

# LAWS RELATING TO RAPE IN SOUTH ASIA: A COMPARATIVE ANALYSIS



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# Laws Relating to Rape in South Asia: A Comparative Analysis

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# BACKGROUND

Sexual violence is criminalized in some form in every legal system without exception. In South Asia, rape is recognized as a crime in every country. Since the criminal law of a cluster of countries in South Asia is based on the Indian Penal Code introduced during the British rule, similar terminology is used to define rape across South Asia. Laws in countries such as Nepal and Bhutan reflect a progressive trend with regard to sexual offences, following the recent amendments and revisions to their Penal Codes effected post 2010.

There have been efforts to define rape in international law. International law recognizes rape of civilians and those not taking part in hostilities to be a crime against humanity and a war crime.<sup>1</sup>The constituents of rape in the 'Elements of Crimes' accompanying the Rome Statute include 'invasion', 'penetration' of part of the body- including the anus and 'genital opening'. The said invasion is by 'force, or by threat of force or coercion'.<sup>2</sup>

International tribunals have further clarified the applicability of this provision in case law. In the case of *Akayesu*,<sup>3</sup> the International Criminal Tribunal for Rwanda (ICTR) defined sexual violence as follows:

*"[A] physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive."*

In the case of the *Furundzija*,<sup>4</sup> the International Criminal Tribunal for the former Yugoslavia (ICTY), following a survey of national jurisdictions, discussed the elements which need to be included in the definition of rape: *"This act is the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by other object"*.<sup>5</sup>

Though the general offence of rape in domestic legal systems corresponds to the crime of rape as defined in international law, particularities differ. Right to equality and non-discrimination based on sex is recognized as a fundamental right by all South Asian states. Despite this recognition, there are gender biases in laws relating to rape which discriminate against women. For instance, there is impunity for rape within marriage across South Asia with a few exceptions.<sup>6</sup> In Sri Lanka, India, Pakistan, Bangladesh, and Afghanistan marital rape is not recognized as a crime.

While laws relating to rape place women at a disadvantaged position due to the influence of gender based stereotypes, rape laws in some South Asian states completely exclude rape when it is perpetrated against men or transgender people as a result of gender specific language in the statutes. Where this is the case, rape against men or transgender people is prosecuted under colonial sodomy laws which also criminalize same-sex sexual relations.

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<sup>1</sup> Respectively Article 7(1)(g) and Article 8(2)(b)(xxii) of the Rome Statute; See UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: <https://www.refworld.org/docid/3ae6b3a84.html>.

<sup>2</sup> International Criminal Court (ICC), Elements of Crimes, 2011, ISBN No. 92-9227-232-2, available at: <https://www.refworld.org/docid/4ff5dd7d2.html>

<sup>3</sup> *Akayesu*, Jean Paul (ICTR-96-4) Available at <https://unictr.irmct.org/en/cases/ictr-96-4>.

<sup>4</sup> *Furundzija* [1998] IT-95-17/1-T Available at <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

<sup>5</sup> *ibid*

<sup>6</sup> Exceptions are Nepal, Bhutan. In Maldives marital rape is recognized only under certain circumstances; For Maldives see 'Country Profile on Universal Access to Sexual and Reproductive Rights: Maldives', Available at <https://arrow.org.my/wp-content/uploads/2017/04/Country-Profile-on-Sexual-and-Reproductive-Rights-Maldives.pdf>.

This paper discusses laws relating to rape in Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka with particular reference to the implications of gender specific provisions. The paper also examines possible law reforms which can address disparities in the treatment of men and women in Sri Lanka.

# OVERVIEW

This section illustrates selected aspects and observations on the laws applicable to rape, in the countries considered for the study.

Laws relating to rape in Bhutan and Maldives use gender neutral language. In India, Nepal, Bangladesh, Pakistan, and Sri Lanka, the definition of rape employs gender specific language, thus restricting the application of the law to instances where rape is committed by a man against a woman.

The Indian Penal Code which was introduced by colonial rulers in 1860, was inherited by Pakistan after partition and by Bangladesh after its independence. Therefore, even after subsequent Amendments, the language in the Penal Codes of the three countries remains similar. The Indian law relating to rape has undergone significant reforms after 2013. However, the elements of rape under laws of Pakistan and Bangladesh's penal laws remain identical, except for the differences in the age of consent.

In India, Bangladesh, and Pakistan, rape in all cases other than when it is committed by a man against a woman; when committed by a man against a man, when committed by a woman against a woman, or when committed by a woman against a man, the perpetrator can be charged under colonial sodomy laws. In all three jurisdictions, s.377 of the respective Penal Code, termed "Unnatural Offences", criminalize voluntary "carnal intercourse against the order of nature with any man, woman or animal". The Indian Supreme Court read down s.377 of the Penal Code to the extent which it criminalizes same-sex sexual activity.<sup>7</sup>

In Sri Lanka, though the Penal Code of 1883 is based on the Indian Penal Code, distinctive sections criminalize same-sex sexual activity and sexual abuse which may be perpetrated on a victim of the same sex.

Section 365 termed "Unnatural Offences" criminalize voluntary "carnal intercourse against the order of nature with any man, woman or animal" and s.365A criminalizes "Acts of gross indecency between persons"; s.365A has been interpreted to include same-sex sexual relations,<sup>8</sup> meanwhile, s.365B criminalizes "Grave sexual abuse"– which includes in its definition, the absence of consent or a circumstance which renders consent ineffective.

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<sup>7</sup> Though the term 'consensual sex' is widely used, the notion that 'sex' is always consensual as opposed to forms of sexual violence such as rape or sexual assault, renders the use of 'consensual' redundant.

<sup>8</sup> *OIC Maradana vs. Galabada Payagalage Sanath Wimalasiri*, SC Appeal No 32/2011, 11-12, Available at [http://www.supremecourt.lk/images/documents/sc\\_appeal\\_32\\_11.pdf](http://www.supremecourt.lk/images/documents/sc_appeal_32_11.pdf).

# THE LEGAL FRAMEWORKS RELATING TO RAPE: A COMPARATIVE STUDY OF COUNTRIES IN SOUTH ASIA

## INDIA

Under Indian law, s.375 of the Penal Code of 1860 defines 'rape'. The proceeding s.376 provides the punishment for rape.

Following the case of *Nirbhaya* in 2012, a judicial committee was appointed to suggest amendments to criminal law in order to strengthen protection against sexual assault. Criminal Law Amendment Act No. 13 of 2013,<sup>9</sup> which was drafted based on the recommendations of the committee replaced s.375 of the Penal Code with a new s.375 with wider scope under the heading 'rape'.<sup>10</sup>

### Definition

The definition of rape in the Indian Penal Code is the only definition of rape from South Asian Region which carries an explanation of the word 'consent'.

**Explanation 2.-** *Consent means 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:*

*Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.*

Indian Penal Code provides the broadest definition of rape among the countries in the South Asian Region. The definition of rape includes the act of inserting, or causing the insertion, of a penis, a part of the body, or an object into the vagina, mouth, urethra, or anus of a woman. It also includes the application of *mouth* to the vagina, anus, urethra of a woman. It is provided further that for the purpose of this section, the word 'vagina' includes *labia majora*.

