

Comparative Analysis of Rape Law across Legal Systems through the Lens of Gender Neutrality

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1. Abstract

India's legal framework pertaining to rape is gender-biased and ignorant and disregards rape against males and other genders, as outlined in Section 375 of the Indian Penal Code. Incidences of male rape often go unrecognised or are mislabelled under the existing legal provisions. This paper seeks to conduct a comparative analysis across jurisdictions in relation to gender-inclusivity in rape laws and the resulting implications, particularly in cementing gender stereotypes. This paper presents Canadian sexual assault laws involving rape as a model to guide potential rape law reforms in India. Japanese rape laws have also been discovered to have made progress in their path towards gender-neutrality. An interdisciplinary approach using socio-psychological reasoning has been adopted to put forth the ground realities of the application of the existing laws and the various causes behind the prevalent gender inequalities. Statistical analysis has also been utilised to draw concrete conclusions. Secondary sources have been utilised, primarily from online portals, comprising articles, journals and news pieces. It is a non-empirical study and conclusions have been drawn on the basis of collated facts and expert opinions of persons of authority in the field. Finally, a solution-oriented section has been incorporated which transplants favourable features of rape laws of different legal systems and adopts them to the unique Indian context.

Keywords: Rape, Section 375, Indian Penal Code, Gender inclusivity

2. Introduction

The offence of rape is a cruel manifestation of corrupted human nature and a profane blot on humankind that must be eradicated via laws and societal rewiring. Rape was first described in the Code of Hammurabi in 1900 B.C., as a “man trying to force sex upon another’s wife or a virgin woman living in her father’s house.”³ The law dictated that such a man should be put to death. This view of rape was followed for centuries until the seventeenth century English law changed the definition to “the carnal knowledge of any woman above the age of ten years against her will.”⁴ In 1860 laws against rape were codified for the first time in India under the Indian Penal Code, 1860 (hereafter ‘IPC’)- which came as a much-needed change in the patriarchal society, wherein

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³ Sally Gold, *The Rape System: Old Roles and New Times*, 27 CATHOLIC UNIVERSITY LAW REVIEW 695-727 (1978)

(Jan. 25, 2023), <https://scholarship.law.edu/cgi/viewcontent.cgi?article=2391&context=lawreview>.

⁴ *ibid*.

the status of women was deplorable and in dire need of empowerment and protection.

Rape was classified according to social structures and the way they were carried out, such as, caste rape, landlord rape, army rape, and rape by those in power. With the growing mental and physical abuse of women, drafting a codified rape law became an exigent step to curb these heinous crimes against women. Section 375 of the IPC defined rape and Section 376 laid out the punishments.

The offence of rape is a high-order violation of the bodily integrity of a person, i.e., any person regardless of their gender identity, by another person. It contains no implicit prescription of gender roles of the victim and perpetrator. Traditionally, rape was conceived as a crime committed against a female and perpetrated by only a man, but in the contemporary world, this situation has drastically broadened. There have been instances where a male has been raped, or a person, not fitting in the binary genders has faced sexual violence. These instances are not reported as they are not 'crime' in India, and there exists no recourse for them. Unable to fit them into the conventional definition of a male raping a female has led to ignorance of their right to seek help, and thus, the definition of rape needs to be broadened. This blinkered perception of rape, and other sexual offences, is rooted not only in the societal norms and social psychology based on generalisations and biases, but also in the legal framework of India which has dictated that the crime is gender specific.

Today, in a sad state of affairs, brutal sexual crimes, especially rape, are on an all-time high. With the transgender and non-binary gender communities becoming more vocal about instances of sexual violence against them, it becomes imperative to reform the restrictive rape law of India.

In the first chapter of the paper, the authors critically analyse the gender specificity present in the anti-rape laws of India by examining the legal history of the same through various law commission reports, amendments and various judgements given by courts of various tiers. The authors then evaluate the sociological and the psychological reasons for the gender-bias apparent in the present law. The paper also discusses the varying perceptions of gender-neutral rape laws.

The authors proceed to assess the provisions for rape and sexual offences in Canada and Japan, highlighting the absence of gender-specificity and its impact on the legal system of these countries. A comparative analysis is presented, juxtaposing the Indian, Canadian, and Japanese legal provisions from the perspective of gender biases inherent in each law and their resulting consequences. The authors also offer a broader global comparison, considering gender neutrality in rape laws and its absence on a global scale. Furthermore, the authors put forth recommendations

for reforming the Indian legal provisions, emphasising the importance of respecting an individual's right to life, dignity, and bodily autonomy. These proposed reforms aim to address the limitations and biases of the existing legal framework, thereby promoting a more equitable and inclusive legal system.

3. India's Rape Law: The Legislative And Judicial Perspective

India's current rape law constructs a skewed narrative wherein only a male can rape a female creating a gender specific perspective. The emboldened words in the provision below substantiate the same. The laws against rape in India are codified in the IPC under Section 375 and Section 376 (defines punishments for the same).

Section 375 states-

*“A **man** is said to commit "rape" if he--*

*(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a **woman** or makes her to do so with him or any other person; or*

*(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a **woman** or makes her to do so with him or any other person; or*

*(c) manipulates any part of the body of a **woman** so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*

*(d) applies his mouth to the vagina, anus, urethra of a **woman** or makes her to do so with him or any other person,*

under the circumstances falling under any of the seven descriptions

* * * * *

Exception 1-A medical procedure or intervention shall not constitute rape.

*Exception 2- Sexual intercourse or sexual acts by a man with his **own wife**, the wife not being under fifteen years⁵ of age, is not rape”*

The provision clearly states that only a man can rape, and only a woman can be raped, thus ruling out any other gender combination of perpetrator and victims. Any other such combination would fall under Section 377 of IPC, defining the sexual offence ‘unnatural’ and it does not amount to

⁵The age of the wife has been raised to 18 years by the Supreme Court in the case of Independent Thought v. UOI (2017) 10 SCC 800.

‘rape’.

Section 377 of IPC reads-

*“Unnatural offences — **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.*

Explanation. —Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

This section allows for the perpetrator to be of any gender, but the victim can only be either a man or a woman. It is pertinent to ask why there exists a differentiation between these two provisions. From a cursory reading of the two sections above, it is clear that IPC does not provide adequate reliefs to those who do not subscribe to heteronormative behavioural patterns. It also distinguishes between sexual abuse of a woman and a man by terming the former as ‘rape’ but latter as ‘unnatural offences.’ At this juncture, it is pertinent to raise the question as to why this differentiation is being made.

