
GENDER NEUTRALITY IN RAPE LAWS: A COMPARATIVE STUDY OF INDIA, THE UNITED KINGDOM, AND CANADA

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ABSTRACT

Rape law has undergone a profound transformation over the past century, shifting from a framework rooted in patriarchal morality and property rights to one grounded in bodily autonomy, dignity, and human rights. Despite this global evolution, India's statutory definition of rape continues to identify only women as victims and only men as perpetrators, a gendered structure preserved even in the recently enacted Bharatiya Nyaya Sanhita, 2023. This paper critically examines the constitutional inadequacy and international inconsistency of this approach through a comparative analysis of India, the United Kingdom, and Canada. Drawing on landmark case law, feminist jurisprudence, international criminal law, including the seminal decisions in *Prosecutor v. Akayesu* (ICTR, 1998) and *Prosecutor v. Kunarac* (ICTY, 2001) and the Rome Statute of the International Criminal Court, the paper argues that India's genderspecific rape laws violate Articles 14 and 21 of the Constitution and fall short of India's international human rights obligations. The United Kingdom's Sexual Offences Act, 2003 and Canada's gender-neutral sexual assault framework under the Criminal Code serve as comparative models demonstrating that inclusive legal reform does not diminish protections for women but rather extends the guarantee of bodily autonomy to all persons. The paper concludes with specific legislative recommendations to align India's rape laws with constitutional values and international norms.

Keywords: Gender neutrality, rape law, Bharatiya Nyaya Sanhita, bodily autonomy, comparative law, sexual violence, India, United Kingdom, Canada.

I. INTRODUCTION

The legal treatment of rape is one of the most revealing indicators of a society's commitment to human dignity and equality. Historically rooted in patriarchal conceptions of women as property, as evidenced in the Code of Hammurabi and Roman law's raptus doctrine, rape was understood as an offence against the honour of a father or husband rather than a violation of the individual. English common law, which formed the template for India's colonial criminal code, required proof of physical resistance, corroboration, and "chaste character" as conditions for a conviction, thereby shifting moral judgment from perpetrator to victim.

The twentieth century brought a fundamental reconceptualisation. Feminist legal theorists, most notably Catharine MacKinnon, reframed rape not as a crime of passion or desire but as an instrument of power, domination, and gender subordination. Simultaneously, international human rights discourse established that bodily integrity and sexual autonomy are fundamental aspects of personal liberty, protected under instruments such as the Universal Declaration of Human Rights and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). International criminal tribunals took this further, recognising rape as a crime against humanity and, in certain circumstances, an act of genocide.

Yet, despite this global evolution, India's rape law remains anchored in a binary gender framework. Section 375 of the Indian Penal Code, 1860, defined rape as an act committed exclusively by a man against a woman. The Criminal Law (Amendment) Act, 2013, enacted in the wake of the Nirbhaya gang rape, substantially widened the definition of penetrative acts and increased penalties, but deliberately retained the gendered structure. Most recently, the Bharatiya Nyaya Sanhita, 2023 (BNS), presented as a modern overhaul of colonial criminal law, reproduced the same gendered framework in Sections 63 and 64, failing to extend legal protection to male and transgender victims of rape.

This paper argues that India's gender-specific rape law is constitutionally unsustainable and internationally anomalous. Part II surveys the historical and feminist foundations of rape law reform. Part III analyses India's current legal framework against Articles 14 and 21 of the Constitution and key Supreme Court jurisprudence. Part IV examines the international recognition of rape as a crime against humanity. Part V presents a comparative analysis of the UK and Canadian models. Part VI synthesises conclusions and offers specific legislative recommendations.

II. FEMINIST JURISPRUDENCE AND THE RECONCEPTUALISATION OF RAPE

The feminist critique of rape law has been one of the most transformative intellectual movements in legal history. Second-wave feminist scholars challenged the foundational assumptions embedded in rape statutes, that rape was primarily a crime of sexual desire, that women's consent could be inferred from their conduct and character, and that the law's purpose was to protect female chastity rather than female persons. MacKinnon's argument that rape is a tool of gender subordination exposed how law had structurally silenced victims, trivialised sexual violence, and reinforced stereotypes of female passivity.