Committing the act of insertion described above constitutes rape in the following instances:

1. when it is done against a woman's will
2. without her consent
3. when consent is obtained by inducing fear of death or hurt
4. when consent is obtained under the false pretense that the perpetrator is her husband
5. with her consent, when she is unable to understand the nature and consequences of such consent due to unsoundness of mind or intoxication or influence of any '*stupefying or unwholesome substance*'
6. with or without a woman's consent when she is under eighteen years of age
7. when she is unable to communicate consent

<sup>9</sup> Available at <https://www.refworld.org/docid/54c218784.html>.

<sup>10</sup> See Report of the Committee on Amendments to Criminal Law 'Justice Verma Committee' (2013) <https://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committee%20report.pdf>.

In *State of UP v. Chottey Lal* (2011), the Court stated that while the expression “against her will” would ordinarily mean that the intercourse was done by a man with a woman despite her resistance and opposition and, the expression “without her consent” would comprehend an act of reason accompanied by deliberation.<sup>11</sup>

The definition covers a range of instances in which consent is not effective. However, the language used fails to assert that consent is an informed decision made by a woman over her body– i.e. rather than stating that agreement to sexual activity does not constitute consent under certain instances, the statute says ‘with her consent *when her consent has been obtained by...*’. This language gives rise to confusion. While the poor understanding of the concept of consent, in general, contributes to the continuation of sexual violence, poor understanding of the concept on the part of the law makers, law enforcement officers, and judicial officers, contributes to victim blaming, denial of justice, and impunity for sexual offenders.

A limitation of this definition is that it does not criminalize marital rape. Even where the wife is living in separation, under a lawful decree or otherwise, the punishment for rape is only a minimum mandatory sentence of two years which may extend to seven years<sup>12</sup>.

This definition of rape is gender specific. It excludes rape which is perpetrated against a man and rape which is committed by a woman.

### **Sentencing**

Sections following s.375, describes penalties for aggravated rape– situations where the offence is understood to be more serious than the general offence owing to specific elements– including (but not limited to) rape by a police officer, a public servant, a member of the armed forces or a person, rape during communal violence, rape knowing a woman to be pregnant, rape of a woman under 16 years of age, and the commission of rape repeatedly.<sup>13</sup>

The punishment prescribed for rape was raised from a mandatory minimum sentence of imprisonment for seven years to mandatory minimum sentence of imprisonment for ten years in 2018.<sup>14</sup> Imprisonment may be up to life.<sup>15</sup> Gang rape,<sup>16</sup> rape of a woman under the age of 16,<sup>17</sup> and rape during which an injury that causes the death of the woman or leaves her in a persistent vegetative state<sup>18</sup> are to be punished with a minimum mandatory sentence of twenty year imprisonment. Mandatory minimum sentences for life are prescribed in cases of repeat offenders<sup>19</sup> and in cases where a woman under the age of 16 is gang raped.<sup>20</sup>

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<sup>11</sup> (2011) 2 SCC 550 Available at <https://indiankanoon.org/doc/1408786/>.

<sup>12</sup> S.376B.

<sup>13</sup> S.376 (2) a-n.

<sup>14</sup> S.5 of Criminal Law (Amendment) Act No. 22 of 2018. Available at [https://mha.gov.in/sites/default/files/CSdivTheCriminalLawAct\\_14082018\\_0.pdf](https://mha.gov.in/sites/default/files/CSdivTheCriminalLawAct_14082018_0.pdf).

<sup>15</sup> Note that in all cases imprisonment may be coupled with a fine.

<sup>16</sup> S.376D.

<sup>17</sup> S.376 (3) as amended in 2018.

<sup>18</sup> S.376A.

<sup>19</sup> S.376E.

<sup>20</sup> S.376DA as amended in 2018.

## Section 377

Rape against a man or rape by a woman is criminalized under the broad s.377 titled “unnatural offences”. ‘Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine’, reads the section.

In *Navtej Singh Johar & others vs. Union of India* (2018), Indian Supreme Court read down s.377 in so far as it criminalizes same-sex sexual activity.<sup>21</sup> It was noted the section only applied to homosexual sex, and thus discriminated between heterosexual and homosexual adults, which is a distinction that has no rational relation to the object sought to be achieved by the section - namely, the criminalization of all ‘carnal sex’.<sup>22</sup> On this ground, s.377 was found to be unconstitutional insofar as it criminalizes homosexual sex.

Section 377 continues to apply in cases of sexual assault which may not be covered under provisions on ‘rape’, particularly when sexual assault is committed against an adult man. The Protection of Children from Sexual Offences Act No. 32 of 2012 contains gender neutral provisions that criminalize a broad range of sexual offences, including rape, when committed against a child.<sup>23</sup>

## BANGLADESH

Sexual offences are criminalized under the Penal Code of 1860.<sup>24</sup> Rape is criminalized under s.375 of the Penal Code.

### Definition

According to s.375, ‘rape’ is committed by a man when he has sexual intercourse with a woman in the following circumstances.

1. against her will
2. without her consent
3. when consent is obtained by inducing fear of death or hurt
4. when consent is obtained under the false pretense that the perpetrator is her husband
5. with or without a woman’s consent when she is under fourteen years of age

Consent is not defined in the Code. Section 155(4) of the Evidence Act 1872<sup>25</sup> allows evidence to prove that the ‘prosecutrix was of generally immoral character’ in order to impeach the credit of the complainant. This allows the complainant’s sexual history/sexual behavior to be raised often resulting in defense lawyers victim-shaming in courtrooms and deploying archaic and stereotypical notions of consent to deny victims justice.<sup>26</sup>

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<sup>21</sup> W.P. (Crl) No 76 of 2016 Available at [https://sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf).

<sup>22</sup> And ‘transgender sex’.

<sup>23</sup> Available at <https://wcd.nic.in/sites/default/files/childprotection31072012.pdf>.

<sup>24</sup> Available at [http://bdlaws.minlaw.gov.bd/pdf\\_part.php?id=11](http://bdlaws.minlaw.gov.bd/pdf_part.php?id=11).

<sup>25</sup> Available at [http://bdlaws.minlaw.gov.bd/print\\_sections\\_all.php?id=24](http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=24).

<sup>26</sup> Bangladesh Legal Aid and Services Trust, *Character Evidence*.

*In Rape Trials A Comparative Study of Rape Shield Laws and the Admissibility of Character Evidence in Rape Cases* (2015 Norton Rose Fulbright), Available at <https://www.trust.org/contentAsset/raw-data/7c70a653-6c85-4734-981b-72a1de7db614/file>.

An explanation notes that ‘penetration’ is sufficient to constitute sexual intercourse.

The definition, however, excludes marital rape.

*‘Exception. Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape’*

Section 376 prescribes a sentence for life imprisonment or a sentence which may extend to ten years and fine for the offence of rape. It is provided further that when rape is committed by a man against his wife who is below the age of 12, he shall be punished with imprisonment which may extend to two years, or with a fine instead, or with both.

The gender specific s.375, excludes rape of men in its definition. Sexual assault committed against men, including rape, is covered under s.377– which also criminalizes same-sex sexual activity.

### **Section 377**

Section 377, titled “Unnatural Offences” criminalizes voluntary “carnal intercourse against the order of nature with man, woman, or animal”. An explanation provides that “penetration is sufficient to constitute the carnal intercourse”. The offence carries a sentence of imprisonment for life, or imprisonment which may extend to 10 years, and a fine.

