

A COMPARATIVE ANALYSIS OF GENDER DISPARITY IN CRIMINAL PROCEDURE FRAMEWORKS: THE CODE OF CRIMINAL PROCEDURE, 1973 AND THE BHARTIYA NAGARIK SURAKSHA SANHITA, 2023

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Abstract

This paper delves into the persisting or evolving nature of gender disparity within the criminal justice system of India, specifically comparing the frameworks laid out in the Code of Criminal Procedure, 1973 (CrPC) and its recently introduced successor, the Bhartiya Nagarik Suraksha Sanhita, 2023 (BNSS). The analysis emphasizes the vulnerabilities faced by women in various stages of the criminal process, including arrest procedures, safeguards during custody, and access to justice. By examining both continuities and potential advancements introduced in the BNSS regarding gender equality, the paper aims to evaluate the effectiveness of these provisions in mitigating gender bias and promoting a fair and equitable criminal process for all.

Keywords: Gender Disparity, Criminal Procedure, Code of Criminal Procedure (CrPC), Bhartiya Nagarik Suraksha Sanhita (BNSS), Arrest Procedures, Custodial Safeguards, Access to Justice, Gender Equality

INTRODUCTION

The journey of criminal legislation in India is a captivating narrative reflecting the country's socio-political landscape, cultural nuances, and its commitment to justice. Rooted in a diverse historical context, the evolution of criminal laws in India has been influenced by indigenous legal traditions, colonial legacies, and contemporary societal demands.

Ancient legal systems such as the Manu Smriti and Artha Shastra laid the groundwork for early criminal jurisprudence in India, offering guidance on offenses and corresponding penalties with a focus on principles of justice and fairness. However, it was during the colonial era that a more structured and codified legal framework emerged. The introduction of the Indian Penal Code (IPC)¹⁴ in 1860 by the British colonial rulers, spearheaded by Lord Thomas Babington

Macaulay, marked a significant departure from pre-existing customary laws. Despite criticisms of its colonial origins, the IPC became a lasting legal legacy, providing a unified legal structure across diverse regions of British India.

Following independence, the Indian legal system underwent substantial reforms to align with the ideals of a sovereign nation. The adoption of the Constitution of India in 1950 enshrined principles of justice, equality, and the rule of law, paving the way for subsequent legislative advancements. Revisions to the Criminal Procedure Code (CrPC) and the Evidence Act were made to incorporate provisions safeguarding individual rights and streamlining legal processes.

In the exploration of gender dynamics within criminal frameworks, it is imperative to consider

¹⁴ <https://ldashboard.legislative.gov.in/sites/default/files/A1860-45.pdf>

historical contexts. As *Winston Churchill*¹⁵ famously remarked, "history is written by the victors," highlighting the pervasive influence of male dominance throughout history. This dominance, traced back to centuries past, has perpetuated a sense of loss of identity for women, often marginalized in historical narratives and discourses.

The Indian Constitution serves as the cornerstone of the country's legal framework, as emphasized by Justice V.N. Khare¹⁶. It not only establishes provisions and guidelines but also confers fundamental rights to citizens, including the rights to equality and non-discrimination outlined in Articles 14, 15, and 16. However, despite these constitutional protections, the phenomenon of phallogocentrism and phallogocentrism persists, privileging male perspectives and undermining the agency of women.

Gender Disparity in the Criminal Justice System

The **Criminal Procedure Code (CrPC), 1973** and the **Bhartiya Nagarik Suraksha Sanhita (BNSS), 2023** are pivotal legal instruments in India, integral to the administration of justice and the protection of citizens' rights. This comparative analysis delves into their provisions concerning women's safety, examining how these laws address issues such as reporting, investigation, and trial procedures related to crimes against women.

The Indian Constitution upholds principles of equality before the law (Article 14¹⁸) and equal protection of laws (Article 15¹⁹), yet the reality for women within the criminal justice system presents a stark contrast. Despite legal assurances, gender disparities persist at various junctures, erecting significant barriers to justice.

