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An assessment of the arguments against gender inclusivity in rape law in India

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Abstract

The article critically analyses the arguments against gender inclusivity in rape law in India using doctrinal, theoretical, and normative methodologies and briefly engages with comparative literature from other jurisdictions. The article begins by critically assessing the strength of major arguments against gender inclusivity in rape laws in India; namely, insufficient number of non-female victims of rape, dilution of importance given to female rape victims, fear of counter allegations and the adequacy of existing provisions of the Bharatiya Nyaya Sanhita, 2023 and the Transgender Protection of Persons Act, 2019 to deal with issues of sexual violence towards non-female victims. Then the article analyses the legislative proceedings and judicial precedents concerning gender neutrality in rape law since 2000. Finally, the article concludes by recommending a revision in the existing rape and sexual offences law in India.

Key words

Gender Inclusive Rape Law; sexual abuse; section 18 TPA; section 63 BNS

Resumen

El artículo analiza críticamente los argumentos en contra de la inclusión de la perspectiva de género en la legislación sobre violación en la India utilizando

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metodologías doctrinales, teóricas y normativas, y aborda brevemente la literatura comparada de otras jurisdicciones. El artículo comienza evaluando críticamente la fuerza de los principales argumentos contra la inclusividad de género en las leyes de violación en la India; a saber, el número insuficiente de víctimas no femeninas de violación, la dilución de la importancia dada a las víctimas femeninas de violación, el miedo a las contra-acusaciones y la adecuación de las disposiciones existentes de la Bharatiya Nyaya Sanhita, 2023, y la Ley de Protección de Personas Transgénero, 2019, para abordar las cuestiones de violencia sexual hacia las víctimas no femeninas. A continuación, el artículo analiza los procedimientos legislativos y los precedentes judiciales relativos a la neutralidad de género en la ley de violación desde el año 2000. Por último, el artículo concluye recomendando una revisión de la ley sobre violación y delitos sexuales vigente en la India.

Palabras clave

Ley contra la violación con perspectiva de género; abusos sexuales; artículo 18 de la ley de Protección de Personas Transgénero (TPA); artículo 63 del Bharatiya Nyaya Sanhita (BNS)

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1. **Introduction**

In 2023, the Indian parliament introduced new bills to replace the three existing major criminal and evidence laws in India. The Indian Penal Code, 1860 (IPC), the Code of Criminal Procedure, 1973 (CrPC), and the Indian Evidence Act, 1873 (IEA) were replaced by the Bharatiya Nyaya Sanhita, 2023 (BNS), Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) and Bharatiya Sakshya Bill, 2023 (BSA) respectively, which came into effect from July 2024. Rape as defined under section 63 of the new penal code BNS and previously under section 375 of the IPC, designates the perpetrator as male and the victim as female.[1] The BNS retains the same definition of rape as the IPC with the only change being that it raises the age of consent for sexual intercourse by a husband with his wife to minimum of 18 years. The BNS provision of rape is mostly the same as the IPC just like most of the BNS provisions, and courts continue to refer to IPC jurisprudence even in BNS cases (*Satender Kumar Antil v Central Bureau of Investigation*, 2022; *Basanagouda R Patil v Shivananda S Patil*, 2024; *Suby Antony v Judicial First-Class Magistrate-III*, 2025). Therefore the author will refer to cases decided on IPC while discussing BNS provisions even if the law has been changed. For the offence of rape, while a woman cannot be charged as a principal offender, her culpability as an accomplice or facilitator remains a possibility. The Supreme Court in *Priya Patel v Union of India* (2006) and in *State of Rajasthan v Hemraj* (2009) ruled that a woman cannot be prosecuted for gang rape even if she facilitates the crime; but in *Om Prakash v State of Haryana* (2015), held that a woman can be prosecuted for abetting gang rape. Therefore, there is a lack of jurisprudential clarity on the culpability of females as accomplices for rape.

Section 377 IPC (absent in the BNS) contained a gender-neutral provision termed as 'Unnatural offences', that criminalised carnal intercourse against the order of nature with any man, woman, or animal, whether consensual or non-consensual. However, the Supreme Court of India in *Navtej Singh Johar v Union of India* (2018) decriminalised consensual sexual relationships between two adult homosexuals, heterosexuals and lesbian women under this section. Still, the words 'against the order of nature' were undefined, reflecting an archaic understanding of sexuality, and the intention of the law was to govern all forms of non-procreative sexual intercourse. The Supreme Court, in *Navtej*, noted that the provision was framed by Macaulay keeping in mind the then prevailing societal morality and his personal views on homosexuality. This provision has been deleted in the BNS. However, many individuals from gender and sexual minorities as well as members of the joint parliamentary committee reviewing the BNS bill recommended retaining this provision.[2] If reintroduced, it could lead to numerous problems. For instance, a trial court in Pune while deciding on a bail application of an accused for the gang rape of a transgender person observed, that the definition in Section

[1] The perpetrator could be trans-male with a surgically constructed penis and the victim could be trans-woman. However, whether a trans-woman is considered a woman for women related offences under the new penal code is yet to be conclusively decided by the Supreme Court or by the legislature, given conflicting decisions across high courts across India. An appeal to decide whether Transwoman can seek relief under Protection of Women from Domestic Violence Act in pending before the Supreme Court in *Vithal Manik Khatri v Sagar Sanjay Kamble (Sakshi Vithal Khatri)*, Criminal Appeal no. 166 of 2024.

[2] BNS report; Dissent note by N R Elango to the report no.246 of the Department Related Parliamentary Standing Committee on Home Affairs on The Bharatiya Nyaya Sanhita, 2023; Derek O'Brien Intervention-Parliamentary Standing Committee On Home Affairs (2023).

377 IPC did not include trans victims as it mentions only man, woman or animal (Firstpost 2017). Therefore, it is important to focus on the relevance, working and issues that may come up if this provision were to be reintroduced, which would be discussed later in this paper.

In 2019, the Indian Parliament enacted a new law for protecting the rights of transgender person (The Transgender Persons (Protection of Rights) Act, 2019 – TPA –). The Act defined a transgender person inclusively, encompassing trans-men, trans-women and persons with intersex variations, genderqueer and non-binary persons [Section 2(k), TPA] and introduced a distinct offence of sexual abuse of a transgender person by another person [Section 18(d), TPA]. Theoretically, Indian laws provide legal remedies against sexual assault for women, trans and non-binary individuals. However, it must be noted that the punishment for rape of women under Section 64 BNS attracts a minimum of 10 years up to life imprisonment and a fine (Sections 64-71 BNS), whereas the erstwhile Section 377 IPC had prescribed life imprisonment with no mandatory minimum sentence. Under the TPA, the maximum penalty for sexual abuse of a transgender person is imprisonment of 2 years and a fine. Such disproportionate disparities in punishments reflects a lack of seriousness and legislative attention towards sexual violence against adult transgender and non-binary persons compared to women victims including an absence of consideration of male rape victims.[3]

Providing equitable justice to all victims of sexual violence requires legal reform, either by framing a gender-inclusive[4] definition of sexual assault similar to Canada's approach or by enacting separate laws of sexual assault covering persons of all and no genders as in England and Wales, Ireland, New Zealand and many Australian states.[5] It is noteworthy that in recent years, South-Asian countries such as Pakistan and Bhutan have also framed gender-inclusive rape laws (Pakistan Penal Code, 1860, Section 375 ; Bhutan Penal Code, 2004, Section 177). Nepal's penal code has a gender-neutral provision prohibiting sexual intercourse with detainees (The National Penal (Code) Act, 2017, Clause 221), whereas Sri Lanka's penal code defines grave sexual abuse of a person in gender-neutral terms (Penal Code of Sri Lanka, 1883, Section 365B). The Penal code of Maldives defines sexual assault in gender-neutral terms, but does not criminalise situations where a woman forces a man to penetrate her (Maldives Penal Code, 2014, Section 130). These developments are significant, especially given their shared colonial pasts and similar societal structures, with conservative sexual values.[6] Therefore, a lack of gender-inclusive rape law in India needs to have a strong rationale.