It has been reported from Bangladesh that s.377 is not enforced in practice. A 2015 Report noted that, *‘Although a few cases have been registered under Article 377, none of them have led to legal proceedings or convictions, usually due to lack of witnesses or evidence’*.<sup>27</sup> In 2017 US Home Office reported that it was noted during a Fact Finding Mission that people were unlikely to be charged under Section 377; rather, other laws, such as drug laws.<sup>28</sup>

## **PAKISTAN**

Originally, the Penal Code of Pakistan of 1860<sup>29</sup> dealt with the offence of rape. The Hudood Ordinances– a set of laws that, among other things, criminalized adultery and non-marital sex, including rape– were enacted in 1979. Section 19 of Offence of Zina (Enforcement of Hudood) Ordinance<sup>30</sup> repealed sections of the Penal Code which covered rape, and instead, criminalized ‘zina-bil-jabr’. ‘[A] person is said to commit zina-bil-jabr if he or she has sexual inter-course with a woman or man, as the case may be, to whom he or she is not validly married...’, read the Ordinance. The law obliterated the difference between rape, sex outside marriage, and adultery.

*“Further, the only forms of admissible evidence allowed by the Zina Ordinance were the confession of the accused or the testimony of four male eyewitnesses. Effectively, this meant that any woman who lodged a complaint of rape could be found guilty of the hadd crime of fornication or adultery,*

<sup>27</sup> Report on the mission to the People’s Republic of Bangladesh’ (2015 France: Office français de protection des réfugiés etapatrides (OFPRA)) Available at <http://www.refworld.org/docid/577ccdf44.html>.

<sup>28</sup> Report of a Home Office Fact-Finding Mission to Bangladesh (2017 UK Home Office), Available at <https://www.gov.uk/government/publications/bangladesh-country-policy-and-information-notes> See also [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/660538/Bangladesh\\_-\\_SOGI\\_-\\_CPIN\\_-\\_v3.0\\_Nov\\_2017.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/660538/Bangladesh_-_SOGI_-_CPIN_-_v3.0_Nov_2017.pdf).

<sup>29</sup> Available at <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=54f834c96>

<sup>30</sup> Available at <https://www.refworld.org/pdfid/4db99952.pdf>

*since by lodging her complaint she would have confessed to having had sexual intercourse (and would almost certainly be unable to provide the required evidence to convict)*".<sup>31</sup>

This prevented many sexual assault victims from seeking redress through the criminal justice system, deeming them guilty of illegal sex.<sup>32</sup>

In 2006, Protection of Women (Criminal Laws Amendment) Act<sup>33</sup> reintroduced statutory provisions criminalizing rape into the Penal Code. Today, s.375 defines the offence of rape while s.376 prescribes related punishments.

## **Definition**

According to s.375, 'rape' is committed by a man when he has sexual intercourse with a woman in the following circumstances.

1. against her will
2. without her consent
3. when consent is obtained by inducing fear of death or hurt
4. when consent is obtained under the false pretense that the perpetrator is her husband
5. with or without a woman's consent when she is under sixteen years of age

Section 376 provides that a person convicted of rape shall be punished with death, or with imprisonment of a minimum mandatory term of ten years which may extend up to 25 years. Death or life imprisonment is prescribed for persons convicted of gang rape. The definition of rape is gender specific and does not include rape which is perpetrated against a man. Such a case may be charged under s.377 of the Penal Code which also criminalizes same-sex sexual activity.

## **Section 377**

Section 377 of Pakistan's Penal Code, "Unnatural Offences" criminalizes voluntary "carnal intercourse against the order of nature with man, woman, or animal". The offence carries a sentence of imprisonment for life, or a minimum mandatory term of imprisonment of 2 years which may extend 10 years, and a fine. While what constituted "carnal intercourse" has not been explored by the judiciary, reported judgements from Pakistan only suggest that children can be victims under s.377.<sup>34</sup>

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<sup>31</sup> Shehar Bano Khan and Shirin Gul, *The Criminalisation of Rape in Pakistan: CMI Working Paper number 8* (2017 Chr. Michelsen Institute) Available at <https://www.cmi.no/publications/file/6323-the-criminalisation-of-rape-in-pakistan.pdf>

<sup>32</sup> Universal Periodic Review of Pakistan (2008 Human Rights Watch) Available at <https://www.refworld.org/docid/4822b4151e.html>

<sup>33</sup> Available at [http://www.na.gov.pk/uploads/documents/1321341579\\_812.pdf](http://www.na.gov.pk/uploads/documents/1321341579_812.pdf)

<sup>34</sup> Famiya Masood, *The Nation* 10/06/2019 "Rape, a gender-neutral crime in Pakistan?", Available at <https://nation.com.pk/10-Jun-2019/rape-a-gender-neutral-crime-in-pakistan>.

## AFGHANISTAN

Afghanistan's Penal Code of 1976 criminalized 'Adultery, pederasty and violation of honor' under s.426 and s.427 (collectively called '*zina*'). This categorization did not distinguish between adultery and rape.

In 2009, rape of a woman was recognized as a distinct offence under the Law on Elimination of Violence Against Women (EVAW). This law was signed into force as a Presidential Decree.<sup>35</sup> The Law did not define rape.

Afghanistan's Penal Code was revised in 2017. The revised Penal Code defines rape and punitive provisions related to it in Articles 636-641.<sup>36</sup>

### Reforms to rape law

The new Penal Code contains more substantive provisions on sexual violence and rape than the EVAW Law. It contains a clearer and a more comprehensive definition of rape, which is not based on the language on *zina*, and includes the use of threats and intimidation to coerce sex. It also provides considerably stricter punishments for rape than for *zina*: the maximum punishment for *zina* in the new penal code is five years' imprisonment, whereas the punishment for rape is up to 16 years. In aggravated circumstances, the punishment for rape is imprisonment up to 20 years, and in the cases of gang rape, the prescribed penalty is death.<sup>37</sup>

Another provision prohibits the prosecution of rape victims, which potentially signals better protection for women reporting rape. However, this provision does not define who is considered a victim of rape; it could potentially be applied narrowly, so that only a woman whose claim of rape leads to an actual conviction is considered a victim<sup>38</sup>.

There is no information available on the laws which apply in a case of commission of rape against a man.

### Criminalization of same sex

Article 130 of the Constitution of Afghanistan allows for the implementation of *Sharia* Law which prohibits same-sex sexual activity, in general.

S.646 of the revised Penal Code criminalizes same-sex sexual activity between men, punishable with imprisonment for up to two years. S.649 criminalizes same-sex intimacy between men in the absence on sexual intercourse. S.645 criminalizes same-sex intimacy between women with imprisonment for up to one year.

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<sup>35</sup> Available at <https://www.refworld.org/pdfid/5486d1a34.pdf>.

<sup>36</sup> The Revised Penal Code is not available in English. Information in this section is based on published reports.

<sup>37</sup> Torunn Wimpelmann, Adultery, rape, and escaping the house: The protection and policing of female sexuality in Afghanistan: CMI Working Paper 2017:9 (2017 Chr. Michelsen Institute) Available at <https://www.cmi.no/publications/6404-adultery-rape-and-escaping-the-house>.

