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# Analysing the Scope of Gender-Neutral Approach in Indian Rape Laws: Critical Lessons from the UK, South Africa, and European Union (with a Specific Focus on Sweden)

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## Abstract

Rape is often considered as a crime against a woman's virtue. However, cases of male rape and sexual violence against members of the LGBTQ+ community cannot be overlooked. Though such cases are much underreported as compared to male-on-female rape, every victim of sexual violence should have legal recourse, regardless of gender, at the very least from a human rights perspective.

In India, however, rape is classified as a gender-specific offence. To provide deeper insights into the issue, this paper examines two key questions: (1) What factors contribute to the persistence of gender-specific laws in India; and (2) What can be learned from a critical analysis of gender-neutral rape laws in the UK, South Africa, and European Union, with a particular focus on Sweden? Additionally, the paper explores the potential for India to adopt relevant legal principles from these jurisdictions.

**Keywords:** gender neutrality, gender justice, right to equality, male rape, transgender rape.

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# Analiza zakresu podejścia neutralnego płciowo w indyjskich przepisach dotyczących gwałtu: Krytyczne lekcje z UK, Afryki Południowej i UE (szczególnie Szwecji)

## Streszczenie

Gwałt jest powszechnie postrzegany jako przestępstwo przeciwko kobiecie. Nie można jednak pomijać przypadków gwałtu na mężczyznach oraz przemocy seksualnej wobec osób należących do społeczności LGBTQ+. Choć tego rodzaju przestępstwa są zgłaszane znacznie rzadziej niż gwałty popełniane przez mężczyzn na kobietach, każda ofiara przemocy seksualnej powinna mieć zagwarantowaną możliwość dochodzenia sprawiedliwości, niezależnie od płci, w szczególności z perspektywy praw człowieka.

W Indiach gwałt wciąż traktowany jest jako przestępstwo płciowo specyficzne, co niesie ze sobą istotne konsekwencje prawne i społeczne. W niniejszym artykule autorzy podejmują próbę odpowiedzi na dwa kluczowe pytania badawcze: (1) Jakie czynniki wpływają na utrzymywanie się w Indiach regulacji prawnych dotyczących gwałtu, które uwzględniają wyłącznie określoną płć sprawcy i ofiary? oraz (2) Jakie wnioski można wyciągnąć z analizy genderowo neutralnych przepisów dotyczących gwałtu obowiązujących w Wielkiej Brytanii, Republice Południowej Afryki oraz Unii Europejskiej, ze szczególnym uwzględnieniem Szwecji? W artykule zbadano ponadto możliwość wdrożenia w Indiach wybranych rozwiązań prawnych funkcjonujących we wspomnianych systemach prawnych, mając na uwadze konieczność reformy systemu prawnego w kierunku większej sprawiedliwości płciowej.

**Słowa kluczowe:** neutralność płciowa, sprawiedliwość płciowa, prawo do równości, gwałt na mężczyznach, gwałt na osobach transpłciowych.

The term 'gender neutrality' in law per se can be simplistically understood as situations when a certain crime or wrongful behaviour is considered irrespective of who is committing that crime or wrongful behaviour. Here, the focus is on consideration of the criminal act without taking gender into account – either fully (of both the offender and the victim) or partially (of only the offender). With the advent of global feminist jurisprudence, there has been a rise in legal recognition of the need for female empowerment and protection in the neoliberal world. The resultant effect has been the enactment of more elaborate laws for the protection of women in the domestic legislation of multiple nations. India is no exception to this trend. Some radical feminists such as Christine Boyle and Catherine Mackinnon have vehemently opposed the idea of gender neutrality in criminal laws.<sup>3</sup>

Interestingly, this is based on the mere assumption that the modification of the present female-centric laws and adopting a gender-neutral approach would have severe adverse effects on the rights of women.<sup>4</sup> However, a prominent feminist scholar Susan Brownmiller amply recognised the real picture of male victimisation in her path-breaking analysis of female victims of rape.<sup>5</sup> According to her, rape is an act of vengeance and though the majority of rapists use their penis as the main weapon to display dominance and power, other tools such as bottles, sticks or fingers tend also to be used for committing rape and sexual assault. She further acknowledged that men don't just use these tools to sexually violate women, but they also invade other men using the same means.

She compared vaginal penetration with anal penetration and oral sexual assault, and observed that a third party can never judge which of these constitutes a graver form of sexual humiliation. Internationally, rape has been acknowledged as a grave offence, not against any particular gender. Rather, the focus is on the act itself as the basic determinant for culpability. In the *UN Handbook for Legislation on Violence against Women*, rape is defined as a violation of the sexual autonomy and bodily

<sup>3</sup> C. Mackinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, Toward Feminist Jurisprudence*, "Journal of Women and Culture in Society" 1983, 8(4), pp. 635–658. Available from: <https://www.jstor.org/stable/3173687>; C. Mackinnon, *Rape Redefined*, "Harvard Law & Policy Review" 2016, 100, pp. 431–477. Available from: [https://harvardlpr.com/wp-content/uploads/sites/20/2016/06/10.2\\_6\\_Mackinnon.pdf](https://harvardlpr.com/wp-content/uploads/sites/20/2016/06/10.2_6_Mackinnon.pdf) (accessed: 19.03.2023).

<sup>4</sup> J. Ring, *Saving Objectivity for Feminism: Mackinnon, Marx and Other Possibilities*, "The Review of Politics" 1987, 49(4), pp. 467–489. Available from: <https://www.jstor.org/stable/1407734> (accessed: 23.03.2023).

<sup>5</sup> S. Brownmiller, *Against Our Will: Men, Women and Rape*, Ballantine Books, 1993, pp. 257–268.

integrity of the victim.<sup>6</sup> Not just women, but men and sexual minorities also enjoy sexual autonomy and bodily integrity capable of being violated. Since India follows the heteronormative narrative to define the rape laws, the legal system also fails to acknowledge the commission of all forms of sexual offences by women-on-women or transgender-on-woman or woman-on-transgender or transgender-on-man. This further exacerbates the plight of victims who do not fall under the conventional form of rape, i.e. male-on-female.

In the following sections of the paper, the researcher delves into the legal framework concerning gender-neutral rape laws in the UK and South Africa. India's response to the idea of gender neutrality in rape laws shall then be analysed and comparisons drawn, where possible. Special emphasis will be placed on examining the scope of borrowings from the rape laws of these two countries for their incorporation in the rape laws of India.

## A Critical Review of Indian Rape Laws

Though India is the largest democracy in the globalising world, still the criminal legal system as well as the socio-cultural set up have not yet been conditioned to recognise the offence of rape against male and transgender persons. The Indian Penal Code, 1860 (hereinafter referred to as "IPC, 1860") defined the offence of rape in gender-specific terms, i.e. male perpetrator(s) and female victim(s). It is pertinent to note here that the provisions of Section 377 of the IPC penalised male-on-male sexual assault as an unnatural offence only if the actus reus involves the act of anal penetration.<sup>7</sup> Recently, the new substantive criminal law, known as the 'Bharatiya Nyaya Sanhita, 2023' (hereinafter referred to as 'BNS, 2023'), has been passed by the Indian parliament, thereby replacing the IPC, 1860. It has been effective since 1 July 2024.<sup>8</sup> Under BNS, 2023, the definition and punishment for rape have seen no major changes, except – (1) the increase in age of wife (from 15 years to 18 years) in Exception 2 related to marital rape, (2) consolidation of sections and, (3) change in section numbers. Rape and its punishment are now covered under Section 63–71 of BNS, 2023.

<sup>6</sup> UN Department of Economic and Social Affairs, *Handbook for Legislation on Violence against Women*, New York 2010. Available from: <https://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf> (accessed: 27.03.2023).

<sup>7</sup> The Indian Penal Code, s. 377. No. 45, Acts of Parliament, 1860 (India).

