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Overview of the Worldwide Practices for Rape Prevention

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ABSTRACT

The laws of Rape have experienced vast revolution all over the globe. Thus, in some places, the word 'rape' has been replaced with 'sexual coercion' or 'sexual assault'; in some places, it has been made gender-neutral; in some others, the element of 'consent' has been set aside, while in some others, marital rape has been acknowledged. There has been symbolic revision to the law on rape, nowadays it is almost invariably criminalized. Rape is universally a crime but the definition and legal principle deviate between countries and yet not everywhere reach the best practice standards developed by international bodies.

The mismanagement of rape and other sex crimes puts victims at a unique prejudice in the criminal justice system, declining the rate of informing rape and increasing the rate of claims withdrawn by victims. Exhaustive sex crime law reform began in the 1970s.³ Feminists denied the view that women are the property of men without separate legal status or rights and claimed transformation in the laws. Most states have widened the terminology of sex crimes to eradicate inequality based on gender and marital status. Most nation-states now precisely perceive rape in the context of marriage. There has been a minimization in the marital exception to rape being a crime but it still remains legal in many countries today also.

Several International developments have taken place over the years with concern to violence against women.⁴ Certain changes are necessary to prosecute rape worldwide⁵ because even today, the laws framed to deal with rape are inadequate and flawed.

The authors purpose is to review the developments in policy practices across the world that aim to prevent rape and to identify best practices and also to ascertain that how far Indian rape laws is at par with other countries law. It is hoped that the findings of this study will help in examining to what extent they address rape prevention.

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³ Women's Law Project, available at: <http://www.womenslawproject.org/> (last visited on January 15, 2021).

⁴ United Nations International Criminal Tribunal for the former Yugoslavia, available at: <http://www.unfpa.org/intercenter/violence/introiiitm> (last visited on January 15, 2021).

⁵ United Nations Population Fund, available at: <http://www.icty.org/x/cases/furundzija/tjug/en/furtj981210e.pdf> (last visited on January 16, 2021).

I. VIOLENCE INTERNATIONAL HUMAN RIGHTS STANDARDS

International law and standards on rape have been full developed not beyond the fabric of gender-based violence and violence against women.⁶ The United Nations Convention on the Elimination of All Forms of Discrimination against Women drives states to proceed with all relevant steps to “eliminate discrimination against women by any person, organization or enterprise” and “modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women and to “eliminate discrimination against women by any person, organization or enterprise” and “⁷States are under obligation for forbidding and prosecuting gender-based violence acts by state actors,⁸ and have a “due diligence” obligation “to take all appropriate checks to prohibit as well as to investigate, prosecute, punish and give satisfaction for acts or exclusion by non-state actors that outcome in gender-based violence against women.”⁹

International human rights law and standards also mandate an exhaustive interpretation of rape to include all non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object.¹⁰ Moreover, legislation should assure that sexual

⁶ The Convention on the Elimination of All Forms of Discrimination Against Women, 1979; The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 1994; The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2005; The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 2011; UN Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence against women, 1992*, available at: <https://www.refworld.org/docid/52d920c54.html> (last visited on October 30, 2020); UN Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, available at: <https://www.refworld.org/docid/4d467ea72.html> (last visited on January 17, 2021);

UN Committee on the Elimination of Discrimination Against Women, *General recommendation on women’s access to justice*, available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf (last visited on January 17, 2021); UN Committee on the Elimination of Discrimination Against Women, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/35&Lang=en (last visited on October 30, 2020); UN Committee on the Elimination of Discrimination Against Women, *General recommendation No. 19: Violence against women*, available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf (last visited on October 30, 2020); United Nation Organisation, *Beijing Declaration and Platform for Action The Fourth World Conference on Women*, available at: https://www.un.org/en/events/pastevents/pdfs/Beijing_Declaration_and_Platform_for_Action.pdf (last visited on January 17, 2021).

⁷ The Convention on the Elimination of All Forms of Discrimination against Women, 1979, art. 1(e), art. (f).

⁸ Committee on the Elimination of Discrimination against Women, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf, (last visited on January 17, 2021), para. 21, 22.

⁹ UN Committee on the Elimination of Discrimination Against Women, *General recommendation No. 19: Violence against women*, available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf (last visited on January 18, 2020), para. 9; *Id.*, para. 24(b).

¹⁰ **Council of Europe Convention on preventing and combating violence against women and domestic violence**, 2011, art. 36 (1)(a); International Criminal Court, *Elements of Crimes*, available at: <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> 8 (last visited on January 17, 2021), p. no. 8, 28, 36-37.

violence and criminal offences of gender-based are punishable by “effective, proportionate and persuasive sanctions, taking into account of their gravity.”¹¹

II. LEGAL ROLE OF CONSENT, FORCE AND COERCION

(A) Europe

*Always take “no” for an answer. Always stop when asked to stop. Never assume “no” means “yes.” If her lips tell you “no” but there’s “yes” in her eyes, keep in mind that her words, not her eyes, will appear in the court transcript.*¹²

About 215 000 violent sexual crimes were registered by the police in the European Union (EU) in 2015. Out of these that is nearly 80 000 were rapes. More than 9 in 10 rape victims and more than 8 in 10 sexual assault victims were girls and women, while approximately all those convicted for such crimes were male (99%).¹³

One survey found that there was some kind of non-physical coercion, aggression, or intimidation was used in 87% of the rapes examined,¹⁴ while actual physical force was used in 85% of the cases.¹⁵ The victim was inhumanly beaten or choked in 32% of the cases.¹⁶ Rape is not an act a victim would find enticing under consensual chances. As one rape victim noted, “Who would consent to lying flat on her back in a dark alley in January?”¹⁷

The legal definition of rape, in Germany was changed to base on consent in November 2016. The condition for the victim to physically resist in order for rape to be established was also abolished.¹⁸ This means, for illustration, that the former may not give permission for prosecution in cases where the victim remains submissive but does not consent. Under Austrian legislation for the act to be punishable the victim must explicitly express her contending will verbally or differently.¹⁹

The vast majority (23) of European countries probed in the course of the research have legal definitions of rape based on coercion, force, threat or force and not on absence of consent.