[3] For the purposes of this paper, the term "non-binary persons" would refer to persons with intersex variations and socio-cultural identities as per Section 2(k) of the TPA.

[4] The author would use the terms "gender inclusive" and "gender neutral" with respect to rape law interchangeably throughout the paper. While the Indian government prefers the term "gender neutral", the author prefers the term "gender inclusive".

[5] Canadian Criminal Code, 1985, Sections 271-273; Sexual Offences Act, 2003, Sections 1-4 (England and Wales); Criminal Law (RAPE) (Amendment) Act, 1990, Sections 2,3,4 (Ireland); The Crimes Act, 1961, Section 128 (New Zealand); Crimes Act, 1958, Section 38-40 (Victoria), Criminal Law Consolidation Act, 1935, Sections 48-49 (South Australia), Criminal Code Act, 1899, Sections 349-352 (Queensland), Criminal Code Act, 1924, Section 185 and 127 (Tasmania), Criminal Code, 1913, Section 325 (Western Australia).

[6] The Penal codes of countries in the Indian subcontinent, except Nepal and Bhutan, are based on the IPC established by the British in 1860. Most of these countries have also recognized gender neutrality in offences of domestic violence.

Gender neutrality in rape laws has been extensively discussed by scholars across jurisdictions. Yvette Russell (2013), Siobhan Weare (2018), Natasha McKeever (2019) and Phil Rumney (2007) examined gender neutrality in sexual offence laws in England and Wales. Leila Ullrich (2021) analysed the lack of recognition of male victims of rape while Laura Sjoberg (2016) discussed female perpetrators, male and non-binary victims of rape in the context of international criminal justice. However, their analysis may not fully apply to the Indian context. In India, Pathak (2016), Sharma (2020) and Roy (2023) have advocated for a gender-neutral rape law. However, their arguments do not focus on the detailed examination of the strength of the objections against gender inclusivity in rape laws. This paper seeks to supplement their arguments by analysing the strengths of the major objections against framing rape laws for male, trans and non-binary victims and female and non-binary offenders in India. By addressing aspects not previously discussed, this analysis seeks to make an original contribution to literature.

It is important to note that the author advocates for gender inclusivity in Indian rape laws from both the offender and victim perspectives. The perpetrator as well as victim could be male, female, trans or non-binary individuals and their sexuality would be irrelevant in determining culpability under the law. The author advocates for a gender inclusive sexual assault law which would be based on principles of violation of bodily integrity and sexual autonomy as the fundamental basis of offending rather than on the identity of the offender. However, the literature and scholars referred in the paper may not always be arguing for gender inclusivity in rape laws from the author's perspective. Therefore, in such cases, the author would specifically mention the context and nature of offending on the basis of which the relevant scholar is situating their arguments.

This article is divided into two sections. The first section explores four major arguments against enacting a gender-inclusive rape law: a) limited statistics on non-female rape victims, b) dilution of importance given to female rape victims, who constitute the majority, c) fear of counter allegations in cases involving female perpetrators and d) the perceived adequacy of existing provisions in the IPC and TPA in addressing issues of sexual violence against non-females. The second section traces previous attempts to enact a gender-neutral rape law in India and understand their outcomes, before concluding.

2. Analysis of the major arguments against gender neutrality in rape law

The major arguments against introducing gender inclusivity in the law can be summarised as follows: a) statistically insufficient male, transgender and non-binary victims of sexual assault, b) potential diminishment of the importance given to female rape victims, who form majority of such victims, c) possible counter allegations of rape made against genuine victims and d) adequacy of existing sexual assault laws to address non-female victims. Let us assess the strength of these arguments individually.

2.1. Not enough male, transgender and non-binary sexual assault victims

Flavia Agnes (2002, 846), a renowned activist and researcher, criticised the gender neutrality advocated in the Law Commission's 172nd report (2000), arguing that there was no reported sexual offence by an adult female on an adult male in India since 1980. She further argued that western nations who introduced such laws are realising that

these laws harm women more than helping men (TNN 2012). However, she doesn't provide any evidence for her arguments. It is worth noting that in the absence of a statutory law recognising sexual violence against persons other than women, it is difficult to accurately determine the actual number of victims (Krug *et al.* 2002). India's current annual crime data survey, conducted by the National Crime Records Bureau, focuses solely on legislated offenses while reporting crime statistics, thereby creating a vicious cycle, which makes it difficult to accurately determine the actual number of non-female victims. A general annual survey of victimisation like the one conducted by the government of England and Wales would have been helpful.

Elizabeth McDonald (2019, 191-192), in the context of New Zealand, argues that gender inclusivity in rape laws should be accompanied by nuanced information gathering on offender and victim characteristics such as age, sex, gender identity and sexual orientation. Disclosing this information to the police and support agencies would assist policymakers determine the reforms needed and create training and sensitisation materials for members of the criminal justice machinery, a practise that would also benefit the Indian legal system. Even with a statutory law, accurate data collection can be challenging due to underreporting, led by severe social stigma attached to marginalisation of men who have sex with men in India (Chakrapani *et al.* 2007). However, some attempts to determine the extent of victimisation of male victims of sexual violence have been made. The Centre for Civil Society (CCS 2013, 3) conducted an online empirical survey among men in India regarding their experience of sexual coercion. Out of the 222 relevant responses from men above the age of 18, 16% reported being coerced or forced to have sex by an adult woman, while 2% cited male perpetrators. The National Human Rights Commission's (NHRC 2014) report highlighted same-sex rapes as a major reason for prison suicides. Surendra Naik (2020, 125) conducted an online survey examining societal perspectives on the prevalence of sexual abuse of males in India. Of the 340 responses analysed, including 196 males and 120 females, 82.6% reported that they had heard about men being raped, yet 43.8% were unaware of the lack of legal mechanisms to protect men from sexual abuse. 40% of males admitted to being sexually harassed, assaulted or being vulnerable in such situations.

Chatterjee and Srivastava (2021) conducted a similar survey to determine the prevalence of sexual harassment against men at workplaces. Out of 75 responses including 49 males and 26 females, 37.3% had come across cases of sexual harassment of men, while 13.3% experienced unwelcome sexual advances by their female superiors. While the author concedes that these surveys reflect a limited number of sexual violence cases faced by men, they do constitute sufficient evidence of the fact that there are male victims and female perpetrators of sexual violence. Lack of legal recognition of their victimisation and the social stigma may dissuade many men from reporting such incidents, thereby underrepresenting such victims of sexual violence. It is essential to understand why there is a general belief that there are no adult female sexual offenders. Sharma (2020, 90) attributes this to the assumption that females in the global south are disempowered and incapable of rape. This is based to some extent on the restrictive understanding of rape as a physical act and the biological misunderstanding of male response to sexual stimuli (Fruchs 2004).

Scholars advocate for moving the sexual assault laws from being phallus-centric to one focusing on violation of bodily integrity and sexual autonomy (Graham 2006, Kulshreshtha 2019, McKeever 2019). Some might find this argument unconvincing, noting that digital and object-based penetration and non-consensual oral sex also constitute rape in India. However, retaining penetration as a defining basis for measuring sexual violation creates a heteronormative norm in legislation, since the idea of penetration itself reflects a performative notion of the male genitalia (Annavarapu 2013, 260). Judith Butler's (1993) in her theory of heterosexuality, similarly asserts that heterosexuality is determined based on who can and who gets to be penetrated. This notion has been passed over generations and concludes that whoever penetrates is masculine and who is penetrated is feminine, which has remained the basis of the law in India.

Similar arguments were made in the English context by Robson, Newman and O'Hagan (2021). In English law, 'forced to penetrate' cases are recognised under the offence of causing a person to engage in sexual activity without consent, and not under rape.[7] While the offence of rape also includes male-on-male rape and is no longer framed around heterosexuality, the fact that only penetrative penile sex is recognised as 'rape' still remains problematic. This could be based on stereotypes surrounding male victims of sexual violence. For example, in *Raghavji v State of Madhya Pradesh* (2023), the victim alleged non-consensual carnal intercourse over a three-year period. The victim, a homeless man, stated that he sought a job from the accused, a state minister, which he arranged in return for sexual favours. The accused filed a quashing petition stating the relations were consensual.

