

THE LAWWAY WITH LAWYERS JOURNAL

VOLUME:-22 ISSUE NO:- 22 ,May 2, 2025

ISSN (ONLINE):- 2584-1106

Website: www.the-lawway-with-lawyers.com

Email: thelawwaywithlawyers@gmail.com

Authored By :- MR. Gaurav Kumar

Co- Authored By:- Bhavneet Sigla

REDEFINING SEXUAL OFFENCES: ANALYZING THE IMPERATIVE FOR GENDER-NEUTRAL RAPE

ABSTRACT

This research critically interrogates the gendered construction of rape within Indian criminal jurisprudence and advocates for a redefinition of sexual offences through a constitutionally grounded, gender-neutral framework. The statutory provisions under Sec 375 of the IPC and its successor, Sec 63 of the Bharatiya Nyaya Sanhita, continue to identify rape as a crime committed exclusively by a man against a woman. While historical conceptions of sexual violence centered masculine perspectives, modern jurisprudence acknowledges diverse experiences. Traditionally, rape laws assumed victims and defendants fell into binary gender roles, disregarding nonconforming identities. This inconsistency with equal protection, non-discrimination, and dignity principles necessitates reform. A comparative analysis of rape statutes in India, Canada, Australia, America, and Britain traces conceptual evolution and assesses remaining issues. Though recent changes addressed past deficiencies, Indian laws still reflect heteronormative preconceptions undermining comprehensive justice. Landmark Supreme Court rulings endorsing self-identification, intimacy, and personal autonomy provide a transformational vision grounding legislative revision.

Situating expanded definitions within constitutional morality and international accords like the Yogyakarta Principles shows reconsideration is not only advisable but required. Crafting an inclusive framework acknowledging varied identities and ordeals can at last fulfill substantive equality and legal safeguards for all survivors of sexual violation.

Introduction

The fundamental right to safety and security from violence stands as a cornerstone of any just and civilized society. Among the gravest violations of this sacred right is sexual violence, an act that inflicts profound and long-lasting physical, psychological, and emotional harm on individuals and communities. As cultures progress through history, so too does comprehension of such offenses, necessitating continuous reassessment of the legal frameworks intended to address and deter them. The notion of rape, specifically, has undergone significant transformations in its definition and societal understanding, evolving from antiquated perspectives of property ownership to a acknowledgment of individual autonomy and bodily self-determination as paramount. Legislative frameworks play a defining role in this evolution, serving as the formal mechanisms through which societies express their values, safeguard their members, and ensure justice for those who have been wronged. This

scholarly paper focuses on the critical need to redefine sexual crimes in India, particularly examining the imperative for gender-neutral rape laws within the nation's constitutional democracy. The historical trajectory of comprehending sexual violence reveals a growing awareness that extends beyond traditional gender roles. This necessitates a critical reexamination of existing legal statutes to ensure they accurately mirror modern understandings of harm, equity, and the diverse experiences of individuals. The very call for a redefinition of sexual offenses underscores a potential discrepancy between the current legal structure and the foundational principles of a constitutional democracy, especially regarding the equitable application of justice across all genders.

1. Defining Rape: A Comparative Analysis

2.1 Traditional and Contemporary Understandings of Rape

Historically, the perspective on rape was often rooted in the flawed belief that women were property to be owned by men. This patriarchal view defined the offense narrowly as a violation of male ownership and authority, failing to recognize a woman's agency over her own body and destiny. Contemporary understandings have rightly progressed to see rape as a devastating breach of one's fundamental right to determine what is done with their own flesh and intimacy. This perspective spotlights the involuntary nature of the act and the profound and lasting damage inflicted upon the survivor, regardless of gender. Despite evolution in how we comprehend this atrocity, debate continues around its precise definition and handling under law. Interpretations vary cross-culturally, molded by diverse social norms and legal pedigrees across the global landscape.

2.2 Rape Under the IPC (IPC)

For the most part, the concept of rape in India was defined by Sec 375 of the IPC before the "Bharatiya Nyaya Sanhita" was passed. As to this provision, "A man commits 'rape' if he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her do so with him or any other person". By naming the offender as a "man" and the victim as a "woman," this definition instantly institutionalises sexism in relation to the crime. The IPC went on to list seven scenarios in which such conduct would constitute rape, including when done against her will or without her agreement. Obtaining her consent by threatening her or someone she loves of harm is not an option. Because she believes he is her husband or because she thinks she is legitimately married to another guy, even if he knows he is not, and she gives her assent anyhow. She may not be able to fully understand the ramifications of her consent when she is under the influence of drugs or alcohol. Whether she grants her consent if she isn't 18 years old, or if she isn't able to verbalise her consent.

Exception 2—which said that "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape"—was a crucial component of Sec 375 of the IPC. Due to its discriminatory character and disregard for a wife's right to bodily

autonomy inside the marriage, this exception—often referred to as the marital rape exception—has generated a great deal of discussion and controversy. After a horrific gang rape case in Delhi, lawmakers approved the Criminal Law (Amendment) Act of 2013, also referred to as the Nirbhaya Act. This was the most substantial of several amendments made to Sec 375 of the IPC over the years. Extending the current definition of rape to include: the introduction of any object or body part other than the penis into a woman's vagina, urethra, or anus; the use of force or manipulation to cause penetration into these orifices or any other area of her body; and the use of the mouth to a woman's vagina, anus, or urethra.