¹¹ *Id.*, art 45 (1).

¹² Asa Baber, *the Stud Muffin Quiz*, Playboy, June 1992, pg. no. 36.

¹³ Eurostat, *Violent sexual crimes recorded in the EU*, available at: <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20171123-1?inheritRedirect=true> (last visited on January 18, 2021).

¹⁴ Menachem Amir, “Patterns In Forcible Rape” 60(1) *California Law Review* (1972).

¹⁵ *Id.*, at 155.

¹⁶ *Ibid.*

¹⁷ Bohmer, Judicial, “Attitudes Toward Rape Victims” 59 *Judicature* 303, 304 (1974).

¹⁸ German Criminal Code, 1998; das zuletzt durch Artikel 1 des Gesetzes vom, geändert worden ist, 2020, art. 177.

¹⁹ Group of Experts on Action against Violence against Women and Domestic Violence, *Baseline Evaluation Report Austria*, available at: www.rm.coe.int/grevio-report-austria-1st-evaluation/1680759619 (last visited on January 19, 2021).

These are: Austria, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Malta, The Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Switzerland.²⁰

Some of the terminology found in the above-mentioned countries do speak about sexual acts against the person's will but also feel necessary these to be followed by force or, for example, "taking advantage of the situation" (Estonia).²¹ In others, force or threat-based definitions of rape also include chances when the victim is "deprived of the possibility of self-defense" (Bulgaria),²² "incapable of resisting the act" (Denmark).²³ or "unable to express his her will" (Hungary)²⁴.

All of the common law jurisdictions in Europe (Wales, England and Northern Ireland, Scotland, and Ireland) have definitions of consent inserted in the legislation.²⁵ In the Republic of Ireland, where rape has been defined as "sexual intercourse without consent" in legislation the Republic of Ireland of since 1981, a statutory definition of consent was introduced into law in February 2017.

In Spain and Portugal, the governments clearly announced in 2018 that they look forward to modify the legislation to recognize sex without consent as rape, both acting in response to on the large-scale protests in the outcome of high-profile gang rape cases in which the justice system failed the victims.²⁶

The Istanbul Convention addresses the participatory states on how to prevent and combat gender-based violence. The Convention can be seen as a minimal or a standard that the state parties must go after. It comprises a definition of rape, which is defined that includes a penetration, a non-consensual sexual act, or any other acts of a sexual description. Most of the members of the Council of Europe have signed the Convention, including the European Union, and 33 states have ratified it.²⁷ The Convention desires that all of the parties require to take legislative steps "to exercise due alertness to prevent, investigate, punish and provide

²⁰ Amnesty International, *Let's talk about Yes*, available at: <https://www.amnesty.org/en/latest/campaigns/2018/11/rape-in-europe/> (last visited on January 19, 2021).

²¹ Estonia Penal Code, 2015, art. 141.

²² Bulgarian Criminal Code, 1968, art. 152(1)(1).

²³ Denmark Criminal Code, 2005, s. 216(2).

²⁴ Hungary Criminal Code, 2012, art. 197(1)(b).

²⁵ Sexual Offences Act, 2003, s. 74; Sexual Offences (Scotland) Act, 2009, part 2; Sexual Offences (Northern Ireland) Order, 2008, s. 3; Criminal Law (Sexual Offences) Act, 2017, s. 48(9).

²⁶ Amnesty International Portugal, *Amnesty International Portugal concerned about gender stereotypes in the ruling of Porto Court of Appeal*, available at: www.amnistia.pt/amnistia-internacional-portugal-preocupada-com-acordao-que-contem-estereotipos-de-genero-com-mensagemprejudicial-as-vitimas-de-violencia-sexual/ last (last visited on January 19, 2021).

²⁷ Council of Europe Convention on preventing and combating violence against women and domestic violence, 2011.

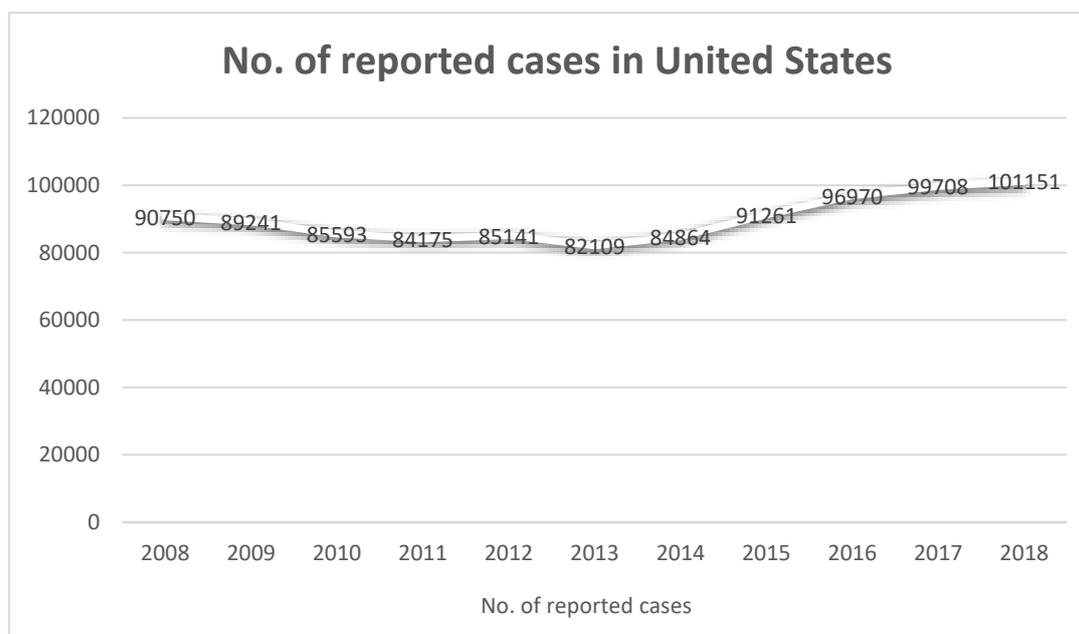
reparation for acts of violence protected by the purview of this Convention that are carry out by non-State actors”²⁸

Sweden is one of the EU member states that has newly amended the rape provision by enacting new provision in the Penal Code,²⁹ which now says that “*anyone who, with a person who does not participate voluntarily, conducts sexual intercourse or another sexual act which, in view of the seriousness of the violation, is comparable to sexual intercourse, is guilty of rape and may be sentenced to imprisonment for a minimum of two years and a maximum of six years.*”³⁰ This provision recorded into effect on 1 July 2018.