Despite the obvious power imbalance between the victim and the accused, and the dire financial circumstances of the victim under which he sought a job, the court deemed the sexual acts consensual since the victim did not complain about his ordeal to anyone in the three years, deeming this fatal in impacting the credibility of the victim's allegation. The undue focus of the court on the lack of victim's diligence in bringing forth the victimisation over three years is concerning. If the complainant had been a minor, the accused's behaviour would constitute as grooming but since the complainant was an adult, no such vulnerability was assumed in the court's perception. This case demonstrates the problematic general perception that males cannot be victims of sexual violence (Mezey and King 1989).

Scholars also argue that physiological responses, such as erections, during sexual assault may lead authorities to wrongly assume consent (Fruchs 2004, Levin and van Berlo 2004, Bullock and Beckson 2011). Despite studies highlighting these issues, the lack of legal recognition of male and non-binary sexual violence under rape laws significantly limits the reach of such vital literature. Socio-cultural factors and gendered upbringing in patriarchal societies also contribute to men's reluctance to report sexual abuse (Sanjay Deshpande 2019, 248). Navpreet Kaur and Roger Byard's (2022) study on male acid attack victims in India noted significant underreporting due to the social stigma of failing to defend themselves from the attack. Therefore, societal conditioning plays a definite role in the lack of sufficient numbers of men reporting sexual violence.

[7] Section 1 of the Sexual Offences Act, 2003, defines rape, and Section 4 defines causing a person to engage in sexual activity without consent.

Contextual situations such as class and power dynamics also influence sexual violence faced by men. Male, trans and non-binary prisoners are vulnerable to sexual abuse including rape by women police officers in their custody (Narrain 2012). This was particularly noticed during the Abu Ghraib torture and prisoner abuse in Afghanistan in 2006, where two female American soldiers, Lynndie England and Sabrina Harman, were photographed engaging in sexual, physical and psychological abuse on male prisoners, and were later convicted. Sexual violence against men during conflict by female perpetrators is not new, as evidenced by historical events such as the Armenian, and the Rwandan and Congo genocides (Sjoberg 2016, 59, 66, 98), and the Sri Lankan civil war (Touquet 2018). Extensive same-sex rape has been noted among Palestinian prisoners in Israeli prisons and Rwandan women during the genocide perpetrated by Pauline Nyiramasuhuko (Sjoberg 2016, Zarkov 2022, 108-109). Laura Sjoberg (2016, 96) explains that while female perpetrators are indeed discussed in media coverage of war criminals, legal and scholarly literature, the timing, nature of their motivations and gender stereotypes tend to project their actions as reasonable or as an outlier event.

Sjoberg contends that rape is about exertion of racialised, gendered or class power dynamics rather than about male or female identities. She explains that gender subordination is a class relationship where femininities are less valued than masculinities, where these classes are defined based on perceptions of strength and weakness, rather than biological bodies. Such subordination can be seen as socially fluid and gendered order changes based on time, place and culture, an argument supported by scholars such as Ulrich (2021) and Gear and Ngubeni (2002). The above incidents highlight the vulnerability of non-female individuals to sexual assault in a prison situation.[8] Further, sexual and physical abuse towards transgender and non-binary persons by police and other state officials has been noted by many human rights groups (International Commission of Jurists – ICJ – 2019, Bhat 2022, Kothari *et al.* 2022), such as the People's Union for Civil Liberties (2001) and the Commonwealth Human Rights Initiative (2020) in India. Therefore, there is enough documented literature showing a growing number of non-female victims of sexual violence in India.

Even if the number of non-female victims of sexual abuse were relatively small, that by itself does not constitute reason to deny them legal protection under the ambit of rape law or provide inadequate punishment to their perpetrators. The Indian Constitution allows for unequal or preferential treatment under the law for marginalised groups. For instance, Articles 15(3) and 16(4) allow the government to create special provisions for advancing women and children or backward communities. However, the determination of backwardness of any particular community can be based on a scientific study or survey in line with the decision in *Kailash Chand Sharma.* No such study has been conducted in India to determine the quantum of non-female victims of sexual assault. However, the state has the authority to declare sexual minorities such as trans and non-binary persons, as marginalised for providing them with legal recognition for the purposes of sexual violence.[9] Legal precedents exist for such actions including the Supreme Court's decision in *NALSA v Union of India* (2014), to provide legal recognition to the socially and economically marginalised transgender community, and

[8] Same sex rape was also mentioned as one of the reasons for suicide in Indian prisons by NHRC (2014).
[9] Under Articles 15(3) and 16(4) of the Indian Constitution.

recommendation to provide them reservation in education and public employment. Similarly, the Indian Parliament enacted special laws for the protection of Scheduled Castes and Scheduled Tribes against mistreatment under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act), 1989.

The government and NGOs concerned with women's rights (NGOWR) have argued several times for retaining gender specificity in rape law, given large-scale victimisation of women and the constitutional principles of reasonable classification and under-inclusion (PLD 2010a, 2010b), Mundkur and Narrain (2013) and Sanjjiv Kkumaar 2018). As far as the large-scale victimisation of women is concerned, the Supreme Court held that a law could be made for even a single person if it is evident that the specific reasons applied only to them and to no-one else (*Chiranjit Lal Chowdhuri*, 1950, para 86). As for the principle of reasonable classification, Article 14 permits the state to treat similarly situated individuals unequally to provide substantive equality to marginalised groups. A reasonable classification needs to fulfil three parameters: it must be founded on an intelligible differentia distinguishing those that are grouped together from others, the differentia must have a rational relation to the object sought to be achieved by the act and there must be non-discriminatory and non-arbitrary intent of the law (*KR Laxman* 2001; *Subramanian Swamy* 2015; *Joseph Shine* 2019). All three conditions must be satisfied in the opinion of any court to uphold such classification (*Nagpur Improvement Trust* 1973). Article 14 of the Indian constitution guarantees similarity of treatment and not identical treatment. Therefore, it seems logical to provide more resources to female victims of sexual violence, and specific policies such as fast-track courts to cater to their needs, given their large numbers. However, denying the most basic recognition of legal violation of non-female victims under the existing rape law would be an unjust classification which the courts can easily strike down (*K. Thimmappa* 2001).

The second constitutional principle relied upon for denying recognition to non-female victims under rape laws is under-inclusion. This doctrine allows the legislature to deal with problems in a piecemeal manner, as an exception to the three-step classification test (*Ambica Mills* 1974). Derived from the American legal system and largely applicable to fiscal or economic laws, this doctrine's reliance on laws concerning constitutional, fundamental and civil rights is questionable and limited (*Girish Kumar Navlakha* 1975). Justice Bhat in *Janhit Abhiyan* (2023, 338-339) held that an under-inclusionary law would be constitutional only if it is reasonable. The legislature has a wider leeway for under-inclusion in economic policies, unlike in other areas. Scholars have even questioned the Supreme Court's review standards for under-inclusionary laws and the inadequate exploration of this doctrine in Indian courts (Bhardwaj 2023, Sebastian 2023). Justice Bhat also cited the ratio of the Supreme Court in *Roop Chand Adlakha* (1989, 124), where it held that to overdo classification is to undo equality. Therefore, courts must carefully scrutinise laws denying protection under rape laws solely based on the rationale of under-inclusion, especially when they are enacted without relying on scientific studies or surveys.

The Supreme Court of India has unequivocally rejected the government's *de minimus* rationale that violations of fundamental rights can be justified on the basis that very few persons are being affected by it, in both *KS Puttaswamy* (2017) and *Navtej Singh Johar* (2018). Similarly, Justice Wachtler in *People v Liberta* (1984), rejected a similar argument

by the State of New York, where he said that the infrequency of female sexual offending would not by itself be a reason to deny their culpability. Statistically, females rarely commit serious crimes, however, that would not justify exclusion of their punishment. Therefore, the argument that there are not enough male, trans and non-binary victims of sexual assault to justify a change in the rape law in India does not seem acceptable.

