

Review Article

## Decoding Rape Laws: Gender Neutrality in Rape a Transnational Perspectives

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### Article History

Received: 11.01.2021

Accepted: 22.01.2021

Published: 30.01.2021

### Journal homepage:

<https://www.easpublisher.com>

### Quick Response Code



**Abstract:** Rape and sexual crime are a significant problem that affects many countries. It disturbs all classes of people and every member of the community. The legal system around the world judges the act of rape through different judicial system. For decades now, rape has been treated as violence against women alone. Rape or sexual assault against men or any LGBTQ+ person is one of the most under-reported crime as it goes against everything that a man is supposed to represent. India fails to address the men and LGBTQ+ rape victims under the rape laws. The new definition of Rape now includes non-penile-virginal acts of penetration, but still, it states that only a female can be the sole victim of Rape. Are males only capable of raping and cannot be raped? Section 375 clearly states that only a male can be a perpetrator of Rape, and only a female can be a victim. Making Rape, a gender-neutral crime has been a demand of Indian society for a decade now, but the Case of Navtej Singh Johar has given it a new life and fire. There are progressive countries shown legal initiatives to ensure legal remedies irrespective any gender. UK, Canada and USA are the best examples for it. In this paper an attempt made to demonstrate the transnational perspectives of rape laws between India and foreign rape laws as the Indian Penal Code was enforced under British rule. Still, the United Kingdom has amended its statutes whereas India is lagging at same.

**Keywords:** Gender neutrality, LGBTQ+, Rape, Sexual Assault and Consent.

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*'Anywhere in the world, Sexual victimisation can be reasonably said that men and LGBTQ+ experience sexual assault similarly to women. Hence, there is an imperative need to address sexual violence through prisms of gender-neutrality'. -Global Forum for Gender-Neutral Rape Laws.*

## INTRODUCTION

Rape is a significant problem that affects each and every country and society. It affects all classes of people and every member of the community. No one is safe from this crime, be it a girl, a boy, a woman, a man or a baby and in some rare cases, even animals are subjected to this heinous crime. The assailant does not care about the gender, age or sexuality of the victim.

Sexual assault and rape involve one person forcing another to have sexual intercourse with them through fear, hurt or consent taken under false or misleading pretext. The non-consensual intercourse may be committed on women, men, boy or girl. The violation and injury caused by the rape may cause lifetime trauma, and in some rare case, it may even lead to death.

The legal system around the world judges the act of rape through different judicial system. In some systems penetration and some force is to be present

while the rape or sexual assault is taking place but in present time many countries have amended their criminal laws and defined rape as sexual intercourse which is against the will of the victim without their expressed consent. Intercourse with a drugged or drunk, a sleeping person is considered as a crime. New and emerging definition of rape also includes date rape and removing of a condom without the knowledge of partner as an offence of rape.

For decades now, rape has been treated as violence against women alone, and the same belief is held in today's time in many countries. Rape against a male is still a taboo, and it presents a negative connotation among homosexual and heterosexual men. Rape or sexual assault against men is one of the most under-reported crime as it goes against everything that a man is supposed to represent. In India, a man is described as someone who is in control, all-powerful and a person no one can do any wrong against whereas women are someone who is fragile and always in need

of protection. Even when a male is a victim of sexual assault he tries to hide and deny it in fear of being tagged as a homosexual if raped by a man and an un-masculine man if raped by a woman.

The effect of rape on a male is similar to the effect of rape on a female not if worse. A male has been shown in our history to be the saviour of the dignity of a woman and who can protect and fight through any type of violence. When a male undergoes any type of sexual assault, he not only suffers from physical or mental health issues but questions his whole existence and has more difficulty in getting married, engaging in sexual activities, engaging in future relationships etc. In today's time, rape is not only about the sexual release or sexual gratification; it's also about humiliation, demonstrating power, supremacy over an individual etc. It is wrong to assume that sexual assault can only be a crime against women.