In Germany, the legal definition of rape was changed to a consent-based one in November 2016. The requirement for the victim to physically resist in order for rape to be proven was also repealed.³¹

To sum up, out of all the European states only ten specify rape on the basis of non-appearance of consent in their legislation which are: Belgium, Ireland, England and Wales (one jurisdiction), Scotland, Northern Ireland, Luxembourg, Belgium, Cyprus, Ireland, Germany, Sweden and Iceland. (For the convenience of authors it is taken in the research that three of these jurisdictions are constituent of the United Kingdom, these could be enumerated as eight states in totality.)

(B) United States



²⁸ *Id.*, art. 5(2).

²⁹ Swedish Criminal Code, 1962.

³⁰ *Ibid.*

³¹ Germany Criminal Code, 1998 (BGBl. I S. 3322), *supra* note 16.

This statistic display the **reported forcible rape cases between 2008 and 2018**.³²

Sources: FBI; US Bureau of Justice Statistics

Source link: [Fbi.gov](https://www.fbi.gov)

There is no uniform legal definition of consent. That's because sexual assault laws, of which consent is often a key component, vary widely state by state.

The definition of consent in the Wisconsin statute is the most progressive in the country and administer the most protection to sexual freedom and an individual's privacy rights.³³ The consolidation of force and freely given consent is not logical, however, in certain circumstances where the proof of force makes it sensible that no freely given agreement could likely be given. Use of the Wisconsin definition exclude the issue of implied consent³⁴. Wisconsin Court of Appeals strengthened this rejection of implied consent in the case *State v. Lederer*.³⁵ The court there concluded that a victim's verbal protests were more than enough to imply non-consent, and held that "No" means no.³⁶ The Minnesota Criminal Code add a reform definition of consent. The basic component of the crime of criminal sexual act are sexual penetration practiced by coercion or force.³⁷ The victim's lack of consent is not covered in the definition of the crime. In a separate "Definitions" section, notwithstanding, the statute explains that "*Consent*' means a voluntary uncoerced manifestation of a present agreement to perform a particular sexual act."³⁸ This definition precisely excludes the use of implied consent, as a current agreement to the individual sexual act must be manifested.

The New York law clearly maintains lack of consent as an element of each sex crime by adding that "*whether or not specifically stated, it is an element of every sex offense that the sexual act was committed without consent of the victim.*"³⁹ The Washington rape law, which has been extensively acknowledged as a major rape reform statute, uses the term "forcible compulsion," but provides its own definition."⁴⁰

³² Statista, available at: <https://www.statista.com/statistics/191137/reported-forcible-rape-cases-in-the-usa-since-1990/#statisticContainer> (last visited on January 20, 2021).

³³ Weiner, "Shifting the Communication Burden: A Meaningful Consent Standard in Rape", 6 *Harv. Women's L.J.* 143, 155-58 (1983); Note, "Abolishing the Marital Exemption for Rape: A Statutory Proposal", *U. ILL. L. Rsv.* 158-61 (1983).

³⁴ *State v. Clark* (1978) Wis. 2d 804.

³⁵ (1980) Wis. 2d 430.

³⁶ *Id.*, at 436.

³⁷ Minnesota Statutes, 2019, s. 609.342.

³⁸ *Id.*, s. 609.341(4).

³⁹ New York Penal Law, 1975, s. 130.05.

⁴⁰ Revised Code of Washington (RCW), 1982, s. 9A.44.010.

(C) Islamic Laws (with special reference to Shariah law)

This research examines the situation of women in Islamic societies (with specific focus on Bangladesh, Egypt, Mali, Yemen, and Sudan⁴¹) Islamic law is predominant in only a few countries (e.g. Pakistan, Saudi Arabia, Iran, and Sudan to a lesser degree) but rising interest for greater application of Shariah, and the enactment of elements of this into widespread legal systems, are aim for the Islamist movements in many countries (e.g. Egypt - Shukrullah, personal communication; Bangladesh)

In Egypt rape is defined by article 267 of the Criminal Code as having complete sexual intercourse with a female without her free consent.⁴² The Criminal Chamber of the Egyptian Court of Cassation has also interpreted the crime of rape, declaring in Ruling No. 4113 of January 6, 1988, that complete sexual intercourse (full penetration) against the will of the victim is a key factor for ascertaining whether or not the offense is rape or sexual assault. The Criminal Code addresses sexual violence (Criminal Code, Article 270) and criminalizes rape (Article 269).

