



THE SWORD OF JUSTICE: EVALUATING THE EFFECTIVENESS OF STRICTER GANG RAPE LAWS IN INDIA UNDER THE BHARATIYA NYAYA SANHITA, 2023

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The issue of sexual violence, particularly gang rape, has long exposed the failures of India's criminal justice system failures marked not only by legislative inadequacy but by systemic apathy. While the IPC, 1860, established punishments for sexual offences, its colonial foundation, patriarchal assumptions, and procedural ambiguity often failed to deliver justice to survivors. With the enactment of the "Bharatiya Nyaya Sanhita, 2023" the Indian state claims to have initiated a post-colonial reset of its criminal code, marked by harsher penalties, redefined legal language, and procedural integrations with the "Bharatiya Nagarik Suraksha Sanhita" and "Bharatiya Sakshya Adhiniyam". This paper critically evaluates whether these reforms specifically those concerning gang rape represent substantive progress or legal symbolism. By analysing legislative evolution, judicial interpretation, and structural obstacles, the paper argues that statutory transformation, while necessary, remains insufficient unless supported by deep-rooted procedural and institutional reform. Without this, the promise of justice remains rhetorical.

KEYWORD:**Gang Rape, Sexual violence, Gender, Capital punishment**

INTRODUCTION

The law often serves two functions: to deter and to deliver. In the context of sexual violence in India, it has historically failed at both. The crime of gang rape, one of the most brutal and symbolically loaded forms of gendered violence, continues to expose the cracks in India's legal and judicial foundations. While legislative responses have been periodically reformed in reaction to public outrage the most notable being after the 2012 Delhi gang rape the gap between statutory ambition and procedural reality has remained persistent. The IPC ¹, despite multiple amendments, continued to reflect a colonial imagination of crime and punishment, embedded in patriarchal structures that rendered justice inaccessible to most survivors.

The “Bharatiya Nyaya Sanhita, 2023”, is the latest attempt to reimagine India's criminal law. Touted as a decolonial overhaul, the statute replaces the IPC and introduces several structural and linguistic modifications. Among the most significant are its provisions concerning gang rape, particularly Section 70, which prescribes life imprisonment and capital punishment in cases involving minors. However, the efficacy of such punitive restructuring remains questionable in a legal system still riddled with institutional inefficiency, evidentiary bias, and socio-cultural barriers to justice.

This paper investigates whether the BNS's revisions in gang rape law offer substantive justice or merely codify retributive expectations without corresponding procedural reform. It compares the IPC regime with the BNS in both statutory form and judicial interpretation, assesses the real-world functioning of rape trials, and examines whether deterrence, justice delivery, and survivor dignity have meaningfully improved. Through this inquiry, the paper argues that criminal law in India, especially concerning sexual violence, must move beyond legislative severity and focus instead on enforceability, accountability, and survivor-centred jurisprudence.

GANG RAPE UNDER THE INDIAN PENAL CODE: STATUTORY ARCHITECTURE AND JUDICIAL INTERPRETATION

The IPC, 1860, was drafted in a colonial context, designed less to reflect Indian constitutional morality and more to regulate a subject population. Despite its longevity and foundational role in shaping Indian criminal law, it carried structural limitations particularly in matters of sexual violence. While the IPC did criminalize rape, its definitional boundaries, evidentiary assumptions, and gendered interpretations rendered it ill-equipped to address the complex reality of gang rape in India. Section 376D, inserted through the “Criminal Law (Amendment) Act of 1983” and amended post-2012, codified the offence of gang rape but fell short of delivering reliable justice to survivors.

“Section 376D of the IPC defined gang rape as a situation where one or more persons acting in concert rape a woman. It mandated a minimum punishment of 20 years' rigorous imprisonment, extendable to life.” On the surface, this provision appeared stringent. However, its deterrent power was systematically undermined by procedural inconsistencies, delayed investigations, low conviction rates, and entrenched patriarchal biases. The

¹ Indian Penal Code, No. 45 of 1860, (repealed 2023).

mere textual existence of Section 376D did not guarantee its enforcement; nor did it mitigate the hostile environment that rape survivors often faced when interacting with police, medical officers, and courts.²

The judicial interpretation of gang rape under the IPC regime reflected both progress and regression. Perhaps the most emblematic case was “Mukesh & Anr v. State (NCT of Delhi)”³, the 2012 Delhi gang rape case. Here, “the Supreme Court upheld the death penalty for the accused, emphasizing the brutality of the act and its impact on the collective conscience of society.” The case galvanized legislative reform and was seen as a high watermark in public accountability. However, its exceptional nature revealed a troubling pattern: justice in sexual violence cases often required media amplification and public outrage to function effectively. The procedural efficiency displayed in the Nirbhaya case swift investigation, fast-tracked trials, and conclusive sentencing remains a statistical outlier.