### Legal sense of Rape

After the Delhi gang-rape case, the definition of Rape was widened after the recommendation of the Justice Verma Committee Report by the Criminal Law (Amendment) Act, 2013. Rape is defined under Section 375 of Indian Penal Code as, a crime committed by a male, by penetration of penis, any object or any body part to any extent into the vagina, mouth, urethra, or anus of any women. Manipulation of any part of the body of a woman to cause penetration in a women's body or applying of mouth to any part of women or makes her do it to anyone else without her will, consent or consent received by putting her or any person she is interested in fear of death or hurt, consent is given believing the man to be her husband, consent given due to intoxication, with or without consent when she is under eighteen year of age. All medical procedures and intervention and sexual intercourse with wife not below the age of fifteen is not to constitute Rape.

This definition can be held discriminatory as it stated that (i). Only a male can be a perpetrator, and only the female can be a victim. Victim can be any gender; victim can be anybody who faces sexual assault.

In India, there is a strong belief that only a woman is capable of being raped as she is seen as a fragile and weak being at the mercy of the male. To hear that a male has also been a victim of Rape is somewhat unthinkable because in a patriarchal society normal thinking prevails that Rape is an act of sexual gratification only, but in many instances, it can be seen that it is not only that it is also to humiliate or to impose dominance over another individual.

The Justice Verma Committee in its Report (2013) recommended the Parliament to amend the definition of Rape and to make it gender-neutral. It's

stated in its report that gender-neutral laws have been implemented by many countries such as California, Canada, South Africa and the United Kingdom. The Parliament of India did not accept the recommendations in 2013, Amendment of Criminal Laws.

The United Kingdom's rape definition was amended by the UK, Sexual Offence Act 2003 which came in force on 1 May 2004. Rape is defined in three different sections. (i) Section 1- defines Rape, (ii) Section 2 defines assault by penetration and (iii) Section 4 defines causing a person to engage in sexual activity without consent. All three sections are read together while the State government has indicted a petition of Rape. The definition assumes 'A' to be the perpetrator and 'B' the victim of the crime.

Section 1 of the Act defines Rape as - (1) A person (A) commits an offence if—

- a) He intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
- b) B does not consent to the penetration, and
- c) A does not reasonably believe that B consents.

The offence of Rape under this section can be committed only by a man against a female or another male. The intentional penetration to the mouth, vagina or anus of a female or another male without the consent will constitute an offence. The punishment on indictment is imprisonment for life. The indictment can only be done in the Crown Court, i.e., Court of Jury.

Section 2 of the Act defines assault by penetration as: (1) A person (A) commits an offence if—

- a) He intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else,
- b) The penetration is sexual,
- c) B does not consent to the penetration, and
- d) A does not reasonably believe that B consents

The offence of assault by penetration could be done by female or male against a female or male. Penetration can be done through any part of the body or by anything else. The word mouth has been omitted under this section, and only penetration to vagina or anus is punishable. The punishment on indictment is imprisonment for life. The indictment can only be done in the Crown Court i.e., Court of Jury.

Section 4 of the Act defines causing a person to engage in sexual activity without consent (1) A person (A) commits an offence if—

- a) he intentionally causes another person (B) to engage in an activity
- b) the activity is sexual,
- c) B does not consent to engage in the activity, and

d) A does not reasonably believe that B consents.

The section includes all sexual activities that a person is forced to carry out with themselves, with another or with the perpetrator. The offence can be committed by a woman or man. If the acts which can be defined under section 1 are committed by forcing the victim than punishment shall be imprisonment for life otherwise (a) on summary conviction, to imprisonment for a maximum term six months or to a fine or both;(b) on conviction on indictment, to imprisonment for a term not exceeding ten years.

One can understand by reading these sections that the definition of Rape includes both male and female as a perpetrator and as a victim. Consent in all the sections means if the person gives it by choice and has the freedom and is the incapacity to make it. These sections also include sexual intercourse while on substances, drunken rapes, Martial rapes, rapes which the victim is unconscious, date rape etc.