<sup>38</sup> *ibid.*

## NEPAL

The Criminal (Code) Act (2074) of 2017<sup>39</sup> enumerates the law on sexual offences in Nepal. National (Muluki) Criminal Code (Act) of 2017, National (Muluki) Criminal Procedure (Code) Act of 2017, and the Criminal Offences (Sentence Determination and Execution) Act, which constitute the legal framework of Nepal on criminal offences came into force in 2017. The Criminal Code was adopted in 2017 alongside five other Acts, designed to replace the Civil Code (2021). Chapter 14 of the Code stipulates provisions on rape, and Chapter 15 on incest.<sup>40</sup>

### Laws relating to rape

Nepali Criminal Code makes provisions against rape under Article 219 titled '*karanisambandhikasur*' or 'crimes related to sex/sexual penetration'. Article 219 defines rape under the heading '*Jabarjastikarani*' which translates to 'forced penetration'. This definition is gender specific. Clause 2 of Article 219 defines rape as "*sex with a woman without her consent or with the consent of a child under 18*".<sup>41</sup> Article 219 further provides that "*the insertion of the penis into the mouth, anal, partial insertion of the penis into the mouth or vagina, and insertion of other objects into the vagina shall be considered rape*".

The Supreme Court of Nepal has stressed the requirement of "penetration" to successfully bring a charge of rape. In *Government of Nepal v. Tek Bahadur Chhetri (2007)*<sup>42</sup>, the Supreme Court noted that in a case where "penetration" of the vagina was impossible due to the "*very early age of the victim girl*", only a charge of attempted rape could be considered.

Marital rape is recognized as a crime in Nepal. '*If the married woman is raped by her husband, he will be imprisoned for 5 years*', reads Clause 4 of Article 219 of Nepal's Penal Code.

Rape against a man is charged under Article 226 of the Code. 'Nobody should have unnatural sex with another person without consent', reads the Code. The term "unnatural sex" is not defined in the Code,<sup>43</sup> similarly in the case of Sri Lanka.

### Progressive laws on sexual orientation and gender identity

Unlike some of its neighbors from South Asia, Nepal does not criminalize same-sex sexual activity under the ambiguous term "unnatural sex". In *Sunilbabu Pant vs. Government of Nepal (2007)*,<sup>44</sup> the Supreme Court of Nepal legally recognized third gender. The Court also appointed a committee to undertake a study on rights of people from diverse sexual orientations and gender identities, and directed the Government to make the legal provisions after considering the recommendations made by the Committee.

The Constitution of Nepal makes reference to people from 'gender and sexual minority groups'. In Article 18(3) the Constitution notes, under right to equality, that nothing shall be deemed to bar the making of special provisions by law for the protection, empowerment or advancement

<sup>39</sup> Official Publication is not available in English. An unofficial translation can be found at <http://www.asianlii.org/np/legis/laws/marrc14276/>.

<sup>40</sup> International Commission of Jurists, 'Serious Crimes in Nepal's Criminal Code Bill 2014', A Briefing Paper (March 2017).

<sup>41</sup> Priyanka Chand, "Nepal's rape laws fail to adequately protect victims" 12/11/2019 Available at <https://www.recordnepal.com/perspective/opinions/nepals-rape-laws-fail-to-adequately-protect-victims/>.

<sup>42</sup> *Government of Nepal vs. Tek Bahadur Chhetri*, Nepal Kanon Patrika 2066 (BS), Issue 5, decision no. 8142. Available at <https://www.icj.org/wp-content/uploads/2017/03/Nepal-Serious-Crimes-Bill-Advocacy-Analysis-Brief-2017-ENG.pdf>.

<sup>43</sup> See note 40.

<sup>44</sup> *Sunilbabu Pant vs. Government of Nepal, Prime Minister and Council of Ministers and Others*, Nepal Kanon Patrika 2065 (BS), Issue 4, decision no. 7958. Available at <https://www.icj.org/wp-content/uploads/2012/07/Sunil-Babu-Pant-and-Others-v.-Nepal-Government-and-Others-Supreme-Court-of-Nepal.pdf>.

of sexual minorities. Article 42(1) on Right to social justice makes reference to “gender and sexual minority groups”.<sup>45</sup>

## BHUTAN

Reports from Bhutan state that from January 1<sup>st</sup> to July 31<sup>st</sup> 2019, 22 cases of rape were reported, out of which 12 cases were persons above 18 years, nine cases were rape of a child below 18 years and one case of rape was of a child below 12 years<sup>46</sup>. There is no sex disaggregated data to gather the sex of the victims. The CEDAW Committee, in their 2009 Concluding Observations raised the need to collect sex disaggregated data in Bhutan.<sup>47</sup>

Sexual offences in Bhutan are governed under the Bhutan’s Penal Code of 2004 and the Penal Code Amendment Act of 2011<sup>48</sup>. Being a recent enactment, Bhutan’s Penal Code exemplifies an organized structure, and recognizes recent developments and nuances in the area of sexual offences.

Chapter 14 of the Penal Code<sup>49</sup> recognizes several forms of sexual offences. These include Rape, Rape of a married person, Statutory rape (child below 12 years or incompetent person), Rape of a child above 12 years, Rape of pregnant women, Gang rape, Gang rape of a married person, Gang rape of a child below 12 years, a child above 12 years or pregnant woman, Custodial rape, Marital rape, Injury, Compensation to the victim, Child molestation, Sexual harassment, Incest, Indecent exposure, Bestiality, and Unnatural sex.

### Definition

All sections and definitions in this chapter are gender neutral and refers to parties as “defendant”, or “person” except in the case of rape of a “pregnant woman”. Section 177 of the Penal Code defines the offence of Rape as follows:

#### *177. Rape*

*A defendant shall be guilty of the offence of rape, if the defendant has sexual intercourse with another person:*

- (a) Without the person’s consent or with consent, when consent is obtained by putting the person or a third person in fear of death or of grievous hurt;*
- (b) Compels the other person to submit to sexual intercourse by force, or by threat of imminent death, bodily injury or serious bodily injury or the commission of a felony to that person or a third person;*
- (c) Substantially impairs the other person’s ability to appraise or control the conduct by administering drugs, intoxicants, or other substances without consent for the purpose of preventing the person’s resistance to the sexual intercourse, or*
- (d) Renders the other person unconscious for the purpose of committing sexual intercourse.*

<sup>45</sup> Available at [https://www.constituteproject.org/constitution/Nepal\\_2015.pdf](https://www.constituteproject.org/constitution/Nepal_2015.pdf).

<sup>46</sup> ‘Rape of Minors Highest Last Year’ (Business Bhutan, Thimpu) 16 August 2017 Available at <https://www.businessbhutan.bt/2017/08/16/rape-of-minors-highest-last-year/>.

<sup>47</sup> Committee on the Elimination of Discrimination against Women, ‘Concluding observations of the Committee on the Elimination of Discrimination against Women: Bhutan’ (Forty-fourth session 20 July-7 August 2009), 8 Available at [https://www.refworld.org/publisher,CEDAW,,BTN,,0.html](https://www.refworld.org/publisher/CEDAW,,BTN,,0.html).

<sup>48</sup> Available at [http://www.nab.gov.bt/assets/uploads/docs/acts/2014/The\\_Penal\\_Code\(Amendment\)\\_Act\\_of\\_Bhutan\\_2011eng7th.pdf](http://www.nab.gov.bt/assets/uploads/docs/acts/2014/The_Penal_Code(Amendment)_Act_of_Bhutan_2011eng7th.pdf).

<sup>49</sup> Available at <https://www.wipo.int/edocs/lexdocs/laws/en/bt/bt019en.pdf>.

However, neither the Code, nor its 2011 Amendment defines “sexual intercourse” to explain the burden that has to be established to prove rape, and treats it as a term that is self-explanatory; i.e. unlike in the case of Sri Lanka and other countries, there is no reference to penetration as a requirement for sexual intercourse. This does not help in identifying whether the action should involve penetration or a lesser degree of force. At the same time, consent is not defined.