The notion that men cannot be raped⁶ needs to be disbanded. There have been various instances where men were raped by another person, be it male, female, or any other gender. One such instance was observed in Jalandhar, Punjab, where four women allegedly temporarily blinded a man by spraying some chemical and sexually assaulted him in a car.⁷ During the ‘#MeToo’ movement, Actor Rahul Raj Singh also spoke about being sexually assaulted when he was 19 years of age.⁸ The Print also published a piece where a male sexual abuse survivor shared his incident of being abused when he was 15.⁹ Times of India reported a case where a bench of judges of the Nagpur High Court instructed the police superintendent to lodge a complaint of a transgender who was allegedly raped in Nagpur Central Jail.¹⁰ The incidents cited above give us a glimpse of

6 Lawrence, Meg, *Men cannot be raped : the systematic silencing of male victims of sexual violence in conflict*, GLOBAL CAMPUS (2017), (Jan. 30, 2023), <https://repository.gchumanrights.org/items/56356927-2d0a-42bd-b07a-dbc12d940933>.

7 S P Kundu, *Four women ‘rape’ a man in Jalandhar: Gender-neutral laws are crying need of hour*, FIRST POST (Dec. 4, 2022),

<https://www.firstpost.com/opinion-news-expert-views-news-analysis-firstpost-viewpoint/four-women-rape-a-man-in-jalandhar-gender-neutral-laws-are-crying-need-of-hour-11747931.html>.

8 Safvi, *Men can be raped, and women can rape: Why Indian laws need to change for a more equal society*, VARIETY (2018), <https://www.dailyo.in/all/rape-laws-sexual-assault-section-377-sodomy-men-victims-of-rape-asia-argento-rahul-raj-singh-metoo-27360>.

9 Lokesh Pawar, *I am a sexual abuse survivor. No, I am not a woman*, THE PRINT (April 18, 2021),

<https://theprint.in/opinion/i-am-a-sexual-abuse-survivor-no-i-am-not-a-woman/641099/>.

10 S Bose, *Transgender alleges rape in jail, moves HC*, THE TIMES OF INDIA (Mar. 25, 2021),

<https://timesofindia.indiatimes.com/city/nagpur/transgender-alleges-rape-in-jail-moves-hc/articleshow/81676465.cms>.

the significant number of unattended and unreported cases relating to sexual assault because of a lack of legal aid for these victims. The traditionalist and rigid provision of India has created loopholes which can be misused by certain genders, which results in obscuring of justice. One such case is that of Priya Patel v. State of Madhya Pradesh¹¹ where the question of a female perpetrator in gang rape was taken up.

Section 376D of the IPC states that-

*“Where a **woman** is raped by one or more **persons** constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine”*

The wording conveys that the perpetrators of a gang-rape could be of any gender and the Madhya Pradesh High Court held that although women cannot rape, they can facilitate in gang-rapes. The Supreme Court however took the stance that women cannot be rapists under Section 375 and this can be extrapolated to gang rape cases as well. It held that even in cases where they facilitate, they cannot be prosecuted under gang-rape section. It also stated that for gang-rape, there needs to be a common intention to rape and women cannot intend to commit rape.¹² Such grey areas need to be resolved so that some do not evade the hand of justice.

Various judgements and reports have advocated for gender-neutral rape laws in India. It was in *Sudesh Jhaku v KC Jhaku*¹³ where the issue of gender neutrality first arose.¹⁴ Herein, the Delhi High Court was to determine whether rape only meant penile-vaginal penetration, or other kinds of penetration would also come under the definition provided in Section 375 of the IPC. Singh, J, going beyond his mandate, opined that rape laws should be redefined to include gender-neutrality.¹⁵

11 (2006) 3 SCC (Cri) 96.

12 S Sengar, *Can Women Be Charged For Rape In India?*, IT EXPLAINERS (Dec. 13, 2021), <https://www.indiatimes.com/explainers/news/can-women-be-charged-for-rape-in-india-556642.html>.

13 (1996) 62 DLT 563.

14 Harshad Pathak, *Beyond the Binary: Rethinking Gender Neutrality in Indian Rape Law*, 2 ASIAN JOURNAL OF COMPARATIVE LAW, 367-397 (2016), <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/9BC983FB009B7BBDEB78CED0BC5144C0/S2194607816000089a.pdf/beyond-the-binary-rethinking-gender-neutrality-in-indian-rape-law.pdf>.

15 *ibid.*

Subsequently, in 2000, the 172nd Law Commission Report on Review of Rape Laws (hereafter Commission) recommended changes in Section 375 of IPC to make it more gender-neutral. The Commission proposed changing the term ‘rape’ in the abovementioned section to ‘sexual assault’ so as to include all other crimes that do not fall in the definition of rape, but infringe a person’s bodily integrity in the same manner. It was also recommended to replace gender-specific terms like ‘man’ and ‘woman’ with ‘any person/ other person’ to make it gender-neutral.¹⁶ Further, the Commission proposed the deletion of Section 377 of IPC to the extent of carnal intercourse between human beings, as this would come under the recommended Section 375.¹⁷

The Justice Verma Committee that submitted its finding in 2013 in the report titled ‘Report of the Committee on Amendments to Criminal Law’ also reiterated the fact that there is a possibility of sexual assault on men, homosexuals and transgenders, the rape provisions of India should recognize the same and amend accordingly.¹⁸ Thereafter, the Criminal Law (Amendment) Ordinance, 2013 was presented in the Parliament meditated to make the rape laws of India gender-neutral.¹⁹ However, due to vehement opposition by feminists groups, the ordinance was not enacted²⁰, and was replaced by the Criminal Law (Amendment) Act, 2013 instead.²¹

Another instance arose when the Kerala High Court observed that there could be cases where a woman tricks a man into sexual relationship on a false promise of marriage. A bench headed by A Muhammad Mustaque, J opined that the laws for rape should be made gender neutral to counter such cases as illustrated above.²² A trial court in Delhi, while sentencing an offender, also remarked that rape and sodomy were same, and there should be no difference between the two.²³

The most recent instance of postulating for gender-neutral laws was seen in 2019, when a private member bill was introduced in Rajya Sabha by Mr. KTS Tulsi, named Criminal Law (Amendment) Bill, 2019, which rewrote anti-rape laws of India to make them gender inclusive²⁴, along with extending the ambit of sexual assault offences by inserting a new section, namely Section 375A.²⁵

16 Law Commission of India, 172nd Report: Review of Rape Laws, NEW DELHI: MINISTRY OF LAW AND JUSTICE, GOVERNMENT OF INDIA, at para 3.1.2.