Feminist activism produced concrete legislative change across common law jurisdictions: the abolition of corroboration requirements, recognition of marital rape, rape shield provisions restricting the admissibility of sexual history evidence, and the introduction of consent-based definitions that centre the victim's perspective rather than the perpetrator's intent. These reforms reframed rape from a violation of social morality to a violation of individual autonomy.

An important and often overlooked dimension of this scholarship is the question of gender neutrality. Scholars such as Philip Rumney have argued that while feminist jurisprudence successfully transformed the understanding of rape for female victims, it inadvertently marginalised male victimisation by treating rape as an almost exclusively female experience. Rumney contends that legal definitions restricting victimhood to women establish the social stereotype that men cannot be sexually violated, thereby discouraging male survivors from reporting assault and perpetuating a culture of impunity in contexts such as custodial facilities. Empirical research supports this concern. Sreekumar's 1992 study documented systematic homosexual gang rape within Indian prisons, demonstrating that sexual violence against men is neither rare nor incidental but structurally embedded in institutions where power imbalances are most acute. The legal invisibility of these victims, denied access to rape provisions because the law does not recognise them as possible victims, represents a direct failure of equal protection. A genuinely rights-based framework must treat rape as a crime against the person, not against a gender category.

III. INDIA'S LEGAL FRAMEWORK: CONSTITUTIONAL TENSIONS

India's rape law carries the imprint of its colonial origin. The Indian Penal Code, 1860, drafted under Lord Macaulay, was shaped by Victorian moral sensibilities that defined rape as an

offence against female chastity and familial honour. This framework was doubly restrictive: it limited the prohibited act to penile-vaginal intercourse and specified that only men could rape and only women could be raped. The marital rape exception, based on the implied consent doctrine, further entrenched the view that a wife's body was at the husband's disposal.

The Criminal Law (Amendment) Act, 2013, enacted after the Nirbhaya case and guided by the Justice Verma Committee Report, made significant strides: it expanded the definition of rape to encompass oral, anal, and urethral penetration; increased minimum sentences; and introduced new offences such as acid attacks and stalking. Crucially, however, Parliament rejected the Committee's recommendation for gender-neutral provisions. The victim was retained as "a woman" and the perpetrator as "a man." The Bharatiya Nyaya Sanhita, 2023, despite its stated ambition to decolonise India's criminal law reproduced this framework verbatim in Sections 63 and 64, adding only cosmetic changes in drafting style.

This legislative continuity raises serious constitutional concerns under Articles 14 and 21. Article 14 guarantees equality before the law and equal protection of the laws to all persons. The Supreme Court's landmark ruling in *E.P. Royappa v. State of Tamil Nadu* (1974) established that arbitrariness is the antithesis of equality, any legislative classification must have an intelligible differentia with a rational nexus to the statute's object. The object of rape law is to punish and deter non-consensual sexual penetration and to provide justice to victims. That object applies with equal force regardless of the victim's gender. A male or transgender person who suffers penetrative rape experiences the same violation of bodily integrity and dignity as a female victim. There is no rational basis for restricting the definition of victim to women; the classification is therefore arbitrary and violates Article 14.

The Supreme Court's ruling in *National Legal Services Authority v. Union of India* (NALSA, 2014) reinforces this conclusion. The Court declared transgender individuals a third gender and held that denial of rights on the grounds of gender identity violates Articles 14, 15, 19, and 21. The failure of Section 63, BNS to include transgender persons as potential rape victims is constitutionally unsustainable after NALSA.

Article 21 extends the argument further. Through a series of progressive interpretations, the Supreme Court has expanded the right to life and personal liberty under Article 21 to include the right to live with dignity, bodily integrity, privacy, and sexual autonomy. Justice K.S. Puttaswamy v. Union of India (2017), decided by a nine-judge Constitution Bench,

unanimously held that privacy, including decisional autonomy over one's body and sexual choices, is a fundamental right under Articles 14, 19, and 21. The necessary implication is that any nonconsensual sexual act constitutes a violation of Article 21 irrespective of the victim's gender. A rape law that recognises this violation only when the victim is female, and denies it when the victim is male or transgender, is in direct conflict with the constitutional framework articulated in *Puttaswamy*.