<sup>8</sup> The Bharatiya Nyaya Sanhita, 2023, No. 45 of 2023. Available from: [https://www.mha.gov.in/sites/default/files/250883\\_english\\_01042024.pdf](https://www.mha.gov.in/sites/default/files/250883_english_01042024.pdf) (accessed: 5.04.2023).

Surprisingly, BNS, 2023 has removed Section 377, IPC which defined and penalised 'Unnatural Offences'. It was the only available remedy for male and trans victims of sexual offences in India, though in a limited fashion. It has not been replaced by any other provision of a similar nature. Gender stereotyping and patriarchy still pose enormous barriers on the path of gender-neutral rape laws in India. Men are subjected to a stereotyped definition of masculinity, which bears the assumption that men are naturally more powerful, aggressive, and dominant than the female gender. The same is reflected in the Indian rape laws as well.

So, if a man is subjected to sexual violence of any kind by a man or woman, he is tagged as less of a man and the taboo attached leads to the secondary victimisation of such victims.<sup>9</sup> Sexual minorities and their rights have a long struggle to reach a state of equal rights scenario as enjoyed by their cis heterosexual fellow natives of India. As a result, the LGBTQ+ community is also highly vulnerable to sexual crimes and insufficiency of legal remedies.

### India's response to the demand for gender neutrality

It is important to bear in mind that the discussions and debates on the issue of gender neutrality in the Indian rape laws is not a brand-new emergence. It was way back in 2000 that the 172<sup>nd</sup> Law Commission Report recommended the amendment of the rape law provisions in the IPC to such an extent that the offence of rape becomes a fully gender-neutral offence, i.e. gender no longer remains a consideration to determine the culpability of a rapist or to provide justice to a victim of rape.<sup>10</sup> Interestingly, the Law Commission of India gave this recommendation on the basis of voting by all the states of India. The majority of the states favoured a gender-neutralist approach in rape laws as the cases involving several young boys as sexual victims were emerging by the day. The National Commission for Women (hereinafter referred to as "NCW"), however, vehemently opposed the recommendation and claimed the possibility of major adverse effects of such laws on the genuine cases of female rape victims.

Upon an analysis of the dominant trends in the Indian legal mechanism, it may be distinctly noted that all the major changes in the legal system are highly reactive in nature. Mass protests and rallies appear to be the only key to get the legislative authorities to act. Such was the aftermath of the Nirbhaya gang rape

<sup>9</sup> B. Capers, *Real Rape Too*, "California Law Review" 2011, 99(5), p. 1259. Available from: <https://www.jstor.org/stable/41345384> (accessed: 17.04.2023).

<sup>10</sup> Law Commission of India, *172<sup>nd</sup> Report of Law Commission on Review of Rape Laws*, 2000. Available from: <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022082487.pdf> (accessed: 21.04.2023).

case.<sup>11</sup> Soon after, Justice Verma Committee was established to analyse the present rape laws and recommending amendments, considering that the present rape laws were insufficient to address the emerging cases of sexual violence.<sup>12</sup> The Committee came up with a recommendation of amending the criminal laws relating to rape in such a manner that they become partially gender-neutral, i.e. the victims can be male or female, but the perpetrator will always be a man.<sup>13</sup> The Indian Parliament, however, rejected the Committee's recommendation while finally passing the Criminal Law (Amendment) Act, 2013 (hereinafter referred to as "Amendment Act of 2013").

Though the Amendment Act of 2013 widened the scope of rape from hitherto penile-vaginal penetration to now inclusive of anal penetration, oral penetration and penetration by object as well, it still remains a gender-specific offence, i.e. only female rape victims are capable of seeking remedy under the laws. The resultant effect is that for the same act committed on men or transgender persons, there is lesser degree of moral condemnation by the society as compared to those experiences wherein the act is in conformity with the male-on-female paradigm.<sup>14</sup> This is violative of the very essence of the right to equality and it's a pure case of discrimination and bias based on the gender of the parties involved. The Amendment Act of 2013 also added new sexual offences to the IPC – such as voyeurism, disrobing, stalking, and sexual harassment, all being gender-specific offences, identifying only female victims. Exceptionally, the offence of acid attack is added as a gender-neutral offence.<sup>15</sup>

### Legal remedies available to male and trans victims of sexual offences

In 2013 and 2018, there were significant changes in the Indian rape laws after extensive research and committee reports. Despite that, the rape laws in India continue to remain gender-specific. However, the Protection of Children from

<sup>11</sup> Mukesh and Anr. v. State for NCT of Delhi & Ors., (2017) 6 SCC 1.

<sup>12</sup> A. Narrain, *The Criminal Law (Amendment) Bill 2012: Sexual Assault as a Gender-Neutral Offence*, "Economic and Political Weekly" 2012, 47(35). Available from: <https://www.epw.in/journal/2012/35/web-exclusives/criminal-law-amendment-bill-2012-sexual-assault-gender-neutral> (accessed: 1.05.2023).

<sup>13</sup> *Ibidem*.

<sup>14</sup> R. Roy, M. Satish, A. Khanna, *Criminalisation and Sexuality*. Partners for Law in Development, 2015. Available from: <http://pldindia.org/wp-content/uploads/2015/11/3-Criminalisation-and-sexuality.pdf> (accessed: 8.05.2023).

<sup>15</sup> The Bharatiya Nyaya Sanhita, 2023, s. 124(1). Voluntarily causing grievous hurt by use of acid, etc.: Whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person... No. 45, Acts of Parliament, 2023 (India).

Sexual Offences Act, 2012 (hereinafter referred to as “POCSO Act, 2012”) legally recognises boys below 18 years of age as potential victims of rape and other sexual crimes. This particular stand of the central legislative authority compels one to consider that the Indian legal system assumes all boys above the age of 18 years to have suddenly become immune from all kinds of sexual offences – including rape, which appears to be quite an absurd assumption.

The only provision to remedy male sexual victimisation was in the form of Section 377 of IPC, which gave recognition to an act as unnatural offence only if the requisite condition, i.e. penetration is involved.<sup>16</sup> As a result, all female-on-male as well as male-on-male (not involving sodomy) forms of sexual assault remained outside the purview of Section 377, IPC. Unnatural offence is no longer given legal recognition under BNS, 2023, which makes justice even more far-fetched. The majority of countries – including India – are still reluctant to modify their rape laws to the extent of making them more gender inclusive. They argue defensively that rape doesn’t affect men or transgender persons to the same extent as it affects women. Instead of the consequences, it is the non-consensual characteristic of the act that should be the determinant factor for being considered as rape.<sup>17</sup>

It must be borne in mind that all acts of a sexual nature that lack consent of the victim are a direct violation of the bodily integrity and sexual autonomy of the victim, irrespective of their gender. It is also noteworthy that all cases that involve men being “made to penetrate” by a perpetrator in authority or being subjected to “sexual coercion” by a person in a dominant position (physically or professionally) still remain unnoticed and unaddressed by the criminal law system.<sup>18</sup>

## Recent developments in courts and the parliament

An NGO by the name of Criminal Justice Society of India presented a plea in 2018 before the apex court of India, claiming that the lack of gender-neutral rape laws in the criminal justice system of India was directly violative of the right to equality and right to a dignified life as enshrined in Article 14 and Article 21 of the Indian

<sup>16</sup> The Indian Penal Code, 1860, s. 377. Unnatural Offence: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, No. 45, Acts of Parliament, 1860 (India).

<sup>17</sup> P.N.S. Rumney, *In Defence of Gender Neutrality Within Rape*, “Seattle Journal for Social Justice” 2007, 6(1), pp. 481–526. Available from: [https://digitalcommons.law.seattleu.edu/sjsj/vol6/iss1/40?utm\\_source=digitalcommons.law.seattleu.edu%2Fsjsj%2Fvol6%2Fiss1%2F40&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](https://digitalcommons.law.seattleu.edu/sjsj/vol6/iss1/40?utm_source=digitalcommons.law.seattleu.edu%2Fsjsj%2Fvol6%2Fiss1%2F40&utm_medium=PDF&utm_campaign=PDFCoverPages) (accessed: 15.05.2023).