17 *ibid*, at para 3.6.

18 Justice Verma Committee, *Report of the Committee on Amendments to Criminal Law*, at para 3 of Conclusions and Recommendations.

19 Criminal Law (Amendment) Ordinance, 2013, S. 8.

20 *Activists join chorus against gender neutral rape laws*, THE TIMES OF INDIA (Mar. 7, 2013),

<https://timesofindia.indiatimes.com/india/activists-join-chorus-against-gender-neutral-rape-laws/articleshow/18840879.cms>.

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

22 PTI, *Gender neutral rape law? Legal experts disagree, call it flawed understanding of law*, THE INDIAN EXPRESS (June 12, 2022),

<https://indianexpress.com/article/india/gender-neutral-rape-law-legal-experts-flawed-understanding-kerala-high-court-7965675/>.

23 Dhananjay Mahapatra, *Rape, Sodomy equal before law ?*, INDIA NEWS, TIMES OF INDIA, (Jan. 30, 2023), <https://timesofindia.indiatimes.com/india/rape-sodomy-equal-before-law/articleshow/915960.cms>.

24 Criminal Law (Amendment) Bill, 2019, S. 10, No. 16 of 2019, The bill aims to replace the words ‘vagina’ and ‘penis’ with ‘genitals’ to provide an inclusive provision for even the intersex.

25 Criminal Law (Amendment) Bill, 2019, S. 11, No. 16 of 2019.

When perused, the chronology above clearly defines the instances when the judiciary and legislature propounded for gender-neutral rape laws. It is sad to note that even after such instances, the legislature has failed to make gender-neutral rape laws. This failure has occurred, inter alia, due to the societal and psychological factors that have been discussed in the next chapter.

4. Gender-biased rape law through a sociological and psychological outlook

Viewing rape as a purely legal and criminal act is extremely parochial since it is intertwined with societal and psychological factors. Social sanctions and personal moral conscience function in tandem with the legalities to ensure prevention of this offence.

5. Causes and Consequences of Gender-Bias in Rape Laws

The gender-lopsided conception of rape can be attributed to the stereotypes that colour all women as ‘weak and lacking autonomy’ and ‘innocuous’, and men’s nature as one ‘driven by impulses’ and ‘overpowering’. The mere thought of a female perpetrator or a male victim can seem incomprehensible to many.²⁶ Such an attitude is responsible not only for notions of patriarchy but also chivalry— which stands for a normative protection of women and treatment of them as easily dominated. *Hostile sexism* outrightly emphasises men’s dominance over women whereas *benevolent sexism* portrays men as protectors of women. The latter is misconstrued as a positive outlook, when in reality it is a subtler form of condescension by men over women and is used to perpetuate the traditional gender roles.²⁷ Hence, even benevolent sexism can pose a damaging challenge to perceiving women as perpetrators and males as victims.

Physical violence towards women can be viewed as an extension to domination and control and power, which are socially and historically constructed.²⁸ *Rape myths* dictate how men and women are expected to behave in sexual situations and any deviation gets dismissed both by laws and the society at large.²⁹ Victim-blaming can be thus explained as well by taking the classic historical notion that a woman ought to behave modestly and acts such as dressing unconventionally or consuming liquor invites social censure and can be used to justify any highly disproportionate enormity she might face.³⁰ Also, a cognitive bias towards the ideas of justice and a fair world cannot digest the fact that such a cruel act of rape can happen to anyone, even children, completely

26 Fiebert et al, *Gender Stereotypes: A Bias against Men*, THE JOURNAL OF PSYCHOLOGY, 407-410 (1997).

27 Glick et al, *The Ambivalent Sexism Inventory: Differentiating hostile and benevolent sexism*, 70 THE JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 491-512 (1996).

28 Elizabeth Bates, *The Impact of Gendered Stereotypes on Perceptions of Violence: A Commentary*, UNIVERSITY OF CUMBRIA, 1-23 (2019).

29 *ibid.*

30 Davies et al, Examining the relationship between male rape myth acceptance, female rape myth acceptance, victim blame, homophobia, gender roles, and ambivalent sexism, 27 JOURNAL OF INTERPERSONAL VIOLENCE, 2807-2823 (2019) <https://doi.org/10.1177/0886260512438281>.

unprovoked, and hence by resigning to the idea that the victim “got what they deserved” provides a kind of illusive cognitive comfort to the society. It gives a predictability and a connection between the consequences and the victim’s ‘risky behaviour’.

Visibility bias also plays a role in the sense that reporting of male rape seldom gets proper media coverage or societal outcry and so it’s perception as something ‘alien’ boldens. What’s more is that these attitudes also affect how victims view their own plight resulting in them falling prey to denial, trivialisation and repression of their victimisation. *Socialisation* process for males seeks to make them self-reliant and stoic, which becomes an obstacle when they have to admit their vulnerability which gets equated with a flawed masculinity.³¹ The criminal justice system caters to the women in cases involving sexual offences. False allegations and the fear of losing custody over children drives the resolve to not report or leave a relationship that is abusive towards men.³² Also, there are no laws to protect non-female rape victims.

The assumption that males can defend themselves or have a strong *unconditional desire* for arousal further impedes any credibility to the male victim’s confession of abuse. There also exists a tendency to explain women’s violence through reason, such as provocation or self-defence vis-a-vis the inherent nature of men to inflict the same violence. Even in bi-directional or mutual violence, a reluctance is present in labelling the woman as an equal perpetrator.³³ The fact that the law views a non-female victim as one subjected to sexual assault or *unnatural offence*, when the victim was actually raped is not only unjust with respect to difference in the punishment, with the former having less severe sanctions, but also evasive of the emotional recognition a victim needs from the laws to back their grievances. The same has the potential to take the form of a barrier to help-seeking in the very first stage.³⁴

6. Perception of a Gender-Neutral Rape Law

It is fallacious to argue that since women are subject to *stark inequalities* and treated as inferior quite often, women can never commit rape. There is no denying that majorly the victims of this crime are women, but to discount those cases where they are not seems logically unsound. It is extremely unfair to leave non-female victims with no redress just because they account for the victims in a

³¹ *supra*, at note 26.