2.3 Rape Under the Bharatiya Nyaya Sanhita (BNS)

The “Bharatiya Nyaya Sanhita (BNS) 2023”, which aims to replace the IPC, also defines rape in Sec 63. The BNS states that “A man is said to commit ‘rape’ if he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,” under similar circumstances as outlined in the IPC. Notably, the BNS continues to use the pronouns “man” and “woman” to describe the offender and victim, respectively, maintaining the offense's explicit gendering. The Indian Penal Code states that in order for a woman to be found guilty of rape, certain circumstances must be satisfied. These include that she must be either mentally or physically impaired, that she must be under the age of 18 (with or without consent), that she must be unable to express her consent, that her will must be broken, or that her consent must have been forced or threatened.

1. Gender Inequality in Indian Rape Laws: A Critical Examination

3.1 Inherent Gender Bias in the Legal Framework

The current legal definition of rape in India, as enshrined in both the IPC and now the BNS, exhibits an inherent gender bias by explicitly identifying the perpetrator as a “man” and the victim as a “woman”. This gendered construction of the offense perpetuates a limited and binary understanding of sexual violence, failing to acknowledge the diverse realities of such experiences. Because of its rigid adherence to this binary paradigm, the law fails to acknowledge that rape may happen to anybody, including males, transgender people, and non-binary individuals. On top of that, under the present definition, women cannot be considered rapists unless we include gang rape, in which a woman may be one of many members of a group working in concert. This gender-specific language sustains harmful stereotypes and leaves large blank spots in legal protection for the individual who does not fit the traditional victim-perpetrator profile.

3.2 Arguments Supporting the Gender-Specific Nature of Existing Laws

Several arguments are often made for the gender-specific nature of Indian rape laws. One primary argument is that it is statistically accurate to say the vast majority of reported cases of sexual violence involve a male offender and female victim.⁸ It has been argued in this way that rape law ought to deal first and foremost with the commonest kind of sexual offences. An alternative argument stresses women's distinctively vulnerable position vis-à-vis sexual violence, since society's deeply entrenched structure is patriarchal and so unequal in its own order. For this reason, gender-exclusive laws are regarded as a pre-condition to provide direct protection to people who are particularly at risk. Also, particular feminist groups have worried that using gender-neutral laws may lead to their abuse against women. For instance, it opens the door to men filing false counter-accusations or could weaken emphasis on specific forms of violence experienced by women.

3.3 Counter-Arguments Highlighting the Exclusion and Need for Inclusivity

Despite the arguments in favor of gender-specific rape laws, a growing body of thought emphasizes the exclusion and injustice inherent in such a framework. Advocates for gender-neutral laws argue that the focus should be on the act of sexual assault and the violation of consent, regardless of the gender of the individuals involved. They highlight the reality that men, transgender persons, and non-binary individuals can also be victims of sexual assault, and the current laws fail to provide them with adequate legal recognition and protection. Moreover, focusing solely on male perpetrators and female victims reinforces harmful gender stereotypes about men as inherently aggressive and women as perpetually vulnerable, thus failing to address the full spectrum of sexual violence. A key counter-argument is that a gender-neutral approach aligns more closely with the constitutional principles of equality and non-discrimination, ensuring that all individuals are treated with equal respect and dignity under the law. There is a fundamental tension in India's patriarchal society between the critical need to protect women from sexual violence and the equally important imperative to ensure justice and equal protection for all individuals, regardless of their gender identity. This tension is shown by the debate around gender neutrality in rape laws. Due to societal stigma and the present lack of legal recognition, sexual assaults against men and transgender people are underreported. This leads to a vicious cycle where the lack of legal protections causes even more underreporting, which is then used to argue against the need for gender-neutral legislation. There is a discrepancy in the Indian legal system that needs to be addressed. For example, while the Protection of Children from Sexual Offences (POCSO) Act addresses sexual abuse victims as children without regard to gender, the definition of rape for adults is still based on gender.

1. The Concept of Gender-Neutral Rape: Towards Inclusivity

4.1 Defining Gender-Neutral Rape

The term “gender-neutral rape” refers to a body of law that treats sexual assault as a threat to the physical and sexual autonomy of any person, regardless of their gender. The emphasis now moves away from the participants’ gendered identities and onto the illegal conduct and the breach of consent. Current gender-specific laws frequently exclude or provide insufficient protection for non-binary people, transgender people, and male survivors of sexual violence; a gender-neutral definition would expand the scope of legal protection and recognition to encompass all of these groups.

4.2 Arguments in Favor of Adopting a Gender-Neutral Approach

There are persuasive reasons to adopt a gender-neutral approach for rape laws. Firstly, it is consistent with the core principle of equality under the law by guaranteeing equal treatment of all people without prejudice towards gender. Secondly, it safeguards basic human rights for everyone, such as rights to physical control over one’s body and sexual self-determination, regardless of identification as male, female, transgender or non-binary. These laws aim to protect all individuals’ fundamental right to make independent decisions about their own bodies and sexuality without external compulsion or coercion. While debates persist, most experts agree that carving exemptions or double standards into legislation rooted in gender risks normalizing harmful behaviours or stripping agency from some. Ultimately, a framework addressing all forms of nonconsensual intimacy in a uniform and impartial manner best serves the interests of a just, compassionate and inclusive society. While gender-neutral legislation is important, the complex nature of human behaviour must also be acknowledged. Societal assumptions about gender roles and violence warp reality, discouraging many from seeking justice. A more nuanced legal perspective could empower survivors of any identity to share their truths, knowing the law respects individuals as individuals. A spectrum of experiences exists, and the letter of justice must recognize this if its spirit is to heal and reform. Through both understanding and protection, perhaps progress arises. Finally, many other countries have already adopted gender-neutral definitions of rape or sexual assault, indicating a growing international consensus on the importance of inclusivity in addressing sexual violence.