In Yemen the definition of rape is based on lack of consent. The law also caters for increased penalties for aggravated forms of rape and sexual violence.⁴³

In Sudan A man is said to commit rape, who, save in the case herein after excepted, has sexual intercourse with a woman against her will or without her consent but if a consent given by a women below the age of 16 years to such intercourse by her teacher, guardian or any other person entrusted with her care or education shall not be a consent within the meaning of this article.⁴⁴

In Bangladesh *“The colonial definition of rape in the Penal Code, does not define penetration, fails to elaborate the meaning of consent, or how consent can be proved. The law still requires proof of physical resistance”* -Taslima Yasmin Assistant Professor, Dept. of Law, University of Dhaka⁴⁵

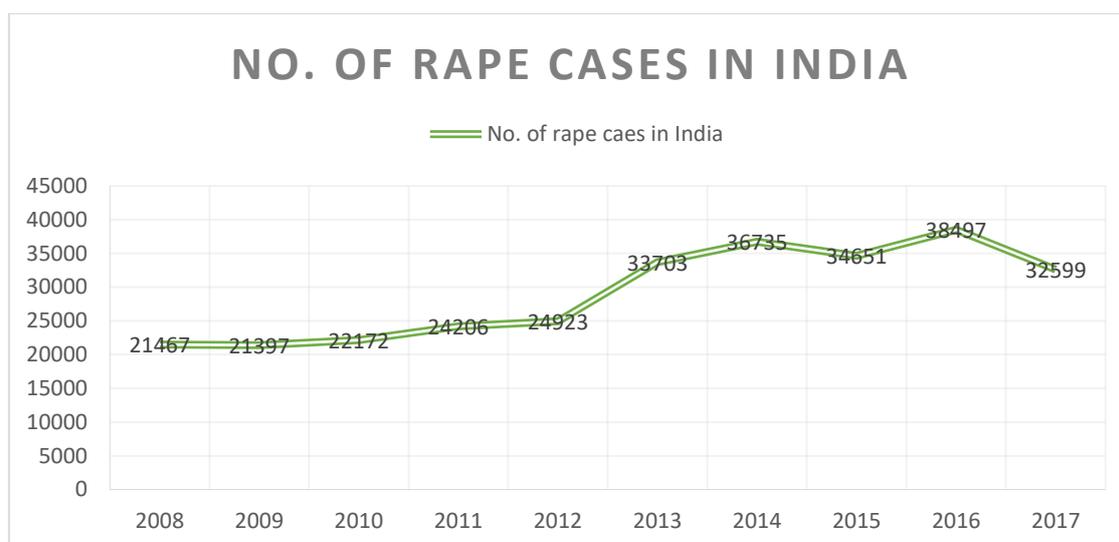
⁴¹ These countries are referred to as 'Islamic' in that a majority of the population are Muslim, although all have non-Muslim minority populations of varying sizes. Sudan has a non-Muslim population of 40 percent, predominantly in the south of the country, although civil war and famine have caused the displacement of large numbers of southern Sudanese to the north, especially Khartoum. In Bangladesh there are small Hindu and Christian minorities (10 percent of population); in Mali there are Animist and Christian minorities (30 percent); in Egypt there are important Christian (Coptic) and Jewish minorities. Most of the population in Yemen is Muslim, although there are both Sunni Muslims and a large minority (40 percent) of Zaydi Shi'is. (NB the figures given here are only approximate.)

⁴² Criminal Code, 2011, art. 267.

⁴³ Yemen's Personal Status Act, 1992 art. 40.

⁴⁴ Sudanese Penal Code, 1925, art. 316.

⁴⁵ Bangladesh Legal Aid and Services Trust, *Rape Law Reform In Bangladesh*, available at: <https://www.blast.org.bd/content/publications/BLAST-RLR-Conference-Report.pdf> (last visited on January 22,

(D) India

Source: National Crime Records Bureau

Explanation 2 annexed to section 375 of the Indian Penal Code defines consent as “*an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act*”.

It is an urgency that a high measure of objectivity be read into section 375 of the Indian Penal Code, because most of the time it is tough for a victim to convey the absence of consent. A victim may well resign to an accused’s sexual advances by becoming frightened due to possible violence and thus, her mere submission cannot be considered consent. Judgements like *Mahmood Farooqui* undo the very aim of 2013 Criminal Law (Amendment) Act, which was passed after the considerably headlined Delhi Gang Rape incident. The legislation de-conceded the victim’s sexual history and supposed the absenteeism of consent in cases of rape. thus constituting an objective standard for concluding consent in favor of the victim. Such delinquent judgments make evident that a symbolic change in the interpretations of Indian rape laws is an urgently needed.

III. MARTIAL RAPE

Marital rape is a rampant problem throughout the world. Some studies put forward that as many as one in three women has experienced sexual and/or physical violence committed by a husband or other male intimate.⁴⁶

2021).

⁴⁶ World Health Organization, *Violence against women: Intimate Partner and Sexual Violence against Women*, available at: www.who.int/mediacentre/factsheets/fs239/en/ (last visited on January 22, 2021).

Still many of the world's countries fall short to criminalize sexual assault in marital relationships. International human rights laws' due diligence framework requires a range of reaction that include the duty to prevent, protect, and provide redress, along with the duty to prosecute and punish. Explicitly framing states' duty in terms of that more comprehensive approach would reach broadly to address the cultural and social barriers that allow marital rape to continue without sanction.⁴⁷

(A) Europe

There has been a markdown in the marital exception to rape being a crime but it still remains legal in many countries today also. It was criminalized in the Nordic European countries in the 1960/70s but in other European countries, like the United Kingdom, or third countries like the United States, Australia and New Zealand only in the 1990s.

As stated in the case law to the European Court of Human Rights in the case of *M.C. v Bulgaria*, *"The equality approach starts by examining not whether the woman said 'no', but whether she said 'yes'. Women do not walk around in a state of constant consent to sexual activity unless and until they say 'no', or offer resistance to anyone who targets them for sexual activity. The right to physical and sexual autonomy means that they have to affirmatively consent to sexual activity."*⁴⁸

In Denmark, the provision whereby if the perpetrator and the victim got married, the perpetrator was eligible for a lesser sentence or acquittal was repealed as late as 2013, following advocacy efforts, including Amnesty's.

In Bulgaria, a similar provision (Art 158) was nullified even more recently, in 2015.

In March 2018, the Greek Parliament acceded legislation ratifying the Istanbul Convention and reconciling certain parts of national legislation with it.

Under the Istanbul Convention, parties are obliged to *"take the necessary legislative or other measures to ensure that the provisions of paragraph 1 [criminalization of sexual violence, Article 36] also apply to acts committed against former or current spouses or partners as recognized by internal law."*⁴⁹

In Seven out of the 28 Member States of the EU, marital rape is not defined as a

⁴⁷ JGoldscheid, "Considering the Role of the State: Comment on Criminalizing Sexual Violence against Women in Intimate Relationships" 109 *AJIL Unbound* 202 (2015).