2.2. Dilution of importance given to the uniqueness of Female Rape Victims

Radical feminist scholars such as Catherine MacKinnon (1990, 3-13), Patricia Novotny (2003), Andrea Dworkin (1987) and Ngaire Naffine (1994a, 1994b) argue that gender neutrality in rape law is a backlash against feminism, undermining the exclusive acknowledgement of violence against women. Susan Brownmiller (1975, 209) calls rape a conscious act by which men keep women in a constant fear of sexual victimisation. May and Strikwerda (1994), argue that men as a class collectively benefit directly and indirectly from the harm inflicted on women; making this crime gender-neutral would be denying the gendered nature of rape and belittle the harm suffered by women. There is no denying that the constant lived reality of sexual victimisation gives women an accurate sense of their vulnerability to sexual violence (Hampton 1999, Brison 2002). However, these arguments fail to consider the reality of male sexual victimisation (McKeever 2019).

Brownmiller (1975, 379) herself acknowledged the reality of male victimisation to rape and the non-penetrative methods of sexual violation such as forced oral sex as equally degrading and violative of personal bodily integrity. Her argument reflects that the reality of male rape has been in public domain amongst leading feminist scholars since the 70s. However, it did not achieve mainstream acceptance due to its perceived effects of dilution on the protection of women's rights. She was against the idea of a hierarchy of sexual violation where non-penetrative acts were seen as less violating towards the victim irrespective of their gender. This is because the intention of the assailant is to degrade and humiliate the victim by denying their personal bodily integrity and autonomy. Therefore, there is no logical reason for not considering the recognition of non-female victims or of female perpetrators of sexual violation as equally harmful towards male victims.

Agnes (TNN 2012), argued that rape involves a unique sense of physicality and use of power against women, bringing them shame and stigma. However, these very reasons affect female victims adversely. The uniqueness of female victims has negative consequences of stereotyping and perpetuating victimhood (Berns 2001, 279). The construction of women as the real and only possible rape victims has a coercive effect in making women believe that such an identity is natural and inevitable by locking them in a state of perpetual victimhood (Sen 2010). Women end up being perceived as sexually passive, vulnerable and gatekeepers to sexual activity while shifting the blame of sexual aggression entirely on males (Mulenhard 1988, 30), an argument supported by feminist scholars such as Susan Brownmiller (1975, 379), Lara Stemple (2011), Louise du Toit and Elisabet le Roux (2021) and Laura Sjoberg (2016, 129-130). Halley (2006, 31-33) in the context of governance feminist scholars flagged similar concerns that they fails to recognize their existing power and their aspirations for power, thereby continuing to view themselves using prisms of female submission and male hegemony.

Sjoberg (2016, 60) argues that the statistical rarity of female perpetrators does not justify downplaying recognition of sexual vulnerability for non-female victims and that the existence of women committing sexual violence during conflicts and wars negate the myth of specialised victimisation of women. Majority of victims of sexual violence perpetrated by Pauline Nyiramasuhuko during the Rwandan genocide were women and were victimised because they were women. Accounts of numerous victims interviewed suggest that these women perpetrated sexual violence either personally or by facilitating such perpetration (African Rights 1995, 21-39), by identifying as cheerleaders for male rapists. One woman accused of genocide for encouraging a male rapist by singing, contends that she should not be punished as she did not personally rape the victim. Such belief is attributed by Sjoberg to the oversimplistic understanding of victim/perpetrator as female/male respectively. This also explains why the Indian Supreme Court's jurisprudence on the issue of female complicity during rape/gang-rape is unclear. Thus, one could argue that the idea of recognition of only male perpetrator/female victim is problematic.

Agnes argued that a gender-neutral rape law would open avenues for inflicting even greater trauma and humiliation on women, an already marginalised section of society (TNN 2012). However, legal reforms and societal concerns have evolved since then, and it cannot be denied that significant resources have been dedicated to addressing crimes against women.[10] For example, establishing women only police stations, allotting female police officers in women related crimes, and creation of specialised courts for dealing with crimes against women. Here, one needs to remember that sexual minorities in India are uniquely placed with respect to their vulnerability to sexual abuse. Further, while homosexuality was decriminalised in Navtej in 2018, the Supreme Court in *Supriyo v Union of India* (2023) refused to allow state recognition of marriage for non-heteronormative individuals under the Special Marriage Act, 1954, holding that this was under the domain of the legislature. Thus, the state is a long way from according them full personhood in the legal system and by extension in society (Mandal 2023, Dam 2023). The uniquely precarious situation of trans-persons, queer and non-binary individuals concerning sexual exploitation cannot be ignored.

Gender inclusive sexual assault laws including men and non-binary individuals as victims and women as perpetrators were enacted in 1983 in Canada, in 2003 in England and Wales and in most states of Australia since 1990's and in New Zealand since 2005.[11] Scholars in these jurisdictions have debated the advantages and disadvantages of gender-neutral rape/sexual assault laws. In the English context, Yvette Russell (2013) argued about the negative effects of a gender-inclusive law on female victims while Phil Rumney (2007) and Siobhan Weare (2018) argued that the existing sexual assault law in Sexual Offences Act, 2003 fails to adequately deal with issues of male victims. Similarly,

[10] 2013 saw major reforms in rape laws, took wherein majority of resources were dedicated to dealing with issues of violence towards women. See Kulshreshtha (2020) and (2023).

[11] Canada Criminal Code, 1985, Sections 272-273; Sexual Offences Act, 2003. The sexual assault law remains distinct for different genders in England. However, females cannot be charged with rape of a man but are instead prosecuted under Section 4 of the SOA for causing a person to engage in sexual activity without consent.

in Canada, arguments against gender inclusivity were made by Lise Gotell (2010, 209-210) and Christine Boyle (1985).

The author noted a general lack of evidentiary foundation in the arguments of the scholars arguing against gender inclusivity in rape laws or its adverse impact. Most of them have not adduced empirical or ethnographical evidence or testimonies, to show that female rape victims have been negatively impacted because of gender inclusivity in rape laws. Without objective evidence, one could argue that these objections stem from ideological differences rather than actual impacts. Toit and Roux (2021, 119), in the context of conflict related sexual violence, argue that feminist scholars' reluctance to engage with male rape victims based on its assumed negative effect on female victims upholds patriarchal meanings of sexual violence, which further marginalises male victims. Sophie Hindes (2022) argues that politicisation of violence of women unintendedly contributes to a narrative that sexual violence is exclusively a women's issue, occurring only in heterosexual relationships. Interviews with sexual assault support workers and the LGBTQ community, workers in Victoria and South Australia similarly suggest that decades of feminist research on gender and sexual violence fails to account for the role of social powers such as heterosexism and cissexism in influencing people's perception of sexual violence (Mortimer *et al.* 2019). Their study explains how sexual violence typically assumes cisgender heterosexual contexts, portraying sexually aggressive men and passive women, thereby trivializing and concealing sexual violence faced by LGBTQ individuals.

Scholars such as Sjoberg (2016, 133), Ison (2019), Kodamaya and Sato (2022), O'Donohue and Grey (2022) and Baaz and Stern (2013) have made similar arguments. It is important to note that none of these scholars including the author advocate for completely disregarding gender considerations in sexual violence. Rather, it is critical that the law and members of the criminal justice machinery acknowledge that individuals do not always conform to their sex, gender or societal roles. The author does not contend that gender neutrality should diminish the role of gender in sexual offences law, but rather about recognising that anyone can be a perpetrator or victim of sexual violence, regardless of their gender or sexuality. Gender being a social construct, influences individuals' experiences and perceptions.

While the author recognises the unique impact of rape on female victims and their situation in a patriarchal society, similar arguments of unique victimisation and its effects can be made for male, trans, non-binary and queer victims. For example, men also face constraints to act within strictly defined gender roles of aggressive and toxic masculinity, inhibiting them from openly speaking about their vulnerabilities, or experiences of sexual abuse, as noted in empirical studies in India (Deshpande 2019, Kaur and Byard 2022). Feelings of low self-esteem due to lack of performance of societal masculinity is explained by Raewyn Connell theory of 'Hegemonic Masculinity' (2005). Connell suggests that masculinity is constructed by society via traits such as independence, dominance and assertiveness, traits which are expected to be exhibited by all men. This helps explain why men assaulted by other men perceived themselves as emasculated, and express their experiences as homosexualisation or perversion (Zarkov 2022). Zarkov's research on male rape during ethnic conflicts in Yugoslavia illustrates how such violations undermine masculinity and morale (2022, 113). She

contends that rape of women does not destroy their femininity, but rape of men destroys their masculinity.