³² *supra*, at note 26.

³³ Hine et al, *But, who is the victim here? Exploring judgements towards hypothetical bidirectional domestic violence scenarios*, UNPUBLISHED MANUSCRIPT (2019).

³⁴ Addis et al, *Men, masculinity, and the contexts of help seeking*, AMERICAN PSYCHOLOGIST, 5-14 (2003), (Jan. 30, 2023), <https://doi.org/10.1037/0003-066X.58.1.5>.

minority of the cases. The current rape law in essence, dehumanises the individuals involved and withdraws the agency from the men and women and places them in a *sexual script* where their actions are deemed uniform and foreseeable. Gender-neutrality seeks to rid the law of such dispositions towards what usually happens and also include in its ambit, the other possibilities so that no one feels unrepresented by the laws.³⁵

The argument that gender-neutral law will *decontextualise* rape and expect both the genders to behave alike is also flawed. The Indian judiciary has stated that mere lack of physical resistance by women cannot amount to consent and the judges are to take into account the specific circumstances in which the alleged rape occurred.³⁶ A common contention raised is that men and women are not similarly affected by rape. This is indicative of the assumption that the society does not judge raped men unfavourably and treats such men less harshly than female victims. However, men also face similar, if not severer mental and physical stress that women victims face.³⁷ The two genders may not be affected identically but the effect is adverse nonetheless. It is a myth that men get less affected and traumatised by such acts. It is high time that the crime of rape be viewed as outraging an individual's sense of bodily autonomy and dignity rather than merely in terms of the social consequences and social connotations.

Another objection raised is that gender-neutral law will be misused to *unnecessarily harass* women and *counter-accuse* women of rape as a dilatory tactic. Citing an imperfect justice system and overlooking the social stigma that hampers males to report any sexual assaults against them in the first place, cannot be the grounds to deny justice to non-female victims.³⁸ The excuse that males cannot really be sexually assaulted is already rebutted by The Protection of Children from Sexual Offences Act, 2012 (POCSO) which recognizes the same in India. The National Commission for Protection of Child Rights (NCPCR) recently found a link between juvenile male survivor of sexual abuse and *propensity to inflict violence* upon women and children later in life.³⁹ Insia Dariwala

35 Jai Vipra, *A Case for Gender-Neutral Rape Laws in India*, CENTRE FOR CIVIL SOCIETY (2013);

Mohd. Islam v State of Bihar (2022) SCC OnLine Pat 1579, para 9;

Sebin James, 'No Physical Resistance By Proseutrix Won't Make The Act Consensual': Madras High Court Upholds Rape Conviction, LIVE LAW (Dec. 26, 2021), <https://www.livelaw.in/news-updates/madras-high-court-rape-no-physical-resistance-by-victim-will-not-make-act-consensual-ipc-376-consent-188412>.

36 Jai Vipra, *A Case for Gender-Neutral Rape Laws in India*, CENTRE FOR CIVIL SOCIETY (2013).

37 *ibid.*, "Frazier (1993) studied 74 male and 1,380 female rape victims and found that male victims were more depressed and hostile immediately post rape than female victims.

Carpenter (2009, citing Mezey, 1987) finds that the "male coping strategy characterised by denial and control renders them more prone to later psychiatric problems and reduces the likelihood of seeking help."

Masters (1986) finds that men who have been raped by women face sexual dysfunction and disorder and are unable to respond physically to a female partner of choice even two years after the attack. The men had lost their "sense of personal dignity and confidence in [their] masculinity."

38 *supra*, at note 34.

39 Safvi, *Men can be raped, and women can rape: Why Indian laws need to change for a more equal society*, VARIETY (2018), <https://www.dailyo.in/all/rape-laws-sexual-assault-section-377-sodomy-men-victims-of-rape-asia-argento-rahul-raj-singh-metoo-27360>.

conducted a survey of 1500 men and found that 71% had been abused in childhood and 84% had not reported this with the reasons being shame (55%), confusion (50%), fear (43%) and guilt (28%).⁴⁰ It seems absurd that the law acknowledges rape of boys but not men. When there is concrete evidence of minor male victims, it is sensible to discard the idea that these experiences cannot continue in major ages.

Any gender-neutral law essentially seeks the promotion of equal rights to consent to sexual activity and they can help dismantle the assumption of ‘men will be men’ and other problematic conceptions that will also benefit women victims.⁴¹ Also, sexual assault of and by homosexual, transgender and gender non-conforming will be brought under the purview of a formal legal system. The following chapter introduces anti-rape provisions of Japan and Canada and assesses it in terms of neutrality and implications.

7. Provisions for rape in Japan and Canada

The Canadian and Japanese rape laws, both, are gender-neutral, thus providing that both the victim and the perpetrator can be of any gender. To discuss the laws of both the countries, this chapter will be subdivided into two parts, the first, dealing with the Japanese provision, and the next, with the Canadian provision.

i. Japanese provision for rape law

The 1907 Penal Code of Japan⁴² defined rape and its punishment under Section 177.

It read as-

*“A **person** who, through assault or intimidation, forcibly commits sexual intercourse with a **female** of not less than thirteen years of age commits the crime of rape and shall be punished by imprisonment with work for a definite term of not less than 3 years. The same shall apply to a person who commits sexual intercourse with a female under thirteen years of age.”*

As seen, the law presumed the victim to be a female only, while the perpetrator could be of any gender. Additionally, the provision only mentioned forcible ‘intercourse’ to be termed as rape,

40 R Chatterjee, *‘The mindset is that boys are not raped’: India ends silence on male sex abuse*, THE GUARDIAN, (2018),

<https://www.theguardian.com/global-development/2018/may/23/indian-study-male-sexual-abuse-film-maker-insia-dariwala>.

41 *supra*, at note 34.