⁴⁸ *M.C. v. Bulgaria* (2003) Application no. 39272/98.

⁴⁹ Council of Europe Convention on preventing and combating violence against women and domestic violence, 2011, art. 36(3).

crime.⁵⁰ Germany made spousal rape illegal only in 1997, which is later than other developed countries.⁵¹ Finland was one of the last countries in the EU to criminalize marital rape, it was made illegal in 1994.

(B) Unites States

In United States two types of laws prevail i.e., National Laws and State laws. There is no national law on rape, so accordingly each state has its own law regarding it. The offence of rape has been mentioned in the Uniform Code of Military Justice under Chapter 47X, section 920, Article 120 and under this provision marital rape is illegal that is it cannot be used as a defense by the accused. The current position of state laws is that, in all the 50 states of America, marital rape is illegal. Initially, there existed the “Marital Rape Exemption” which allowed a person to rape a spouse without fear of facing any legal action. South Dakota was the first state to drop this exception and North Carolina the last one.

However, certain landmark cases changed the perspective on marital rape in the United States. In *People v. Liberta*, the New York Court of Appeals ascertained that a married woman has the same right to dominion her own body as does an unmarried woman.⁵² The court in *Liberta* did not give great yielding to the legislature and its badly designed statute because it was based on gender discrimination and instead, enacted a new rape statute which abolished the marital rape exemption and penalized those who commit rape, regardless of gender or marriage. According to *Liberta*, the aim behind the early rape laws was to safeguard the integrity of women.⁵³ Currently, *People v. Liberta* stands as the law for marital rape in the United States, yet, not all states follow this law to abolish marital rape in a joined-up manner.⁵⁴

(C) Islamic Laws (with special reference to sharia law)

Marital rape is not criminalized. Rape of a wife by a husband was not conventionally subject to punishment in Sharia courts, but a husband is under a general duty not to harm his wife.⁵⁵

There is no law to criminalize domestic violence in Oman. Marital rape is also not accepts and cases of family violence can only be delivered under general assault or battery charges.⁵⁶

⁵⁰ European Parliament, available at: <https://www.europarl.europa.eu/> (last visited on January 22, 2021).

⁵¹ BBC, *Germany rape law: 'No means No' law passed*, available at: <https://www.bbc.com/news/world-europe-36726095> (last visited on January 22, 2021).

⁵² *Griswold v. Connecticut* (1965) 381 U.S. 469; *People v. Liberta* (1984) 152 N.E.2d 567.

⁵³ Anne Dailey, “To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment”, 99 *Harvard Law Review* 1257 (1986).

⁵⁴ *People v. Liberta* (1984) 152 N.E.2d 567.

⁵⁵ Arab States, available at: https://arabstates.unfpa.org/sites/default/files/pub-pdf/Saudi%20Country%20Assesment%20-%20English_0.pdf (last visited on January 23, 2021).

⁵⁶ Human Rights Watch, *Oman 2016*, available at: <https://www.hrw.org/world-report/2017/country-chapters/oman> (last visited on January 23, 2021).

In Egypt marital rape is not criminalized as it is indicated in the law that a woman may not refuse sexual relations with her husband.⁵⁷ Exception - Such sexual intercourse by a man with his own wife is not rape, if she has attained to puberty.

1. Positive Developments in Muslim Family Laws⁵⁸

Family Matter	Muslim Family Laws Currently in Force
Violence against women in the family Applicable CEDAW Provision GRs 12 & 19 Para. 40 GR21	Marital rape: South Africa, Turkey: Marital rape is criminalized.

CEDAW Committee's third commitment with the Government of Maldives, which assented to the CEDAW Convention on 1 July 1993, and entered reservations to Article 16, and reserves its right to apply the article '*without prejudice to the provisions of the Islamic Sharia, which govern all marital and family relations of the 100 percent Muslim population of the Maldives.*'⁵⁹ Marital rape not criminalized. The Domestic Violence Prevention Act (2012) does not cover marital or spousal rape.⁶⁰

Turkey and Malaysia criminalized in 2005 and 2007 respectively.⁶¹ In Indonesia, marital rape has been ruled in the Domestic Violence Eradication Act 2004 It is practiced as one of the forms of sexual harassment.

Clause (5) of section 375⁶² with or without her consent when she is under 14 years old. Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Sexual intercourse by a man with his own wife, the wife not being under 13 years of age is not rape." Therefore, it will not be rape if any wife is more than 13 years old.

Marital rape is not recognized as a criminal offence in the Sudanese Criminal Act. Acts of rape within marriage may be prosecuted as assaults but we are not aware of any such practice.⁶³

Significantly, the offense of rape has been removed from the Zina Ordinance and returned to the Pakistan Penal Code in the form of Section 375.⁶⁴ The offense of rape is defined in such a

⁵⁷ *Supra* note 53.

⁵⁸ This table is based on Musawah's research on Muslim family laws and practices in 30 countries.

⁵⁹ *United Nations Treaty Collection: CEDAW Declarations and Reservations*, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited on Jan 24, 2021).

⁶⁰ *Ibid.*

⁶¹ Wikipedia, *Marital Rape*, available at: https://en.wikipedia.org/wiki/Marital_rape (last visited on January 24, 2021).

⁶² Bangladesh Penal Code, 1860, cl. (5) s. 375.

⁶³ Sudanese Criminal Penal Code, 1925, art. 316.