The criminal justice system has long been criticized for its gender bias, a sentiment supported by the evident preference for the 'reasonable man' standard in evaluating evidence and conduct. This bias permeates even into cases of offenses against women, such as rape, where the determination of consent hinges on subjective interpretations of the victim's resistance.

An infamous case in India, *Tuka Ram And Anr vs State Of Maharashtra on 15 September*²⁰, 1978 known as the **Mathura case**, exemplifies this issue. Despite clear circumstances indicating lack of consent, the Supreme Court acquitted the accused policemen, emphasizing the importance of revisiting and reforming laws to address gender disparities in the criminal justice system.

Efforts have been made to address these disparities, particularly concerning the arrest process. Recognizing the vulnerability of women in police custody, safeguards have been proposed to limit arbitrary arrests and ensure respectful treatment. Suggestions include prohibiting male officers from touching women during arrest, restricting arrests after sunset, and involving senior officers and magistrates in the decision-making process.

Additionally, proposals aim to enhance the investigation and trial process for gender-related offenses. Recommendations include conducting investigations and trials involving rape cases predominantly by women police officers and judges to ensure sensitivity and fairness. However, debates persist regarding the effectiveness and implications of such measures, with some arguing for a more balanced approach that prioritizes impartiality over gender.

Concerns extend beyond criminal offenses to encompass societal issues like dowry deaths and marital rape. Legislative efforts have been made to address these issues, such as mandatory medical examinations for suspicious

¹⁵ MICHAEL W. ROBBINS, 'Letter From Military History - January 2013 | Historynet' (HistoryNet, 2012) available at <https://www.historynet.com/letter-from-military-history-january-2013.htm>.

¹⁶ Justice V. N. Khare, CJI, Union of India versus Naveen Jindal, 2004 2 SCC 510 paragraph 27.

¹⁷ https://www.livelaw.in/pdf_upload/bharatiya-nagarik-suraksha-sanhita-511325.pdf

¹⁸ <https://indiankanoon.org/doc/367586/>

¹⁹ <https://indiankanoon.org/doc/609295/>

²⁰ <https://indiankanoon.org/doc/1092711/>

deaths and provisions for maintenance of wives. However, challenges remain in interpreting and enforcing these laws consistently across diverse cultural and religious contexts.

Furthermore, the interpretation of legal terms like 'wife' has sparked debates and led to discrepancies in maintenance rights for women. While efforts have been made to ensure gender-neutral application of laws, cultural and societal norms continue to influence judicial decisions.

While strides have been made to address gender disparities in the criminal justice system, much work remains to achieve true equality. Reforms must navigate complex legal, cultural, and societal landscapes to uphold the rights and dignity of women effectively.

Looking at the Code of Criminal Procedure, 1973 through the lens of Gender Disparity

In the endeavour to examine the presence of sex and gender within India's criminal legal system, a thorough investigation of the Code of Criminal Procedure, 1973 (hereafter referred to as the Code) becomes essential. The statement of objects and reasons of the Code emphasizes its aim to uphold the doctrine of natural justice for ensuring fair and speedy trials. However, upon scrutinizing the prologue and objectives, it becomes evident that there is a glaring absence of any reference to sex and gender. This absence might lead one to believe that sociology and biology play no role in this aspect of law. Nevertheless, a closer examination reveals subtle yet significant instances where the biology and sociology of gender influence legal provisions intended to ensure the security and independence of individuals, as recognized under Article 21²¹ of the Constitution.

Proviso to Section 46(1): This provision delineates the procedure for the arrest of women, stipulating that only a verbal intimation from the arresting officer is required for the custody of a female offender, and a male police officer must refrain from physically touching her.

However, ambiguity arises regarding whether this provision extends to transgender individuals, raising questions about its inclusivity.

Arrest of Women (Section 46(4)): This section governs the arrest of women during specific hours, with a requirement for the presence of a female police officer in urgent situations. However, it primarily addresses biological females, neglecting the rights of transgender individuals who may identify as women.