Navtej Singh Johar v. Union of India (2018) deepens this constitutional foundation. In striking down Section 377's criminalisation of consensual same-sex relations, the Court held that constitutional morality, grounded in equality, dignity, and liberty, must prevail over majoritarian prejudice. By analogy, a rape law that withholds protection from male and transgender victims on the basis of gender assumptions reflects precisely the kind of majoritarian prejudice that *Navtej Singh Johar* declares constitutionally impermissible.

IV. INTERNATIONAL RECOGNITION OF RAPE AS A CRIME AGAINST HUMANITY

The international legal trajectory of rape presents a striking contrast to India's domestic stasis. For most of the twentieth century, international humanitarian law including the Geneva Conventions conceptualised rape as an offence against the honour of women rather than a violation of their bodily integrity. This changed fundamentally in the 1990s, driven by the empirical reality of systematic sexual violence in the conflicts in the former Yugoslavia and Rwanda.

The International Criminal Tribunal for Rwanda's judgment in *Prosecutor v. Akayesu* (1998) is a watershed moment. The Tribunal formulated the first authoritative international definition of rape: "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive." The deliberate use of "a person" rather than "a woman" was a principled choice, reflecting the Tribunal's recognition that rape is a crime against the individual against bodily integrity and human dignity regardless of the victim's gender. The Tribunal further held that rape could constitute genocide when committed with intent to destroy a protected group, and a crime against humanity when forming part of a widespread or systematic attack on a civilian population.

The International Criminal Tribunal for the Former Yugoslavia advanced this jurisprudence in

Prosecutor v. Kunarac (2001). While adopting a more act-oriented definition centred on penetration, the ICTY made a critical conceptual contribution: it placed consent at the heart of the definition and recognised that in contexts of armed conflict, detention, and systematic oppression, the coercive environment itself renders any semblance of consent null and void. The requirement of physical resistance was abandoned; the focus shifted to the perpetrator's conduct and the circumstances of the act.

These decisions were codified in the Rome Statute of the International Criminal Court (1998). Article 7(1)(g) lists rape among the acts constituting crimes against humanity, and Article 8 lists rape as a war crime in both international and non-international armed conflict. The Elements of Crimes defines rape in explicitly gender-neutral terms "the body of a person" and adopts a broad coercion-based consent framework. UN Security Council Resolution 2106 (2013) further recognised men and boys as victims of sexual violence in conflict, establishing an international consensus that legal frameworks for addressing sexual violence must be responsive to all victims, regardless of gender.

India has not ratified the Rome Statute. However, the principles codified therein reflect customary international law and general principles recognised by civilised nations, which are binding on India as sources of international law. The Supreme Court's methodology in *Vishaka v. State of Rajasthan* (1997) using international conventions to fill gaps in domestic law and in *Puttaswamy* (2017) using international standards to interpret fundamental rights provides a framework for courts to invoke these international norms in challenging India's gender-specific rape law.

V. COMPARATIVE ANALYSIS: THE UK AND CANADIAN MODELS

The United Kingdom and Canada two common law jurisdictions sharing India's legal heritage offer concrete models of how gender-neutral sexual offence frameworks can be designed and implemented effectively.

The UK's Sexual Offences Act 2003 (SOA) represents a carefully calibrated approach to gender neutrality. Section 1 defines rape as penile penetration of the vagina, anus, or mouth of "another person" without that person's consent. Victims of any gender male, female, or transgender are therefore protected. The perpetrator must use a penis, meaning the offence is currently limited to male perpetrators in terms of the primary rape charge; however, Section 2 (assault by

penetration) and Section 3 (sexual assault) are fully gender-neutral as to both victim and perpetrator and carry equivalent or identical maximum penalties including life imprisonment. The marital rape exception, abolished in *R v R* (1992), has not been reinstated.

The consent framework under Sections 74 to 76 of the SOA represents perhaps its most significant innovation. Section 74 defines consent as agreement by choice made with freedom and capacity. Section 75 creates rebuttable presumptions that consent was absent in circumstances such as the use of violence, unlawful detention, or intoxication. Section 76 makes consent conclusively absent where deception was used as to the nature of the act. Crucially, the accused must have held a reasonable not merely honest belief in consent. These provisions apply uniformly to victims of all genders. Landmark decisions including *R v Bree* (2007) on intoxication and *R v Olugboja* (1982) on submission have further refined consent doctrine in a victim-centred direction.