In contrast, the case of “Tukaram v. State of Maharashtra”⁴, better known as the Mathura rape case, exposed the judiciary’s entrenched patriarchal assumptions. The Supreme Court acquitted two policemen accused of custodial rape, reasoning that the victim did not exhibit sufficient signs of struggle and that her past sexual history weakened her credibility. This ruling triggered nationwide protests and led to the 1983 amendment, which introduced Sections 114A of the Indian Evidence Act and revised rape provisions in the IPC. These changes attempted to reduce the evidentiary burden on survivors by presuming non-consent where the accused failed to prove otherwise. However, the impact of these reforms remained uneven at best.

Another seminal judgment was “State of Punjab v. Gurmit Singh”, in which the Supreme Court recognized the primacy of the survivor’s testimony. The Court categorically stated that the victim’s account, if trustworthy, did not require further corroboration. Despite this progressive stance, trial courts continued to operate under older evidentiary standards, often disbelieving survivors for reasons unrelated to fact such as the absence of physical injuries or minor inconsistencies in statements. The disjunction between Supreme Court rulings and lower court practices continued to erode the credibility of rape jurisprudence under the IPC.⁵

Moreover, the IPC regime was marred by procedural gaps that disproportionately disadvantaged survivors. Police often delayed filing FIRs, forensic evidence was either collected poorly or not at all, and medical examinations frequently employed the now-outlawed “two-finger test,” which violated both privacy and dignity. There were no statutory timelines for investigation or trial completion, allowing cases to languish for years. Fast-track courts introduced post-2012 lacked personnel and infrastructure, further compounding delays.⁶

The use of the death penalty in rape cases also remained contentious. In “Bachan Singh v. State of Punjab”⁷, the Supreme Court had held that capital punishment must only be awarded in the “rarest of rare” cases. Yet in the aftermath of high-profile rape cases, courts increasingly awarded death sentences to appease public sentiment, raising concerns about the politicization of judicial discretion. This arbitrariness was highlighted in “Shatrughan

² Indian Penal Code, No. 45 of 1860, § 376D (repealed 2023).

³ Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1: AIR 2017 SC 2161.

⁴ Tukaram v. State of Maharashtra, (1979) 2 SCC 143: AIR 1979 SC 185.

⁵ State of Punjab v. Gurmit Singh, (1996) 2 SCC 384: AIR 1996 SC 1393.

⁶ Indian Evidence Act, 1872, § 114A.

⁷ Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : AIR 1980 SC 898.

Chauhan v. Union of India”, where the Court emphasized the need for uniformity and restraint in capital sentencing.⁸

Statistically, the IPC’s regime failed to instill confidence. According to the NCRB, conviction rates for rape remained under 35%, and gang rape convictions were even lower. Thousands of cases remained pending, and many were dropped due to lack of evidence or hostile witnesses. The deterrent effect of Section 376D was, thus, largely theoretical.

In conclusion, the IPC’s approach to gang rape was marked by statutory rigidity, procedural fragility, and institutional apathy. Although landmark judgments attempted to assert a more victim-centric jurisprudence, their effects were diluted by inconsistent application and cultural resistance within the lower judiciary. The limitations of the IPC provided both the rationale and urgency for a legislative overhaul. It is in this context that the “Bharatiya Nyaya Sanhita” was introduced not as a mere replacement, but as a symbolic attempt to reset the normative and procedural framework of criminal law in India.

GANG RAPE UNDER THE BHARATIYA NYAYA SANHITA: A STRUCTURAL SHIFT OR COSMETIC REFORM?

The “Bharatiya Nyaya Sanhita, 2023”, presented as a decolonial reform, replaces the IPC, 1860, and is accompanied by the “Bharatiya Nagarik Suraksha Sanhita”⁹ and “Bharatiya Sakshya Adhiniyam”¹⁰. Among its notable provisions is Section 70, which addresses gang rape. While it expands state punitive power through enhanced sentencing, the extent to which it departs from the IPC’s punitive logic is debatable.¹¹

Section 70(1) closely mirrors the repealed Section 376D of the IPC¹², criminalising gang rape committed by individuals acting with common intention, with a minimum sentence of twenty years’ rigorous imprisonment. Section 70(2), however, introduces life imprisonment until the convict’s natural life or the death penalty where the victim is a girl under sixteen. This broadens the scope of capital punishment first introduced for child rape through the 2018 amendment, which applied to victims under twelve.