Search of Women (Section 51(2)): This section mandates that body searches of females must be conducted by female officers, emphasizing decency without a clear definition. Court rulings have emphasized the necessity of female officers conducting searches, highlighting the importance of respecting women's privacy.

In *State of Punjab v. Baldev Singh*²², it was held that whenever a female is being searched that has to be done by another female police officer only and her initials with designation be noted down in the personal search memo and if that is a failure it will lead to violation of decency of women.

Identification of the Person Arrested (Section 54A): While this section focuses on identification procedures for mentally or physically disabled individuals, it fails to address gender or sexuality-related concerns, such as those faced by rape victims or transgender persons.

Examination of Accused Persons (Section 53 and 53A): Both sections outline procedures for the examination of accused individuals, including DNA profiling. However, the need for a separate provision (Section 53A) for medical examinations in cases of sexual offenses raises questions about legislative redundancy and complexity.

Summoning an Untraced Person (Section 64): This provision allows for summons to be served through an adult male member of the family, reflecting patriarchal assumptions about women's capabilities.

²¹ <https://indiankanoon.org/doc/1199182/>

²² AIR 1999 SC 2378.

Maintenance of Wife, Children, Parents (Section 125): While this section aims to protect women and children from abandonment, it also imposes gender-specific obligations and limitations, potentially perpetuating stereotypes and inequalities.

In *Dr. Vijaya Manohar Rabat v. Kashirao Rajaram Sarwai & others*²³, it was held by the apex court that a father can claim maintenance from his married daughter. It was further stated by the court that sustaining parents is moral debt of a child be it son or a daughter. However, Court also stated that ordering maintenance against a married daughter, watchfulness needs to make functional.

In *Valsarajan v. Saraswati*²⁴ here the Kerala High Court went ahead of this patriarchy and ruled that under 125(4) and 125(5), a divorced woman is eligible to seek maintenance despite the fact that she was living in an adulterous relationship. In here the court gave prima facie importance to the right of maintenance of a woman rather than cribbing about her emphasizing on her sexuality.

Proviso to Section 154(1): This amendment requires the initial recording of certain offenses by a woman police officer, acknowledging the sensitivity of these cases. However, challenges remain in ensuring timely and unbiased recording of complaints.

In *Lalita Kumari v. Government of Uttar Pradesh*²⁵, it was held by the apex court that it is not up to the prudence of police officer to hold preliminary enquiry before recording FIR under section 154. In fact he is bound to record the information provided despite the fact that he is finding the information not level headed and lacking credibility. But yet practically this discretion is being utilized and it requires a great deal of physical, social and monetary muscle to get an FIR registered especially in case of sexual

offences²⁶.

In *State of Maharashtra v. Suresh Bhusare*²⁷, the apex court settled that delay of filing FIR in rape cases is not of any substance but yet researcher in her practice of law on daily basis have witnessed the arguments been made by the advocates trying to take advantage of the fact that despite of a sexual offence there was a delay in cataloguing of the case.

Attendance of Women in Police Station (Section 160(1)): This provision exempts women from attending police stations for recording statements, recognizing the need to protect their privacy and dignity.

Recording of Statements (Section 161 and Section 164): These sections mandate the recording of statements, particularly in cases of sexual offenses. While efforts have been made to involve female officers, disparities between police and judicial practices raise concerns about consistency and fairness.

Medical Examination of Women (Section 164A): This section permits medical examinations of rape victims upon consent, but its limitations exclude victims of other forms of sexual assault and individuals from the LGBTI community.

Complainant Other Than Aggrieved Woman (Section 198(2), Section 198A, Section 198B): These sections address offenses related to marriage, but their application reflects traditional gender roles and biases, necessitating reconsideration in light of evolving societal norms.

Treatment of Sexual Assault Victims (Section 357C): While this section mandates free treatment for victims of specific offenses, its focus on procedural aspects rather than holistic support raises questions about its effectiveness in addressing victims' needs.