While s.177 provides sufficient protection against rape against men and rape by women, voluntary sexual activity between people of same sex is criminalized under the offence of “unnatural offences”.

### **Unnatural sex**

Section 213 of the Code enumerates the offence of “Unnatural sex”, which is defined as engaging in “sodomy or any other sexual conduct that is against the order of nature.” Although s.214 provides that the offence shall be considered a “petty misdemeanor”, there have been no convictions under this law.

In June 2019, a Bill was passed by the Lower House of the Parliament to repeal s.213 and s.214 of the Penal Code, with all but one vote in favor of its repeal. The Bill needs to be passed by Bhutan’s Upper House, the National Council, in order to become law.<sup>50</sup>

## **THE MALDIVES**

The law relating to sexual offences in the Maldives is recent and is reflective of the equal standards applying to male and female victims of sexual violence. Sexual offences are enumerated in the Penal Code of No. 6 of 2014 of the Maldives,<sup>51</sup> the Sexual Harassment Prevention Act 2014, and the Sexual Offences Act of 2014.

### **Definition**

Section 130 of the Penal Code criminalizes rape using gender neutral terminology.

#### Section 130 – Sexual Assault

*(a) Offense Defined– A person commits an offense if he engages in sexual intercourse without consent.*

Section 411(a) (1) and (2) state that the offence of “*Unlawful sexual intercourse*” can be committed through “sexual intercourse”, or through “sexual intercourse with a person of the same sex”.

<sup>50</sup> Alasdair Pal, ‘Bhutan’s lower house of parliament votes to decriminalise homosexuality’ (Reuters) 07/06/2019, Available at <https://www.reuters.com/article/bhutan-lgbt/bhutans-lower-house-of-parliament-votes-to-decriminalise-homosexuality-idUSL4N23E1XG>.

<sup>51</sup> An official translation of the Code is not available in English. An unofficial translation can be found at <https://www.law.upenn.edu/live/files/4203-maldives-penal-code-2014>.

Section 411(f)(1) of the Code explains what constitutes sexual intercourse as follows:

#### Section 130 – Sexual Assault

*(a) Offense Defined– A person commits an offense if he engages in sexual intercourse without consent.*

(1) “unlawful sexual intercourse” means insertion even to a small degree, by a man of his penis into the vagina of a woman who is not his wife or a not a woman waiting his post-marital divorce period.

“Post martial waiting period” as defined in s. 410(b) 3 months from the date of divorce for a divorced woman and four months from the date of husband’s death.

(2) “same- sex intercourse” means

(a) Insertion by a man his sexual organ or any object into the anus of another man for sexual gratification. Or the insertion into another man’s mouth the penis of a man, or

(b) Insertion of a woman’s organ or any object into the vagina or anus of another woman for sexual gratification.

The explanation in (1) above does not distinguish between rape and adultery. The explanation in (2) criminalizes, in addition to rape against a victim of the same sex, same-sex sexual activity.

However, the law excludes rape which may be committed against a man by a woman.

Section 130 (d) (1) classifies unlawful sexual intercourse as a felony within its class depending on whether the offence falls under aggravating circumstances such as incest. It is also observed that the degrees of relationship categorized under the offence of incest is more expansive than the degrees applicable in Sri Lankan law.

#### **Same-sex sexual activity**

Section 411(a)(2) criminalizes intercourse between persons of the same sex with a penalty of up to eight years imprisonment. Section 412 read with s.130, prohibits “sexual contact” with a person of the same sex with a penalty of up to eight years imprisonment. “Sexual contact” is defined as touching another person’s sex organs, anus or breast without a reason permitted in Islamic *Sharia* or causing a person to touch one’s own or another person’s sex organs, anus or breast without a reason permitted in Islamic *Sharia*.

## SRI LANKA

Sri Lankan Penal Code<sup>52</sup> was originally enacted in 1883 during the British rule.<sup>53</sup> The Code utilizes language similar to the language in the Indian Penal Code. Sri Lanka's Penal Code has been amended in 1995, 1998, and 2006 with regard to provisions relating to sexual offences.

As per Sri Lanka's crime trends, Sri Lanka holds an increasing crime record of sexual offences committed over the years since 2006. In 2018, the reported numbers were at: Rape of women over 16 years 345; Statutory rape with the consent of the victim 1199; Statutory rape without consent of the victim 248; and Unnatural offences/grave sexual abuse 749.<sup>54</sup> The numbers remained 294;1206; 232; and 616 respectively in 2017. Reporting of sexual offences has changed from the all-encompassing two categories named "Rape/incest" and "Unnatural offences/grave sexual abuse". Although the numbers have increased, the data not being sex disaggregated obscures the gender nuances that the crime trends otherwise would have revealed.

Sexual offences in Sri Lanka are primarily governed by the Penal Code Act No. 2 of 1883. Sections 363- 365 stipulate the offences, their elements, and the related punishments. Section 363 lays down the constituents of the offence of rape whereas section 364 states the punishment for rape.

### Definition

#### 363. Rape

A man is said to commit "rape" who has sexual intercourse with a woman under circumstances falling under any of the following descriptions:-

- a) without her consent even where such woman is his wife and she is judicially separated from the man;
- b) with her consent, while she was in lawful or unlawful detention or when her consent has been obtained, by use of force or intimidation, or by threat of detention or by putting her in fear of death or hurt;
- c) with her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by alcohol or drugs, administered to her by the man or by some other person
- d) with her consent when the man knows that he is not her husband, and that her consent is given because she believed that he is another man to whom she is, or believed herself to be, lawfully married
- e) with or without her consent when she is under sixteen years of age, unless the woman is his wife who is over twelve years of age and is not judicially separated from the man

The *Explanation* to 363 does not define whether the requirement of "penetration" is vaginal penetration.

<sup>52</sup> Available at [http://hrlibrary.umn.edu/research/srilanka/statutes/Penal\\_Code.pdf](http://hrlibrary.umn.edu/research/srilanka/statutes/Penal_Code.pdf).

<sup>53</sup> G.L. Peris, *General principles of Criminal Liability in Ceylon (Sri Lanka) A Comparative Analysis* (Lake House Investments Ltd 1972), 1-9.

<sup>54</sup> Crime Division of Sri Lanka Police, 'Grave Crime Abstract for The Year 2018 and 2017 for Whole Island' Available at <https://www.police.lk/index.php/crime-trends>.

*Explanation:*

*(i) Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.*

However, the same has been interpreted to mean vaginal penetration in case law. Defining “penetration” in a 2012 judgment, Justice Ranjith Silva stated, *“The slightest penetration of the penis within the vulva, such as the minimal passage of glans between the labia with or without the emission of semen or rupture of hymen constitutes rape. There need not be a completed act of intercourse. Rape can be committed even when there is inability to produce penile erection. Rape can occur without causing any Injury and as such negative evidence does not exclude rape”*.<sup>55</sup>

Penal Code recognizes the offence of Incest in section 364A while statutory rape is recognized under 363(e), which is gender specific and states that rape is committed by a person who has sexual intercourse with a woman, *“with or without her consent when she is under sixteen years of age, unless the woman is his wife who is over 12 years of age and not judicially separated”*.

### **Section 365: Of Unnatural Offences and Grave Sexual Abuse**

Sections 365 criminalizes “unnatural offences”. Section 365A criminalizes “Acts of gross indecency between persons” while s.365B criminalizes “grave sexual abuse”. The sections were amended by the Penal Code Amendment Act No.22 of 1995. Sections 363 and 365B were further amended with minor changes by the Amendment Act No 29 of 1998. The Penal Code Amendment Act No. 16 of 2006 amended sections 364, 365, 365A, and 365B to define “injuries” to include psychological and mental trauma. All three of these sections are gender neutral and criminalize the said sexual behavior regardless of the gender of the perpetrator/s.