4.3 Concerns and Arguments Against Gender-Neutral Rape Laws in the Indian Context

That the arguments for gender neutrality are quite powerful is self-evident and unquestionable; yet, there also exist concerns and arguments against its introduction into the Indian context. One important concern in this context is that gender-neutral laws might alter the focus on particular vulnerabilities and experiences of women. These, after all, tend to be intimate or sexual violence which disproportionately hits women by destroying their self-image as potential human beings. Similarly, some people fear that indecorous attitudes engendered by Such a law might even in patriarchal society be interpreted as pointing to more false cases filed against men and thereon nullify some of what has been achieved for women in the struggle against sexual assault. Another argument against gender neutrality is the assertion that the social reality of sexual abuse in

India primarily involves male perpetrators and female victims, and therefore, the laws should primarily reflect this reality. The ongoing debate surrounding gender-neutral rape laws often reflects fundamentally different perspectives on the primary purpose of rape law: whether it is to address the systemic issue of male violence against women, or to protect the sexual autonomy of all individuals. The significant fear of misuse of gender-neutral rape laws, particularly concerning false accusations against men, is a critical consideration in the Indian context due to existing gender power dynamics and societal biases. In navigating these complex issues, the concept of “gender sensitivity” in rape laws offers a potential way forward, perhaps through parallel legal frameworks that acknowledge the specific realities of violence against women while also providing avenues for justice in cases involving non-heterosexual individuals or female perpetrators.

1. **Comparative Analysis of National Legal Frameworks**
2. **United Kingdom: The Sexual Offences Act 2003**

When it comes to sexual offences, the Sexual Offences Act of 2003 is the bedrock of British law. Although this law updated earlier statutes, the definition of rape in Section 1 still heavily favours the victim’s gender. Rape is defined under the Act as the deliberate and unlawful penetration of a person’s vagina, anus, or mouth by means of a penis without that person’s consent or with the reasonable belief that consent is not provided. The act of penetrating the victim’s penis by the offender is directly associated with rape according to this definition. Statutory definitions that utilise the pronoun “he” further establish a link to the masculine sex. Consequently, under this definition, only a male individual can be charged as the principal offender for rape. This inherent gendered nature of the perpetrator in the legal definition stands in contrast to a potentially genderless understanding of the victim. While the Act allows for male victims of rape, the act itself, by legal definition, can only be committed by someone with a penis acting as the principal. This creates a legal distinction where non-penile penetration by a male, or any form of penetration by a female, even if intentional and without consent, would be classified under a different offense.

Interestingly, societal understanding of rape in the UK appears to extend beyond this narrow legal definition. When one person uses their penis or any other instrument or body part to enter another person’s mouth, vagina, or anus, it is often considered a form of rape. It seems that the general public has a different understanding of the act than what is specified in Sec 1 of the Sexual Offences Act 2003.

Contrary to the gendered rape definition, “Assault by Penetration” is addressed in Sec 2 of the Act. The act of deliberately penetrating another person’s vagina or anus without their agreement, using a tool, or any other part of the body other than a penis, is considered an offence. It is worth noting that this provision uses wording that does not discriminate based on gender, suggesting that anybody may commit this offence. A woman would be prosecuted with this offence if she violates another woman’s

vagina without her agreement, as stated directly in the Act. While assault by penetration carries the same maximum penalty as rape, its classification as a separate offense implicitly suggests a distinction in the nature of the crime as perceived by the law, despite the equal severity in sentencing. This distinction might inadvertently perpetuate the notion that penile penetration holds a unique significance within the spectrum of sexual offenses.

Furthermore, Sec 4 of the Act deals with “Causing a Person to Engage in Sexual Activity Without Consent”. This offense encompasses a range of non-penetrative sexual acts and can also be committed by a person of any gender. Importantly, it includes scenarios where an individual intentionally causes another person to engage in sexual activity without their consent, which could involve making someone masturbate or forcing them to sexually touch another person. This Sec could potentially apply to situations where a female perpetrator forces a male victim to penetrate her. However, even in such instances, the act would be classified under Sec 4, rather than being legally defined as rape under Sec 1, further highlighting the gendered prerequisite of penile penetration by a male for the latter offense.

In summary, the UK legal framework for sexual offenses demonstrates a degree of gender neutrality, particularly concerning who can be a victim and in the classification of non-penile penetrative acts and non-penetrative sexual acts. However, the core definition of rape within the Sexual Offences Act 2003 remains inherently gendered with respect to the perpetrator, requiring penile penetration and thus limiting the offense, in its principal form, to male individuals.

- **B. Canada: Criminal Code R.S.C.**

Canada’s approach to sexual offenses, as codified in the Criminal Code R.S.C., presents a more comprehensively gender-neutral framework compared to the United Kingdom. The central offense is defined as “Sexual Assault” under Sec 271. A wide range of sexual acts, including those in which one party does not wish to participate or in which neither party gives their informed permission, fall under this umbrella term. This includes a wide range of acts, from unwanted groping or kissing to all forms of sexual activity, thereby covering acts that would fall under the definition of rape in other jurisdictions.

The language used in Sec 271 is explicitly gender-neutral, applying to “everyone who commits a sexual assault,” without specifying the gender of either the perpetrator or the victim. The focus of the offense lies in the non-consensual nature of the act and the violation of the victim’s sexual integrity, regardless of the genders involved or the specific type of sexual act committed. This represents a fundamental shift from definitions centered on specific acts like penile-vaginal penetration, towards a broader understanding of sexual violence as any non-consensual act of a sexual nature.