Probation of the Offender (Section 360(1)): This section allows for probation of offenders based on various criteria, but its gendered

²³ AIR 1987 SC 1100

²⁴ 2003(2)KLT 548

²⁵ AIR 2014 SC 187

²⁶ Rape attempt: Victim claims police delayed filing of an FIR, The Hindu, July 18, 2016

²⁷ (1997) 2 Crimes 257 (Bom.)

application highlights societal perceptions of women's roles and responsibilities.

In *Master Chowki v. State of Rajasthan*²⁸ constitutionality of section 360 of the code was challenged stating that it is violative of Article 14 of the constitution. It was held by the court that this legal piece is perfectly constitutional because children and women who are treated as separate categories are indulged so not because of their sex and gender but because of their status in the society because 244 kids as a result of their tender age are not able to understand the scope and the content of the crime while the women who is the natural caregiver of a home and her family requires her, needs special protection so that her homely life is not disturbed even if she is standing at violation of law.

In *Kamalakshu v. State of Kerala*²⁹, it was again held by the court that benefit of provision has to be specially awarded to female sex and gender if she has not committed any crime punishable with offence of life imprisonment and death because she is the one who keeps a family together and if she is imprisoned then family as a unit will fall apart.

Death to Life Exclusively for Women (Section 416): This provision mandates the commutation of death sentences for pregnant women, reflecting biological determinism and gendered notions of vulnerability.

Provisions of Bail (Section 438 and 439): Recent amendments restrict anticipatory bail in certain cases, but their limited scope fails to address the diverse needs of all victims, including those from marginalized communities.

While the Criminal Procedure Code of 1973 ostensibly aims for neutrality and fairness, a closer examination reveals entrenched biases and inadequacies, particularly regarding gender and sexuality. Despite legislative amendments and judicial interventions, systemic challenges persist, highlighting the need for ongoing

scrutiny and reform to ensure justice for all individuals, regardless of sex, gender, or sexual orientation.

The Bhartiya Nagarik Suraksha Sanhita, 2023: A New Approach?

The Bhartiya Nagarik Suraksha Sanhita, 2023 (BNSS), enacted on December 25, 2023, aims to rectify gender disparities and enhance efficiency in the Indian legal system. Its primary goal is to repeal outdated colonial-era criminal laws and streamline the judicial process to address issues such as prolonged case proceedings, high case backlogs, low conviction rates, and insufficient utilization of technology and forensic techniques.

Key Changes:

FIR Registration: BNSS allows FIRs to be registered electronically and mandates their acknowledgment within three days of submission. It introduces a preliminary inquiry for cognizable offences punishable with imprisonment between three to seven years, to be completed within 14 days. Additionally, it mandates the registration of "Zero FIRs," enabling the transfer of cases to the appropriate jurisdiction.

Property Attachment: Section 107 of BNSS empowers Magistrates to attach property suspected to be proceeds of crime. The process includes both interim and permanent attachment, with provisions for equitable distribution among affected parties. Section 86 allows the court to seek assistance from international authorities for attachment or forfeiture of assets belonging to proclaimed offenders.

Timelines: BNSS sets strict deadlines for various legal procedures, aiming to expedite investigations and trials. These include timeframes for committal, supply of police reports, framing of charges, and rendering judgments. Trials and inquiries are to be conducted on a day-to-day basis, with limited adjournments.

²⁸ AIR 1975 Raj 10

²⁹ 1997(2) KLT 869

Arrest Procedures: While BNSS doesn't significantly alter arrestee rights, it allows individuals to inform any person of their arrest, not limited to friends and relatives. For women detainees, it mandates informing relatives about their whereabouts. Handcuffing is permitted for certain categories of offenders.

Electronic Mode Usage: BNSS introduces the use of electronic communication and audio- video means for legal procedures. Summons, statements, and evidence can be communicated and recorded electronically, promoting efficiency and transparency in legal proceedings.