Section 365 criminalizes “voluntary carnal intercourse against the order of nature with any man, woman, or animal”. Section 365A states that any person publicly or privately “is a party to the commission of, or procures or attempts to procure the commission” of any act of gross indecency with another person shall be guilty of an offence. Section 365B stipulates any grave sexual abuse that does not amount to rape would be an offence if happened:

1. Without consent;
2. With consent but consent has been obtained by force, threat, or intimidation or putting other in fear of death or hurt;
3. With consent but the consent obtained at a time of unsound mind or intoxication.

In a recent Appeal to the Supreme Court which concerned sentencing under s.365A-gross indecency between persons, s.365A was discussed. The facts of the case were, briefly, that a witness reported a case of oral sex between two men inside a vehicle to the Police, and allegedly Police officers who visited the place witnessed the same. After considering several points on evidentiary value and probability of facts placed before the court, judges imposed a suspended sentence of rigorous imprisonment for two years considering circumstances of the case. Commenting on the aspect of sex between adults, Justice Aluwihare stated as follows:

*“The contemporary thinking, that consensual sex between adults should not be policed by the state nor should it be grounds for criminalization appears to have developed over the years and may be*

<sup>55</sup> *Perera vs. Attorney General* (2012) 1 SLR 69.

*the rationale that led to repealing of the offence of gross indecency and buggery in England. The offence however remains very much a part of our law.”<sup>56</sup>*

### **Sentencing**

As per sentencing, the Amendment Act No. 22 of 1995 in s.364 imposes rigorous imprisonment for rape. Sentence is not less than seven years and not exceeding 20 years with fine and compensation for the victim. An aggravated punishment of not less than ten years not exceeding twenty years with fine and compensation can be imposed if the offender takes advantage of his official position and rapes a woman in his official custody, if the offender is: a. Public officer or person in a position of authority; b. On management, or staff of remand or other place of custody of women’s or children’s institution; c. On management of staff of a hospital; d. Rapes a pregnant woman; or rapes a e. woman under 18 years; f. a woman who is mentally or physically disabled; or Commits gang rape.

For acts of gross indecency between persons under s.365A and grave sexual abuse under s.365B, the sentence imposed is rigorous imprisonment for not less than ten years and not exceeding twenty years, fine and compensation. This sentence is equivalent to the aggravated sentence imposed for rape.

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<sup>56</sup> OIC Maradana v. Galabada Payagalage Sanath Wimalasiri, SC Appeal No 32/2011, 11-12 Available at [http://www.supremecourt.lk/images/documents/sc\\_appeal\\_32\\_11.pdf](http://www.supremecourt.lk/images/documents/sc_appeal_32_11.pdf).

# OBSERVATIONS ON THE LAWS OF SRI LANKA

This concluding section of the paper identifies several points of observation in the laws relating to rape in Sri Lanka. Premised on the findings and the discussions of the laws, this section identifies key points for advocacy and law reform in the area of sexual offences in Sri Lanka. These points are inspired by current discourses on sexual offences and comparative insights from the countries that are discussed above.

In Sri Lanka, existing laws can be amended only by the Parliament. Unlike in India where the judiciary is empowered to decide upon the constitutionality of a law, after its enactment, where such law violates fundamental right, in Sri Lanka, the Constitution expressly prevents post judicial review of legislation. The Constitution only provides for pre enactment judicial review. Article 80(3) states that once a Bill becomes law upon the certificate of the President or the Speaker, *“no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever”*. Additionally, Article 16 of the Constitution states that all existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the Fundamental Rights Chapter.

## **DEFINITION OF RAPE**

The offence of rape needs to be redefined with consent at the center. 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”*. Language which causes confusion with regard to consent need to be addressed. Consent needs to be defined as an informed and active decision made while having the capacity to give such consent.

When consent is at the center, whether the forced penetration is vaginal, oral, or anal, or whether such penetration was done using a penis, a part of the body, or an object is irrelevant. The invasion of a sexual nature violates bodily autonomy in all cases. Therefore, the definition of rape needs to be extended to anal and oral penetration, and to penetration by part of the body or an object.

Recalling the types of intrusions listed in the Indian Penal Code under “Rape” can be useful here:

**Section 375 of the Indian Penal Code as amended by The Criminal Law (Amendment) Act, No. 13 of 2013**

375. A man is said to commit “rape” if he–

- (a) penetrates his penis in to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of the body of such woman or makes her to do so with him or any other person; or
- (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person

**THE QUESTION OF GENDER NEUTRAL RAPE LAWS**

In Sri Lanka, laws relating to rape are gender specific and covers only the instances where rape has been committed by a man against a woman. A *man* who commits rape against a man, or a *woman* who commits rape will be charged under grave sexual abuse under s.365B. While the existing rape laws leave out many possible forms of sexual violence– such as anal and oral penile penetration and penetration of the vagina, anus or mouth with part of the body or such penetration with an object–the laws also prevent an understanding of sexual violence which goes beyond the gender binary. Therefore, in Sri Lanka, rape of a transman or a transwoman falls outside the scope of s.363 that defines ‘Rape’ and places the act within s.365B titled ‘Grave sexual abuse’. This indicates a reluctance to recognize the offence as rape, even when other elements of rape can be established, when it is committed against someone other than a ‘woman’.

In the Maldives, s.130 of the Penal Code utilizes gender neutral terminology to criminalize rape, under the offence “sexual assault”. “Unlawful sexual intercourse” is central to this offence. Section 411 (f) of the Penal Code explains “Unlawful sexual intercourse” to be the “insertion even to a small degree, by a man of his penis into the vagina”. “Same- sex intercourse” is explained as the insertion by a man of his penis to the anus or mouth of another man, or insertion of an object to the anus or another man, and the insertion of a woman’s organ or any object into the vagina or anus of another woman by a woman. Thus s.130 of the Maldivian Penal Code covers diverse instances of rape but excludes from its scope a situation in which a man may be forced to penetrate by a woman.

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<sup>57</sup> Available at [http://www.hrcsl.lk/PFF/Library\\_Domestic\\_Laws/Legislations\\_related\\_to\\_Employment/Penal%20Code%20\(Amendment\)%20Act%20No%2022%20of%201995.pdf](http://www.hrcsl.lk/PFF/Library_Domestic_Laws/Legislations_related_to_Employment/Penal%20Code%20(Amendment)%20Act%20No%2022%20of%201995.pdf).