The Canadian Criminal Code further categorizes sexual offenses into different levels based on the degree of violence or harm inflicted. Sec 271 defines the basic offense of sexual assault. Sec 272 addresses “Sexual Assault with a Weapon, Threats to a Third Party or Causing Bodily Harm,” which involves the commission of a sexual assault where the offender carries, uses, or threatens to use a weapon, threatens to harm a third party, or causes bodily harm to the complainant. Aggravated Sexual Assault, defined in Sec 273, occurs when the sexual assault results in the complainant being

wounded, maimed, disfigured, or having their life endangered. This tiered system of offenses emphasizes the severity of the assault and the harm caused to the victim, rather than the specific nature of penetration or the gender of the perpetrator, further reinforcing the gender-neutral application of the law.

The historical evolution of Canada's sexual offense laws saw the term "rape" replaced by "sexual assault" in the 1980s. This change reflected a growing societal and legal recognition that sexual violence encompasses a wide range of non-consensual sexual acts beyond the traditional definition of rape. We need to protect sexual autonomy and repair the harm done by all non-consensual sexual contact, no matter who is involved. In conclusion, Canada has now formalized its sexual offense laws in what is convincingly a gender-neutral way. By having the term "sexual assault" cover a wide range of nonconsensual sexual acts and using gender-neutral language for both perpetrators and victims, Canada's Law of Criminal Code ensures that every individual has equal protection from sexual violence regardless as to their sex or any particular nature of this injury.

- **C. Australia (New South Wales): The Crimes Act (NSW)**

Similarly to Canada, the Crimes Act 1900 (NSW) lays up the legal foundation for sexual offences in New South Wales, Australia, and it does not discriminate based on gender. The crime of "Sexual Assault" is defined under Section 61I of the Act. If you engage in sexual relations with another person without their permission and you know that they do not consent or are irresponsible about whether or not they agree, you might face imprisonment according to this section.

By using the terms "any person" and "another person," Sec 61(I) uses language that is clearly non-sexist, implying that offenders and victims may be of any gender. This aligns with the broader trend of moving away from gender-specific definitions of sexual offenses. The focus of the offense is on the lack of consent and the act of "sexual intercourse" without consent, rather than the gender of the individuals involved. New South Wales's extensive definition of "sexual intercourse" under Section 61HA of the Crimes Act goes beyond the conventional understanding of penile-vaginal penetration. Included in this are the following actions: penetrating another person's genitalia or anus with any part of their body or an object, bringing one's genitalia into another person's mouth, putting one's mouth or tongue to another's genitalia, and carrying on with any of these. Because of this broad definition, sexual assault may be defined as any non-consensual penetrative act, regardless of the offender's gender or the nature of the act itself. This contributes significantly to the gender neutrality of the legal framework in practice.

Similar to Canada, NSW law also recognizes aggravated forms of sexual assault. Sec 61J of the Crimes Act outlines "Aggravated Sexual Assault," which carries a higher maximum penalty for offenses involving aggravating factors such as the infliction of actual bodily harm, threats to inflict such harm, the victim being under 16 years of age, the victim having a serious disability, the offender being in company with another person, the offender being in a position of authority over the victim, or the offender breaking into a building to commit the offense. Indeed, Sec 61JA also creates "Aggravated Sexual Assault in Company", and the maximum penalty for an offence of this kind is significantly higher, such as if GBH

is intentionally caused in company, force or threat of force with a weapon is used, or the victim is deprived of their liberty. The stress on aggravated factors of the effect of that (the injury caused and the vulnerability of the victim) rather than the precise details of the initial sexual conduct or the gender of the offender is yet another example of the gender-neutral application of the law in NSW. The historical backdrop is that the offence at common law of rape was abolished in NSW in 1981 and three sexual assault offences in ss 61I, 61J and 61JA of the Crimes Act were introduced that continue in practice today. It was hoped that this change could lessen the aversion in some teenage girls towards recounting unpleasant stories of assault and make it more clear what is and is not sexual assault. Simultaneously, during that early stage, the use of gender-neutral language and a comprehensive understanding of sexual intercourse marked a significant advance towards a more inclusive legal framework.

To sum up, through the gender-neutral language employed in its definition of both crime and (where necessary) culprit in relation to sexual assault, as well as a wide understanding that sexual intercourse includes many forms of penetrating act's. The Crimes Act (NSW) provides means for prosecuting sexual offenses in a gender-neutral way.

The focus on consent and the escalation of penalties based on aggravating factors further underscore the commitment to addressing sexual violence irrespective of gender.

- **D. United States: Varying State Laws with Inclusive Terminology**

The legal landscape for sexual offenses in the United States is characterized by a federal system where criminal laws are primarily enacted and enforced at the state level. Consequently, there is no single, uniform definition of rape or sexual assault across the country. However, for statistical purposes, the "Federal Bureau of Investigation (FBI)" has established a definition of rape: "Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim". This federal definition, revised in 2011 and implemented in 2013, is explicitly gender-neutral, recognizing that both victims and perpetrators can be of any gender. It also includes various forms of penetration, acknowledging that sexual violence extends beyond traditional definitions centered on penile-vaginal intercourse. While the FBI's definition serves as a standard for data collection, the actual criminal laws defining sexual offenses vary from state to state. Nevertheless, a clear trend towards gender neutrality in state statutes has emerged over the past several decades.²⁰ Most states have moved away from historically gender-specific definitions of rape, which often focused on male perpetrators and female victims, towards more inclusive language that recognizes that individuals of all genders can experience and perpetrate sexual assault.²⁰ Some states have defined the term "sexual assault" to include a wider range of non-consensual sexual acts (like sexual battery offenses), while others use particular terms and categories to distinguish sexual assault offenses depending on the type of penetration that was involved.

