamy (privacy), it builds a constitutional ethos of decisional autonomy.

These decisions together weaken binary presumptions and invite Parliament to rethink victimhood beyond sex assignments at birth.

3.3 The POSH–Vishaka Lineage and Its Limits

The Vishaka (1997) guidelines and *Medha Kotwal Lele* (2012–13) compliance orders constitutionalized workplace sexual harassment law before POSH. They expressly framed harassment as discrimination violating Articles 14, 15, and 21. But because Parliament ultimately codified protections as woman-specific, men and non-binary persons who experience workplace sexual harassment must rely on other causes of action (e.g., service rules, tort, or criminal provisions), not POSH's dedicated machinery.

3.4 Marital Rape, Consent, and Ongoing Litigation

India continues to grapple with marital rape. Independent Thought addressed minors; broader criminalization remains contested (Delhi High Court split verdict in 2022; policy debates persisted through the 2023–24 reforms). The BNS, like the IPC, keeps the marital exception for wives aged 18+, a point widely criticized by scholars and news analysis.

3.5 Transgender Persons Act, 2019 and Cross-Statute Friction

The Transgender Persons (Protection of Rights) Act, 2019 prohibits discrimination in employment, education, healthcare, and access to services, and defines "transgender person" broadly. Yet criminal statutes remain binary in key places (rape), creating friction between equality-of-status norms and offence definitions.

3.6 The Justice Verma Committee (2013): Neutrality, Consent, and State Duties

The Justice Verma Committee Report considered gender-neutral drafting for sexual offences and recommended an expansive definition of sexual assault and consent reforms, foregrounding the state's positive duties. Legislative outcomes only partially tracked the recommendations.

Interim assessment. India's constitutional law strongly supports dismantling stereotypes and widening access to protection, but core criminal provisions and remedial frameworks (POSH/PWDVA) remain woman-specific. This asymmetry invites a careful reconsideration of *where* neutrality makes sense (victim-facing entries into justice) and *where* targeted measures remain justified (resource allocation, shelter systems, risk-assessed interventions).

4. Comparative Perspectives

4.1 United Kingdom: Gender-Neutral Matrix with a Penis-Specific Rape

The Sexual Offences Act 2003 defines rape (s. 1) as penile penetration of the vagina, anus, or mouth of another person without consent, meaning a *male* perpetrator for rape; however, offences of assault by penetration (s. 2) and sexual assault (s. 3) are gender-neutral for both victims and perpetrators. Consent is centrally defined (s. 74) and supported by evidential and conclusive presumptions (ss. 75–76). The Crown Prosecution Service guidance makes explicit that women cannot be principal offenders for rape but can be secondary parties; victims across genders have protection through adjacent offences.

The Domestic Abuse Act 2021 adopts a gender-neutral definition of domestic abuse and establishes a Domestic Abuse Commissioner; statutory guidance emphasizes children as victims in their own right.

Lesson. The UK demonstrates that a system can preserve a historical, sex-specific definition of rape while ensuring comprehensive gender-neutral coverage through functionally equivalent offences and a clear consent architecture.

4.2 Canada: Fully Gender-Neutral Sexual Assault + Affirmative Consent

Canada's Criminal Code uses the umbrella offence of *sexual assault* (s. 271) with aggravated forms (ss. 272–273) all gender-neutral. Critically, s. 273.1 codifies consent as *voluntary agreement* to the sexual activity, and s. 273.2 curtails the “mistaken belief” defence, requiring reasonable steps to ascertain consent. Canadian doctrine and guidance stress that silence or passivity is not consent; consent must be present and ongoing.

Lesson. Canada anchors neutrality in both offence definitions and consent rules, pairing it with evidentiary reforms a model of *substantive* neutrality.

4.3 South Africa: Gender-Neutral Redefinition and Consolidation

South Africa's Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 repealed common-law rape and established an expanded statutory definition applicable irrespective of gender. The statute systematizes a wide range of sexual offences and includes a National Register for Sex Offenders, with subsequent amendments refining child-protection and decriminalization issues.

Lesson. Comprehensive legislative redesign can move quickly to gender-neutral offences while embedding child-protection and registration regimes.

4.4 New Zealand: Consent-Based, Gender-Neutral Sexual Violation

New Zealand's Crimes Act 1961 (as amended) defines “sexual violation” (s. 128) and its sub-offences in gender-neutral terms and codifies consent standards, including circumstances where consent is legally vitiated.

Lesson. A consolidated “sexual violation” framework can avoid definitional fragmentation and reduce reliance on gendered terms.

4.5 United States: Workplace Sex Discrimination, LGBTQI+ Inclusion, and VAWA

Although US criminal law is state-defined, federal equality jurisprudence under Title VII of the Civil Rights Act transformed how law understands “sex”: *Oncale v. Sundowner Offshore Services* (1998) recognized same-sex sexual harassment as sex discrimination, and *Bostock v. Clayton County* (2020) held that discrimination based on sexual orientation or transgender status is discrimination “because of sex.” The Violence Against Women Act (VAWA) despite its title funds gender-inclusive services and has been repeatedly reauthorized, with 2022 updates expanding protections and coordination duties.