<sup>18</sup> S. Weare, ‘Oh You’re a Guy, How Could You Be Raped by a Woman, That Makes No Sense’: Towards a Case for Legally Recognising and Labelling ‘Forced-to-Penetrate’ Cases as Rape, “International Journal of Law in Context” 2017, 14(1), pp. 110–131. Available from: doi: 10.1017/S1744552317000179 (accessed: 11.05.2023).

Constitution respectively. The court did find merit in the petitioner's plea.<sup>19</sup> Nevertheless, it expressed its authoritative incompetence to amend the laws. In a survey carried out by the Centre for Civil Society, the results indicated that about 18% of adult males surveyed claimed that they faced sexual coercion. Out of these, 16% were coerced by a female and 2% were subjected to coercion by a male perpetrator.<sup>20</sup>

Furthermore, in July 2019, KTS Tulsi, a Member of Parliament and senior advocate, presented a private member bill before the Rajya Sabha, seeking such amendments in the criminal laws that would allow all sexual offences to be read in a gender-neutral language. He further pleaded for addition of a new offence to the IPC called "sexual assault" under a new provision "Section 375A".<sup>21</sup> This offence would also be gender-neutral in nature and consist of using sexual words, gestures or touching of a sexual nature. As another pertinent development on the issue, a citizens' group named "No Rape India" wrote an open letter seeking gender-neutralist approach in rape laws addressed to then Law Minister for the Union, Ravi Shankar Prasad. This occurred as an aftermath of the Tamil Nadu based Shantakulam case of father-son victims of sexual brutality causing death by police officials in 2020.

The absence of legal recourse and the fear of secondary victimisation at every step by the police officials, the judicial bodies and the society at large prevents the men from reporting any kind of sexual violence to which they are subjected. The above discussion makes it clear that India's response to the gender-neutralisation of present rape laws is quite far from ideal. In 2013, the Centre for Civil Society conducted research wherein out of the 96 nations that were studied, 63 had a gender-neutralist approach to their rape/sexual assault laws. Additionally, six of them had partially gender-neutral rape laws (rapist defined as male, but victim could be male or female). The rest of the 27 studied nations had gender specific rape laws (rapist defined as male and the victim could only be female).<sup>22</sup>

In this paper, the intent is to study the rape laws of the UK and South Africa. For the same purpose, it is noteworthy that the IPC was drafted when India was still a colony of British Raj. Its drafting was extensively influenced by then English

<sup>19</sup> Criminal Justice Society of India v. Union of India & Ors., W.P. (C) No. 1262/2018.

<sup>20</sup> J. Stokes, *India's Law Should Recognize Men can be Raped too*, Scroll.in, September 11, 2014. Available from: <https://scroll.in/article/676510/indias-law-should-recognise-that-men-can-be-raped-too> (accessed: 21.05.2023).

<sup>21</sup> The Criminal Law (Amendment) Bill, 2019 (Bill No. XVI of 2019). Available from: <http://164.100.47.4/BillsTexts/RSBillTexts/asintroduced/crimnal-E-12719.pdf> (accessed: 1.06.2023).

<sup>22</sup> J. Vipra, *A Case for Gender-Neutral Rape Laws in India*, [CCS Working Paper #286 Researching Reality Internship], 2013. Available from: <https://ccs.in/sites/default/files/2022-10/A%20Case%20for%20Gender%20Neutral%20Rape%20Laws%20in%20India.pdf> (accessed: 9.06.2023).



criminal laws. Even the English law, which has a founding influence on the IPC, has dropped the age-old male-on-female paradigm and moved towards a more inclusive protection to male and LGBTQ+ victims of rape and sexual assault. But, as discussed at the beginning of this section, even the New Criminal Laws, specifically the BNS, 2023, fail to provide the necessary remedies to male and transgender victims of sexual abuse and rape.<sup>23</sup> Therefore, it seems pertinent to analyse the present English rape laws and compare them with the rape laws still prevailing in India. Furthermore, the rape laws of South Africa have quite recently been defined and successfully implemented in gender-neutral language. It is safe to say that the rape laws of the UK and South Africa can act as potential models for amendment of Indian rape laws.

### The state of law in the UK: evolution of rape laws

Historically, the UK Parliament has come up with multiple legislations in its attempt to respond to rape. Some of the most important ones are the Sexual Offences Act of 1956, modified in 1976, 1994, and 2003, the Youth Justice and Criminal Evidence Act of 1999, and the Criminal Justice Act of 2003 in England. Earlier, the English common law didn't give recognition to male rape. Rather, all cases of male sexual assault fell under the category of non-consensual buggery. The maximum punishment for buggery was ten years imprisonment, while the maximum punishment for rape was life imprisonment.<sup>24</sup> In other words, the liability for buggery was comparatively lesser than the conventional male-on-female paradigm of rape.

The legislation that covered all kinds of sexual offences back then was the Sexual Offences Act, 1956. However, male rape gained legal recognition for the first time in the UK Parliament via an amendment by the Criminal Justice and Public Order Act in 1994. The Act of 1994 defined rape in a broader and more inclusive language. It stated that it would amount to an offence if a man rapes a woman or another man.<sup>25</sup>

As is evident from the provisions of the Act of 1994, it recognised rape as only a partially gender-neutral offence, which means that the law did acknowledge the

<sup>23</sup> The Bharatiya Nyaya Sanhita, 2023, No. 45 of 2023. Available from: [https://www.mha.gov.in/sites/default/files/250883\\_english\\_01042024.pdf](https://www.mha.gov.in/sites/default/files/250883_english_01042024.pdf) (accessed: 5.04.2023).

<sup>24</sup> C. Carson, *A Comparison of Sexual Assault in the U.S., Canada, and England*, "Undergraduate Review" 2007, 3(1), pp. 57–69. Available from: [https://vc.bridgew.edu/cgi/viewcontent.cgi?article=1055&context=undergrad\\_rev](https://vc.bridgew.edu/cgi/viewcontent.cgi?article=1055&context=undergrad_rev) (accessed: 14.06.2023).

<sup>25</sup> *Ibidem*.

male-on-female as well as the male-on-male paradigm of rape. But it didn't acknowledge the existence of female-on-male or the female-on-female paradigms of rape. Furthermore, what amounts to rape wasn't very well defined and the heteronormative narrative was still deeply seated in the criminal laws of the UK.<sup>26</sup> Finally, the Sexual Offences Act, 2003 (hereinafter referred to as the "Act of 2003") was enacted, which partially replaced the former legislation and broadened the definitions of already existing sexual offences and added new offences based on the research conducted before it was passed. This Act of 2003 categorises this grave sexual offence into two, namely:

- 1) *Penile Penetration* – Non-consensual penetration of vagina, anus or mouth with the penis of offender. For this offence to be committed, the three essential elements are – (a) penile penetration of vagina, anus or mouth; (b) the victim's consent is not given for such penetration; and (c) there is no reasonable belief in the mind of offender that the victim has given consent. If all these three elements are proved against offender, he is punishable for this offence with life imprisonment.
- 2) *Assault by Penetration* – Non-consensual penetration of vagina or anus of the victim (male or female) with a body part of offender (finger, etc.) or with an object (bottle, rod, etc.). In addition to such penetration, three more essential elements are to be proved – (a) The nature of the penetration is sexual; (b) the victim has not consented to such penetration; and (c) there is no reasonable belief in the mind of offender that the victim has consented. If all these elements are proved against offender, he is punishable for this offence as well with life imprisonment.<sup>27</sup>

The Act of 2003 also recognises non-consensual penile penetration of mouth (oral sex) as an offence as it criminalises *penetration of vagina, anus and mouth with the accused's penis as amounting to rape*.<sup>28</sup> It further added genitalia reconstructed through surgery as part and parcel of the offence of rape to ensure inclusion of the transgender persons in the category of victims. The present English laws do recognise male rape and sexual assault victims.