42 Japan Penal Code, No. 45 of 1907.

thus, making penile penetration a requisite. Sexual offences of other kind, for example, assault by inserting finger, hand, objects, or anything else through the genitals of a female would not be considered ‘rape’, but ‘indecenty’ and would be punishable under Section 176 of the Penal Code.⁴³ Japan ranked 116th in the Gender Gap Report 2022⁴⁴, falling from 110th in 2018.⁴⁵ It is apparent that Japan holds different genders in unequal positions, and the same can be seen through their rape provision. The inherent gender-bias is reflective of the societal prejudices⁴⁶ that Japan held. After a period of 110 years, the anti-rape laws were finally amended by the Penal Code Amendment Pertaining to Sexual Offences⁴⁷, which replaced the old provision, with a gender neutral one.

The amended provision read-

*“A **person** who, through assault or intimidation forcibly engages in vaginal intercourse, anal intercourse or oral intercourse (hereinafter referred to as "sexual intercourse") with **another person** of not less than thirteen years of age is guilty of the crime of forcible sexual intercourse, and is punished by imprisonment for a definite term of not less than 5 years. The same applies to a person who engages in sexual intercourse against another person under thirteen years of age.⁴⁸”*

The amended provision replaced the gender-specific victim (‘female’) with a more gender inclusive phrase (‘another person’). It also expanded the ambit of the section by replacing ‘rape’ with ‘forcible sexual intercourse’ while including oral and anal intercourse in the definition. The new law accepts the fact that victims can be from any gender, and thus accepts the fact that men and other genders, along with females, can be victims of sexual intercourse. The provision has also increased the minimum punishment for the offence, from 3 years to 5 years, recognising the severity of the crime.

It is important to note that the amended provision still does not recognize forcibly inserting finger, hand or any object through the vagina, anus or mouth of another person as ‘sexual intercourse’ and the abovementioned offence still comes under ‘indecenty’ and holds a lower minimum

⁴³ *ibid.*, S. 176.

⁴⁴ *Gender Gap report 2022*, WORLD ECONOMIC FORUM.

⁴⁵ *Gender Gap report 2018*, WORLD ECONOMIC FORUM.

⁴⁶ Harriet Gray, *Rape and Sexual Assault in Japan: Potential Gender Bias in Pre-Trial Procedures*, 11 REINVENTION: AN INTERNATIONAL JOURNAL OF UNDERGRADUATE RESEARCH,

https://warwick.ac.uk/fac/cross_fac/iatl/reinvention/archive/volume11issue1/gray.

⁴⁷ Penal Code Amendment Pertaining to Sexual Offences, No. 72 of 2017.

⁴⁸ *ibid* at para 2.

punishment. Japan does have separate provisions for ‘Quasi-rape’, or ‘Forcible Indecency’ in its Code under Section 178 which is to involve cases where the woman was violated when unconscious or unable to resist.⁴⁹

The law, however shifts the burden to prove non-consent upon the victim, which implicitly requires the victim to establish that resistance was given.⁵⁰ Punishment for rape is a minimum of 3 years, gang-rape for 4 years and forcible indecency 6 months. While the focus of the comparison is on the basis of gender neutrality, it is pertinent to note that the given punishment for such heinous crime is inadequate to actually create a deterrence in the society.⁵¹

ii. Canadian model of rape law

Canada introduced gender-neutral laws of sexual offences in 1983. There is no specific rape law but rather an umbrella sexual assault provision that accommodates varying degrees of the sexual offence.⁵² The relevant sections in the *simplified* form are-

*“Section 271: Sexual assault occurs if a **person** is touched in any way that interferes with their sexual integrity: this includes kissing, touching, intercourse and any other sexual activity without his/her consent.*

*Section 272: Sexual assault with a weapon, threats to a third party or causing bodily harm occurs if a **person** is sexually assaulted by someone who has a weapon or imitation weapon and threatens to use it; the offender threatens to harm a third person, a child or a friend if the **person** does not consent to a sexual act; the offender causes harm to the person; or more than one offender assaults the person in the same incident.*

*Section 273: Aggravated sexual assault occurs if the **person** assaulted is wounded, maimed, disfigured, beaten or in danger of losing her/his life while being sexually assaulted.”⁵³*

The Canadian provision also states that no one under the age of 17 can consent to sexual intercourse with a figure of authority (like a coach), and an intoxicated or unconscious person can never consent. Anyone of the age 12-13 cannot consent to sexual activity to anyone more than 2

49 *Discriminatory Family Code*, GENDER INDEX OECD, 3, <https://www.genderindex.org/wp-content/uploads/files/datasheets/JP.pdf>.

50 *ibid.*

51 *supra*, at note 47.

52 Amanda Dale, *Canada: Rape as Part of Broader Definitions of Sexual Assault* 1-12 (Speaking notes-Expert Advisory Panel Member, Canadian Femicide Observatory for Justice and Accountability).

53 The Criminal Code of Canada, 1985.

years older and anyone aged 14-15 cannot consent to anyone more than 5 years older. Depending upon the severity of physical aspects of the assault, the offence is classified under level 1, level 2 or level 3 sexual assault. Any non-consensual sexual act can fall under these provisions, which also clearly lays down the definition of consent. Thus, it is an accommodative provision. Additionally, the sentencing is presented as a range corresponding to the absence or presence of a weapon by the offender, from a minimum of 4 years to a maximum of life sentence. The Code has laid down rules that determine admissibility of specific evidence so as to deter any stereotypes or discriminatory myths about how the sexual assault victims are expected to behave.⁵⁴

The Bill C-51, introduced in 2017⁵⁵, brought major changes to the sexual assault law viz.

- Clarified that defence of mistaken belief of consent is not valid if based on mistake of law or lack of physical resistance
- Strengthened the “rape shield” provision by dismissing communications of sexual nature of the victim through “twin myths” of
 - a) victim was more likely to have consented
 - b) victim is less credible, based on prior sexual history
- Clarified that an unconscious person is incapable of consenting.