As Rape Law in the United States demonstrates, there has been a dramatic reformation of rape laws in the US since the 1970s. These initiatives also sought reforms to the law that would result in gender neutral rape and sexual assault statutes, abolition of the spousal rape exemption to the

crime of rape and a re-definition of rape as sexual assault, based on lack of consent and the infringement of sexual autonomy. They helped changes in state laws that retreated from the previous stance that if it was forcible, for example by throwing someone to the ground, that that was all that was needed for a rape prosecution. The FBI's decision to revise its definition in 2011/2013 further reflects this broader societal and legal recognition of the importance of gender neutrality in understanding and addressing sexual violence.

Many states in the US also have gender-neutral statutory rape laws. Historically, statutory rape laws often focused on protecting young females from sexual intercourse with adult males. However, contemporary laws in many states have been amended to remove gender-specific language, making it illegal for an adult to engage in sexual activity with a minor, regardless of their respective genders. This shift reflects a broader understanding of the need to protect all minors from sexual exploitation, irrespective of the gender of the minor or the perpetrator.

In conclusion, while the United States lacks a single federal definition of sexual offenses for criminal prosecution, there is a clear and widespread trend towards gender neutrality in the definitions used by individual states. The FBI's gender-neutral definition for statistical purposes, coupled with the reforms in state laws, indicates a growing consensus on the importance of inclusive legal frameworks that recognize all individuals as potential victims and perpetrators of sexual violence. However, the decentralized nature of the legal system means that specific terminology and the scope of offenses may still vary between states.

Table 1: Key Definitions of Sexual Offences Across Jurisdictions

Jurisdiction	Offense Name (Legal Term)	Definition (Key Elements)	Gender Neutrality(<i>Perpetrator</i>)	Gender Neutrality(<i>Victim</i>)
UK	Rape	Penile penetration of vagina, anus, or mouth; lack of consent; no reasonable belief in consent	No (<i>Principal Offender</i>)	Yes
UK	Assault by Penetration	Penetration of vagina or anus by any body part or object; sexual nature; lack of consent; no reasonable belief	Yes	Yes
Canada	Sexual Assault	Any unwanted sexual act or activity without voluntary agreement/consent	Yes	Yes
Australia (NSW)	Sexual Assault	Sexual intercourse without consent; knowledge of non-consent or recklessness	Yes	Yes
USA	Rape	Penetration of vagina or anus	Yes	Yes

(Federal)		by any body part or object, or oral penetration by a sex organ; without consent		
USA (State Laws)	Varying by State	Varying definitions; general trend toward gender-neutral definitions of rape or sexual assault	Yes (<i>Trend</i>)	Yes (<i>Trend</i>)
India (BNS 2023)	Rape	Penile penetration of vagina, mouth, urethra, or anus of a woman; insertion of object; manipulation; oral acts; without consent	No (<i>Man Only</i>)	No (<i>Woman Only</i>)

1. Historical Evolution Towards Gender Neutrality: A Comparative Perspective

The journey towards gender neutrality in sexual offense laws has varied across the United Kingdom, Canada, Australia (New South Wales), the United States, and India, reflecting different socio-political contexts and timelines for legal reform.

In the **United Kingdom**, the evolution has been incremental. Historically, the definition of rape was narrowly focused on penile-vaginal penetration with a female victim, rooted in common law traditions. A significant step towards recognizing male victims occurred in 1994, with the expansion of the definition to include penile-anal intercourse, regardless of the victim's gender. The Sexual Offences Act 2003 further broadened the scope by including oral penile penetration in the definition of rape. However, the requirement of penile penetration for the charge of rape has meant that the perpetrator's gender remains a defining element for this specific offense. This has led to ongoing debate regarding the need for a fully gender-neutral definition of rape that would encompass female perpetrators and other forms of penetration. The current legal framework reflects a tension between modernizing the law to align with evolving understandings of sexual violence and the historical emphasis on specific acts and perpetrator characteristics.

Canada underwent a more radical shift in its approach to sexual offense laws. Prior to the 1980s, Canadian law, influenced by English common law, exhibited gender bias, including the non-recognition of marital rape. However, significant reforms in the early 1980s saw the term "rape" replaced with the gender-neutral term "sexual assault" in the Criminal Code. This fundamental change shifted the focus from a specific act to the non-consensual nature of any sexual act and the violation of sexual integrity, applicable to all genders. This proactive approach to addressing gender bias in the legal framework positioned Canada as an early adopter of gender neutrality in this area.

Australia (New South Wales), similar to Canada, made a decisive move towards gender neutrality in its sexual offense laws in 1981. The common law offense of rape was abolished and replaced with the offense of "sexual

assault,” employing gender-neutral language from the outset. Furthermore, the broad definition of “sexual intercourse” in the Crimes Act (NSW) includes various forms of penetration, contributing to a legal framework that is not limited by traditional gendered understandings of sexual violence. Subsequent reforms in NSW have continued to focus on issues of consent and aim to address the diverse experiences of individuals affected by sexual assault. This consistent legislative effort reflects a sustained commitment to ensuring that the law protects all individuals from sexual assault, regardless of their gender or sexual orientation.