Canada in 1983, made amendments to its Criminal Code, amending the definition by replacing the term rape with sexual assault and making the term gender-neutral. Sexual assault is defined as any sexual contact with another person without their consent. Prior to the amendment, the definition of rape was, a male commits rape when he has sexual intercourse with a female knowing she is not his wife, without her consent. The amended definition is gender-neutral as it uses the term person in place of male or female, hence under the Canada Criminal Code, each person is protected against the crime of sexual assault be it male or female.

Rape laws of Germany were amended in 1997; the definition was widened to criminalize marital rape and incorporate gender-neutral language. The amended defines rape under the section 177, of the Germany Criminal Code as, any person against the consent of another person carries out any sexual act on the person himself or through the third party shall be punished with imprisonment form 6 months to 5 years. The term used in is a person and not male, female, women and men making the definition gender-neutral. Many countries around the world have amended their rape or sexual assault laws to make them gender-neutral and protecting both the female and male, homosexuals and transgender from the offence of rape.

### India and Gender-Neutral laws

The Constitution of India bestows equal rights to every citizen of India under Article 14, Article 15(1) and Article 21. In the landmark judgement of Maneka Gandhi Vs Union of India [1], it was held by the

<sup>1</sup>Maneka Gandhi Vs Union of India [1978] AIR 597, 1978 SCR (2) 621

Supreme Court that right to life given under Article 21 includes right to live with human dignity. Rape has been held as a crime against human dignity as it is not only a crime against the victim's body but also against the reputation, health and future of the victim. In the case of State of MP vs Madanlal [2], the Supreme Court dismissed the idea of compromise in rape cases gave the reasoning that rape a crime against the body of the woman. These crimes affect not only the body but also the reputation, which is the richest jewel for a human, and no one allows it to be extinguished. The dignity of a woman is a living part of her, and no one should paint it with clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct, also, in the case of Bodhisatwa Vs. Subhra Chakraborty [3] the SC stated that Rape is a crime against basic human rights is violative of Article 21.

In 2012 a bill was presented before the Parliament to make the rape laws gender-neutral, but before any voting could be conducted on it, India was shaken by the Delhi gang-rape which caused a series of protests against the government to widen the rape definition because of which a committee was established to review the Criminal legislation. The Justice Verma Committee also recommended making the rape laws gender-neutral but the Criminal Law (Amendment) Act, 2013 widened the definition of Rape with a male as the only perpetrator and women as the only victim of this crime.

Sudesh Jhaku Vs. K.C. Jhaku [4] was the first case in which gender neutrality in rape laws was discussed by the Supreme Court of India. The court stated that sexually assaulted men should be given the same protection of the law as given to female victims. In the case of Sakshi Vs. Union of India and others [5] the Supreme Court directed the issue to the Parliament. In Tara Dutt Vs. State [6] the HC of Delhi disappointedly reported that despite the recommendation of the Law Commission Report 172 the Parliament didn't widen the Definition of Rape and substituted the term Rape with Sexual Assault. Whereas the recommendation of making the definition gender-neutral was also ignored by the Parliament. A similar conclusion was drawn by the Supreme Court in the

<sup>2</sup>State of MP v Madanlal [2015] Criminal Appeal No 231 of 2015.

<sup>3</sup>Bodhisatwa Vs. Subhra Chakraborty, [1996] 1 SCC 490.

<sup>4</sup>Sudesh Jhaku Vs. K.C. Jhaku,[1998] CriLJ 2428, 62 (1996) DLT 563, 1996 (38) DRJ 22

<sup>5</sup>Sakshi Vs. Union of India and others [1999] CriLJ 5025, 1999 (5) SCALE 376, (1999) 6 SCC 591

<sup>6</sup>Tara Dutt Vs. State [2008] Cri. Revp No. 321 of 2008

judgement of Vijay Jadhav vs The State of Maharashtra And Anr [7].

A Public Interest Litigation was filed in the High Court of Delhi in 2018 stating that the law was against Article 14 and Article 15 of the Constitution of India, against which the Central Government filed an affidavit and told the HC to leave the definition of Rape under section 375 of IPC untouched. The affidavit submitted by the Ministry of Home Affairs stated that these sections have been enacted to protect and keep a check on the rising level of sexual offences against women in the country.