It has been argued that restricting the law relating to rape to the protection of women is an unjustifiable 'double standard'.<sup>58</sup> Although records suggest that rape of women and girls is more frequent than rape of men and boys, it cannot be ruled out that rape is not perpetrated against men. Recognition of the offence as rape imputes necessary legal protections for the victim and aggravated punishment for the perpetrator. A 2017 study in the UK analyzed experience of men who were "forced to penetrate" by a female perpetrator.<sup>59</sup> But even in the UK, laws relating to rape exclude male survivors: Though s.01 of the Sexual Offences Act 2003<sup>60</sup> in the UK employs gender neutral terminology, the explanatory notes provide that "rape" can only be committed by a male, because it relates to "penile penetration".<sup>61</sup>

There have been demands to extend the definition of 'rape' to include rape against a man. Recently, a Bill which proposed gender neutral rape laws was presented in India.<sup>62</sup> In 2012, a Bill to amend the criminal law of India,<sup>63</sup> proposed a gender-neutral provision to replace the provision on rape as follows:

*"375. A person is said to commit "sexual assault" if that person—*

- (a) penetrates, for a sexual purpose, the vagina or anus or urethra or mouth of another person with—*
  - (i) any part of the body including the penis of such person; or*
  - (ii) any object manipulated by such person, except where such penetration is carried out for proper hygienic or medical purposes;*
- (b) manipulates any part of the body of another person so as to cause penetration of the vagina or anus or urethra or mouth of such person by any part of the other person's body;*
- (c) engages in "cunnilingus" or "fellatio", under the circumstances falling under any of the following six descriptions..."<sup>64</sup>*

<sup>58</sup> Natasha McKeever, "Can a Woman Rape a Man and Why Does It Matter?", *Criminal Law and Philosophy* (2018 Springer) Available at <https://link.springer.com/content/pdf/10.1007%2Fs11572-018-9485-6.pdf>.

<sup>59</sup> Dr. Siobhan Weare, *Forced-to-penetrate Cases: Lived Experience of Men* (2017 Lancaster University) Available at <https://wp.lancs.ac.uk/forced-to-penetrate-cases/files/2016/11/Project-Report-Final.pdf>.

<sup>60</sup> Available at <http://www.legislation.gov.uk/ukpga/2003/42/contents>.

<sup>61</sup> See <http://www.legislation.gov.uk/ukpga/2003/42/notes/division/5/1/1>.

<sup>62</sup> TIMESOFINDIA.COM "Bill in Parliament to make sexual crimes gender neutral: Read Full Text" 13/07/2019 Available at <https://timesofindia.indiatimes.com/india/kts-tulsi-introduces-bill-in-rajya-sabha-to-make-sexual-crimes-gender-neutral-full-text-of-the-bill/articleshow/70202016.cms>.

<sup>63</sup> Available at [https://www.prsindia.org/sites/default/files/bill\\_files/Criminal\\_Law\\_%28A%29\\_bill%2C\\_2012.pdf](https://www.prsindia.org/sites/default/files/bill_files/Criminal_Law_%28A%29_bill%2C_2012.pdf).

<sup>64</sup> S.5 The Criminal Law (Amendment) Bill 2012 Available at [https://www.prsindia.org/sites/default/files/bill\\_files/Criminal\\_Law\\_%28A%29\\_bill%2C\\_2012.pdf](https://www.prsindia.org/sites/default/files/bill_files/Criminal_Law_%28A%29_bill%2C_2012.pdf).

While both Canada and South Africa use a gender-neutral approach to rape laws, Canada uses the broad offence of “sexual interference”<sup>65</sup> and South Africa retains the term “rape”<sup>66</sup>.

South African law defines rape as follows:

#### 247. Rape

(1) Whoever, has sexual intercourse or carnal intercourse with another person, against his or her will or without his or her consent, commits the offence of rape, and upon conviction, shall be sentenced to imprisonment for a term not exceeding fourteen years and may also be liable to a fine<sup>67</sup>.

Under this law, men who perpetrate rape against men as well as women who perpetrate rape against women, and men, are liable to be prosecuted. In fact, news reports from South Africa suggest that women have been charged for rape against a man under this law.<sup>68</sup>

In theory, there is no reason why all people– men, women, transgender persons, and non-binary people, cannot be afforded protection against sexual violence under the same provision.

However, while adopting laws which go beyond gender binary is important, the question whether such laws will place women at a disadvantage, remains. Studies from Sri Lanka have suggested that despite the existence of gender specific laws relating to rape, there is exceptional impunity for rape against women in Sri Lanka.<sup>69</sup> In the meanwhile, the presence of gender biases have been observed in reported judgements on rape in Sri Lanka.<sup>70</sup> This is problematic firstly, as it points to the poor understanding of consent, and secondly as it effectively discriminates against women when they seek justice.

Then, the question arises whether a gender neutral rape law in a judicial system which affords men exceptional immunity for rape against women, and allows gender biases and stereotypes that place women at a disadvantage seeping into the justice system, will further victimize women through affording men an opportunity for false accusations. In an adversarial court system within a patriarchal society where women find it hard to prove that they were victims, how hard will it be for a woman to prove her innocence?

Therefore, it can be concluded in reality, that Sri Lanka is not yet ready for gender neutral rape laws. The existence of laws that discriminate against women and gender biases present in the language of judgements, point to the influence of patriarchy on the justice system. Until the justice system is able to see beyond the gender binary and recognize men, women, and

<sup>65</sup> S.151 of Criminal Code of Canada <https://laws-lois.justice.gc.ca/eng/acts/c-46/page-34.html#h-118150>.

<sup>66</sup> A discussion on using the term 'sexual assault' instead of 'rape' can be found in the Report of the Committee on Amendments to Criminal Law 'Justice Verma Committee' (2013) Available at <https://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committee%20report.pdf>.

<sup>67</sup> Available at <https://www.wipo.int/edocs/lexdocs/laws/en/ss/ss014en.pdf>

<sup>68</sup> See news reports at <https://www.independent.co.uk/news/world/africa/three-women-kidnap-man-rape-him-and-steal-his-semen-in-south-africa-10233198.html>, <https://www.thesun.co.uk/news/3673560/three-women-rape-man-23-for-three-days-after-kidnapping-man-in-a-taxi-and-force-feeding-him-energy-drinks-in-south-africa/>, and <http://www.sabcnews.com/sabcnews/30-year-old-woman-sentenced-for-raping-boy-10/>

<sup>69</sup> Shenali de Silva, A Snapshot of the Criminal Justice System: Building a Picture Through Sexual Violence Cases in the Court of Appeal (2018 Law and Society Trust) Available at [https://www.lstlanka.org/wp-content/uploads/2018/04/LST\\_CJS\\_REPORT\\_230418.pdf](https://www.lstlanka.org/wp-content/uploads/2018/04/LST_CJS_REPORT_230418.pdf)

<sup>70</sup> Sandani Abeywardene, 'Images, myths and Stereotypes: A Critical Discourse Analysis of the Construction of the 'female' in Judicial Pronouncements on Rape in Sri Lanka', 37-44, LST Review: Queering the Law, <https://www.forum-asia.org/uploads/wp/2017/03/LST-Review-Queering-the-Law-Dec-2016.pdf>

everyone else as equals, such a law would place those who are already at a disadvantage, in an even more disadvantaged position.

*“We are further of the opinion that merely facial gender neutral laws and policies cannot deny what has perceptively called “.....differential access to justice faced by women seeking to engage with the legal system.....”, states the Justice Verma Commission, recognizing the need for substantive equality.*

## PROTECTION OF MEN AND TRANSGENDER PEOPLE AGAINST RAPE

An examination of laws relating to rape show that there are slight differences in punishment based on the gender of the victim. A person accused of rape against anyone other than a woman will be charged under s.365B. The penalties imposed upon conviction under this section, differ from the penalties imposed in s.364 which concerns rape committed against a woman.