The rationale for this expansion lies in projecting a hardline stance against sexual violence, particularly against minors. Yet it raises concerns over deterrent value, judicial consistency under the “rarest of rare” doctrine, and the possible chilling effect on reporting especially where perpetrators are known to the victim.

Although the BNS updates legal phrasing, it retains a gender-specific definition of rape, excluding male and transgender victims. This reinforces the binary framing of victimhood seen under the IPC, in contrast to jurisdictions that have adopted gender-neutral statutes.

⁸ Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1 : AIR 2014 SC 246.

⁹ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, §§ 173(2), 184.

¹⁰ Bharatiya Sakshya Adhiniyam, No. 47 of 2023, §§ 65B, 22, 24.

¹¹ Bharatiya Nyaya Sanhita, No. 45 of 2023, § 70.

¹² Criminal Law (Amendment) Act, No. 22 of 2018, § 6 (amending IPC § 376AB).

Procedurally, the BNS is reinforced by the BNSS, which mandates expedited investigations, electronic FIRs, and digital witness recordings. Similarly, the BSA modernises evidentiary rules, allowing digital documentation. These reforms aim to correct longstanding delays that plagued IPC-era prosecutions.

However, infrastructural deficits such as poor connectivity, understaffed forensic labs, and lack of trained personnel threaten the practical impact of these changes. Without corresponding investments in institutional capacity, these procedural tools may remain inaccessible, especially in rural and semi-urban areas.

The statute also fails to mandate trauma-informed processes or survivor support mechanisms. While in-camera trials and identity protection exist, they have not curtailed hostile cross-examinations or stigma. The BNS remains largely indifferent to survivors' broader vulnerabilities such as social exclusion and economic instability.

As of now, there is no judicial interpretation of Section 70. Given its recent enactment, the law's doctrinal robustness remains untested. But if precedent from the IPC era is instructive, judicial inconsistency and procedural inertia may once again blunt the potential of statutory reform.¹³

Ultimately, the BNS recasts the language and expands punishments but leaves key institutional assumptions intact. It replaces colonial vocabulary without reimagining survivor-centric justice. Whether it achieves meaningful change will depend less on its text and more on the willingness of institutions to implement it with integrity and urgency.

EVALUATING THE EFFECTIVENESS OF THE BHARATIYA NYAYA SANHITA: INSTITUTIONAL CHALLENGES AND GROUND REALITIES

The effectiveness of a criminal statute lies not in the precision of its language or severity of punishment but in its real-world implementation by police, forensic staff, prosecutors, and judges. The BNS despite its reformist ambition, inherits the same institutional dysfunction that undermined the IPC.¹⁴ The systemic failures that crippled rape prosecutions under the earlier regime especially in gang rape cases remain largely unaddressed.

Conviction rates under the IPC were dismally low, with rape cases yielding under 35% nationally.¹⁵ Section 376D mandated a minimum of twenty years for gang rape¹⁶, yet prosecutions frequently collapsed due to delayed FIRs, flawed forensics, hostile witnesses, and institutional apathy. The BNS retains the same investigative machinery and judicial processes, leaving this pattern intact.¹⁷

India's forensic infrastructure remains inadequate. SAECKs are not consistently available, and forensic labs are too few to meet demand. Although the BNSS mandates completion of investigations within sixty days¹⁸, these

¹³ Justice Verma Committee Report (2013), Government of India.

¹⁴ Indian Penal Code, No. 45 of 1860, § 376D (repealed 2023).

¹⁵ National Crime Records Bureau, Crime in India – 2021: Statistics on Crime Against Women (Ministry of Home Affairs, Govt. of India), <https://ncrb.gov.in/en/crime-india-2021> [hereinafter NCRB 2021 Report].

¹⁶ Id.

¹⁷ Amnesty Int'l, Justice Jailed: The Systemic Failure in Delivering Justice to Survivors of Sexual Violence in India (2018), <https://www.amnesty.org/en/documents/asa20/8477/2018/en/> [hereinafter Justice Jailed].

¹⁸ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 173(2), Gazette of India, July 2023.

deadlines are often missed due to resource shortages and lack of trained personnel. Crucially, no accountability mechanism enforces compliance with these timelines.

Survivors still face systemic hostility from the outset. Police often discourage complaints, especially where the accused holds social power.¹⁹ In rural settings, caste hierarchies further obstruct access to justice, particularly for Dalit and Adivasi women. The BNS does not address these asymmetries, nor does it mandate specialised support units within law enforcement.²⁰

Courtrooms remain sites of secondary victimisation. Survivors continue to face invasive cross-examinations and outdated character-based defences, despite procedural safeguards. There is no statutory requirement for gender-sensitisation training for judges or prosecutors a long-standing recommendation that remains ignored. Acquittals often result from procedural lapses rather than substantive findings of innocence.