Criminal Law (Amendment) Bill, 2019 has been introduced in Rajya Sabha with a recommendation of amending all penal offence which are mentioning only women and man to be gender-neutral law and any person should be inserted in place of man and women.

The UK recognized male rapes in 1994 for very first time and later in 2003 by the enactment of Sexual Offences Act, 2003 the legislature made Rape a gender-neutral crime, but it can't be said totally gender neutral as the law didn't recognize it as Rape but Assault by penetration and engaging in sexual activity without consent. A woman could be held liable if she penetrated a male thorough any body part or object or forced him to penetrate her against his consent. The difference can also be seen in the punishment for the crime of sexual assault where a male can be imprisoned for a maximum time period of imprisonment for life, and the women can be imprisoned a time period not exceeding ten years.

In Canada and Germany, women or male can be held liable for rape of another male or homosexual person, and the punishment is similar for women and male without making any discrimination in the imprisonment term. Why has the Government of India has shown reluctance in amending rape laws to gender-neutral law? The Preamble of Universal Declaration for Human Rights states "all humans are born free and should be given equal rights regardless of sex, class, race, religion and place of birth". Article 2 of UDHR asserts that everyone is entitled to all freedoms and rights which are enshrined in the declaration and that too, without discrimination on any grounds including sex. Article 7 also states that every person is equal before the law and is entitled to equal protection of the law without any discrimination. Article 8 and most important in this context states that everyone has an exclusive right to avail effective remedy from any national tribunal in case any of his fundamental rights guaranteed by the constitution or by any law is violated.

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<sup>7</sup>Vijay Jadhav vs The State Of Maharashtra And Anr [2014] WP. No. 1181 OF 2014

As per the People's Union for Civil Liberties (PUCL) Karnataka survey, which was held among the college students, 10.5% stated that they were raped and 10.5% reported that there was an attempt to rape them. It can be seen that now day's Rape is not just about lust or sexual tension release. It is also a mode of humiliation and a show of power over another.

### **Transnational Case laws**

In 1984, in the case of *People v. Liberta* [8] the Court of Appeals of New York declared that rape shall be made a gender-neutral offence. The Section 130.35 was challenged on the ground of equality before law as the definition of rape was defined as an offence committed by a male against a female by forcible compulsion. The court held that the section violated equal protection of law because it criminalized forced sexual intercourse by a male against a female but exempted forcible rape of males. It was also held by the court rare occurrence or difficulty in committing rape of a male does not satisfy the constitutional test hence neutralizing the gender requirement for the offence of rape.

In the case of *R. v Millberry* (William Christopher) [9] the Court of Appeal held that male should be provided with similar remedy and the similar guidelines followed where a male is raped. United Kingdom Joseph McCaan and Reynard Sinaga had their term of minimum jail sentence increased from 30 year to 40 years by the court of appeal. Sinaga a postgraduate student from Indonesia was convicted in four trials of raping and drugging 48-year-old men and 195 other men in different occasions from 2017-2019.

### **The Contours of Rape among Genders**

The concept of gender neutrality within rape has been influential over the few decades in those jurisdictions that have engaged in significant reform of their rape and sexual assault laws. Rape definition needs to be studied from three points of views for the understanding requirement of gender-neutral rape laws.

1. Male on Male Rape
2. Female on Male Rape
3. Female on Female Rape
4. Rape of LGBTQAI+ community member

### **Male on Male Rape**

Sexual assault is prevalent torture technique in police custody. In the time of war, Rape has been committed on both male and female soldiers. Rapes in jails are very common and widely heard of. Ram Singh, the convicted rapist of Nirbhaya Rape case, reported that he was repeatedly raped by fellow inmates, not only him but other inmates had also reported that other

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<sup>8</sup> *People v Liberta* [1984] 64 NY 2d 152 [Liberta]