⁶⁴ Pakistan Protection of Women (Criminal Laws Amendment) Act, 2006, s. 5.

manner that marital rape, if defined as the sexual intercourse with a woman against her will or without her consent, is an offense under Pakistani law.⁶⁵ Any sexual intercourse with a woman under the age of sixteen is defined as rape, irrespective of consent.⁶⁶

(D) India

The definition of rape codified in Section 375 of the Indian Penal Code incorporate all forms of sexual assault implicating nonconsensual intercourse with a woman.⁶⁷ Nevertheless, Exception 2 to Section 375 exempts unwilling sexual intercourse between a husband and a wife over fifteen years of age from Section 375's definition of "rape" and thus protect such acts from prosecution. As per prevailing law, a wife is assumed to deliver eternal consent to have sex with her husband after coming into marital relations. While unwilling sexual contact between a husband and a wife is accepted as a criminal offense in almost every country of the world, India is one of the thirty-six countries that still have not criminalized marital rape.⁶⁸ The Supreme Court of India and various High Courts are presently surged with writ petitions challenging the constitutionality of this exception, and in a recent landmark judgment, the Supreme Court criminalized unwilling sexual contact with a wife between fifteen and eighteen years of age.⁶⁹ This judgment has in turn led to an increase in other writs challenging the constitutionality of Exception 2 as a whole.

The marital rape victims have to take protection in Section 498-A of the IPC or to the PWDVA. This Act came into force in 2006, effectively provides protection against marital rape or other forms of sexual aberration and domestic violence. However, it offers only a civil remedy for the offence.

But while the data on marital rape in India exists, marital rape as a crime, "does not exist".

"The form of sexual violence most ordinarily reported by women was that their husband used physical force to have sexual intercourse when they did not want to," says the survey.⁷⁰

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

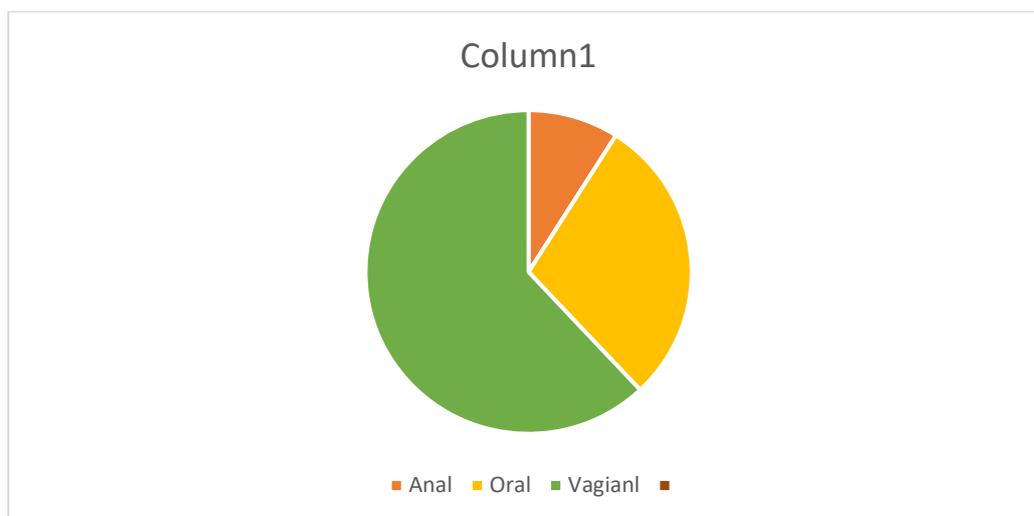
⁶⁷ Indian Penal Code, 1860 (No. 45 of 1860), s. 375.

⁶⁸ "Marital Rape in India: 36 countries where marital rape is not a crime", *India Today*, March 12, 2016, available at <https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12> (last visited on February 4, 2021).

⁶⁹ *Independent Thought v. Union of India* (2013) 382 SCC 2017.

⁷⁰ National Family Health Survey India, available at: <http://rchiips.org/NFHS/NFHS-4Report.shtml> (last visited on February 9, 2021).

IV. GENDER NEUTRAL RAPE LAWS



Type of penetration by frequency based on responses from 154 men.⁷¹

Accordingly, to quote Phil Rumney:

gender-neutral reforms are not designed to make gender irrelevant in our understanding of sexual violence; in fact, gender is central to any understanding of how and why sexual violence occurs. What is clear, however, is that while females are the main victims of sexual violence and males the main perpetrators, one still has to consider how sexual assaults beyond the male-on-female paradigm are to be labeled by the criminal law.⁷²

The results of a new survey of penal codes in 189 countries⁷³ reveal a rampant lack of legal protection for men who experience sexual abuse. Not only do these frameworks make justice for male victims an unworkability in many countries, they can determinedly dampen first-instance reporting to police and service providers by male victims.

In 2013, the United Nations (UN) Security Council for the first time declared in Security Council Resolution 2106 that conflict-related sexual violence also affects men and boys.

Some jurisdictions across the globe have done aside with Heteronormativity of Rape Laws by adapting Gender Neutral terms in their Criminal Codes for Definition of the Offense of Rape (or Sexual Assault). A fundamental example of Gender neutrality is that of International Criminal Law which has always recognized Gender Neutrality in the offense of Rape. In

⁷¹ Lancaster University, *Forced-To penetrate Cases: Lived Experiences of Men*, available at: <https://wp.lancs.ac.uk/forced-to-penetrate-cases/files/2016/11/Project-Report-Final.pdf> (last visited on January 29, 2021).

⁷² Phil Rumney, "In Defence of Gender Neutrality Within Rape" 6(1) *Seattle Journal for Social Justice* 481 (2007).

⁷³ IISS, Armed Conflict Database, available at: <https://www.iiss.org/publications/armed-conflict-database> (last visited on January 29, 2021).

National Jurisdiction, Gender Neutrality of rape has been quite recent. These include- United States of America, Finland, United Kingdom, Canada, Philippines, Ireland, and Australia⁷⁴. Some of these jurisdictions recognize both males and females as perpetrators⁷⁵ and rest have only made their definitions gender neutral in case of victims⁷⁶.