The ‘justice gap’ still exists, between the written text and actual courtroom practice. In practice, the counsel has been permitted at times to present sexual records for misleading purposes. The Criminal Code falls short when it comes to the inherent prejudices of the judges manifested in the type of questioning done in the court (scrutiny over the victim’s style of scream and not fighting back).⁵⁶ The Canadian government tries to take on a proactive role to ensure an unbiased temperament in the judiciary through various schemes. In the 2017 Budget, the Canadian Judicial Council was provided with \$2.7 million for 5 years and \$0.5 million per year thereafter for access to gender-sensitivity training for judges.⁵⁷ In 2020, the Canadian Government introduced a legislation that sought to train judges in sexual assault law and social context.⁵⁸ The next chapter deals with a comparative study over the rape laws of India, Japan and Canada and seeks to juxtapose the spirit and letter of the law and its translation into the real world.

⁵⁴ *supra*, at note 50.

⁵⁵ *Bill C-51, An Act to amend the Criminal Code and the Department of Justice Act*, DEPARTMENT OF JUSTICE, (Jan. 30, 2023), <https://www.justice.gc.ca/eng/csj-sjc/pl/cuol-mgnl/c51.html>.

⁵⁶ Kate Puddister, *In Canada, rape myths continue to prevent justice for sexual assault survivors*, THE CONVERSATION (2019), <https://theconversation.com/metoo-in-canada-rape-myths-continue-to-prevent-justice-for-sexual-assault-survivors-110568>.

⁵⁷ *supra* at note 50, at 11.

⁵⁸ *Government of Canada introduces legislation to ensure judges participate in training on sexual assault law and social context*, NEWS RELEASE, DEPARTMENT OF JUSTICE, CANADA (2020), <https://www.canada.ca/en/department-justice/news/2020/02/government-of-canada-introduces-legislation-to-ensure-judges-participate-in-training-on-sexual-assault-law-and-social-context.html>.

8. A comparative analysis of rape laws embedded in three dissimilar legal systems.

This chapter focuses on three countries namely India, Japan and Canada, examining their respective rape laws and identifying areas of similarity and difference. India's system borrows from the common, civil customary and religious law sources, while Japan is a civil law system and Canada is a bi-jural (common and civil) legal system. Canada is an exemplary western nation that has the widest sexual assault provision of the three countries. Japan, like India, is an Asian-value driven nation, but ahead in terms of acknowledgment of sexual crimes against other genders comprising the minority of these cases.

i. Drafting of the Law

Canada introduced gender-neutral rape laws (that fall under the offence of sexual assault) in 1983, and Japan amended its Penal Code in 2017 to introduce gender-inclusive laws. In contrast, India has gender-specific laws, providing that only the male gender can be the perpetrator and only the female gender can be the victim.

The ambit of each law depends on how the provisions are worded. The rape law provisions of India and Canada have a wider ambit than that of Japan. Japan considers vaginal, anal and oral intercourse that occurs due to force as 'sexual intercourse'⁵⁹, and does not cover forcible insertion of finger, objects or anything else while the other two countries do take such incidences into account as well. In this regard, Japan has the narrowest anti-rape provision. No express provision outlaws marital rape however through case laws, it has been made a criminal offence in Japan.⁶⁰ India's IPC expressly excluded marital rape from the purview of the Section 375. Canadian legal reforms of 1983 explicitly treat marital rape as a crime in Canada.⁶¹

ii. A Comparison of the Reporting Rates of Non-female Rape

The reporting rates of sexual violence and assault are often tied to, and even dependent upon the entrenched societal stigma and taboos surrounding sexualised crimes. Hence, it is relevant to assess these rates in the nations to draw conclusions about the nexus between mere written law and its usage and the impediments to realising the true purpose of the text.

⁵⁹ *supra*, at note 46.

⁶⁰ *Discriminatory Family Code*, GENDER INDEX OECD, 3, <https://www.genderindex.org/wp-content/uploads/files/datasheets/JIP.pdf>.

⁶¹ Jennifer Koshan, *The Criminalisation of Marital Rape and Law Reform in Canada: A Modest Feminist Success Story in Combatting Marital Rape Myths*, SSRN (Sep. 18, 2017).

India

The National Crime Records Bureau of India reported 31677 rape cases in 2021, an average of about 87 cases each day.⁶² The figure represents the reported cases of rapes where women were victims. As rape doesn't acknowledge men as victims, there are no official records of men who have been raped. The Centre for Civil Society conducted an independent survey that found that among some 300 men, 41 percent of those aged 35-44 had been coerced into sex by a woman and 20 percent above 45 years had been coerced into sex by a man. On an average, 18% men reported being coerced into sex, with 16% claiming a female perpetrator and 2% claiming a male one, indicating that female-on-male rape is more prevalent than male-on-male rape.⁶³ In a 2017 PIL introduced by advocate Sanjiv Kumar, in Delhi High Court, it was stated- "Male rape is far too prevalent to be termed as an anomaly or a freak incident."⁶⁴

Japan

The National Police Agency reported 1388 cases of forcible sexual assault and 4283 cases of forcible indecency in the year 2021.⁶⁵ The 2018 report stated that out of the 1300-1400 cases reported of sexual assault, there were only 50-70 cases where the victim was a male, comprising just 3% to 5% of the total cases.⁶⁶ A Cabinet Survey by Japan reported that 47.3% of sexual assault victims did not report the incident with the law enforcement, nor did they share it with anybody else.⁶⁷ The reasons for this were that they felt that it was too shameful to narrate (36%), the crime wasn't serious enough (32.2%) or that there was no use talking about this (28.5%), while some victims were unsure about who to consult (25.7%).⁶⁸

Canada

A 2019 report by the Canada Government recorded 24,672 cases of sexual assault that were reported to the police in 2017.⁶⁹ Out of 1000 women, 37 women faced sexual assault, while out of

⁶² Table 1.2, IPC CRIMES (2019-21),

<https://ncrb.gov.in/sites/default/files/CII-2021/TABLE%201.2.pdf>

⁶³ Jai Vipra, *A Case for Gender-Neutral Rape Laws in India*, CENTRE FOR CIVIL SOCIETY, 11 (2013).

⁶⁴ Aakansha Latala and Ishika Agarwal, *The Silent Male Rape Victims in India*, IJLMH (2020).