<sup>26</sup> A. Javid, *Male Rape in Law and the Courtroom*, "European Journal of Current Legal Issues" 2014, 20(2). Available from: <https://webjcli.org/index.php/webjcli/article/view/340/434> (accessed: 25.06.2023).

<sup>27</sup> Sexual Offences Act, 2003, ss. 1, 2. Available from: <https://www.legislation.gov.uk/ukpga/2003/42/contents> (accessed: 8.07.2023).

<sup>28</sup> *Ibidem*.

## Woman's liability for male rape

Due to the legal definition of rape, women are still absolved from liability as principal offenders, with an exception in the form of liability as accessories to the crime.<sup>29</sup> This is so because the definition of rape means penetration involving the use of a penis. The cases of penetration by any object other than penis would be classified as sexual assault instead of rape. The resultant effect is that only men are considered capable of committing the offence of rape. However, a woman who acts as an accomplice, aids or abets the commission of rape of another person by a man, can be held guilty of the offence, though still not as a principal offender. This would also have the effect of intentional ignorance of all the cases involving the 'made to penetrate' situation. In such situations, the male victim accuses the woman of rape by coercing the male victim to the extent that he is made to penetrate unwillingly, either out of fear of false rape blame or professional position of dominance of the woman or otherwise.<sup>30</sup>

Based on recent statistics published by the UK Government, it has been estimated that there are approximately 78,000 victims of rape or attempted rape, out of which about 9,000 are male victims.<sup>31</sup> The image and response of the judicial system to the unconventional forms of rape and sexual assault also has deep impact on the perspective of the wider community. In the case of *Payne*, the judge categorised the offence of buggery as a form of rape against the male victim.<sup>32</sup> Furthermore, it is observed that a judge often considers the involuntary physiological reaction of the rape victim's body to the act of rape as a mitigating factor in various cases of female and male rape victims.<sup>33</sup> There is immense medical evidence to prove that the assumption of such physiological reactions being proof of consent is entirely invalid and based on myths.

<sup>29</sup> P.N.S. Rumney, *The Review of Sex Offences and Rape Law Reform: Another False Dawn?* "The Modern Law Review" 2001, 64(6), pp. 890–910. Available from: <https://www.jstor.org/stable/1097198> (accessed: 13.07.2023).

<sup>30</sup> N.A. Khan, *Male Rape: The Emergence of a Social and Legal Issue*, Hampshire 2008. Available from: <https://link.springer.com/book/10.1057/9780230227651> (accessed: 20.07.2023).

<sup>31</sup> T. Merz, *Men and boys get raped too*, "The Telegraph" 2014, February 24. Available from: <https://www.telegraph.co.uk/men/thinking-man/10657485/Men-and-boys-get-raped-too.html> (accessed: 28.07.2023).

<sup>32</sup> R v. Payne, (1994) 15 Cr App R 395, 396.

<sup>33</sup> R v. Billam, (1986) 8 Cr App R (S) 48.

## The EU Legislative Competences & Sweden's Approach to Definition Of Rape

All 27 Member States of the European Union (hereinafter referred to as "the EU") have their individual sets of separate legislative policies and measures. However, the EU also has certain legislative competences that have been provided in the *Treaty on the Functioning of the European Union* (hereinafter referred to as "TFEU").<sup>34</sup> The said document provides for three levels of legislative competences of the EU: (i) exclusive competences (Article 3); (ii) shared competences (Article 4); and (iii) supporting competences (Article 5).<sup>35</sup> In this section, the analysis will examine the extent to which the EU has the legislative competence to act upon the policy areas concerned with male rape and transgender, non-binary victims of sexual violence. Additionally, the level of gender inclusivity and gender neutrality in the rape laws of Sweden in particular, shall also be analyzed. Upon a careful review of the EU competences, it can be stated that for the purpose of combating sexual violence, the most relevant policy area is the area of freedom, security and justice for which the EU has shared competence with the EU Member States. However, the EU does not have any exclusive competence to combat sexual violence.<sup>36</sup>

Nevertheless, the legislations and actions of the EU are evident of the fact that it does make efforts to combat sexual violence by exercising its shared competence under Article 4 of TFEU. But the question arises whether it does so with a gender-specific or a gender-neutral language. It is noteworthy that both the *Treaty on the European Union* (hereinafter referred to as "TEU") (Article 2-3) and the TFEU (Article 8) discuss the relevance of the principle of equality between women and men. In the context of sexual violence, it is pertinent to discuss Article 82 and Article 83 of the TFEU. The main focus of Article 82 is on judicial cooperation in criminal matters and the regulation of competence in the field of harmonisation of procedural criminal law. Article 82(2) specifically provides that the European Parliament and the Council of Europe may issue directives to ensure the establishment of some minimum rules concerning the rights of victims of crime. By implication, this provision related to the rights of victims of crime is also inclusive of the rights of victims of sexual violence and sexual crime. The language of Article 82,

<sup>34</sup> B. Csokan, *Male Victims of Sexual Violence in the European Union: An Analysis of the EU's Actions Combating Sexual Violence*, "Global Campus Working Paper" 2017, 5/17, pp. 1–23. Available from: doi: 20.500.11825/491 (accessed: 1.08.2023).

<sup>35</sup> Publications Office of the European Union, *Consolidated Version of the Treaty on the Functioning of the European Union*, "Official Journal of the European Union" 2012, 55, pp. 47–58. Available from: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF> (accessed: 31.07.2023).

<sup>36</sup> B. Csokan, *op. cit.*

however, does not indicate any specific focus on male, female or minor victims of sexual violence.

Article 83 of the TFEU, on the other hand, deals with regulation of competence in the field of harmonisation of substantive criminal law. Based on relevance to the present study, Article 83(1) plays a significant role in clarifying the stand of the EU as regards gender neutrality in rape laws. While referring to the need for directives to establish certain minimum rules in particular areas of crime, Article 83(1) mentions about sexual exploitation of women and children only as one of those areas of crime. It is obviously reflective of gender specific language, excluding adult male, transgender and non-binary victims of sexual exploitation altogether from the ambit of legislative competence.<sup>37</sup> The current wording of Article 83 therefore clarifies that it does not cover the cases involving sexual exploitation of 'anyone'. Rather, its specific focus is upon combating the sexual exploitation of women and children. As a result, harmonisation of the substantive criminal law (particularly rape and other laws related to sexual exploitation) at the EU level in a gender-neutral manner is not possible with the current wording of Article 83 of TFEU.

It is only in some of its legally binding directives that a gender-neutral language is used, such as *Directive 2011/99/the EU* on the European Protection Order and *Directive 2011/36/the EU* on preventing and combating trafficking in human beings and protecting its victims, thereby giving recognition to male and transgender victims of trafficking. The former directive uses words like 'person' while defining victims, protected person or person causing danger, etc. It refrains from using gender-specific language. On the other hand, the latter directive does mention specific genders, but at the same time, it also acknowledges the prevalence of both, male and female victims of trafficking. It emphasises on the gender perspective of trafficking in the sense that female victims and male victims are trafficked for different purposes in majority of the cases. Therefore, this directive also promotes gender-specificity in the provision of services for victims of both the genders.

The EU has been consistently making efforts to prevent gender-based violence, to protect the victims and to hold the perpetrators accountable. Its commitment to do so is confirmed by the EU Gender Equality Strategy 2020–2025. To meet these ends, on 8 March, 2022, the European Commission adopted a proposal in order to harmonise the criminal law on gender-based violence. It is the Proposal for a Directive of the European Parliament and of the Council on combating violence

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<sup>37</sup> Publications Office of the European Union, *Consolidated Version of the Treaty on the Functioning of the European Union*, "Official Journal of the European Union" 2012, 55, pp. 47–58. Available from: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF> (accessed: 31.07.2023).

against women and domestic violence.<sup>38</sup> The aim of the proposal is to set out targeted rules and thereby ensure protection of the victims of gender-based and domestic violence across the EU, irrespective of whether the act of violence occurs offline or online.