(A) Europe

In 2017, England and Wales had the most documented rape offences reported in selected European countries, which is 48 thousand female victims of rape and 5.8 thousand male victims. France had the second top notch number of rapes at 14.9 thousand female victims and approximately 2.2 thousand male victims.⁷⁷

Erstwhile English Common Law did not formally recognize male rape. Sexual Assault of Males was recorded and penalized as non-consensual buggery, which toted a lesser sentence. 1994 onwards, the Law recognizes males as victims of Rape.⁷⁸

The Irish and Scottish Statues for Sexual Offences also recognize males as victims.⁷⁹

(B) United States

In 2013, USA has amended the definition⁸⁰ of Rape in the Title 18 of the US Code to be Gender neutral. Earlier, rape was perceived when committed on a female victim⁸¹ and was defined as sexual intercourse, against her will.⁸² There had been successful attempts to bring about Gender neutrality prior to this amendment in different states such as Washington.⁸³ Nevertheless, some states⁸⁴ had continued to recognize Gender specific rape.⁸⁵

⁷⁴ Philip N.S. Rumney, "In Defense of gender neutrality within rape", 6(1) *Seattle J. Soc. Justice* 481 (2007).

⁷⁵ United States of America, Canada etc.

⁷⁶ England, Ireland, Scotland etc.

⁷⁷ Statista, available at: <https://www.statista.com/statistics/1072770/number-of-rapes-in-europe/> (last visited on February 10, 2021).

⁷⁸ Criminal Justice and Public Order Act, 1994, s. 142.

⁷⁹ Sexual Offences (Scotland) Act, 2009; Sexual Offences (Northern Ireland) Order, 2008.

⁸⁰ "Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim"

⁸¹ The offense of Rape prior to 2013 was defined as Carnal knowledge of a female forcibly and against her will.

⁸² Criminal Justice Information Services Division, *Crime in the United States 2013*, available at: https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/rapeaddendum/rape_addendum_final (last visited on February 12, 2021).

⁸³ Washington Review Code, 2006, s. 9A.44.010 defines rape as "A person is guilty of rape in the first degree when such a person engages in sexual intercourse with another person by forcible compulsion"; *United States v. Smith* (1978) 574 F.2d 98, the Ninth Circuit held that sexual intercourse is "any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex [and] any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another."

⁸⁴ Patricia Searles and Ronald J Berger, "The Current Status of Rape Reform Legislation: An Examination of State Statutes", 10 *Women's Rts. L. Rep.* 25 (1987).

⁸⁵ *Brooks v. State* (1975) 330 A.2d 670, 672 Special Court of Appeals in Maryland rejected plea to make Gender neutral rape law stating, "that only females may be raped is nothing short of a physiological reality."

Erstwhile English Common Law did not customarily recognize male rape. Sexual Assault of Males was recorded and penalized as non-consensual buggery, which carried a lesser sentence. After 1994, the Law recognizes males as victims of Rape.⁸⁶

The Scottish and Irish Statutes for Sexual Offences also recognize males as victims.⁸⁷

In Unites States one in five women and one in 71 men will be raped at some point in their lives
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(C) Islamic Laws (with special reference to sharia law)

In the armed conflict in the former Yugoslavia, it has been reported that, ‘in 6000 concentration camp victims in the Sarajevo Canton, 5000 were men and 80% of them had reportedly been raped.’⁸⁹ In Liberia, a survey of 1666 adults found that 32.6% of male combatants (118 of 367) experienced sexual violence while 16.5% (57 of 360) were forced to be sexual servants.⁹⁰

The Secretary-General, for example, has recognized in his report on children and armed conflict in Afghanistan that, ‘there are a number of substantive reports of children, especially boys, being sexually abused and exploited by members of the armed forces and armed groups.’⁹¹

In Bangladesh while the laws cover women and female children, serious sexual violence against male children is left uncovered.⁹²

The definition of rape under the criminal code covers women only and exempts men from being labelled as victims of rape. The phrasing of section 375 clearly states that the rapist can only be a man and the victim a woman because penile penetration is an essential ingredient for the offence of rape.

The Egyptian feminists and human rights activists have for many years aimed to eradicate the silence around women’s and girls’ vulnerability to sexual violence, the appreciation of men’s exposure to sexual violence in particular in everyday life has been less forthcoming.⁹³ This

⁸⁶ Criminal Justice and Public Order Act, 1994, s. 142.

⁸⁷ *Supra* note 77.

⁸⁸ National Sexual Violence Resource Center, *Statistics about sexual violence, available at: nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf* (last visited on February 15, 2021).

⁸⁹ Zeljka Mudrovic, ‘Sexual and Gender-Based Violence in Post-Conflict Regions: The Bosnia and Herzegovina Case’ in *The Impact of Armed Conflict on Women and Girls: A Consultative Meeting on Mainstreaming Gender in Areas of Conflict and Reconstruction* UNFPA 64 (2001).

⁹⁰ Kirsten Johnson et al., ‘Association of Combatant Status and Sexual Violence with Health and Mental Health Outcomes in Post conflict Liberia’ 300(6) *Journal of the American Medical Association* 676 (2008).

⁹¹ UN Security Council, *Report of the Secretary-General on children and armed conflict in Afghanistan, available at: <https://www.refworld.org/docid/4d6238044.html>* (last visited on February 20, 2021).

⁹² *Supra* note 43.

⁹³ At the time of publication, there were no reports specifically dedicated to gender-based violence against men in

taboo has been brought by the media and human rights activists in Egypt only in the past few years.

While reform desired at gender neutrality in many countries has had the effect of defining penetrative sexual offending against men, I found no record of this being a stated or even aimed in sharia law

(D) India

The offense of rape as laid down under the Indian Penal Law⁹⁴ continues deem male as the putative perpetrator, and female as the putative victim.⁹⁵

More recently, the question of whether the Rape law should be made Gender neutral is being considered by the Supreme Court in a Public Interest Litigations filed be by Adv. Rishi Malhotra⁹⁶ and Sanjiv K kumar⁹⁷

The Section 375 and 377 of the Penal Code, 1860 and Section 9 and 10 of the Prevention of Women and Children Repression Act, 2000 addresses the issue of rape and sexual harassment. The definition of rape under Section 375 of the Penal Code provides the definition on the assumption that only a woman can be a victim of rape. Unfortunately, rape of man or male children and penetration by other means or oral penetration are not included in the definition which have made the law gender biased and inadequate to ensure justice for male victim. The Section 9 (1) of the Prevention of Women and Children Repression Act, 2000 excluded any scope of justice for male rape victims.