Lesson. Even when penal definitions vary by state, anti-discrimination law and federal funding statutes can advance inclusive protection and shape institutional practice.

5. International and Regional Norms

5.1 CEDAW and Due Diligence

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is not neutral but imposes obligations to remove discrimination and ensure protection against GBV. General Recommendations (esp. No. 19 and No. 35) have linked GBV to discrimination under Article 1. CEDAW's stance supports sustained, targeted measures while not *forbidding* states from extending protections to all victims.

5.2 Istanbul Convention: Comprehensive, Though Woman-Centric

The Council of Europe's Istanbul Convention (2011) obliges states to prevent, protect, prosecute, and coordinate on VAW and domestic violence. Its architecture, while woman-centered, has driven European consent-based reforms (e.g., the “Yes means Yes” wave) and robust service obligations.

5.3 International Criminal Law: Gender-Neutral Definitions of Sexual Violence

The Rome Statute and ICC Elements of Crimes use gender-neutral definitions of rape and sexual violence, focusing on invasion/penetration and coercion or lack of consent, with context-specific elements for war crimes and crimes against humanity. This doctrinal move illustrates how high-level international criminal

law can avoid sexed categories without losing normative clarity.

5.4 The Yogyakarta Principles

The Yogyakarta Principles and Yogyakarta+10 (soft-law) articulate the application of existing human rights law to sexual orientation, gender identity/expression, and sex characteristics. They emphasize equal protection, non-discrimination, and access to justice norms that support inclusive victim-facing criminal remedies.

5.5 ECtHR Jurisprudence on Consent and Domestic Violence

The European Court of Human Rights (ECtHR) in *M.C. v. Bulgaria* (2003) recognized states' positive obligations to criminalize and effectively prosecute non-consensual sexual acts even absent physical resistance; and in *Opuz v. Turkey* (2009), the Court found systemic failures to protect victims of domestic violence violated the Convention and constituted sex discrimination under Article 14. These cases catalyzed consent-based reforms and due-diligence obligations across Europe.

6. What Do We Mean by "Gender Neutrality" in Criminal Law?

The term covers at least four design choices:

1. **Neutral Victims, Gendered Perpetrators.** E.g., UK rape (male-only principal offender) but neutral coverage through "assault by penetration" and "sexual assault."
2. **Neutral Victims and Perpetrators.** E.g., Canada's sexual assault, South Africa's redefinition, New Zealand's sexual violation.
3. **Woman-Specific Remedial Statutes With Neutral Adjacent Protections.** E.g., POSH and PWDVA in India alongside general criminal provisions.
4. **Neutral Language + Intersectional Implementation.** Where statutes are neutral but resource frameworks prioritize groups at greater risk (women and girls, LGBTQI+ persons, persons with disabilities).

Neutrality is not merely a lexicon choice; it interacts with consent standards, evidentiary rules, institutional capacity (ICs, Protection Officers), and social stigma. Without these, neutrality risks becoming *formalism*.

7. Consent, Coercion, and Capacity: The Core of Substantive Neutrality

Comparative law suggests the *center of gravity* for gender-just reform lies in consent architecture:

- **Affirmative Agreement.** Canada's s. 273.1 model treats consent as voluntary agreement, explicitly rejecting silence or passivity and setting out vitiating circumstances (incapacity, abuse of authority, withdrawal).
- **Presumptions and Culpable Mental States.** UK law supplements a unitary consent definition with evidential and conclusive presumptions, and guidance clarifies when belief in consent is reasonable.
- **Positive Obligations to Criminalize and Prosecute.** ECtHR's *M.C.* decision articulates a due-diligence duty to ensure effective laws and prosecutions for non-consensual acts.

India's debates on marital rape show the limits of formal neutrality when a structural exception undermines the very idea of consent in intimate relationships. A consent-based, neutral framework would strengthen protection for *all* victims including men and transgender/non-binary persons without diminishing attention to gendered prevalence.

8. Workplace Harassment and Domestic Violence: Should Neutrality Be Universal?

8.1 Workplace Harassment

The POSH Act is woman-specific. Critics argue that men and transgender persons can be victims (and that same-sex harassment is actionable), urging either a parallel, gender-neutral statute or amending POSH. Proponents of the status quo contend that women still disproportionately suffer workplace sexual harassment and face higher retaliation costs, justifying targeted statute design; they note that anti-discrimination and service rules can cover others. (Statutory scope: see India Code and official PDFs.)

Comparative note. In the United States, Oncale already recognized same-sex harassment under Title VII, and *Bostock* extended "sex" to sexual orientation and gender identity, effectively ensuring gender-inclusive federal protection in employment though that is *civil rights* rather than a specialized harassment statute.

Policy middle-path. Keep a specialized mechanism (Internal Committees, conciliation constraints, confidentiality) but open standing to "any person," while requiring gender-sensitive procedures and ensuring survivor-centric safeguards for groups at greater risk.