Production of Digital Evidence: BNSS allows courts and police to compel the production of communication devices containing digital evidence. However, this provision raises concerns regarding privacy and privilege violations.

Rights of Victims: BNSS grants several rights to victims, including updates on investigation progress, access to police reports, and involvement in prosecution withdrawal decisions. It also mandates the establishment of witness protection and victim compensation schemes.

Applicability: BNSS specifies that ongoing legal proceedings will continue under the provisions of the Criminal Procedure Code, 1973 until resolved, ensuring a smooth transition to the new legislation.

Furthermore, BNSS emphasizes prompt complaint registration for crimes against women, promotes advanced technology and forensic tools in investigations, introduces safeguards to protect victims during trials, and establishes special courts dedicated to cases involving crimes against women, aiming for quicker resolutions and a more supportive environment for victims.

Criminal Procedure Code (CrPC):

The legal landscape surrounding women's safety in India is shaped by two key legislative frameworks: the Criminal Procedure Code (CrPC) and the Bhartiya Nagrik Suraksha

Sanhita.

Both are instrumental in administering justice and safeguarding the rights of citizens. This comparative analysis delves into their respective provisions concerning gender and women's safety, scrutinizing how they handle crucial aspects such as reporting mechanisms, investigation procedures, and trial processes in cases involving crimes against women.

Comparative Analysis and Evaluation of Criminal Procedure Code and Bhartiya Nagrik Suraksha Sanhita with regard to gender and women safety.

Reporting and Filing of Complaints (Sections 154 and 156 CrPC): The CrPC lays down procedures for reporting and filing complaints. Section 154 mandates the registration of First Information Reports (FIRs) for cognizable offenses, including crimes against women. Despite this provision, challenges arise due to issues such as police reluctance or societal pressures, which can impede the effectiveness of this process.

Investigation (Sections 160-176 CrPC): Empowering the police to conduct thorough investigations, the CrPC provides a framework for this process. However, the investigation phase can be prolonged, leading to delays in justice. Notably, the inclusion of Section 166A, introduced post the Nirbhaya case amendments, holds police officers accountable for lapses in recording information, thereby aiming to ensure a more diligent investigative process.

Evidence (Sections 161-164 CrPC): The CrPC delineates rules for recording statements during investigations. While these provisions are essential, the cross-examination of victims during trial poses a challenge, often resulting in secondary victimization.

Trial Procedure (Sections 225-237 CrPC): Governed by the CrPC, the trial process emphasizes fairness and transparency. However, the lengthy legal proceedings can take a toll on victims emotionally, and the backlog in

the judicial system may further delay justice.

Bhartiya Nagrik Suraksha Sanhita:

Reporting and Filing of Complaints (Bhartiya Nagrik Suraksha Sanhita): This legislation prioritizes the prompt registration of complaints related to crimes against women. It introduces measures to ensure a victim-centric approach, fostering a more compassionate response during the reporting stage.

Investigation (Bhartiya Nagrik Suraksha Sanhita): The Bhartiya Nagrik Suraksha Sanhita advocates for the use of advanced technology and forensic tools in investigations. This forward-thinking approach aims to enhance the efficiency and effectiveness of the investigative process.

Evidence (Bhartiya Nagrik Suraksha Sanhita): Recognizing the need to protect victims during trials, this legislation introduces safeguards to minimize trauma during cross-examination, promoting a more supportive and empathetic environment for victims.

Trial Procedure (Bhartiya Nagrik Suraksha Sanhita): It introduces the establishment of special courts dedicated to cases involving crimes against women. This provision seeks to expedite the trial process, ensuring quicker resolution and minimizing the stress on victims.

COMPARISON

Proactive Approach of Bhartiya Nagrik Suraksha Sanhita: While the CrPC provides a foundational structure, the Bhartiya Nagrik Suraksha Sanhita adopts a more proactive stance by incorporating contemporary measures to address challenges associated with crimes against women.