The **United States** experienced a more gradual and decentralized evolution of its sexual offense laws. Historically, these laws were largely gender-specific, often defining rape as penile-vaginal penetration by a man against a woman, with marital exemptions in place until the mid-1970s. The feminist movement played a crucial role in advocating for reforms, beginning in the 1970s, which led to state-level changes aimed at creating gender-neutral definitions and eliminating discriminatory provisions. This resulted in a patchwork of laws across different states, with varying terminology and definitions. However, the overarching trend has been towards greater gender neutrality. The FBI’s revision of its definition of rape in 2011/2013 to be gender-neutral and include various forms of penetration signaled a significant shift at the federal level, further encouraging states to adopt more inclusive definitions. The historical context in the US underscores the significant impact of social and political movements in driving legal change towards recognizing sexual violence as a violation of individual autonomy, irrespective of gender.

In **India**, the historical evolution of rape laws, now codified in the Bharatiya Nyaya Sanhita 2023, has largely maintained a gender-specific approach. Rooted in English common law, the IPC of 1860 defined rape with a focus on male perpetrators and female victims. Subsequent amendments, including those following landmark cases like the Mathura rape case and the Delhi gang rape case (Nirbhaya case), broadened the definition to include various forms of penetration and aggravated offenses, but the fundamental gendered nature of the offense remained. While there have been discussions and recommendations from law commissions and judicial pronouncements advocating for gender neutrality, these have not yet translated into comprehensive legislative reform. The historical trajectory in India reflects a continued emphasis on protecting women as victims, with limited legal recognition for men and transgender individuals as victims of rape under the primary offense.

1. **The Yogyakarta Principles**

International human rights law as it pertains to gender identity and sexual orientation is addressed in the Yogyakarta Principles, which were approved in 2006 and revised in 2017. No one’s worth or humanity can be diminished because of their sexual orientation or gender identity, which is why these principles aim to prevent discrimination and abuse based on these factors. Everyone, regardless of their gender or sexual orientation,

has the right to be free from discrimination and to live in an equal society, according to Principle 2. Principle 9 demands that nations take adequate steps to avoid violence or threats to the body or the person, and it recognises that everyone has the right to security of person regardless of their sexual orientation or gender identity. Furthermore, states are obligated to prevent, investigate, prosecute, and penalise acts of violence, discrimination, and other violations that violate the right to state protection from such acts, regardless of sexual orientation, gender identity, gender expression, or sex characteristics. Yogyakarta Principles stress the need to respect the human rights of all people, regardless the fact that their sexual orientation or gender identity might not be mainstream. This is highly pertinent to discussion about gender-neutral rape laws, since the gendered definitions can be just as inattentive to the needs of those who identify as transgender or genderqueer both in the sense of the potential of being raped and the potential to rape. One example of this is a heterosexual definition of rape as the assault of a female by a male: such a definition would not acknowledge a male-bodied transgender victim, or an MTF transgender rapist. The Yogyakarta Principles call for laws that are comprehensive and which protect everyone, irrespective of their sexual orientation and gender identity, thus demonstrating the need for gender-neutral rape laws for all persons. These principles are particularly pertinent to India, where the current legal framework does not fully address the rights and protection of transgender individuals in the context of sexual offenses.

1. Landmark Supreme Court Judgments: Shaping the Discourse on Gender, Identity, and Dignity

Several landmark judgments by the SC of India have significantly shaped the constitutional discourse on gender, identity, and dignity, providing crucial jurisprudential foundations for the arguments advocating for gender-neutral rape laws.

8.1 *NALSA v. UOI (2014)*: Recognizing the Third Gender and the Constitutional Right to Self-Identified Gender

Transgender people in India finally had their rights acknowledged in the landmark 2014 case National Legal Services Authority (NALSA) v. UOI. In this historic decision, the Supreme Court confirmed that everyone has the freedom to choose their own gender.

8.1.1 Interpretation of Gender Identity as an Innate Perception

The Supreme Court made it clear that “an innate perception of one’s gender” is more important than physical traits like genitalia or chromosomes when it comes to determining one’s gender identification. It officially acknowledged a “third gender” that does not fit neatly into the male-female dichotomy, including hijras and eunuchs. The Supreme Court ruled that no “third gender” individual should be required to undergo any kind of medical or biological testing that violates their right to privacy, highlighting the importance of psychological identity above biological sex.

8.1.2 Upholding Dignity as Encompassing Diversity in Self-Expression

The SC granted a most liberal meaning of dignity in Article 21, observing that it “includes within its ambit the indigenous and unvoiced expressions with necessary subversiveness to ensure an individual to live a dignified life. The Court expressly incorporated a person’s gender identity within the sweep of the right to dignity which Article 21 guarantees. This acknowledgment left no doubt as to the fact that the ability to define and to express one’s gender identity is a manifestation of the principle of dignity of the human being, whatever may be the “sex assigned at the time of birth”.

8.1.3 Implications for the Understanding of ‘Sex’ under Articles 15 and 16

Furthermore, the Court addressed the interpretation of the term “sex” as used in Articles 15 and 16 of the Constitution, which prohibit “discrimination on the grounds of sex”. A person’s “gender” according to their own subjective experience is likewise included in the definition of “sex” in these articles, according to the Court. Transgender people are now more adequately protected from discrimination under these basic rights since the Court ruled that “sex” discrimination included discrimination based on gender identity.