⁶⁵ Crime situation in 2021 (2021)

https://www.npa.go.jp/english/crime_situation_in_2021_en.pdf

⁶⁶ *Many male sex crime victims still hesitate to report abuse in Japan*, THE JAPAN TIMES (2022), (Jan. 30, 2023),

<https://www.japantimes.co.jp/news/2022/12/28/national/male-sexual-abuse-victims/>

⁶⁷ *47.3% of those who experience sexual violence in Japan stay quiet, survey finds*, THE JAPAN TIMES (2022),

<https://www.japantimes.co.jp/news/2022/06/17/national/sexual-violence-cabinet-survey/>

⁶⁸ *ibid*.

⁶⁹ *Sexual Assault*, GOVERNMENT OF CANADA (2019)

(Jan. 30, 2023), <https://www.justice.gc.ca/eng/tp-pr/jr/jf-pf/2019/apr01.html>

1000 men, only 5 men faced the same.⁷⁰ This reflects the higher victimisation women face than men. According to a 2014 GSS, only 5% of the cases were reported, while 83% of the incidents were not reported. In the male sample group⁷¹ 70% of the sample did not report sexual abuse by adult.⁷² This is because of a pre-existing notion that the society will not believe the men, or the feeling of shame that they may have to face.⁷³

From the figures mentioned above, it is clear that there are instances of men being sexually assaulted, but there is either gross under-reporting or non-reporting of these crimes. While India does not report sexual assault crimes against any gender, excluding females, Canada has the highest percentage of under-reported crimes of the discussed nature. The main reasons for the same include the apprehension that no one would believe male victims and the shame that they feel⁷⁴. Even though Canada has gender-neutral laws, there is a lack of trust in the people towards the law-enforcement which has led to a dismal number of reported incidents.⁷⁵ It is worthwhile to note that even though Japan amended the rape laws only in 2017, the reporting rate of the crime is more than that of Canada whose laws were changed in 1983.

iii. A Comparison of the Queer Stakeholders

In Canada, the queer population touched 1 million in 2021⁷⁶, while in Japan it 1 in 10 identify as part of the LGBTQ community⁷⁷ (roughly 10 million). In India, according to the 2011 data, an estimate of about 45 million individuals do not identify as straight in India. The statistic only involves the openly queer people of the country.⁷⁸ When considering the significant number of individuals affected by gender-neutral rape laws, particularly in India with its substantial queer population, there is a pressing need to include them in the relevant legal provisions given that such inclusion is essential to ensure that the rights and protections provided by the law extend to all members of society, regardless of their sexual orientation or gender identity.

⁷⁰ *ibid.*

⁷¹ The male sample group was part of a larger sample group. The larger group had 3 divisions- female, northern, and as mentioned above, the male group.

⁷² *supra*, at note 67.

⁷³ *supra*, at note 67.

⁷⁴ Susan McDonald and Adamira Tijerino, *Male Survivors of Sexual Abuse and Assault: Their Experiences*, RESEARCH AND STATISTICS DIVISION, DEPARTMENT OF JUSTICE CANADA, 6 (2013).

⁷⁵ *ibid.*

⁷⁶ Nick B, *Canada's LGBTQ population now 1 million — but hate crimes are rising too: Statistics Canada*, CBC (June 15, 2021), <https://www.cbc.ca/news/politics/statistics-canada-lgbtq-pride-report-1.6066638>.

⁷⁷ *Poll shows 1 in 10 in Japan identify as LGBT or other sexual minorities*, THE JAPAN TIMES (2019), <https://www.japantimes.co.jp/news/2019/12/11/national/social-issues/japan-lgbt-sexual-minority-survey/>.

⁷⁸ Warren Bateman, *The possible role of the psychiatrist: The lesbian, gay, bisexual, and transgender population in India*, NATIONAL LIBRARY OF MEDICINE, 489-493 (2018).

iv. Social Comparison of the Nations

Laws essentially reflect the societal will of the people that has crystallised into an agreed-upon legislation. Hence, it is inappropriate to not consider societal factors when critically comparing the rape laws of the three countries, since these dictate not only the path followed by the text but also the extent of its effectiveness and the gaping holes that must be addressed.

There also exists a correlation between gender-neutral rape law and the rights of the LGBTQ+ community in a country. The legal recognition of same-sex marriage and the overall production of LGBTQ+ rights are indicative of a more inclusive and equitable legal framework. India, does not recognise same-sex marriages and only allows for unregistered cohabitation, whereas gay marriage is legal in Canada. In Japan, the legality of such marriage varies across regions. Canada ranks the highest in the LGBT Equality index for 2021 (90/100) whereas India is the lowest among the three (63/100).⁷⁹

India

Centre for Civil Society in India conducted an anonymous online survey among 305 men on whether they believe men can be raped by women and 79.3 percent of them said yes with a cent percent agreement from those aged above 45 and only 71 percent from those in the age-group 18-24.⁸⁰ Hence, there is a disconnect between society's stance and the regressive rape laws of India. Recommendations for gender-neutral modifications to the existing rape law of India have been opposed by certain feminist groups who view rape as an explicitly patriarchal and gendered crime.⁸¹ Under IPC, punishments for various crimes including sexual offences can extend till even capital punishment, under the Transgender Persons (Protection of Rights) Act, 2019, offences involving mental, sexual or physical abuse of a transgender individual invite relatively lenient punishments involving only 6 months to 2 years of imprisonment. The Act also requires an Identity Certificate and out of the 9064 applications received, 22% remain pending (16% of which have been pending for 7-12 months, despite the provision directing issuance or rejection within 30 days) and 13% have been declared ineligible as per National portal for transgender persons.⁸²

79LGBT rights, EQUALDEX (2021)

<https://www.equaldex.com/region/india>

<https://www.equaldex.com/region/japan>

<https://www.equaldex.com/region/canada>

80 Jai Vipra, *A Case for Gender-Neutral Rape Laws in India*, CENTRE FOR CIVIL SOCIETY, 11 (2013).

81 Aakansha Latala and Ishika Agarwal, *The Silent Male Rape Victims in India*, IJLMH (2020).

82 Mishra, *Raped, Mocked By Police For Seeking Justice: India's Rape Laws Do Not Cover Transwomen*, ARTICLE 14, (Jul. 7, 2022), <https://article-14.com/post/raped-mocked-by-police-for-seeking-justice-india-s-rape-laws-do-not-cover-transwomen--62c65919a04a3>.