Section 70(2)'s introduction of the death penalty for gang rape of girls under sixteen adds another layer of concern. Though seemingly tough on crime, this provision risks deterring reporting when perpetrators are family members, a common scenario in child sexual abuse cases. The constitutional validity of capital punishment in rape remains unsettled, and its use may become arbitrary under political or public pressure.²¹

Technological reforms under the BNSS and BSA such as digital FIRs and electronic evidence remain largely aspirational in jurisdictions where infrastructure is lacking. These reforms presuppose levels of access and literacy that do not reflect the reality of most survivors.

The BNS also omits any rehabilitative framework. There are no provisions for compensation, counselling, or reintegration support. Survivors are left to navigate an adversarial process that remains oriented around punishment rather than restoration.²²

Ultimately, the BNS's more aggressive language and tighter timelines do little to overcome the deep procedural and institutional shortcomings it inherits. Without systemic reform in policing, forensics, judiciary, and victim support, the BNS risks replicating the IPC's failings rendering justice aspirational rather than achievable.

STRUCTURAL GAPS AND MISSED OPPORTUNITIES: A CRITICAL APPRAISAL OF THE BNS APPROACH

Despite its ambitions to modernise and decolonise Indian criminal law, the "Bharatiya Nyaya Sanhita, 2023", replicates many of the ideological and institutional shortcomings of its predecessor.²³ While it attempts to present a departure from the colonial foundations of the IPC by introducing more indigenised legal language and harsher punishments, it ultimately avoids confronting the deeper socio-legal structures that have historically

¹⁹ Justice Jailed, *supra* note 4.

²⁰ Centre for Child and the Law, National Law School of India University, Implementation of POCSO Act in India: Challenges and Recommendations (2020).

²¹ Bharatiya Sakshya Adhiniyam, No. 47 of 2023, § 65B, Gazette of India, July 2023.

²² Lawyers Collective & HRLN, Rape Law Reforms in India: History and Debates (2014).

²³ Bharatiya Nyaya Sanhita, No. 45 of 2023, Gazette of India, July 2023.

obstructed justice in cases of sexual violence. Its reforms are largely vertical focused on state punishment rather than horizontal, aimed at transforming survivor experience, systemic accountability, and procedural fairness.²⁴

The most immediate structural gap lies in the continued reliance on a punitive framework that equates justice with severity. The enhancement of minimum sentencing and the reintroduction of the death penalty in Section 70(2) are emblematic of a retributive logic that centres the state, not the survivor. This approach presumes that the primary goal of criminal law is to demonstrate the power of the state to punish, rather than to enable justice as a process that restores, rehabilitates, and repairs. While harsher penalties may offer political appeal, they do little to address the root causes of sexual violence or the procedural breakdowns that allow perpetrators to evade accountability.²⁵

The BNS also fails to incorporate a trauma-informed understanding of how sexual violence impacts survivors. Nowhere in the statute is there a requirement for police officers or judicial officers to undergo sensitivity training.²⁶ There is no statutory obligation to ensure that survivors are informed of their rights, provided with immediate legal aid, or referred to psychological counselling. The law continues to treat survivors as witnesses to a crime rather than as individuals with complex, ongoing needs. This absence of a survivor-centric approach is not a mere oversight; it reflects a deeper disinterest in placing the victim at the centre of the justice process.²⁷

Further, the statute does not meaningfully address the issue of secondary victimisation the retraumatisation of survivors through repeated, often hostile interactions with police, medical professionals, and the courtroom. Although the “Bharatiya Nagarik Suraksha Sanhita” contains provisions for in-camera trials and restrictions on the identity of survivors, these were already present in the Criminal Procedure Code.²⁸ Their mere repetition does not constitute reform. There is no innovation in how testimony is to be recorded, how cross-examination is to be moderated, or how delays are to be curtailed beyond vague timelines. The absence of institutional reforms such as dedicated sexual assault response units, trained forensic teams, and independent prosecutorial oversight renders procedural protections largely aspirational.²⁹

Another glaring omission is the failure to adopt a gender-neutral definition of sexual offences. The BNS continues to define rape as an act committed by a man against a woman, thereby excluding male, transgender, and non-binary survivors. In doing so, it perpetuates the patriarchal logic that sexual violence is exclusively a women’s issue rather than a broader violation of bodily autonomy and human dignity. This exclusion is not merely symbolic; it has material consequences. Survivors who do not conform to the statute’s gender binary are effectively rendered invisible in law, without access to the remedies or protections afforded to others.³⁰

²⁴ Tarunabh Khaitan, *Beyond Reasonableness: A Rigorous Standard of Review for India’s Sexual Violence Laws*, 1(2) Indian L. Rev. 125 (2017).