Upon reading the 'Reasons for the Proposal' and the 'Objectives of the Proposal' provided by the European Commission, the statement may be encountered that gender-based violence mentioned in the proposal relates to any physical, sexual, economic or psychological suffering or harm '*directed against a woman because she is a woman or that affects women disproportionately*', such as sexual violence including rape, female genital mutilation, stalking, sexual harassment, cyberviolence, and the like. From this and other wordings of the proposal, it may be observed that the terms gender-based violence and violence against women have been used interchangeably throughout the proposal, leaving no room for male or transgender victims of violence. More recently, on 15 June, 2023, the Council of the European Union approved the above-mentioned proposal, but with changes suggested in the form of additions and deletions.<sup>39</sup>

### A comparison of the original proposal of the European Commission of 2022 and the revised draft of the proposal of 2023

In order to understand the current position of the Council of the European Union as regards the said proposal, it is pertinent to compare the original proposal of 2022 with the present draft along with the changes suggested by the Council to be incorporated into it. For the purpose of the present study, the most significant changes are with respect to rape-related provisions. In the original proposal of 2022, the offence of rape was defined in paragraph 13 and further elaborated upon in paragraph 14 in gender-specific terms. According to this definition which uses words like "rape of women", only women are recognised as the victims of the crime of rape. It further states that 'rape is a crime that disproportionately affects women.'

In paragraph 4 of the proposal, the application of the proposed directive has been discussed. It states that the proposed directive would apply upon any criminal conduct that amounts to violence against women or domestic violence, and is

<sup>38</sup> European Commission, Directorate-General for Justice and Consumers, *Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence*, COM/2022/105, 2022. Available from: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52022PC0105> (accessed: 02.08.2023).

<sup>39</sup> General Secretariat of the Council of the European Union (Justice and Home Affairs), *Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence*, 10717/23, 2023. Available from: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST\\_10717\\_2023\\_INIT](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_10717_2023_INIT) (accessed: 04.08.2023).

criminalised as per the Union or national law. Such criminal conduct is inclusive of offences defined under this directive, such as rape, female genital mutilation, etc. This directive further provided a list of offences defined under national law to be included under the broader category of violence against women, to ensure that the directive covers them as well.

The Council of the European Union has suggested some significant changes to the proposal, specifically related to rape. On the other hand, the Council approved the proposal of 2023, suggesting the deletion of paragraph 13 and paragraph 14 from the original proposal, which defined the offence of rape. It has further suggested modifications in paragraph 4 of the proposal, thereby removing the offence of rape from the list of offences defined under the Directive. This is to ensure harmony between the modified versions of paragraph 4, 13, and 14. However, the Council adds the offence of rape to the list of offences defined under national law, as mentioned in paragraph 4 itself. The Council also adds 'provisions of this Directive which relate to rights of the victim' at the beginning of paragraph 4, thereby emphasising more on the rights of victims, instead of generally upon criminal conducts per se.

The resultant effect of these changes suggested by the Council is that the directive will not have direct application concerning the offence of rape. Rather, it grants more powers to the Member States to draft and implement national laws concerning the offence of rape. This also leads to inconsistency and disharmony between rape laws of various Member States of the EU. The directive would only step in when there is a clear case of violation of victims' rights, provided that the act is a criminal conduct constituting violence against women. On 1 October, 2023, the European Commission also became a party to the Istanbul Convention on preventing and combating violence against women and domestic violence, thereby recognising that violence against women is also a violation of their fundamental rights, thereby reiterating its consistent efforts to combat gender-based violence against women.<sup>40</sup>

Based on the above discussion, it may be concluded that the EU has very recently come up with the first legislative draft from a gendered perspective in the form of Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence. It aims at combating violence against women, and sexual violence against women more specifically. The EU has

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<sup>40</sup> Directorate-General for Neighbourhood and Enlargement Negotiations, European Commission, *Commission and High Representative/Vice-President reinforce their commitment to protect women and girls from violence*, 2023. Available from: [https://neighbourhood-enlargement.ec.europa.eu/news/commission-and-high-representativevice-president-reinforce-their-commitment-protect-women-and-girls-2023-11-24\\_en](https://neighbourhood-enlargement.ec.europa.eu/news/commission-and-high-representativevice-president-reinforce-their-commitment-protect-women-and-girls-2023-11-24_en) (accessed: 28.11.2023).

a long way to go before it focusses on sexual violence against victims of other genders. As of now, its efforts are all focused upon women victims of sexual violence, without any possibility of viewing sexual violence from a gender-neutral lens.

### The legal approach to rape in Sweden

The rape laws in majority of the EU Member States have been defined in gender-neutral language. However, Cyprus, Bulgaria, and Slovakia still do not even recognise men as possible victims of rape. One of these the EU Member States that has set an example in terms of gender inclusivity in its rape laws is Sweden. Swedish tradition believes in gender equality and the same is very well reflected in its legislations and policies. Rape is categorised as a crime against humanity in Sweden. The definition of rape is provided in the *Swedish Criminal Code of 1962*. Chapter 6 of the Swedish Criminal Code deals with Sexual Crimes. Swedish Criminal Code, 1962 defines rape as “forced sexual intercourse initiated against a woman or man by one or several people, without consent.”<sup>41</sup> However, the term sexual intercourse in this definition was largely indicative of the norm of heterosexual acts between persons.

Express gender neutrality was introduced into the definition of rape by the amendment of 1984. The said amendment added to section 1, paragraph 1 that “*some other sexual act that in view of the seriousness of the violation is comparable with sexual intercourse*” would also amount to rape, thereby intending to include acts of anal and oral penetration. Herein, it is pertinent to note that the phrase “sexual activity comparable with heterosexual intercourse” is capable of wide judicial interpretations. The punishment for rape laid down in paragraph 1, section 1, chapter 6 of the Swedish Criminal Code is minimum two years imprisonment extendable to maximum six years imprisonment.

Paragraph 2 of section 1 takes into account all situations such as unconsciousness, serious fear, sleep, intoxication, illness, physical injury or mental disturbance wherein the victim is subjected to improperly exploitation, by sexual intercourse or sexual act comparable to it, while they are in a vulnerable situation. If the rape was committed after (i) threat or violence of a serious nature, involving danger to life; (ii) assault was committed by more than one person; or (iii) there was presence of particular brutality or ruthlessness displayed by perpetrator in the process of committing rape, then it will be categorised as “*Gross rape*”.<sup>42</sup> The punishment for

<sup>41</sup> The Swedish Criminal Code, 1962, Chapter 6, s. 1. Available from: <https://www.government.se/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf> (accessed: 30.11.2023).

<sup>42</sup> Amnesty International, *Criminalisation and Prosecution of Rape in Sweden: Submission to the UN Special Rapporteur on Violence Against Women, its Causes and Consequences*, 2010, pp. 1–10. EUR 42/2426/2020.



gross rape may range from minimum four years of imprisonment to maximum ten years of imprisonment.

If the offence does not fulfil the requirements of paragraph 1 of section 1, but it still involves sexual violence, then it will amount to the less serious offence of sexual coercion which is punishable with a maximum of two years imprisonment as per section 2 of chapter 6 of the Swedish Criminal Code, 1962. In 2018, the Swedish rape law had been amended to add cases with no consent within the definition of rape, even if any form of coercion, threats or violence is absent altogether. Any person engaging in sexual intercourse with another would now have to seek explicit consent before making any sexual contact, in the absence of which, the act would amount to “*negligent rape*”.<sup>43</sup> For all cases of negligent rape, the scale of sanctions is limited to a maximum of four years imprisonment, while for rape of a child (involving child victims under the age of 15 years), the scale of sanctions is two years to six years of imprisonment.<sup>44</sup>

### The judicial approach to rape in Sweden

In Sweden, the case laws and judicial approach to the laws set by legislation plays a crucial role in setting precedents to guide in the application of the laws. In a landmark case of 2008, the Supreme Court of Sweden considered *digital penetration* by a man into the vagina of a woman as a sexual act comparable with heterosexual intercourse and therefore rape, on account of penetration of fingers by accused into the main genital organ of the victim without her consent, thereby causing extreme pain.<sup>45</sup> This case indicates the rape narrative in Swedish courts and the level of expansion that the phrase “comparable with heterosexual intercourse” is capable of. The resultant effect is that the law gives more scope for inclusion of majority of the acts of sexual violence wherein the actus reus does not reflect the conventional penile-vaginal penetration by a male perpetrator against a female victim.