Technological Integration in Investigations: Bhartiya Nagrik Suraksha Sanhita emphasizes leveraging technology in investigations, reflecting a commitment to enhancing the efficiency of the criminal justice system.

Safeguards during Trial: The introduction of safeguards in the Bhartiya Nagrik Suraksha Sanhita, particularly concerning minimizing

trauma during cross-examination, represents a significant step forward in prioritizing the well-being of victims throughout the legal process.

Provision for Special Courts for Expedited Trials:

The establishment of special courts under Bhartiya Nagrik Suraksha Sanhita demonstrates a clear intention to expedite trials related to crimes against women, addressing the issue of prolonged legal proceedings and aligning with the urgent need for timely justice.

In the realm of women's safety, the Bhartiya Nagrik Suraksha Sanhita introduces progressive measures and modern approaches to overcome existing challenges. The integration of technology, safeguards during trial, and the establishment of special courts underline the evolving commitment to ensuring a safer and more efficient legal process for women in India. Together, these legislations represent a concerted effort to create a legal environment that not only addresses crimes against women effectively but also prioritizes the well-being of victims throughout the criminal justice journey.

CONCLUSION

The analysis presented in this research paper sheds light on the enduring gender disparities within the criminal justice system of India, focusing on the frameworks laid out in the Code of Criminal Procedure, 1973 (CrPC) and its successor, the Bhartiya Nagrik Suraksha Sanhita, 2023 (BNSS). The examination of these legal instruments underscores the complexities and challenges inherent in addressing gender bias and promoting equitable treatment within the criminal process.

Throughout history, the Indian legal system has evolved, influenced by diverse cultural, historical, and socio-political factors. However, despite constitutional provisions guaranteeing equality and non-discrimination, gender disparities persist, erecting significant barriers to justice for women. The CrPC, enacted in 1973, aimed to uphold principles of fairness and impartiality, yet its provisions often reflect entrenched biases and inadequacies, particularly concerning

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gender and sexuality.

A detailed analysis of the CrPC reveals instances where gender considerations subtly influence legal provisions, impacting various stages of the criminal process, from arrest procedures to trial proceedings. While efforts have been made to incorporate safeguards for women, such as restrictions on male officers during arrest and female officers conducting body searches, challenges remain in ensuring consistent and effective implementation across diverse contexts.

In contrast, the *Bhartiya Nagarik Suraksha Sanhita*, enacted in 2023, represents a paradigm shift towards a more proactive and victim-centric approach to addressing gender disparities within the criminal justice system. By introducing contemporary measures such as electronic FIR registration, technological integration in investigations, safeguards during trial, and the establishment of special courts for expedited trials, the BNSA aims to enhance efficiency, transparency, and support for victims of crimes against women.

The comparative analysis between the CrPC and BNSA highlights the progressive strides made by the latter in tackling gender bias and promoting women's safety within the legal framework. While the CrPC provides a foundational structure, the BNSA adopts a more holistic and forward-thinking approach, leveraging technology and prioritizing victim welfare throughout the legal process.

In conclusion, while significant challenges persist in achieving true gender equality within the criminal justice system of India, the enactment of the *Bhartiya Nagarik Suraksha Sanhita* represents a significant step towards addressing gender disparities and promoting a fair and equitable legal process for all individuals. However, ongoing scrutiny, evaluation, and reform are essential to ensure that these legislative advancements translate into meaningful improvements in the lives of women across the country.

1. <https://iddashboard.legislative.gov.in/sites/default/files/A1860-45.pdf>
2. MICHAEL W. ROBBINS, 'Letter from Military History - January 2013 | HistoryNet' (HistoryNet, 2012) available at <https://www.historynet.com/letter-from-military-history-january-2013.htm>.
3. Justice V. N. Khare, CJI, *Union of India versus Naveen Jindal*, 2004 2 SCC 510 paragraph 27.
4. https://www.indiacode.nic.in/bitstream/123456789/15272/1/the_code_of_criminal_procedure%2C_1973.pdf
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