V. CONCLUSION AND RECOMMENDATIONS

Inadequate and incompetent legislation criminalizing rape remains a problem in many European states. The Istanbul Convention stands in need for criminalization of rape and all other non-consensual acts of sexual nature.⁹⁸ Today, rape is seen as a non-consensual act, so the perquisite of violence seems unjust. Hence, it seems that the consent-based legislation fits

Egypt, though I have encountered a lot of anecdotal evidence of its occurrence.

⁹⁴ *Supra* note 65.

⁹⁵ *Ibid.*, defines rape as the act of a man having sexual intercourse with a woman against her will or without her consent, or where consent is obtained by coercion or misrepresentation or fraud, or where the woman does not have the capacity to consent.

⁹⁶ *Rishi Malhotra v. Union of India Writ Petition* (Criminal) 145 of 2017.

⁹⁷ *Sanjiv kumar v. Union of India Writ Petition* (Civil) No. 8745 of 2017.

⁹⁸ Council of Europe Convention on preventing and combating violence against women and domestic violence, 2011, art. 36(1); Council of Europe, *Recommendation Rec (2002) 5 and documents concerning violence against women*, available at: <https://www.coe.int/en/web/genderequality/recommendation-rec-2002-5-and-other-tools-of-the-council-of-europe-concerning-violence-against-women> (last visited on February 13, 2020), which urges states to punish all non-consensual acts, including where the victim doesn't show resistance; PACE Resolution 1691, 2009, para. 5.2.1, which calls on states to "make rape (including marital rape) an ex officio crime."

more to the morals of today in Europe due to the changed mentality. As human integrity and sexual autonomy are seen as meaningful rights of the individual, it should be appreciated that sexual activity needs consent. There is no rigid legal definition of consent. That's because of considering that sexual assault laws, of which consent is often a key element, vary widely state by state. Only few states, among them Wisconsin, Florida and, California, have an affirmative consent. Far more than that about half of all states don't define consent at all in their sex assault laws. Many of these states use force, rather than lack of consent, as a standard for deciding whether an assault occurred.

In India section 375 gives the definition of rape, as presently interpreted and used within a cultural narrative that polices and suppress female sexuality, fails to protect women who are forced to "consent" to sexual violence through absence of choice. It emphasizes the need for an affirmative consent standard to pacify the damage caused to women under this system.

In seven of the 28 Member States of the EU, marital rape is not defined as a crime. As a result, victims of such violence are left defenseless. Marital rape must therefore be recognized as a specific crime throughout the EU, as recommended by Amnesty International and prescribed by the Istanbul Convention. In the United States, each state treats the marital rape exemption differently. The laws vary from a complete spousal exemption to exclusion of marital exemption.

The exception under Section 375 which permits a man to have sexual intercourse with his wife without her consent is the violation of Article 14 & 21 of Constitution of India. But the exemption under Section 375 of IPC, 1860 discriminates a wife when it comes to protection from rape.

The Islamic Sharia advised that the sexual intercourse between man and wife should be conducted with intimacy and love and made such amicable conduct as a sign of piety. So, the marital rape should be criminalized as it is Un-Islamic.

We argue that the legal definition of rape in India persist to be deficient in its scope, despite amendments, because of its concentration on penetration. The obsession with penetration also prevents a more gender-just and inclusive conceptualization of rape. 'Men' as penetrators are almost unthinkable to imagine as victims, and 'women' as passive recipients of the penetration, cannot be envisaged as perpetrators in India.

Recommendations for India

After the analysis of various countries laws the authors recommend for India the below mentioned things:

The perception that a woman's silence is persistent with her sexual fulfillment presumes that her partner is naturally able to discern her sexual desires and she needs it correctly. Given the complexity and variability of sexual desires and the uncertainty and unreliability of nonverbal sexual signals, this inference seems baseless, even absurd. So, there is a ground that such views is sufficient reason for rejecting them as a model of mutual sexual enjoyment.

Section 375 of the IPC is apparently the only provision that in itself discriminates among two groups of the same sex that is married women and unmarried women. It is illogical to have a law in which, one part safeguards all women from sexual violence but at the same moment also allows marital rape of a married woman by her husband. So, the punishment for marital rape should be the same as the one given for rape under Section 376 of the Indian Penal Code;

- The fact that the parties are married should not make the sentence lighter or lesser
- Also, it should not be an immunity to the charge that the wife did not fight back and resisted forcefully or screamed and yelled.

The fear of the law being exploited creates a difficult situation. So, we must try to equalize the rights of all identities. We require a law in which on the one hand safeguard is given to all identities, i.e., women, men, and the transgender community against sexual violence, and on the other does not create a problem for the most vulnerable section of the society that is obviously the women.

But at the same time remedies should also be there for rape and sexual offences against male and boys and many things need to be done before the issue of rape against them can be perfectly discussed. There should be free of denial or shame. Such an important development will enable to have more exhaustive prevention remedies and better help for the victims can be given.

Also, in the case of rape of minors, according to the POCSO Act, the victim may either be male or female. However, in cases of adults under the IPC, rape is as an offence only if the offender is male and the victim is female. So, the laws should also be implemented for male and adequate remedies should be made available for them also.

Yet, it is our belief that accomplishing a law gender neutral should not be seen as yet 'another tool' which is violation to women. Rather it should be considered as a tool to safeguard male victims and encourage them to come forward and seek justice under India's legal system. Abridging their right to seek remedy under law is just one more form of discrimination, and is in neither way an advantage for women or the matter of feminism.

Rape is rape, regardless of who the perpetrator is.