But then, another case came before the Supreme Court of Sweden, where the male defendant was accused of rape on the grounds that he had masturbated the

<sup>43</sup> L. Wegerstad, *Sex Must Be Voluntary: Sexual Communication and the New Definition of Rape in Sweden*, “German Law Journal” 2021, 22, pp. 734–752. Available from: doi: 10.1017/glj.2021.32 (accessed: 05.12.2023).

<sup>44</sup> The Swedish Criminal Code, 1962, Chapter 6, ss. 1a, 4. Available from: <https://www.government.se/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf> (accessed: 11.12.2023).

<sup>45</sup> U. Andersson, *The Body and the Deed. Places of Rape in Swedish Court Narratives*, “Gender and Women’s Studies” 2021, 4(1), pp. 1–12. Available from: [https://riverapublications.com/assets/files/pdf\\_files/the-body-and-the-deed-places-of-rape-in-swedish-court-narratives.pdf](https://riverapublications.com/assets/files/pdf_files/the-body-and-the-deed-places-of-rape-in-swedish-court-narratives.pdf) (accessed: 14.12.2023).

male complainant who was an employee of the accused.<sup>46</sup> The complainant was quite young, far away from home, and in an intoxicated state at the time of alleged incident's occurrence. Further, the accused was in a position of dominance. None of these circumstances were considered as aggravating factors by the Supreme Court while pronouncing the judgment that the act was not of such a nature as to be comparable with forced sexual intercourse and hence, it is not a case of rape. The defendant was convicted for a lesser crime of sexual coercion as defined in section 2 of chapter 6 of the Criminal Code.

Taking both the cases into account, it may be observed that though the Swedish law promotes gender neutrality and gender inclusivity to the best possible extent, in terms of effectiveness, some parts of the law are still questionable. The majority of cases involving sexual violence, wherein the main genital organ of the female, i.e. the vagina, and/or the main genital organ of the male, i.e. the penis is involved, are viewed as comparable with heterosexual intercourse according to the rape narrative set by the court. This rape narrative, based on judicial decisions, has been set as – cases of penile-vaginal intercourse are the most serious forms of sexual violation. According to some jurists, this form of rape narrative extended by courts of Sweden is phallogocentric in nature.

## The state of law in South Africa: beyond heteronormativity

For the purpose of comparative research, the rape laws of South Africa are quite suitable as the criminal laws of some South African states, such as the Northern Region of Nigeria, Sudan and the Northern Region of Somalic Republic have penal codes derived from the IPC, 1860. Furthermore, both India and parts of South Africa are British commonwealth countries and the origin of their laws can be traced back to the English laws.<sup>47</sup> The present rape laws in South Africa that are drafted and implemented in gender-neutral terms have their foundation built on the following two rights guaranteed by the Constitution of South Africa, i.e. (1) the right to be free from all forms of violence; and (2) the right to equality, thereby allowing the laws to operate in the most liberal manner possible.

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<sup>46</sup> *Ibidem*.

<sup>47</sup> J.S. Read, *Criminal Law in the Africa of Today and Tomorrow*, "Journal of African Law" 1963, 7(1), pp. 5–17. Available from: <https://www.jstor.org/stable/745277> (accessed: 19.12.2023).

The hitherto gender-specific rape laws prevailing under the common law practice have now been replaced by the well-defined statutory provisions through the *Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007* (hereinafter referred to as the “Sexual Offences Act, 2007”). This legal development took place as an aftermath of the *Masiya Case*<sup>48</sup> wherein anal penetration of female victims was considered under the definition of rape.<sup>49</sup> After the amendment, the male victims of sexual violence who are subjected to oral or anal form of penetration are now legally recognised as victims of rape as opposed to victims of ‘indecent assault’, which was the pre-amendment offence with a lesser degree of liability.

Earlier, the definition of rape was limited to penile-vaginal penetration, thereby requiring the involvement of a man as perpetrator and woman as victim of rape. With the advent of Sexual Offences Act, 2007, all forms of penetration which are non-consensual in nature fall under the category of rape.

The Sexual Offences Act, 2007 defines rape under section 3 as sexual penetration. Now sexual penetration can be caused by any of the following means provided under the definition clause of the Act: (1) by causing penetration of mouth, anus or genital organs of a person with the genital organs of another person; or (2) by causing such a penetration with any object or other body part, including the body part of any animal; or (3) by causing penetration of the mouth of the victim with an animal’s genital organs. In a similar manner, the offence of sexual assault is yet another form of sexual crime defined in the Sexual Offences Act, 2007. The provisions of the Act define it as an act involving intentional non-consensual sexual touch or inflicting coercion, physical or otherwise, upon the victim for the purpose of engaging that person in a sexual act against the will.<sup>50</sup>

Based on comparison with sexual penetration amounting to rape, sexual assault has a wider scope in terms of coverage as it includes groping, child sexual abuse and any other form of torture of a sexual nature. In a nutshell, the Sexual Offences Act, 2007 bifurcates the sexual offences into two categories based on the *actus reus* involved, i.e. (1) rape as defined in section 3 of the act; and (2) sexual assault as defined in section 5 of the act. The criterion of distinction between rape and sexual assault lies in the *actus reus* of both offences. For rape, the *actus reus* is sexual penetration. For sexual assault, the *actus reus* is sexual violation sans penetration.<sup>51</sup>

<sup>48</sup> *Masiya v. Director of Public Prosecutions and Another*, 2007 (5) SA 30 (CC).

<sup>49</sup> N. Dyani, *An Opportunity Missed for Male Rape Survivors in South Africa: Masiya v Director of Public Prosecutions and Another*, “Journal of African Law” 2008, 52, pp. 284–301. Available from: <https://www.jstor.org/stable/27608011> (accessed: 22.12.2023).

<sup>50</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, ss. 3, 5, No. 32, Acts of Parliament, 2007 (South Africa).

<sup>51</sup> *Ibidem*.

Both the offences have been defined and procedurally enforced with a gender-neutralist approach.

Nonetheless, the definition of rape and sexual assault under the Act, 2007 has a major lacuna that remains unnoticed and unresolved even till date. The lacuna is that in these definitions, the cases of sexual assault which are extremely grave and brutal would still not be categorised as rape if penetration in any form is not involved.<sup>52</sup> This would prima facie not appear to be problematic. However, even though the amount of liability imposed on the offender by a court in this case is the same as that inflicted on a rape offender, but the level of moral condemnation to which the offender is subjected by the police, peer-groups and society would still not be much as compared to that faced by a rape convict.

This is so as the term 'rape' itself has an extremely grave and heinous image inbuilt in people's minds. Anything else is considered a lesser offence. According to a survey conducted by the Medical Research Council in 2009, an estimated number of 3.5% men have become victims of forced sex by other men.<sup>53</sup> Additionally, the estimates of another survey conducted in 2012 reveal that about 19.4% of the total adult sexual assault victims in South Africa were male victims.<sup>54</sup>

It is noteworthy here that the figures mentioned based on these surveys are those that were highlighted despite the fact that the male victims often tend to stay silent and add to the number of underreported cases of sexual violence. This underreporting can be largely attributed to the following factors: social stigma, fear of secondary victimisation, tag of homosexuality, stereotyped attributes of masculinity and victim blaming to name a few. The resultant effect is that despite having a legal recourse, male victims of any form of sexual violence fail to avail justice as they face several hurdles at various levels in their struggle for justice. Interestingly, the Sexual Offences Act, 2007 ensures inclusivity of sexual minorities in its laws relating to rape to such an extent that it deliberately defines "genital organs" as inclusive of *surgically constructed or reconstructed genital organs*, in addition

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<sup>52</sup> L. Artz, D. Smythe, *Feminism vs. the State: A Decade of Sexual Offences Law Reform in South Africa*, "Rape: Gender Based Violence Trilogy" 2007, 74, pp. 6–18. Available from: <https://www.jstor.org/stable/27739335> (02.01.2024).