Canada's approach is structurally bolder. The Criminal Law Amendment Act, 1983 replaced rape entirely with a three-tiered framework of "sexual assault" (Section 271), "sexual assault with a weapon or causing bodily harm" (Section 272), and "aggravated sexual assault" (Section 273) under the Criminal Code. The offences are fully gender-neutral: "person" replaces all gendered language for both victims and perpetrators. The marital rape exception was abolished simultaneously. Severity is calibrated by the harm inflicted rather than the type of sexual act or the gender of participants.

Section 273.1 defines consent as voluntary agreement to participate in the specific sexual activity in question. Consent cannot be implied from prior sexual conduct, can be withdrawn at any time, and cannot be given in advance for acts that occur while the complainant is unconscious (*R v JA*, 2011). The Supreme Court of Canada in *R v Ewanchuk* (1999) definitively rejected the concept of implied consent: only an affirmative yes means yes. Rape shield provisions under Sections 276 and 278 protect complainants of all genders from prejudicial questioning about their sexual history.

The comparative evidence is clear: gender-neutral reform in both jurisdictions did not weaken protections for women. On the contrary, protections were expanded concurrently stronger consent definitions, rape shield laws, and procedural safeguards were introduced alongside gender-neutral victim definitions. The fears voiced by opponents of reform in India that gender neutrality is an "anti-women" measure find no empirical support in the experience of these

jurisdictions. As Rumney argues, recognising male and transgender victims strengthens the foundational principle that rape is an attack on a person's bodily autonomy and dignity, a principle that ultimately protects everyone.

VI. CONCLUSION AND RECOMMENDATIONS

The analysis in this paper establishes three converging conclusions. First, India's gender-specific rape law is constitutionally indefensible. The exclusion of male and transgender victims from the definition of rape violates Article 14's guarantee of equal protection by creating an arbitrary victim classification without rational nexus to the law's object. It simultaneously violates Article 21's protection of bodily integrity, dignity, and sexual autonomy rights the Supreme Court has confirmed belong to all persons irrespective of gender, as affirmed in *Puttaswamy*, *NALSA*, and *Navtej Singh Johar*. Second, India's domestic law is inconsistent with its international obligations. The gender-neutral definitions of rape under the Rome Statute and the ICTY/ICTR jurisprudence, the recognition of male and transgender victimhood in UN Security Council Resolution 2106, and the non-discrimination obligations under the ICCPR collectively require India to provide equal protection against sexual violence regardless of gender. Third, the comparative experience of the UK and Canada demonstrates that gender-neutral reform is practically viable, constitutionally sound, and does not diminish protections for women.

The persistent failure to reform evidenced by the BNS 2023 reproducing the gendered framework of the colonial IPC with only cosmetic changes is not attributable to a lack of expert guidance. The Law Commission's 172nd Report (2000) and the Justice Verma Committee Report (2013) both recommended gender-neutral reform with detailed constitutional justifications. The failure reflects legislative inertia and ideological resistance rooted in stereotypes about gender and victimhood that the Supreme Court has otherwise condemned.

Based on this analysis, the paper recommends six specific legislative reforms. First, Section 63 of the BNS should replace the phrase "a man is said to commit rape" with "a person is said to commit rape," and should replace "a woman" with "a person" as the identified victim. This single change would extend the protection of India's primary sexual offence to all genders and resolve the most direct constitutional infirmity. Second, the marital rape exception should be abolished without reservation. The exception violates Articles 14 and 21 and has been eliminated in both the UK and Canada without adverse consequences. Third, a robust

affirmative consent framework should be introduced that applies uniformly to all complainants, establishes clear presumptions where consent is to be treated as absent, and requires the accused to have taken reasonable steps to ascertain consent. Fourth, rape shield provisions should be enacted protecting complainants of all genders from prejudicial use of prior sexual history. Fifth, specific legislative provisions should be enacted to ensure that transgender persons are recognised as potential victims under all sexual offence provisions, in fulfilment of the constitutional mandate in NALSA. Sixth, graded sexual offences modelled on Canada's three-tier framework should calibrate criminal severity by the harm inflicted rather than the anatomy of the parties involved. Rape law does not exist in isolation; it is a mirror of a society's values. A law that defines rape as something that can only happen to women, and only be committed by men, communicates a normative message that male and transgender suffering does not rise to the level of the gravest violation of bodily integrity. That message is constitutionally impermissible, internationally discordant, and empirically false. The time for India to reform its rape laws into a genuinely gender-neutral, rights-based framework is long overdue.