<sup>9</sup> *R. v Millberry* (William Christopher)[2002] EWCA Crim 2891; [2003] 1 W.L.R. 546; [2003]

inmates raped them. In India, an Indian Journal of Medical Research article in 2010 reported cases from Arthur Road jail in Mumbai in which 72% of the inmates interviewed said sex between men was common. About 11% said they had sex with other men. Rape is not only committed by inmates but also by the prison staff. It is true that in most of the rape cases, women are the prime victim, but many reports indicate that males are also the victim of sexual abuse but are ashamed or unable to report these cases. In the US, male Rape has been documented by a few organizations. Statistics show that in 2003 one in every ten rape victims was male. In another study, it was found that male victims only report female perpetrators in the instance when forced to penetrate (2012: 78.5%), sexual coercion (2012: 81.6%) and unwanted sexual contact (2012: 53.0%). Male victims who were raped by being penetrated, 86.5% reported only male perpetrators (in 2010 it was 93.3%).

### **Female on Male Rape**

It can't be said that only males commit Rape; many times, female also commit rape by forcing a male to penetrate her or other women or male. The National Intimate Partner and Sexual Violence Survey reported 28.6% of men who faced sexual assault, 54.8% reported females as the perpetrator. In another study by the Centres for Disease Control and Prevention found that one in seventeen men reported to being forced to penetrate at the same point in their life. It is assumed that the males can't be raped by women because they won't be able to gain an erection under pressure and if they gained an erection, then they were willing to involve in the sexual act.

### **Female on Female Rape**

The taboo of female-on-female rape is another crime which is not considered in India. It is always assumed that a female can't be raped by another female; neither a female can be an accomplice in the offence of crime. A female can be raped by another female through digital manipulation, oral sex, strap-on or other foreign objects. The offence of female on a female is under-reported in fear of coming out as lesbian or bisexual to their families or loved ones, hostility by the police, unwillingness to be tagged as a lesbian or bisexual and the sense that the female-on-female rape is not taken seriously by the general public and society.

### **Rape of LGBTQAI+ Community Member**

After the Judgement of NALSA case [10], transgender was recognized as the third gender; with this case, the sexual abuse of this particular gender also came to limelight. The Transgender Persons (Protection of Rights) Act, 2019 provides some protection to the transgender community against sexual violence, but the

punishment for sexual abuse is stated as imprisonment not less than six months, which may extend to 2 years whereas the punishment for Rape under various provisions under Indian Penal Code, 1860 can be imprisonment for not less than seven years which may not extend ten years, life imprisonment, imprisonment for life and in some cases capital punishment. But the same protection is not provided to LGBTQ+ community which got decriminalized through Navtej Singh Johar case [11]. It is shown through various reports by different countries that people belonging to this community are more likely to be raped. In a survey conducted by Centre of Disease Control and Prevention and the National Coalition of Anti-Violence Projects stated that one in ten LGBTQ+ community members had been sexually abused and half of transgender and bisexual women will experience sexual abuse once in a lifetime.

In a survey conducted by Disease Control and Prevention which stated that out of 43.8% lesbians who victims of sexual assault were, 67.4% of them reported females as perpetrators. Madhya Pradesh High Court in the case of State. v. Sheodayal [12] held that modesty of a woman could be outraged by another woman under Section 354 of IPC. In the case of Priya Patel Vs. State of UP [13] this case holds its importance for being the only celebrated case in which the question of whether a woman may be prosecuted for gang rape has been taken up. It is an appeal filed against the decision of the High court of Madhya Pradesh. The rationale given by the High court was that though a woman could not commit Rape if a woman facilitated the act of Rape, she could be prosecuted for gang rape, but this was overruled by the SC.

It is high time that India also amends its rape definition and provides equal protection to all three genders (female, male and transgender) and people of different sexual orientation. It is not that India doesn't believe that males don't get raped. Males under 18 are given protection from sexual abuse under the POCSO Act, but it's hard to believe that the protection is snatched away from them once they turn 18. Article 21, Article 14 and Article 15 all provide that every person has the right to live with dignity, to have equal protection by law and not to be discriminated on the bases of sex. Many feminist groups are against gender-neutral laws as they believe it would create a backlash against the women as the man could also claim the same protection and may end up blackmailing women into silence. According to Agnes "A gender-neutral

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<sup>10</sup>National Legal Services Authority v. Union of India [2012] WP (Civil) No 400 of 2012