Before *NALSA* (2014), sexual minorities were looked upon as an object of disgust and faced neglect from the state. Even post *NALSA*, laws concerning trans and non-binary individuals continue to operate using the lens of heteronormativity (Ghosh and Sanyal 2019, Sinha 2022). Despite decriminalisation of non-heterosexual relations in *Navtej* (2018), anecdotal evidence suggests vulnerability of queer and non-binary individuals to a unique form of sexual violation (Kumar 2024). For example, queer individuals using dating apps to maintain discretion of their sexuality, have been targeted for sexual exploitation, with perpetrators threatening to publicly reveal their sexual orientation,[12] knowing that their victimisation will not be taken seriously by police (Pinch *et al.* 2022, Sharma 2022). Similar accounts of exploitation were reported by trans and non-binary individuals in prisons in India (Ganesan and Dadoo 2020, Shantha 2021, Mahaseth and Jain 2023). Therefore, this makes their victimisation to sexual abuse similarly unique like male or female victims. Thus, all victims of sexual assault have different reasons for being placed in a position of vulnerability, and it would not be appropriate to prioritise one group's recognition of legal harm over another's. The New Zealand Court of Appeal made a similar suggestion in *R v Ngawahika* (1987), where a transvestite was convicted of unlawful sexual connection of a young man, but received a lenient sentence of 3 years. On appeal, the court held 'that any suggestion of a hierarchy of sexual offences classifying violation of a female as prima facie more serious than violation of a male has to be avoided'.

Scholars have discussed the idea that the criminal justice machinery is already overburdened with the existing caseload, and it would take years for them to be dealt with (Kulshreshtha 2020, PRS 2021). However, these concerns overlook the fact that sexual assault towards non-female victims remain unrecognised under the existing rape law in the new BNS and were barely recognized under the older IPC.[13] What is being advocated is an appropriate labelling of sexual violence directed towards non-female victims and a dedicated effort to treat these victims under the ambit of the same law as female rape victims. While this could increase the pressure on existing resources, it can be resolved by a sustained focus of the government to develop appropriate infrastructure and contribute resources to ensure that legal protection could be extended to all parties harmed by sexual violence equally (Rumney 2007). Therefore, the argument that framing gender-neutral rape laws would dilute the importance given to female victims of rape has limited evidentiary basis.

2.3. Fear of counter-allegations in cases of rape by accused against complainants

Another objection to the framing of gender-neutral rape laws is the fear of counter-allegations by the accused. At the outset, it is essential to note the ratio of the Supreme Court in *Collector of Customs v Nathella Sampathu Chetty* (1962, para 34), which expressly

[12] The term 'Outing' in the LGBTIQA+ community refers to the act of revealing a person's gender identity or sexuality preference publicly. Most individuals especially in developing countries prefer to keep these details private from the fear of violence, ridicule or discrimination.

[13] Section 377, IPC generally and Section 18(d) of the TPA for trans individuals. Section 377 equivalent is absent in the BNS.

stated that misuse of a provision is no ground to hold it procedurally or substantively unreasonable. The law recognising non-female victims of sexual violence even if legislated can potentially be misused. However, apprehensions of a counter-allegation, albeit a reasonable one, does not mean that it will necessarily be made in every case or that it would impact the credibility of the victim's complaint. These arguments seem more like hyperbole assertations designed to defeat any attempt to reform the status quo.

In the past decade, courts and scholars have observed misuse of specific laws such as on dowry prohibition, harassment, domestic violence, rape and unnatural offences. Criminal law is often applied for purposes unintended by lawmakers. For instance, kidnapping and rape are often misused when families disapprove of the choice of partners due to religious or caste differences (Vishwanath 2018, 2022, Parthasarthy and Oza 2020).[14] Further, in cases of rape on the pretext of marriage, complainants have manipulated the law of rape on the advice of police to coerce their partners to marry them. Zoe Brereton (2017) noted how women police officers in the state of Uttar Pradesh encouraged complainants to frame their complaints of rape on the pretext of marriage in a scripted manner, ensuring that the complainants' moral credibility would not get affected for engaging in premarital sex. This was done in order to coerce the other side to compensate the complainant with a marriage proposal.

Another study on the widespread perception of misuse of dowry harassment provision, found that most complainants withdrew their complaints after filing them, intending to leverage state's support and arrest power to end domestic violence at homes, where power differentials based on gender, class, or family support were lacking (Dave *et al.* 2017, 87-88). Agnes (2015) also contends the same and cites it as a reason for the widespread perception of misuse of these laws. Contrary to this opinion, courts have noticed that allegations of domestic violence and sexual abuse are routinely made in matrimonial disputes to coerce men into negotiating a higher settlement (*Ajit Naharsingh Dasana* 2021, *Santhosh* 2017, *Mukesh Bansal* 2022, *Rajesh* 2021). The Supreme Court, recognising indiscriminate arrest and misuse of these provisions, issued guidelines deterring police officers from conducting routine arrests in matrimonial disputes (*Arnesh Kumar* 2014). In *Achin Gupta v Union of India* (2024), the Supreme Court requested the legislature to consider revising the laws protecting women from dowry harassment under the BNS. However, in the author's opinion, even the widespread misuse of this provision needs to be properly studied rather than being based on anecdotal cases decided by individual courts.

The author certainly acknowledges the realities of societal structure in India, which forces women to seek state support and arrest power to end domestic violence. However, the trend noted by various courts in misuse by unscrupulous litigants in connivance with lawyers cannot be ignored. Despite this, no calls have been made for completely repealing these laws by the legislature or majority members of the public, clearly recognizing their intended benefits for certain sections of society, considering the

[14] Misuse of Domestic Violence Laws by female complainants have been noted by the Supreme Court in *Arnesh Kumar* (2014) and in *Kahkashan Kausar* (2022).

historical and societal prejudices against them. Similarly, the assumption of misuse of a gender-neutral rape law is by itself no logical ground to deny its enactment.

Despite the enactment of gender-neutral laws in jurisdictions such as Canada and England and Wales, no reports of the widespread trend of counter allegations in sexual assault/rape cases have come up. Even assuming a counter-allegation is made, the court would dismiss it if found meritless. For instance, consider the English case of *R v Hodge* (2018) where a 49-year-old man was accused of rape, assault by penetration and sexual assault by the 18-year-old daughter of his employee. The accused on being arrested, and prior to release on bail, did not make any statement to the police, despite the police stating that his semen was found on the girl's sofa cushion at home. On being subsequently charged, he stated that the semen was a result of non-consensual masturbation performed on him by the complainant. His explanation was deemed unconvincing by the jury and he was convicted of rape, sexual penetration and sexual assault. His appeal against his conviction was dismissed by the court, and his arguments and the two witness who testified in his support were dismissed as meritless.

A single case by itself cannot be an indication of certainty, but the Hodge decision illustrates how courts can effectively handle counter-allegations. A similar example of this in the Indian context is *King Victor Marak v State of Meghalaya* (2023). Here, the accused filed an appeal against his conviction on a charge of aggravated sexual assault on a four-year-old child, and his mother, brother and cousin sister testified on his behalf attesting to his innocence. However, the High Court of Meghalaya dismissed all these testimonies for lack of reliability, while also noting that the defence witnesses were tutored and the trial judge should have charged them with perjury. While this is not a case of adult rape and the above two cases cannot be used to form a definitive opinion, the author's limited contention is that counter complainants and false testimonies are routinely made in cases before courts who are generally well-equipped to deal with such issues. Therefore, there seems to be no reasonable ground for doubting the capability of courts to deal with false testimonies or malicious cases.