The *NALSA* judgment established a crucial precedent by legally recognizing gender identity as distinct from biological sex and integral to dignity and equality. This landmark ruling strongly supports the argument that laws, including those related to sexual offences, should be gender-neutral to ensure “the protection of the fundamental rights of all individuals, including transgender persons, who may be victims of sexual assault”.

8.2 *Navtej Singh Johar v. UOI (2018)*: Decriminalizing Homosexuality and Affirming the Right to Live with Dignity and Identity

By striking down Sec 377 of the Indian Penal Code, the Supreme Court decriminalised adult-to-adult gay conduct in the 2018 landmark case *Navtej Singh Johar v. UOI*. This decision was grounded in the affirmation of the “right to live with dignity and identity for all individuals”, irrespective of their sexual orientation.

8.2.1 Recognizing Sexual Orientation as an Intrinsic Aspect of Identity

The Supreme Court made it clear that a person’s sexual orientation is an inherent and organic part of who they are. This movement saw same-sex sexuality as a natural variety of human sexuality and opposed the discriminatory and antiquated divide between “natural” and “unnatural” sexual activity. Everyone, including those who identify as LGBTQI, has the inherent right to freely express themselves without fear of persecution or discrimination, as the ruling made clear.

8.2.2 Emphasizing Dignity, Privacy, and Personal Liberty in the Context of Sexual Choices

In deciding cases involving sexual orientation and choices, the Court gave great weight to issues of human dignity, decision-making autonomy, and basic privacy under Article 21. It ruled that Section 377 infringed against these basic rights by labelling LGBTQI people as “less than humans” and making them endure stigma, discrimination, and shame because of their identity. The court’s decision upheld the rights of all citizens to freely select their sexual orientation, find and express their sexual orientation in

privacy, and prohibit the criminalisation of consenting romantic relationships between adults of the same sex.

8.2.3 Overruling Earlier Precedents and Embracing Transformative Constitutionalism

In its decision, the Supreme Court overruled its earlier judgment in *Suresh Koushal v. Naz Foundation (2013)*, which had upheld the constitutionality of Sec 377. The Court explicitly relied on the principles of transformative constitutionalism, emphasizing that the Constitution is a dynamic instrument for social change and the progressive realization of rights. It underscored the concept of “constitutional morality” prevailing over “social morality,” asserting that the rights of even minority groups cannot be subjected to the whims of majoritarian views.

The *Navtej Singh Johar* judgment further solidified the understanding of dignity and identity under the Constitution by extending it to sexual orientation. This landmark ruling reinforces the principle that the law should not discriminate based on sexual characteristics or identity, which is directly relevant to the ongoing debate on the necessity of “gender-neutral rape laws to protect all individuals from sexual assault, irrespective of their sexual orientation or gender identity”.

1. Scholarly and Institutional Perspectives on Gender Neutrality in Rape Laws

9.1 Examining Scholarly Articles and Legal Analyses on the Constitutional Validity of Gender-Neutral Rape Laws in India

Scholarly articles and legal analyses provide compelling arguments for the constitutional validity of gender-neutral rape laws in India, primarily based on the “principles of equality and non-discrimination.” Proponents argue that the current gender-specific definition of rape perpetuates a binary understanding of gender, unjustly excluding male and transgender individuals as potential victims of sexual assault. This exclusion is seen as a violation of Article 14, which guarantees “equality before the law and equal protection of the laws to all persons”, and Article 15(1), which prohibits “discrimination based on sex”, as interpreted to include gender identity.

Proponents of gender-neutral laws argue that denying legal recognition and protection to male and transgender victims is a violation of their fundamental rights, in response to concerns voiced by feminist scholars and women’s rights groups regarding the possible negative impact of gender-neutral laws on female victims and the possibility of misuse. They contend that the state’s duty to safeguard its inhabitants against infringements of human rights ought to include all persons, irrespective of gender. The argument that retaining gender specificity is justified under Article 15(3) (special provisions for women) is also debated, with many scholars asserting that while affirmative action for women is necessary, it should not come at the cost of denying basic rights and equal protection to other genders in matters of personal safety and security from sexual violence. The prevailing scholarly view leans towards the necessity of reforming the current rape laws to be more inclusive and in line with the evolving understanding of equality and non-discrimination under the

Constitution, especially in light of the progressive interpretations adopted by the Supreme Court in cases like *NALSA* and *Navtej Singh Johar*.

9.2 Analyzing Reports and Recommendations from the Law Commission of India and Other Legal Bodies on Gender-Neutrality in Sexual Offence Laws

Multiple times, the Law Commission of India has acknowledged the need of a sexual offences framework that is more inclusive. Both the victim and the offender should not be defined by their gender when rape laws are reviewed, according to the Commission's 172nd Report on the Review of Rape Laws. The rationale behind this recommendation was to widen the scope of the offence and to ensure that all victims of sexual assault, regardless of their gender, receive equal protection under the law. The Commission also suggested replacing the word "rape" with "sexual assault" to reflect this broader, gender-inclusive approach.

The "Justice Verma Committee", constituted after "the 2012 Delhi gang rape incident", also deliberated on the issue of "gender-neutrality in rape laws". Complete gender-neutrality for victims and perpetrators was a contentious issue, as was the Committee's recommendation to criminalise marital rape and broaden the definition of rape to include all non-consensual penetration. Some members favoured making the victim gender-inclusive while retaining a gender-specific definition for the perpetrator, at least in the immediate context, considering the prevailing socio-legal realities in India. However, the overarching sentiment in these reports and recommendations indicates a growing recognition within legal bodies of the need to reform the current gender-specific rape laws to align them with constitutional principles of equality and to address the diverse realities of sexual assault.