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<sup>11</sup>Navtej Singh Johar vs Union Of India Ministry Of Law And others [2016] WP (Cr) No. .76 OF 2016

<sup>12</sup>State. v. Sheodayal [1954] Criminal Appeal No. 219 of 1954

<sup>13</sup>Priya Patel Vs. State Of UP [2006] Appeal (crl.) 754 of 2006

rape law would open up avenues for inflicting even greater trauma and humiliation to an already marginalized section [women] and hence defeat the very purpose of reform.”. It is also deemed by the feminist groups that the majority of rapes are committed by a man against a woman and making the law gender-neutral would be giving more power to the men. But this is not only about males getting protection from the sexual assault but also for the protection of the LGBTQ+ community who have facing more atrocities related to sexual violence and sexual assault in walk of their lives.

## CONCLUSION

Gender-neutrality is rooted in the idea that both (any) genders, male and female, are equally oppressed and that any attempt to hold men and male institutions accountable for transgressions against women is no longer fashionable nor acceptable. This concept has become a useful tool in an attempt to establish that women are as guilty as men for the offences attributed to them. While forcible sexual assaults by females upon males or one transgender against another trans person are undoubtedly less common than those by males upon females this numerical disparity cannot by itself make the gender discrimination constitutional. Women may well be responsible for a far lower number of all serious crimes than are men, but such disparity would not make it permissible for the State to punish only men who commit, for example, robbery. The occurrence of rape and sexual assault in some special situations such as war, communal conflicts and prisons occurred irrespective of gender identities. These cases of sexual assault show that identities of religion, caste becomes the dominant irrespective of their gender.

Understanding of sexual offending by women is growing; as such, legal discussion and analysis should take into account these new understandings. If we are to be a society that takes sexual assault seriously, then it is important to recognize all victims and perpetrators of rape. It is also of central importance to this process of recognition that sexual assault is correctly labelled by the criminal law. This can and should be achieved while recognizing the fact that most victims are women and that there are important issues of gender to consider in understanding the causes of rape in our responses to victims and in the enforcement of the criminal law. It has yet to be convincingly argued, however, that these wider understandings

should lead to the exclusion of male victims (or women perpetrators) from the definition of rape.

Rape or non-consensual intercourse is not just a crime against the body of the victim but also against the dignity, reputation and future of the victim. In the definition of Rape, the victim only includes women. The definition is discriminatory as each and every individual should get equal rights under Article 14, Article 15 and Article 21 of the Constitution of India. Each and every person should get equal rights against sexual assault, be it a man, gay, bisexual, lesbian, transgender, a married woman etc. Rape is raping no matter who the victim is, and they should be protected from such type of sexual atrocities.

A principle of criminal law is, surely, that all persons should be protected equally from harm of like degree. The case for treating crimes of like heinousness similarly appears to be stronger than that calling for a distinction to be made between penetration of the female body and penetration of the male body, whatever the sex of the actor. In light of the arguments laid above certain amendments should be made to Rape laws of India.

- The term Sexual Assault should be substituted for the term Rape, as mentioned in Section 375 of IPC.
- In the definition of Rape "every person" should be used in place of man and women making the offence gender-neutral.
- The Rape laws should also be included to LGBTQ+ persons.
- The punishment for Sexual Violence, as mentioned in The Transgender Persons (Protection of Rights) Act, 2019, should be amended to a similar sentence, as mentioned under IPC.
- 172nd Law Commission Report March 25, 2000 recommendation on the rape laws to be gender-neutral should be amended for best protection any rape victims.
- Sexual assault of any kind and against of person is legally considered as rape in many countries but protecting one sex alone in India may leads more sexual crimes in other genders.
- Global perspectives on rape victims, sexual crimes, penal are reduces the sexual crimes in many countries, but in India these remedies are denied to other genders.

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**Cite This Article:** Devakumar Jacob (2021). Decoding Rape Laws: Gender Neutrality in Rape a Transnational Perspectives. *East African Scholars J Edu Humanit Lit*, 4(1), 23-28.