While the author may appear relatively optimistic regarding judicial decision-making on rape cases in India, this stems from the series of progressive decisions taken by judicial officers in sexual offence cases such as protecting vulnerable witness during depositions (*Smruti Tukaram Badade* 2022), admonishing of allowance of humiliating questioning of rape victims during cross-examinations (*Ranjeet Shahaji Gade* 2021) and overturning inappropriate analysis of sexual offence provisions (*Satish* 2022). Post *Navtej*, several decisions by high courts across India have accorded protection to same sex couples (*Sreeja S.* 2018, *Chinmayee Jena* 2020, *S. Sushma* 2021), included preventing premature gender reassignment surgery on an intersex child (*Health Secretary, Kerala* 2023) and directed reservation of places in politically representative bodies for transgender individuals (*The President* 2023, *Dhananjay Chauhan* 2023). While there remains a lot to be desired in terms of judicial analysis in rape cases, and the above constitute limited situations of progressive decisions, one could argue that dealing with false testimonies and malicious cases even in rape cases would not be particularly difficult to adjudicate for the Indian judiciary.

Scholars like Harshad Pathak (2016, 392-393) and Anupama Sharma (2020, 86-87) acknowledge the possibility of counter-complaints against the victim under a gender-

neutral rape law, but also maintain that this would be the same for all kinds of victims under the ambit of a gender-neutral law. It is also important to focus on developing mechanisms for bringing malicious prosecutors and perjurers to justice as was mentioned in *Marak* (2023).[15] Therefore, the mere prospect of a counter-complainant is not a sufficient deterrent from granting protection against sexual violence to non-female individuals or for recognising that any person irrespective of their gender or sexuality can be a perpetrator of sexual violence.

2.4. Existing statutory laws are sufficient to deal with issues of sexual violence against men, transgender persons and non-binary individuals

Statutory remedies for sexual violence against men, trans persons and non-binary individuals was earlier governed by Section 377 IPC, and for sexual abuse of trans persons, under Section 18 of the TPA. While the IPC provision has been deleted in the BNS, it is important analyse the differential treatment towards victims of sexual violence other than females under the criminal justice system. This could be best demonstrated by the following table:

TABLE 1

Relevant laws governing sexual assault	**63 (BNS) (Rape)**	**Section 18 Transgender (Protection of Persons) Act (Sexual Abuse)**
Victims/Perpetrators	Only females including trans-females[16] can be victims while only males including trans-males can be perpetrators.[17]	Victims can only be trans-persons while Perpetrators can be any person (TPA, Section 2(k)).
Cognizable/Non-Cognizable[18]	Cognizable	Non-cognizable
Bailable/Non-Bailable	Non-Bailable	Bailable
Punishment	Rigorous imprisonment for minimum 10 years, may extend to imprisonment for life or even death, along with a fine.	Simple imprisonment for minimum 6 months, may extend up to 2 years, along with a fine.

[15] Though there exist civil and criminal redressal mechanisms for malicious prosecutions in India, these are rarely availed by victims and courts. See Law Commission of India, 2018 Report.

[16] Trans-females and Trans-males refer to individuals who identity themselves with a gender different from what they were assigned at birth whether they have undergone sex reassignment surgery, hormone therapy, laser therapy or such therapy or not as per section 2(k) of the TPA.

[17] Whether trans-females can be covered by the laws enacted for women remains contested. This is because some high courts in India have held that a trans woman can be considered as a woman while others have decided against so. In the absence of an authoritative decision of the Supreme Court or a legislative enactment clarifying the same, this issue remains unresolved.

[18] A cognizable offence in the Indian criminal justice system refers to offences where a police officer is authorized to arrest the accused and investigate the offence without the permission of the magistrate.

Triable by what court	Court of Sessions	Magistrate of any class
Plea-Bargaining	Not allowed	Permissible
Summary Trial	Not possible	Possible

Table 1. Comparative Treatment Table of Rape and Sexual Abuse in Indian Laws.

The above table demonstrates the disproportionate treatment given to non-female victims of sexual violence. Lenient sentencing and reduced powers of the police reflects the legislative opinion on sexual violence towards non-female victims. These disparities beg the question of why such differential treatment persists under the law.

Criminal law, prior to independence, was used primarily to enforce societal morality through punishment. This explains why Section 377 used to be termed as an offence 'against the order of nature' since oral or anal sex does not lead to procreation (Pande 2022, 68-71). With the advancement of criminal law scholarship, this thought process has changed to using the law to prevent harm to others. However, scholars continue to assert that judicial inquiries in trials of sexual offence still function keeping in mind considerations of public morality, decency and societal attitudes towards sex (Garg 2019, Kulshreshtha 2023, 2024). Instances like *Raghavji* (2023), involving rape of an adult man or the unfortunate comments made by a district judge about transgender persons while denying bail (*Jyoti Manjappa Prasadavi* 2024) even post *NALSA* and *Navtej* corroborate the same. Therefore, the author believes that a revision in the definition of rape would send the right message to judicial and police officers that legislators as representatives of the public, view non-heteronormative sexuality as natural and positive.

The author conducted an analysis of adult male complainants under the erstwhile Section 377 IPC prior to *Navtej*. Only seven cases of adult male complainants were noted during this analysis (1947-2018). As discussed previously, in *Raghavji*, despite an apparent disproportionate power differential between the accused and the complainant, the complainant was dismissed, based on stereotypes regarding male victims. However, in *Raunak Hajari* (2023) case, a similar power differential was acknowledged, and the accused's request for quashing the complaint was dismissed. Notably, in cases where the complainant was a minor boy, or an adult victim involving multiple assailants, courts have been more willing to accept their vulnerability to sexual violence (*Ram Bhagat Ram* 2009, *Surendra* 2016, *Ramchandra* 2019, *Vijay* 2019, *Ajay Sahu* 2023, *Nirmal Kumar Dey* 2023, *Sabuddin* 2023, *Vikas Sharma* 2024). Police officials continue to invoke this provision in cases of child sexual abuse despite there being a specific law for the same (POCSO). Let us now assess the use of this provision by police officers in practice.

Danish Sheikh (2017) argues that the language used in first information reports filed by police officers in cases of Section 377 refers to the offending act as morally dubious, rather than one involving a lack of consent. While Danish's argument predates *Navtej*, his analysis remains relevant even today. This is particularly noticeable when the offence is combined with kidnapping and other crimes used by families to separate lesbian couples (Arasu and Thangarajah 2012, Shukla 2020, Banerjie 2022). Scholars have noted that misuse of criminal law as a tool to regulate an adult woman's sexuality has been a time-tested practice by police officers (Brereton 2017, Vishwanath 2018, 2022, Garg 2019, Shukla 2020). However, post Navtej, many high courts have come in support of the rights of adult persons to choose their partners in same-sex relationships when facing

threats of violence and separation from their families (*Sreeja S.* 2018, *Chinmayee Jena* 2020, *S. Sushma* 2021). Framing a sexual violation law that focuses on harm based on bodily integrity and sexual autonomy instead would help recognise the legitimacy and existence of queer and non-binary personhood in India.

It is also important to assess whether the criminal justice machinery envisions situations where it would have to deal with non-female victims of sexual violence. In 2016, the LNJN National Institute of Criminology and Forensic Science released a forensic guide for crime investigators as a standard operating guide.[19] The guide contained a chapter for police officers on dealing with victims of sexual offences, but only rape victims under section 376 (punishment for rape) (Section 64 BNS) and child victims. Any reference to male, trans person and non-binary victims of sexual violence was completely missed out. Such omission in a guide published by a government research institute reflects their attitudes and beliefs regarding such victims.

In 2014, the Ministry of Health and Family Welfare, Government of India, published guidelines for medico-legal care for survivors/victims of sexual violence. These guidelines acknowledge male, trans persons, non-binary and queer persons as potential victims of sexual violence and provide instructions on dealing with them sensitively. However, the annexure referring to legal definitions of sexual violence did not mention the erstwhile Section 377. In Kerala, a male doctor filed a writ petition in the High Court challenging the state protocol of having only gynaecologists, preferably women, for examining victims of sexual violence (*Dr Laxmy Rajamohan*, 2024). While the court noted that the policy is in place to assist female victims who tend to be majority of these victims, it also conceded that men, trans and non-binary persons too can be victims of sexual violence. These instances suggest that the state and the criminal justice machinery largely work with the perception of near impossibility of the existence of non-female victims of sexual violence, an issue noticed earlier, particularly in the case of treatment of trans individuals in prison (Ganesan and Dadoo 2020, Shantha 2021, Mahaseth and Jain 2023).