<sup>53</sup> R. Jewkes, N. Abrahams, S. Mathews, *Preventing Rape and Violence in South Africa: Call for Leadership in a New Agenda for Action*, "South African Medical Research Council Policy Brief" 2009, November, pp. 1–2. Available from: <https://www.samrc.ac.za/sites/default/files/attachments/2022-09/PreventingRape.pdf> (accessed: 10.01.2024).

<sup>54</sup> C. Maseko, *Male Rape Still Considered a Joke in South Africa*, news24, July 29, 2015. Available from: <https://www.news24.com/life/archive/Male-rape-still-considered-a-joke-in-South-Africa-20150729> (accessed: 13.01.2024).

to the conventional definition covering the whole or part of the male and female genital organs.<sup>55</sup>

The result is that all transgender men and women now fall within the ambit of the rape laws without any discrimination. The purpose behind such inclusion is to prevent the rampant cases of corrective and homophobic rapes and murder of lesbians and gay men in order to correct their sexual orientation or as a form of hate crime per se.<sup>56</sup> The Sexual Offences Act, 2007 also gives legal recognition to the offence of compelled forms of sexual assault and self-sexual assault wherein a person forces another person to cause the sexual offence against a third person or upon self respectively.

In order to extend its support to mandates of the constitution, the government of South Africa has further established the Commission for Gender Equality and the Human Rights Commission which keep a check on all forms of violence against the people, including sexual violence.

## A Comparative Analysis of The Element of Gender Neutrality in Rape Laws of The UK, Sweden, South Africa & India

If the offence of rape is characterised as a case of human rights violation, the state becomes duty-bound to protect each and every person from such a grave form of human rights violation wherein the perpetrator directly attacks the sexual autonomy and bodily integrity of the victim.<sup>57</sup> From the victim's perspective, this view creates an obligation upon the state to provide a legal recourse in the form of gender-neutral rape laws as an initial step towards gender equality in the legal and judicial system. The next step involves drawing comparisons between the criminal legislations of the UK, South Africa, Sweden, and India – specifically concerning their rape laws. This analysis will help evaluate the similarities and dissimilarities between these laws and thereby determine the potential for legal borrowings from the UK, South Africa, and Sweden by India.

<sup>55</sup> Criminal Law (Sexual Offences and Related Matters) Act, 2007, s. 1, No. 32, Acts of Parliament, 2007 (South Africa).

<sup>56</sup> Human Rights Watch, *We'll Show You You're a Woman: Violence and Discrimination against Black Lesbians and Transgender Men in South Africa*, 2011. Available from: <https://www.hrw.org/report/2011/12/05/well-show-you-youre-woman/violence-and-discrimination-against-black-lesbians-and> (accessed: 26.01.2024).

<sup>57</sup> H. Pathak, *Beyond the Binary: Rethinking Gender Neutrality in Indian Rape Law*, "Asian Journal of Comparative Law" 2016, 11(2), pp. 367–397. Available from: <https://www.cambridge.org/core/journals/asian-journal-of-comparative-law/article/beyond-the-binary-rethinking-gender-neutrality-in-indian-rape-law/9BC983FB009B7BBDEB78CED0BC5144C0#> (accessed: 6.02.2024).

Table 1 offers a clear comparison of the rape laws of the UK, South Africa, Sweden, and India.

**Table 1.** Comparison of the rape laws of the UK, South Africa, Sweden, and India

Country	United Kingdom	Sweden	South Africa	India
Nomenclature for Rape	(i) <i>Penile penetration</i> (ii) <i>Assault by penetration</i> as defined under Section 1 and 2 respectively of the Sexual Offences Act, 2003.	<i>Rape</i> as defined under chapter 6, section 1 of the Swedish Criminal Code, 1962.	<i>Sexual penetration</i> as defined under section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.	<i>Rape</i> as defined under section 63, Bharatiya Nyaya Sanhita, 2023 (Earlier section 375, Indian Penal Code, 1860)
Nature of Offence of Rape	Partially gender-neutral in nature (victim can be male or female)	Completely gender-neutral in nature.	Completely gender-neutral in nature.	Gender-specific in nature.
Scope of Definition of Rape	It covers penile-vaginal, penile-anal and penile-oral penetration.  It also includes vaginal or anal penetration using any object or body part of offender.  <b>Note:</b> Urethral penetration and penetration by genital organs of an animal are excluded from the definition.	It covers sexual intercourse (heterosexual in nature, i.e. penile-vaginal penetration).  It also includes acts which in view of the seriousness of the violation, is comparable to sexual intercourse (such as oral, anal penetration, etc.)  <b>Note:</b> Digital penetration was considered as rape by the Supreme Court of Sweden by way of a precedent in 2008).	It covers penetration of genital organs, anus or mouth of a person with the genital organs of another person.  It also includes penetration of genital organs or anus with any object or other body part, including the body part of any animal.  Finally, it also includes penetration by genital organs of an animal into mouth of victim.	It covers penile-vaginal, penile-anal, penile-urethral penetration.  It also includes vaginal, anal or urethral penetration using any object or body part of female victim.  Finally, it also includes oral sexual abuse of a woman.  <b>Note:</b> Penetration by genital organs of an animal is excluded from the definition.
Gender of Perpetrator	Man only.	Man or woman.	Man or woman.	Man only.
Gender of Victim	Woman or man.	Man or woman.	Man or woman.	Woman only.

Genital Organs	Definition of genital organs includes genital organs reconstructed through surgery.	No express mention of the inclusion of surgically constructed/reconstructed genital organs within the definition of male and female genital organs.	Definition of male and female genital organs inclusive of surgically constructed or reconstructed genital organs.	Definition of vagina includes labia majora as well. However, silent on the point of surgically constructed/reconstructed genital organs.
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Source: own elaboration.

It might be interesting to note that the definition of rape (*penile penetration*) given in the Sexual Offences Act, 2003 of the UK is drafted in partially gender-neutral terms, thereby covering both man and woman victims but limited to male perpetrators alone.<sup>58</sup> The legislation, however, provides for an alternative penal provision in the form of *assault by penetration*. The definition of *assault by penetration* has a wider ambit with no gender restrictions.<sup>59</sup> It covers all male and female victims and perpetrators, thereby guaranteeing a legal recourse with equivalent criminal liability to all the victims of rape not falling under the conventional rape by penile penetration category. The main limitation of this situation is that the cases of rape that lack penile penetration will be called sexual assault and not rape, thereby resulting in lack of social stigma and abhorrence faced by the rape accused and convicts.

The EU has proposed its first legislative draft from a gendered perspective in the form of Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, 2022. The changes suggested by the Council to be incorporated into it further take away the European Commission's power to legislate on rape laws, as it suggests deletion of the definition of rape and related provisions from the proposal. So, the EU's current position is that it earlier defined rape in gender-specific terms in the original 2022 proposal, thereby only recognising women victims of rape. Now, after incorporating the Council's suggestions, it does not even provide a definition of rape.

Sweden is one of the few nations that has led the path to gender neutrality in rape laws. It was way back in 1984, when the UK, South Africa, and India were still struggling to provide equal rights to women, that the Swedish Criminal Code, 1962 had already defined the offence of rape in completely gender-neutral terms

<sup>58</sup> Sexual Offences Act, 2003, ss. 1, 2. Available from: <https://www.legislation.gov.uk/ukpga/2003/42/contents> (accessed: 8.07.2023).