Japan

The Japanese police provide a hotline service and a public women consultation service. However, there exists no 24-hour rape crisis services to cater to immediate medical care and counselling or protection shelters for the victims.⁸³ Various NGOs have linked prejudice of the police, judges and advocates, lack of trust in the justice system, re-victimising judicial procedures through consideration of prior sexual history, as the major reasons for the underreporting of rape cases. They also found that the systematic gender-sensitivity training of prosecutors and judges is not undertaken as per the norms and the hospitals and NGOs that seek to provide post assault care are heavily underfunded. Also, the disparate power relations between the offender and victim are seldom attended to. Cases wherein the offender abuses his authority or position to coerce sexual participation by the victim are many a times interpreted to be consensual.⁸⁴

Canada

Sexual assault cases keep getting dismissed throughout the Canadian justice system where only 50% of the suspects face prosecution and of these, only half get convicted. In reality, false reports of assault cases are not higher than other crimes. Still, the misconceptions that the police hold drive their decisions as to who is a genuine victim in need of protection.⁸⁵

In the Justice Canada studies⁸⁶, the most widely felt reasons for not reporting child and/or adult sexual abuse were the fear of disbelief by others, embarrassment and shame, unawareness as to whether reporting can be done, and absence of family support.

Despite being one of the most advanced Western nations, Canadian people are encumbered by insensitive dealing of assault cases and apathy of the authorities.

The Global Scenario

The following table shows major countries and where they stand in terms of the rape provision being gender neutral towards the victim and the perpetrator.

COUNTRY	VICTIM-NEUTRAL	PERPETRATOR-NEUTRAL
India	No	No
UK	Yes	No

⁸³ *Discriminatory Family Code*, GENDER INDEX OECD, 3, <https://www.genderindex.org/wp-content/uploads/files/datasheets/JP.pdf>.

⁸⁴ NGO *Joint report of Japan*, JAPAN NGO NETWORK FOR CEDAW, 9 (2009).

⁸⁵ Bain et al, *A New Chapter in Feminist Organizing: The Sexual Assault Audit Steering Committee*, 28 CJWS, 6-15 (2010).

⁸⁶ *Sexual Assault*, RESEARCH AND STATISTICS DEPARTMENT- GOVERNMENT OF CANADA, (2019), <https://www.justice.gc.ca/eng/rp-pr/tr/jf-pf/2019/docs/apr01.pdf>.

USA	Yes	Yes
Japan	Yes	Yes
Canada	Yes	Yes
New Zealand	Yes	Yes
China	Yes	Yes
South Africa	Yes	Yes
Australia	Yes	Yes
France	Yes	Yes
Russia	Yes	Yes
Bangladesh	No	No
Brazil	Yes	Yes
Pakistan	No	No
Indonesia	No	Yes

Out of the 96 countries studied by the Centre for Civil Society, 63 had neutral, 6 had partly neutral and 27 had gender-specific rape laws.⁸⁷

The following countries have gender-neutral laws but prescribe a harsher punishment for women victims than non-female ones⁸⁸ :

- Bahrain
- Egypt
- Ethiopia

According to the CCS data, 14 out of the 19 Sub-Saharan countries have gender-neutrality in rape laws. The continent with most gender-specific rape laws is Asia whereas there are none in Western Europe and North America.⁸⁹ This correlates with the 2022 Global Gender Gap Report in which out of the top 10 gender-parity nations, 6 were from Western Europe. It will take Asia an average

⁸⁷ Jai Vipra, *A Case for Gender-Neutral Rape Laws in India*, CENTRE FOR CIVIL SOCIETY, 8 (2013).

⁸⁸ *ibid.*

⁸⁹ *ibid.*

of 172 years to close the gender gap and Western Europe and North America an average of 59.5 years to do the same.⁹⁰

9. Conclusion

India certainly needs reforms in rape provisions involving substituting ‘man’, ‘woman’ with ‘a person’ to be palatial enough to involve all types of offenders and victims. Making a gender-neutral rape law will *not affect the gravity* with which rape cases are treated or render the law ineffectual. All it will ensure is that the *right to equality* and *equal protection of laws*, justice and dignity is not denied to a great many that get side-lined far too often. The Indian provisions in IPC against sexual harassment (Section 354A), voyeurism (Section 354C) and stalking (Section 354D) are also gender-specific. Crafting a gender-impartial rape law could start a *domino effect* and these provisions may follow suit to foster an inclusive justice system.

However, it is also to be kept in mind that just making the law gender-neutral without altering the prevailing courtroom practices and improving the reporting coverage is futile. The same has also been noted in the nations of Japan and Canada, where there is a paucity of appropriate judicial attitude and grassroots level availability of redressal mechanisms. Ultimately, society has to become less judgemental and more empathetic towards the victims, regardless of their gender, so that the ubiquitous stigma around even reporting of the crime gets abated. The legal professionals and police are not impenetrable to societal attitudes, and hence any change for the better in society’s tolerance will permeate into the justice system as well.

Through the first chapter, the current rape provision of India was examined with respect to lack of gender-neutrality. The gender-rigidity of the law allows only the females to be able to report rape. The fallacy that other genders cannot be raped was set aside by providing non-stereotypical instances in India. The second chapter highlighted the consequences of a gender-biased provision for rape such as perpetuation of rape myths and stereotyped sexual scripts. The causes for the tendency to view men as perpetrators and females as victims were seen to be a result of socialisation. The misconceptions impeding support for gender-neutral rape laws such as threat of counter-accusations and decontextualization were further rebutted.

Finally, a comprehensive comparison with two foreign legal systems was conducted on the

⁹⁰Global Gender Gap Report 2022, WORLD ECONOMIC FORUM, <https://www.weforum.org/reports/global-gender-gap-report-2022/infographics-145b9111f2>.

parameters of presence of gender-neutrality in rape provisions, rates of reporting of such offences and the social impact ensuing from such provisions. Japan's rape law sits at a partly progressive approach where although it is gender-neutral, what constitutes rape is spelled out in a restrictive manner. The Canadian law is a multi-levelled and condensed law that looks at the intensity of the offence and the sexual situation of every case, and spurns preconceived gender myths. In this regard, it looks at rape from an individual perspective, as an abuse of one's autonomy and integrity. Such a setup could be considered as a model for the Indian rape law to metamorphosise around.