A punishment of a minimum of 6 months to a maximum of 2 years under section 18 of the TPA is inconsistent with the treatment of men accused of rape of females under section 63 BNS. The act does not define what constitutes sexual abuse. The Supreme Court, in *Gaurav Jain v Union of India* (1997), regarding the POCSO Act, held that any injury to private organs would amount to sexual abuse, where the word 'abuse' is to be given a wide meaning. In the absence of a specific definition which would provide for graver punishment for aggravated acts of violence, the existing term of sexual abuse leaves much to be desired. This disproportionate treatment meted out to non-female victims of sexual violence sends the message in society that their victimisation is less important.

Scholars argue that the lack of reference towards non-female victims of sexual violence is based on the existing cultural and institutional setup of society, where family structure bases itself on a cisgender heterosexual understanding of an individual's sexuality. The Supreme Court in *Supriyo*, dismissed the idea of recognition of right to marry of non-

[19] The Institute is a research and training institute established under the Bureau of Police Research and Development, Ministry of Home Affairs, Government of India in 1972. It conducts degrees in criminology and forensic sciences and provides training to law enforcement officers.

heterosexual couples. Therefore prior to fully considering the victimhood of non-female victims of sexual violence, there is a need to embrace personhood of non-binary and trans individuals as natural and part of Indian society. For example, Sanyal and Ghosh (2022) have argued for the removal of consummation as a ground for annulment of marriage in Indian family laws. They argue that the existing provisions are based on heteronormative understanding of sexuality and hinder the recognition of non-normative forms of marriages, thereby blurring the line between marital rape and marital sexuality and essentialising sex within marriage.

Akshat Agarwal (2023) argues that the legal recognition of LGBT+ couples would positively affect Indian family laws by generating arguments for expanding recognition of diverse families. Similar themes can be noticed in the epistolary exchange of two scholars discussing marriage equality in the aftermath of the *Supriyo* decision (Sheikh and Samuel 2024). Mandal (2024) contends that the focus of the Indian feminist movement is on situating the issue of domestic violence solely in a domestic sphere in heteronormative relationships. This diminishes the focus on domestic violence in queer relationships such as lesbian women and overall holds back the road to recognition of non-heteronormative families (Ghosh and Sanyal 2024). Gerber *et al.* (2021) contends that it is important to move the conversation beyond marriage equality and decriminalization of homosexuality on an international scale for complete gender inclusivity in society.

Another issue is the conflation of intersex personhood with trans personhood (Kothari *et al.* 2020). There is a need to sensitise members of the criminal justice machinery and legislators regarding the presence of personhood beyond the traditionally conceived biological essentialism. While a review petition for *Supriyo* is pending before the Supreme Court, recognition of marriage equality for LGBTQ+ couples would be a positive step towards the recognition of full personhood in society, and as possible victims of sexual violence. Zaid Baset (2012, 99-104) in his analysis of the *Naz Foundation* decision argues that using the lens of privacy for asserting queer rights suggests that expression of this form of sexuality should be done in private, which is its default place, thereby suggesting that any non-heteronormative form of sexuality is to be kept hidden from public eyes. From the above analysis, it seems evident that the existing statutory provisions are not adequate to deal with the sexual victimisation of non-female victims. Let us now assess the previous attempts by the government and individuals to frame gender neutral rape laws in India.

3. An overview of previous attempts to enact a gender-neutral rape law in India

The possibility of framing a gender-neutral rape law was first discussed in *Sudesh Jhaku v KC Jhaku* (1996). This was a case of sexual assault of a girl by her father. The complainant's lawyer pleaded for an interpretation for an expanded definition of rape beyond peno-vaginal interpretation. However, in the context of expanding the definition of rape, the court went beyond the scope of the case to also suggest framing a gender-neutral law that would help avoid instances where an accused would escape culpability due to such restricted definition. This marked the first judicial discussion on gender neutrality in rape laws.

In 1996, a Non-Governmental Organisation (NGO), Sakshi, working for the welfare, and dignity of women, filed a public interest litigation (PIL) in the Supreme Court, appealing for the recognition of oral, anal, and other violations within the definition of rape (*Sakshi* 1996). Acknowledging the inadequacy of the current legal framework to deal with sexual abuse of children, the court directed the Law Commission of India to submit a report on the reformation of rape laws. The Law Commission (2000; para 3.1), recommended including non-penetrative and penetrative acts concerning non-vaginal orifices within the definition of rape, while also advocating for a gender-neutral definition, in-line with global trends. Additionally, it suggested renaming rape to sexual assault to destigmatise the offence.

Subsequently, the Indian government invited consultations from NGOWR (Criminal Law Amendment Bill, 2001; Criminal Law Amendment Bill, 2002 (Redrafted by All India Women's Democratic Alliance); Criminal Law Amendment Bill, 2005 (AIWDA)) and the National Commission for Women (NCW) on the proposed changes. Multiple discussions took place between the NGOWR, and documented by Partners for Law in Development (PLD), a legal resource group (Partners for Law in Development 2010a, 2010b). Three distinct positions emerged. Firstly, the NGOWR vehemently opposed gender neutrality in rape laws, fearing it would disproportionately impact female rape victims negatively (PLD 2010a, 2010b, 2, 4, 6, 10-11). Secondly, they advocated enacting a separate provision for governing same-sex violence; but rejected any law recognising females as perpetrators (PLD response to Criminal Law Amendment Bill 2010, 10-14). Thirdly, they emphasised the need for a separate gender-neutral law for governing sexual abuse of children (*ibid*.).

In May 2012, the government passed the Protection of Children from Sexual Offences Act, 2012 (POCSO), a dedicated gender-neutral law for punishing child sexual offenders with graver punishments. However, laws regarding adult rape victims remained largely unchanged until the Nirbhaya case in December 2012 (*Mukesh* 2017). In December 2012, a Criminal Law Amendment Bill, 2012 was introduced in the Parliament, which recommended renaming the offence of rape as sexual assault and making it gender-neutral, aligning with 172nd Law Commission report's suggestions. In 2013, after large-scale protests in the aftermath of the horrific gang rape and subsequent death of a woman, the government established the JS Verma committee (2013) to recommend changes in law, procedure and evidence, which recommended sweeping changes in sexual violence, procedural and evidentiary laws to provide an empathetic and trauma-free experience to sexual violence victims. It recommended retaining the offence of rape rather than renaming the offence to 'sexual assault', due to the moral opprobrium associated with that offence by Indian society. Using the generic crime of sexual assault can signal a dilution of political and social commitment dedicated to promoting women's right to dignity, agency and autonomy (Verma 2013, 67). Therefore, the committee recommended retaining the offence of rape where women would be victims and men would be the perpetrators. However, the committee also acknowledged the possibility of sexual assault of men and rape of homosexuals, transgender and transexuals and recommended that the provisions of the law should be cognizant of the same (Verma 2013, 416, para 3). How the law will take cognizance of the same remained unanswered by the committee.

In March 2013, a department related parliament standing committee on home affairs (DRPSCHA, 2012) submitted its report on the Criminal Law Amendment Bill, 2012. After undertaking public consultations and the recommendation of the Verma Committee report, the parliament's standing committee recommended a new gender-neutral offence of sexual assault to replace the offence of rape.[20] The committee disregarded the Verma (2013) committee suggestion of keeping rape as a separate offence as they believed that the purpose of the amendment was to replace the offence of rape with sexual assault. The committee recommended that the victim for the offence of sexual assault and rape be made gender neutral while the perpetrator remain a man. However, the Bill and the committee's recommendations received widespread opposition from NGOWR and concerned individuals.[21] As a result, the government withdrew the bill, and enacted a new act which retained rape as a gender specific offence, defined new aggravated forms of rape, and provided stricter punishments for all offences against women. Additionally, it introduced offences of stalking, voyeurism and sexual harassment, but limiting perpetrators to men and victims to women (Criminal Law Amendment Act, 2013 (13 of 2013)). Thus, a major attempt to introduce gender neutrality in sexual offences was defeated due to large-scale opposition.[22] Subsequently, several individuals filed PILs or special leave petitions in constitutional courts challenging the discriminatory treatment towards men and non-binary individuals under existing sexual violence laws, without much progress.