<sup>59</sup> *Ibidem*.

by way of an amendment.<sup>60</sup> However, instead of explicitly including the various forms of sexual violence in the definition of rape, it has left a lot subject to judicial interpretation by adding the phrase “acts comparable to sexual intercourse” instead. There is no express mention of anal penetration, oral penetration, digital penetration in the definition of rape, and majority of these and similar inclusions are dependent upon judicial interpretation by Swedish courts.

Further, unlike the rape laws of the UK and South Africa, the Swedish Criminal Code does not explicitly include surgically constructed/reconstructed genital organs within the definition of male and female genital organs for the purpose of imposing criminal liability upon perpetrators of rape who target those members of the transgender community who have undergone sex-reassignment surgeries. Any non-penetrative acts of sexual violence that do not fall within the ambit of rape are punishable as sexual coercion under the Code.<sup>61</sup>

Based on comparison with the UK, Sweden, and India, the rape laws of South Africa are wider in definition and scope. This claim is based on the fact that the definition of rape under the provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 is inclusive of all forms of serious sexual acts that can be categorised as rape. It includes not only penile-vaginal, penile-anal and penile-oral penetration, but also penetration of the genital organs by any body part or object.<sup>62</sup> Furthermore, instead of using particular terms for the particular genital organs, the definition resorts to the umbrella terms “genital organs of person” and “genital organs of another person”<sup>63</sup>, thereby leaving scope for inclusion of urethra, etc. as well. At the same time, the use of these umbrella terms also allows for the highest level of gender neutrality possible. Another noteworthy and appreciable aspect of the South African rape laws is that, unlike India and the UK, it also includes penetration of genital organs or anus with the body part of any animal. At the same time, oral penetration of the victim by genital organs of an animal is also considered as a sufficient actus reus to amount to the offence of rape.

As compared to the rape laws prevailing in the UK, Sweden and South Africa, the rape laws in India are not only gender-specific in nature, but also seem to be highly biased. Post the Criminal Law Amendment Act of 2013 triggered by the

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<sup>60</sup> The Swedish Criminal Code, 1962, Chapter 6, s. 1. Available from: <https://www.government.se/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf> (accessed: 30.11.2023).

<sup>61</sup> The Swedish Criminal Code, 1962, Chapter 6, s. 2. Available from: <https://www.government.se/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf> (18.02.2024).

<sup>62</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, ss. 3, 5, No. 32, Acts of Parliament, 2007 (South Africa).

<sup>63</sup> *Ibidem*.



infamous Nirbhaya rape case,<sup>64</sup> Section 63 of the BNS, 2023 (earlier Section 375, IPC, 1860) does expressly include penile-vaginal, penile-anal, penile-urethral as well as oral penetration. However, from the perspective of gender inclusivity in the rape laws, it falls far behind. Let's imagine a hypothetical situation wherein an uncle is found guilty of the non-consensual penetration with an object of his niece and nephew, both victims being adults above 18 years of age. In such a scenario, the criminal justice system of India, based on the application of present rape laws, would hold the uncle culpable for the offence of rape of the niece, but not of the nephew.

For the same act committed by him against the nephew, he may/may not be liable even under section 377, dependent on how the courts interpret "carnal intercourse against the order of nature."<sup>65</sup> There is even a possibility that the uncle might just be liable for offences such as assault, hurt or grievous hurt, dependent on the physical injuries caused to the nephew. Similarly, if the perpetrator in this case had been a female, then even for the sexual penetrative act committed against the niece, there is no appropriate legal remedy available under the BNS, 2023. To add to the already existing insufficiency in the rape laws, the definition of rape in India also excludes penetration by the use of animals and their genital organs or other body parts, unlike South Africa, which gives consideration to such acts as well within the ambit of their rape laws.

It is peak time that the Indian legal system and society stop turning a blind eye to the incidents of male and transgender rape and sexual assault. Even the idea of partial gender neutrality can be borrowed to start with, based on the rape laws of the UK, wherein the victims are viewed from a gender-neutral perspective while the perpetrator remains male only. Another idea that can be transplanted from the South African rape laws is a wide and gender inclusive definition of 'genital organs', thereby including the surgically constructed and reconstructed genital organs within its ambit.

## Concluding remarks

Before the incorporation of new and inclusive laws based on legal borrowings from other countries can become not only a plan, but reality, it is necessary to first remove the defects and ambiguities prevailing in the existing legal system of India. The

<sup>64</sup> Mukesh and Anr. v. State for NCT of Delhi & Ors., (2017) 6 SCC 1.

<sup>65</sup> V. Deswal, *Unnatural Offences: Decrypting the Phrase, 'Against the Order of Nature'*, "The Times of India" 2019, October 18. Available from: <https://timesofindia.indiatimes.com/blogs/legally-speaking/unnatural-offences-decrypting-the-phrase-against-the-order-of-nature/> (accessed: 25.02.2024).

deep-rooted gender stereotypes and social stigma surrounding rape victims adds to the secondary victimisation of female as well as male victims of rape and sexual assault. Since members of the LGBTQ+ community already experience social discrimination and sexual violence at a large level, they are labelled as a vulnerable group of persons and rightly so. It is through the legal recognition of male and transgender rape that such victims would get the courage to report the sexual crimes committed against them.

According to Julie Goldscheid, the use of ‘violence against women’ frame in law making and understanding of the crime does not reduce/ eliminate the violence that is directed towards the women.<sup>66</sup> On the contrary, it plays the role of reverse discrimination and violates the human right of equal protection. Instead of ‘violence against women’ (including sexual violence), Goldscheid suggests the use of ‘gender violence’ or ‘gender based’ violence frames. These would allow women to be the main target for the purpose of framing protective laws, but it would not exclude men, transgender and non-binary victims at the same time.

The EU’s Proposal for a Directive of 2022, as amended in 2023 currently does not provide any definition of rape. Therefore, based on the analysis of the rape laws of the UK, South Africa, and Sweden, it can be concluded that India is also capable of modifying the present rape laws to include male-on-male, female-on-female, female-on-male paradigms and sexual offences involving transgender persons as perpetrator or victim. This would act as a chance of stepping beyond heteronormativity. As a completely gender-neutralist approach to rape might prima facie appear to be quite far-fetched in the present socio-legal circumstances, the definition of rape under section 63, BNS, 2023 can be modified to the extent of viewing only the victim from a gender-neutral lens, while the perpetrator remains male only.

This partially gender-neutral definition of rape and a perspective regarding its operation can be borrowed from the study of the rape law of the UK as discussed. After analysing the effectiveness of partially gender-neutral rape laws in the UK and completely gender-neutral rape laws in South Africa and Sweden, it may also be concluded that stepping towards gender neutrality in Indian rape laws will not endanger the rights of female rape victims, as is assumed by many feminist scholars and the National Commission for Women in India.

Alternatively, gender inclusivity can be kickstarted with a separate offence termed as ‘sexual assault’ being added to BNS, 2023. This was also suggested in the Criminal Law (Amendment) Bill of 2019 submitted in the Indian Parliament by KTS

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<sup>66</sup> J. Goldscheid, *Gender Neutrality and the “Violence Against Women” Frame*, “University of Miami Race & Social Justice Law Review” 2015, 5(2), pp. 307–324. Available from: <http://repository.law.miami.edu/umrsjlr/vol5/iss2/9> (accessed: 8.03.2024).

Tulsi.<sup>67</sup> It must be a completely gender-neutral provision in order to address the grievances of all victims who do not fall under the male-on-female paradigm. It would then act as an agency of relief to a great extent. In the end, some law to look up to is better than no law at all.

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<sup>67</sup> The Criminal Law (Amendment) Bill, 2019 (Bill No. XVI of 2019), <http://164.100.47.4/BillsTexts/RSBillTexts/asintroduced/crimnal-E-12719.pdf> (accessed: 1.06.2023).

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