REFERENCES

Primary Legal Sources

Bharatiya Nyaya Sanhita, No. 45 of 2023, §§ 63–64 (India).

Chairman, Railway Board v. Chandrima Das, (2000) 2 SCC 465 (India).

Criminal Law (Amendment) Act, No. 2 of 1983 (India).

Criminal Law (Amendment) Act, No. 13 of 2013 (India).

Criminal Code, R.S.C. 1985, c. C-46, §§ 271–273 (Can.).

E.P. Royappa v. State of Tamil Nadu, AIR 1974 SC 555 (India).

Francis Coralie Mullin v. Administrator, Union Territory of Delhi, AIR 1981 SC 746 (India).

Indian Penal Code, No. 45 of 1860, § 375 (India).

Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (India).

Maneka Gandhi v. Union of India, AIR 1978 SC 597 (India).

Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (India).

National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (India).

Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Int'l Crim. Trib. for Rwanda Sept. 2, 1998).

Prosecutor v. Kunarac, Kovač & Vuković, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

R v Bree [2007] EWCA Crim 804 (UK).

R v Ewanchuk [1999] 1 SCR 330 (Can.).

R v JA [2011] 2 SCR 440 (Can.).

R v Olugboja [1982] QB 320 (UK).

R v R [1992] 1 AC 599 (UK).

RIT Foundation v. Union of India, W.P.(C) 284/2015 (Delhi H.C. May 11, 2022).

Rome Statute of the International Criminal Court arts. 7–8, July 17, 1998, 2187 U.N.T.S. 90.

Sexual Offences Act 2003, c. 42 (UK).

State of Karnataka v. Krishnappa, (2000) 4 SCC 75 (India).

State of Punjab v. Gurmit Singh, AIR 1996 SC 1393 (India).

Tukaram v. State of Maharashtra, AIR 1979 SC 185 (India).

Vishaka v. State of Rajasthan, AIR 1997 SC 3011 (India).

International Instruments

Committee on the Elimination of Discrimination Against Women, General Recommendation No.

19: Violence Against Women, U.N. Doc. A/47/38 (1992).

Committee on the Elimination of Discrimination Against Women, General Recommendation No. 35: Gender-Based Violence Against Women, U.N. Doc. CEDAW/C/GC/35 (2017).

Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

UN Security Council Resolution 2106 (2013), S/RES/2106 (June 24, 2013).

Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948).

Books and Academic Articles

Backhouse, Constance & Schoenroth, Lorna, A Comparative Study of Canadian and American Rape Law, 7 Can.–U.S. L.J. 173 (1984).

Barker, Alexandra, A Critical Analysis of Gender Neutrality in Relation to the Sexual Offences Act 2003, 3 Liverpool J. Student L.J. (2024).

Brownmiller, Susan, Against Our Will: Men, Women and Rape (1975).

Elvin, Jesse, The Concept of Consent Under the Sexual Offences Act 2003, 72 J. Crim. L. 519 (2008).

Jain, Sakshi, Need for Gender Neutral Rape Laws, Pen Acclaims (Nov. 22, 2019).

Law Commission of India, 172nd Report on Review of Rape Laws (Mar. 2000).

MacKinnon, Catharine A., Toward a Feminist Theory of the State (1989).

Perera, A., Why a Gender Neutral Rape Law Is Not Anti-Women, Firstpost (Mar. 12, 2013).

Rumney, Philip N.S., In Defence of Gender Neutrality Within Rape, 6 Seattle J. Soc. Just. 481 (2007).

Sharma, B., Rape Laws in India: Need for Gender Neutrality (2018).

Sreekumar, T.N., Sexual Violence in Prison, 27 Econ. & Pol. Wkly. 339 (1992).

Sudharrshan, Tharak, Need for Gender Neutral Rape Laws in India: A Legal Study, 9 J. Legal Stud. & Res. 174 (2023).