9.3 Aligning the Arguments for Gender-Neutrality with the Foundational Constitutional Principles and the Supreme Court's Evolving Jurisprudence

The arguments for gender-neutral rape laws in India find strong resonance with the foundational constitutional principles of "equality before the law" (Article 14), "prohibition of discrimination on the grounds of sex" (Article 15(1)), and "the right to live with dignity" (Article 21), as interpreted and expanded by the Supreme Court in its evolving jurisprudence. The landmark judgments in "*NALSA*" and "*Navtej Singh Johar*" have progressively broadened the understanding of gender, identity, and dignity under the Constitution. *NALSA* recognized transgender persons and affirmed the right to self-identified gender, emphasizing that "sex" under Articles 15 and 16 includes gender identity. *Navtej Singh Johar* decriminalized homosexuality, affirming sexual orientation as an intrinsic aspect of identity and underscoring the importance of dignity and privacy in personal choices.

These judicial pronouncements, rooted in "the principle of transformative constitutionalism", which encourages the use of the Constitution as an instrument for social change and the achievement of substantive equality, provide a robust jurisprudential basis for arguing that the current gender-specific rape laws are outdated and inconsistent with the constitutional ethos. A gender-neutral approach to rape laws would align with the Supreme Court's recognition of diverse gender identities and sexual

orientations, uphold the “right to live with dignity for all individuals”, and ensure equal protection against sexual violence, regardless of gender. The continued adherence to a gender-binary definition of rape appears increasingly incongruous with the evolving understanding of fundamental rights and the judiciary’s “commitment to fostering a more just and equitable society”.

1. CONCLUSION

In a dynamic constitutional democracy like India, the law must remain fluid, responsive, and ethically aligned with the evolving understanding of gender, sexuality, and the pluralistic realities of human experience. The present legal framework governing rape, as defined under both the IPC and the Bharatiya Nyaya Sanhita, continues to rely on a gender-specific model that designates the man as the sole perpetrator and the woman as the only victim. This narrow and binary construct is discordant with both lived realities and the transformative spirit of the Indian Constitution.

By maintaining the exclusion of gender nonconforming and male individuals from the legal definition of rape, we only serve to maintain silence, oblivion, and injustice at a structural level. This exclusion is not just a reflection of legislative stagnation, but a denial of constitutional rights under Articles 14, 15, 21 - the right to equality, non-discrimination and the right to life with dignity. It is not the abstract ideal of men and women as equals but the desperate necessity to counter legal invisibility and social marginality that makes it essential to redefine rape in gender-neutral terms.

This study highlights the redefinition of sexual assault, through gender-neutral language, may facilitate the destigmatization of sexual assault to all genders including men and transgender individuals. It is not the same as if going to law has mere symbolic relevance. It is a first and indispensable step in encouraging reporting, requiring redress, and giving means of accessing support to victims who do not fit the traditional mold of the (female) victim. The point is not to water down the rights of women; it is to expand the umbrella of justice over all who are victims of the rape of their sexual autonomy and the assault on their bodily integrity.

The transformative jurisprudence on the part of the Supreme Court in *NALSA v. UOI*, *Navtej Singh Johar v. UOI* and *Joseph Shine v. UOI* has decisively reasserted these constitutional principles of dignity, identity, autonomy and liberty. These rulings have stretched the legal imagination to include the idea that sex is not confined to biology, that sexuality doesn’t exist in a heteronormative hierarchy. However, the legislative response in the context of sexual offence law is still outdated and limiting. Around the world, jurisdictions such as Canada, Australia (NSW) and various states in the US have adopted more inclusive gender-neutral rape laws based on consent and harm, rather than anatomical categories. India’s continued use of gendered definitions is inconsistent with these global legal developments and with its own international human rights commitments, as detailed in the Yogyakarta Principles.

The simplest, fairest and constitutionally least controversial rape law worthy of its name is that which can accommodate both imperatives: of responding to the systemic forms of patriarchal violence, reaching out especially to women, and, at the very same time, of ensuring that all victims of sexual violence, including male victims, stand on speaking terms with the law and can complain when things go wrong. This is not an impossible or an undesirable balancing act; it is the one that is required, and long overdue.

In other words, a call for gender-neutral rape laws is not a call for gender to cease to exist, it is a call for gender justice. True constitutionalism requires that the law defend not only the majority, but also the dignity of every individual who is insulted. India will have to adopt gender neutrality in sexual offence laws if it is serious about expectations of the Constitution to bring about the promise of equality, liberty and dignity for all.

1. BIBLIOGRAPHY

Statutes and Legal Texts

1. IPC, 1860
2. Bharatiya Nyaya Sanhita, 2023
3. Criminal Law (Amendment) Act, 2013
4. Protection of Children from Sexual Offences (POCSO) Act, 2012
5. Sexual Offences Act, 2003 (United Kingdom)
6. Criminal Code, R.S.C. 1985 (Canada)
7. Crimes Act, 1900 (New South Wales, Australia)
8. State Laws and FBI Definitions (United States)

Reports and Committee Documents

1. Law Commission of India, 172nd Report on Review of Rape Laws (2000)
2. Justice J.S. Verma Committee Report on Amendments to Criminal Law (2013)

International Human Rights Instruments

1. The Yogyakarta Principles (2006)
2. Yogyakarta Principles plus 10 (2017)
3. Universal Declaration of Human Rights (UDHR), 1948
4. International Covenant on Civil and Political Rights (ICCPR)