²⁵ Bharatiya Nyaya Sanhita, § 70(2)

²⁶ Amnesty Int’l, *Justice Jailed: The Systemic Failure in Delivering Justice to Survivors of Sexual Violence in India* (2018), <https://www.amnesty.org/en/documents/asa20/8477/2018/en/> [hereinafter *Justice Jailed*].

²⁷ Id.

²⁸ National Human Rights Commission, *Advisory on Criminal Justice Response to Sexual Violence Against Women and Children* (2020).

²⁹ UN Women India, *Making Justice Survivor-Centric: Comparative Lessons from the Global South* (2022).

³⁰ Centre for Child and the Law, National Law School of India University, *Implementation of POCSO Act in India: Challenges and Recommendations* (2020).

The law also remains largely silent on issues of socio-economic and caste-based vulnerabilities. It does not acknowledge the differential access to justice experienced by Dalit, Adivasi, or other marginalised women, nor does it provide for special safeguards in cases where intersectional oppression shapes the experience of sexual violence. Given the well-documented evidence that caste plays a significant role in both the perpetration and prosecution of sexual crimes in India, the absence of any caste-sensitive provisions constitutes a critical failure of legislative imagination.

Finally, the BNS neglects to institutionalise any form of restorative justice. There is no mechanism for survivor compensation within the statute. While compensation schemes do exist at the state level, they are bureaucratically opaque, inconsistently applied, and often inaccessible. The law provides no clarity on how restitution is to be operationalised, nor does it establish a fund or financial support system for survivors navigating the justice process. In cases of gang rape, where survivors often face long-term social and economic marginalisation, this absence is particularly damaging.

In short, the BNS represents a missed opportunity to recalibrate the purpose and function of rape law in India. It reforms the penal code but not the courtroom. It strengthens the hand of the state but leaves the survivor unsupported. It rewrites the law's vocabulary but retains its silences. A truly transformative legal framework would have moved beyond codifying punishment to institutionalising protection, access, and dignity. The BNS does not make that leap. In doing so, it risks becoming the latest in a long line of laws that promise justice but deliver only its performance.³¹

CONCLUSION

The “Bharatiya Nyaya Sanhita, 2023” , represents a significant legislative shift in India's criminal law framework, especially in relation to sexual violence and gang rape. By replacing the IPC and prescribing harsher punishments such as life imprisonment and the death penalty in certain cases it signals a strong retributive stance. However, this shift remains largely symbolic in the absence of structural reform.³²

The failures of the IPC were never merely legislative. They were institutional: weak investigations, low conviction rates, lack of survivor support, and judicial bias. The BNS, while stronger in statutory design, does not confront these core deficiencies. It neither mandates trauma-informed policing nor ensures gender-neutral protection. Caste-based and socio-economic vulnerabilities remain unaddressed, and procedural guarantees often exist without mechanisms for enforcement.³³

In effect, the BNS reforms the form but not the function of rape law. It modernises terminology and raises penalties, but leaves intact the same systems that have historically failed survivors. Unless accompanied by a

³¹ Human Rights Watch, *Breaking the Silence: Child Sexual Abuse in India* (2013), <https://www.hrw.org/report/2013/01/24/breaking-silence/child-sexual-abuse-india>.

³² Tarunabh Khaitan, *Beyond Reasonableness: A Rigorous Standard of Review for India's Sexual Violence Laws*, 1(2) Indian L. Rev. 125 (2017); Vidhi Centre for Legal Policy, *Towards Victim-Centric Criminal Justice in India* (2021).

³³ National Crime Records Bureau, *Crime in India – 2021: Statistics on Crime Against Women* (Ministry of Home Affairs, Govt. of India), <https://ncrb.gov.in/en/crime-india-2021>.

transformation in enforcement capacity, judicial sensitivity, and survivor-centric support structures, the BNS risks repeating the IPC's legacy of underperformance.³⁴

Justice, particularly in the context of sexual violence, demands more than punitive statutes. It requires a responsive, inclusive, and accountable system something the BNS has yet to guarantee.

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³⁴ Amnesty Int'l, Justice Jailed: The Systemic Failure in Delivering Justice to Survivors of Sexual Violence in India (2018), <https://www.amnesty.org/en/documents/asa20/8477/2018/en/>.

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