In 2018, Rishi Malhotra, a practicing lawyer, filed a PIL in the Supreme Court, arguing that sexual violence laws discriminate against men, violating their right to equality under Articles 14 and 15 of the constitution (HT Correspondent 2018). The PIL was dismissed as 'imaginative' and on grounds that amending laws is the parliament's job (Livelaw News Network 2018). The court stated that while both men and women can be perpetrators of gender-based crimes, it could not direct the government to collect data regarding female sexual offenders. Both these observations contradict established judicial precedents. The Supreme Court itself, in *Kailash Chand Sharma v Union of India* (2002, 584-586) held that any form of positive discrimination in favour of a particular group for the purposes of equality can only be provided based on empirical studies or surveys, and the state should endeavour to collect relevant data before determining if positive discrimination is needed. Therefore, when the court on its own concedes that women can be perpetrators of gender-based crimes, then it should have directed the government to conduct a survey rather than disregarding its own jurisprudence in Kailash Chand Sharma.

As far as the inability of amending laws is concerned, the Supreme Court in cases such as *DK Basu* (1997) and *Vishakha* (1997) have struck down unconstitutional laws and

[20] Department-Related Parliamentary Standing Committee on Home Affairs, Rajya Sabha, One Hundred and Sixty Seventh Report on the Criminal Law (Amendment) Bill, 2012, Clause 2.5.2.

[21] Press Release of Demand by Women's groups and individuals for urgent reform of law relating to sexual assault, and seeking accountability of NCW- Petition signed by 92 organizations and 546 individuals (2012); Press Release for President urged not to sign the Ordinance by Women's Organizations (2013); Press Release by NGOs and individuals on the Parliamentary Standing Committee overlooking the JVC Report on rape law reforms (2013).

[22] Certain groups felt betrayed that issues of sexual violence towards transgender and non-binary persons were ignored during the deliberations and enactment of the Criminal Law Amendment Act, 2013 by the NGOWR. See Mundkur and Narrain (2013).

implemented new measures even in the absence of statutory provisions. The issue of limitations of the Supreme Court's power to legislate laws or influence government action was specifically discussed in *Anoop Barnwal* (2023). In this case, public interest litigators sought reform in the appointment process of union election commissioners to preserve their independence. The government urged the court to follow strict separation of powers and leave the issue to be settled by parliamentary debate. However, the Supreme Court dismissed this argument by stating that 'the theory that the court cannot or do not make laws is a myth which has been busted a long ago'.

The Indian Supreme Court also has a rich tradition of striking down personal laws (*Shayara Bano* 2017), expanding the benefits of under inclusionary laws (*DS Nakara* 1983) or determining what constitutes a fundamental right (*KS Puttaswamy* 2017) for upholding constitutionality of legislated laws. Therefore, dismissing the PIL seems inconsistent with judicial precedents. An argument advanced by scholars such as Sengupta (2025), in the context of including LGBTQIA+ persons within the purview of 'aggrieved' under the ambit of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and Malhotra and Sulakshya (2023) in the context of the *Supriyo* decision. The Court could very well direct the government to reform the existing gender specific rape laws, or even strike down the existing rape law as gender discriminatory and under-inclusive. Striking down the law is not a preferable option, an opinion shared by scholars based on precedents in other common law jurisdictions. (Bhardwaj 2023, Sebastian 2023). Rather, expanding the scope of section 377 IPC would have been a more realistic solution. However, given the absence of this section equivalent in the new penal code, it would be best to enact a new gender inclusive sexual assault offence instead.

Advocate Sanjjiv Kkumaar (2018) challenged the constitutionality of gender-specific rape law in India, through another PIL. The Delhi High Court sought the government's response which submitted that most perpetrators of crimes against women are men; therefore, rape laws should be kept gender specific, following consultations with various stakeholders including the NGOWR. Further, globally most sexual offences are committed by men against women; therefore, the government retained gender-specific laws. However, such reasoning is also in dissonance with global trends where sexual violence laws are moving towards providing recognition to non-female victims. Senior advocate and Rajya Sabha (Upper House of the parliament) member, KTS Tulsi, made a few attempts to bring gender neutrality in sexual crimes; first through a PIL in 2018 (*Criminal Justice Society of India*), followed by a private members bill in 2019 (Criminal Law Amendment Bill, 2019 (16 of 2019)). The PIL was dismissed on grounds that amending legislation was within the domain of the legislature whereas the bill lapsed without a discussion in the parliament. The widescale opposition to the enactment of gender neutrality from NGOWR and the reluctance from the government to make changes to the current law explains the lack of urgency in protecting men, trans and non-binary persons from sexual violence under the rape laws.

Some interesting observations can be made regarding the role of gender in the new provisions while comparing the new penal code, BNS and the old penal code, IPC. The BNS includes transgender persons within defined genders under Section 2(9), aligning with Section 2(k) of the TPA, 2019. The offences of Enticement or Detainment or taking

away with criminal intent of a married woman (Section 84), Assault or use of criminal force to woman with intent to disrobe (Section 76) and Voyeurism (Section 77) have been defined in gender inclusive terms regarding perpetrators. However, Section 377 of the IPC, which criminalised non-consensual sexual penetration amongst adults is missing from the BNS, despite recommendation from the parliamentary committee to the government to retain it (BNS report, Paras 1.16-1.17) and experts advocating for a provision for criminalising sexual assault towards non-female victims (Dissent Note (n 3)). Further, the definition of rape under Section 63 does not include trans-women.

Notably, the IPC defined rape and other sexual offences under 'Sexual Offences' whereas the BNS defines them under 'Offences against woman and child.' This reflects the government's outlook that it refuses to even consider the possibility of male, trans and non-binary individuals as rape victims and women as perpetrators. It is also not clear whether a trans woman can be treated as a woman for women specific offences and protective laws such as domestic violence, and dowry harassment. While numerous high courts have affirmed that trans woman is a woman for the purposes of law (*Ganga Kumari,* 2017; *Anamika,* 2018; *Ms X,* 2019; *Anjali Guru Sanjana Jaan,* 2021; *Vithal Manik Khatri,* 2021), some have decided against it (*Bhupesh Thakur* 2024). Thus, a golden opportunity to introduce gender inclusivity in the sexual offences law was missed. Hopefully, future legislators or the Supreme Court would reconsider their stance on this issue.

4. Conclusion

Over the years, many attempts to frame a gender-inclusive rape law in India have been made based on multiple arguments. Four primary arguments have been made, neither of which holds sufficient weight to make a convincing case for having a gendered law on rape in India, as analysed above. It does make sense to frame laws which treat sexual victimisation of all individuals equally. Even if laws catering to specific genders have been made in other jurisdictions, long-standing myths and beliefs tend to hurt such victims from seeking justice and legal recourse. A combined effort of reforming the law while engaging in large-scale sensitization of the entire criminal justice machinery would be a step in the right direction. However, to clarify, policies could be made to largely focus on female victims of rape, who remain the majority of sexual assault victims in Indian society today.

This is because the Indian constitution allows the state to deliver justice in a piece meal fashion and prioritise more vulnerable victims over others. Therefore, the state could devote more resources to female victims of sexual violence till statistical data justifies a change in this approach. What is impermissible is complete denial of the victimhood of non-female victims of sexual violence under the ambit of the existing law which has been aggravated post the removal of Section 377 in the new penal code. Oppression is not a competition and should not be treated as such. Every person irrespective of their gender and sexuality deserves protection from sexual violence and development of a hierarchy of victims should be resisted.

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