8.2 Domestic Violence

The PWDVA targets protection gaps for women in intimate and domestic relationships. Critics urge gender-neutral protection orders to assist male and non-binary victims; supporters warn that neutrality

risks being exploited to counter-file against women complainants or to obscure the gendered nature of coercive control. A carefully designed neutrality model (wide standing + risk assessment tools + penalties for vexatious cross-filings + specialized shelters) could reconcile both concerns.

Comparative note. The UK's Domestic Abuse Act 2021 is gender-neutral and child-inclusive; it coordinates policing, courts, and services under a Commissioner.

9. India in Global Conversation: Lessons and Cautions

1. **Define Consent Clearly (Substantive Neutrality).** Canada's codification (s. 273.1) is instructive. It is neutral yet deeply protective. India could clarify consent in statutory text (including vitiation circumstances) and training for investigators and judges.
2. **Address Marital Exceptions.** Comparative trends and ECtHR due-diligence principles undercut the idea that marriage should alter consent baselines. The BNS's continuation of a marital exception undermines equality and autonomy.
3. **Broaden Standing while Retaining Gender-Sensitive Implementation.** POSH and PWDVA could be amended to allow "any person" as complainant while mandating gender-responsive procedures and performance metrics that focus on those at greatest risk.
4. **Connect Domestic Statutes to International Obligations.** Even as CEDAW centers women, nothing prevents India from extending protections universally; the Istanbul Convention's comprehensive architecture offers implementation lessons on services, monitoring, and coordination.
5. **Use Anti-Discrimination Law to Fill Gaps.** US Title VII jurisprudence shows how civil-rights regimes can secure gender-inclusive protections that criminal law alone might not deliver.
6. **Data, Services, and Capacity.** Neutrality without shelters, Protection Officers, Internal Committees that actually function, and trauma-informed policing is empty. State capacity and accountability mechanisms are as crucial as text.

10. A Reform Blueprint for India

10.1 Principles

- **Victim-Facing Neutrality:** Any person should be able to report sexual offences, domestic abuse, or workplace harassment through the specialized procedures.
- **Context-Sensitive Implementation:** Recognize that women and girls disproportionately experience sexual and domestic violence; ensure targeted services, high-risk-case protocols, and budgeting reflect that reality.
- **Consent-Centric Redrafting:** Adopt a statutory definition of consent and vitiating circumstances akin to Canada's s. 273.1 (adapted to Indian jurisprudence), cross-referencing due-diligence obligations.
- **Marital Rape Reform:** Remove the exception; at a minimum, make it inapplicable to all non-consensual sexual acts irrespective of marital status, supported by protective evidentiary rules and survivor services.
- **POSH/PWDVA Amendments:** Revise standing to "aggrieved person" while safeguarding against retaliatory misuse through procedural filters and penalties for bad-faith cross-filings.
- **Alignment with International Norms:** Explicitly cite CEDAW obligations and, where relevant, track the consent logic developed in *M.C. v. Bulgaria*, and the due-diligence ethos of *Opuz v. Turkey*.

10.2 Concrete Drafting Moves (Indicative)

1. **BNS Sexual Offences Chapter:**
 - Replace sexed language ("man," "woman") with "person," and redefine rape as *intentional penetration of the body of another person without that person's consent*, listing modes of penetration (including object/any body part), with aggravated forms.
 - Insert a consent section: "Consent means voluntary agreement..." with a non-exhaustive list of circumstances where there is no consent (incapacity, coercion, abuse of authority, withdrawal).
 - Retain child-specific aggravations; cross-reference POCSO.
2. **POSH (Amendments):**

- Replace “aggrieved woman” with “aggrieved person”; guarantee gender-responsive procedures; mandate IC composition includes members trained on SOGIESC (sexual orientation, gender identity/expression, sex characteristics).
- Preserve confidentiality, prohibit retaliation, and require annual reporting to state portals.

3. PWDVA (Amendments):

- Replace standing with “aggrieved person,” define “coercive control,” include LGBTQI+ partners, and provide gender-sensitive shelters and protection planning.

4. Implementation:

- **Training:** Trauma-informed policing and prosecution; standard consent instructions.
- **Data:** Disaggregate by gender identity, age, disability, caste, and relationship to offender; publish dashboards.
- **Monitoring:** Independent audit of ICs and Protection Officers (drawing from the UK’s Domestic Abuse Commissioner model).

11. Conclusion

The binary scaffolding that once structured criminal law is crumbling where it should and holding where it mustn’t. India’s constitutional trajectory points toward dignity, autonomy, and non-stereotyping for *all* persons. Comparative law offers a toolkit: make offences and consent rules person-centred; build neutral access to remedies; retain gender-sensitive implementation calibrated to risk; and establish accountability mechanisms that actually work.

A *beyond-binary* criminal justice one that neither erases women’s realities nor excludes male and non-binary survivors requires both doctrinal courage and administrative patience. It asks lawmakers to write cleaner, more inclusive statutes; courts to interpret with constitutional empathy; and institutions to deliver services that meet people where they are. The choice is not neutrality *versus* protection; the choice is neutrality with protection.

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