Rape against a woman		Rape against a man or a transgender person	
Section	Punishment	Section	Punishment
364 (1) Rape under s.363	Rigorous imprisonment for a term not less than seven years and not exceeding twenty years, and with fine and compensation as determined by the judge	365B(2)(a)	Rigorous imprisonment for a term not less than seven years and not exceeding twenty years, and with fine and compensation as determined by the judge
364 (2) (e) Commits rape on a woman under eighteen years of age	Rigorous imprisonment for a term not less than ten years and not exceeding twenty years, and with fine and compensation as determined by the judge	365B(2)(b) Commits grave sexual abuse on a person under eighteen years of age	Rigorous imprisonment for a term not less than ten years and not exceeding twenty years, and with fine and compensation as determined by the judge
364 (2) (a) Being a public officer...	Rigorous imprisonment for a term not less than ten years and not exceeding twenty years, and with fine and compensation as	Corresponding aggravated offences are not recognized.	
364 (2) (b) Being on the management or staff... of..place of custody or institution...			

364 (2) (c) Being on the management or staff of a hospital...	determined by the judge	
364 (2) (d) Commits rape on a woman knowing her to be pregnant		
364 (2) (f) Commits rape on a woman who is mentally or physically disabled		
364 (2) (g) Commits gang rape		

Table 1: Sentencing in cases of rape when committed against women and others

Decided cases show that in cases of rape, women are stereotyped as victims and men as perpetrators. In *Perera v. Attorney General*<sup>71</sup> Ranjith Silva J pointed to a “natural presumption” with regard to a case of abduction of a young woman by a man: *“The natural presumption when a young man abducts a girl of marriageable age is that he abducted her with the intention of having sexual intercourse with her consent after seduction or after marrying her. I cannot see any reason why this presumption could not be extended mutatis mutandis to read as “when a male lures away a female to an isolated spot and then keeps her in wrongful confinement in order to gratify his sexual needs does so with the intention of having sexual intercourse”.* However, a similar approach has not been adopted with regard to victims who are men.

There appears to be a disassociation of male identity with victimhood, particularly in relation to sexual violence. Engendering victimhood is a largely under-explored area around which a broad research agenda seems to be developing.<sup>72</sup> Stereotypes around victimhood, thus, need to be challenged in order to provide adequate protection for men.

At the same time, with regard to sentencing, the non-recognition of aggravated offences– those that demand a more serious punishment due to the circumstances in which the offence was committed, under s.365B similar to those found in sections 364 (2) (a)-(g) cannot be justified.

<sup>71</sup> (2012) 1 SLR 69.

<sup>72</sup> Heleen Touquet, ‘Sexual violence against men: enabling disclosure in the face of denial’ (2018, Department of Gender Studies, London School of Economics and Political Science) available at <https://blogs.lse.ac.uk/gender/2018/11/21/sexual-violence-against-men-enabling-disclosure-in-the-face-of-denial/>; Charu Hogg, ‘No Justice for Sri Lankan Male Survivors’ (2017, Opinio Juris) available at <http://opiniojuris.org/2017/06/26/no-justice-for-sri-lankan-male-survivors/>.

## DECRIMINALIZING SEX BETWEEN SAME-SEX PARTNERS

While same-sex sexual relations have been decriminalized in India and Nepal, a Bill to repeal the law which criminalizes homosexuality has been passed in the Lower House in Bhutan.

In Sri Lanka, in a recent Appeal to the Supreme Court which concerned sentencing under s.365A- gross indecency between persons, the Court noted that the laws which criminalize sex between same-sex partners still form part of our law. However, a suspended sentence was given “*considering the fact that the act was consensual*”.<sup>73</sup>

*“This offence deals with the offences of sodomy and buggery which were a part of the law in England and is based on public morality. The Sexual Offence Act repealed the sexual offences of gross indecency and buggery in 2004 and not an offence in England now.*

*The contemporary thinking, that consensual sex between adults should not be policed by the state nor should it be grounds for criminalisation appears to have developed over the years and may be the rationale that led to repealing of the offence of gross indecency and buggery in England.*

*The offence however remains very much a part of our law. There is nothing to say that the appellant has had previous convictions or a criminal history. Hence to visit the offence with a custodial term of imprisonment does not appear to be commensurate with the offence, considering the fact that the act was consensual, and absence of a criminal history on the part of the other accused as well. In my view this is a fit instance where the offenders should be afforded an opportunity to reform themselves”.*

Justice Aluwihare, PC, in *OIC Maradana vs. Galabada Payagalage Sanath Wimalasiri*,  
SC Appeal No 32/2011

The Court recognizes that the contemporary thinking that consensual sex between adults should not be grounds for criminalization has developed over the years. One could interpret this to mean that the Sri Lankan law in this area calls for review by the legislature.

As s.365 and s.365A discriminate against people of diverse sexual orientations, the repeal of these provisions is necessary. The two provisions identify sexual activity with no violence present, as offences. However, unlike in India where the Supreme Court took the progressive step to decriminalize same-sex sexual activity, in Sri Lanka change will require action by the legislature.

A possible argument from those who may oppose this reform can be the need to “protect children”. However, the existing legal framework provides sufficient protection for children. The Penal Code (Amendment) Act, No. 16 of 2006<sup>74</sup> introduced new offences relating to sexual abuse of children further strengthening legal protection for children.

<sup>73</sup> *OIC Maradana vs. Galabada Payagalage Sanath Wimalasiri*, SC Appeal No 32/2011, 11-12 Available at [http://www.supremecourt.lk/images/documents/sc\\_appeal\\_32\\_11.pdf](http://www.supremecourt.lk/images/documents/sc_appeal_32_11.pdf).

<sup>74</sup> Available at <https://www.oecd.org/site/adboecdanti-corruptioninitiative/46817262.pdf>.

## STATUTORY RAPE

Setting an age of consent for sexual activity supports young people as they learn to negotiate sexuality, a profound aspect of adulthood. This boundary provides safety from pressure to engage in sex while a young person is not yet “ready”. The law allows them to explore and develop into adulthood with safety from sexual advances of adults who benefit from the power dynamics between young people and adults, due to maturity, financial strength, independence, and decision making capacity which generally accompany age.

The Penal Code states, “A man is said to commit rape who has sexual intercourse with a woman” “with or without her consent when she is under sixteen years of age”.<sup>75</sup> While a reading of this provision, with the rationale for setting an age of consent in mind, explains that consent of a girl below 16 is irrelevant for a conviction under s.363(e), the Courts and the law enforcement appear to have derived the idea that statutory rape can be committed in two instances:

1. with the consent of a girl below 16, or
2. without her consent

In 1995, an Amendment to the Penal Code provided that where the offender is under 18 years of age, and if the intercourse has been with consent of the person, a term less than the mandatory minimum sentence may be imposed. It was envisioned that this amendment would allow judges to give relief to young boys who have been in romantic relationships with the prosecutrix and committed statutory rape within such relationships.

*“Provided however, that where the offence is committed in respect of a person under sixteen years of age, the court may, where the offender is a person under eighteen years of age and the intercourse has been with the consent of the person, impose a sentence of imprisonment for a term less than ten years”*

This provision is perhaps the reason why one finds the problematic oxymoron “statutory rape with the consent of the victim” in Sri Lanka’s crime statistics.<sup>76</sup> Sri Lanka Law Commission, has raised several concerns regarding the amendment, including the non-recognition of a lower limit of the age where a girl can consent.<sup>77</sup> Can the judiciary exercise discretion if she is 13 years old? Can a 11 year old give consent? What if she was 9 ½?

In contrast, section 365B, under which ‘grave sexual abuse’ committed against a man falls (due to definitional limitation in rape to recognize men as victims), includes no such proviso which allows for judicial discretion in sentencing with regard to such sexual abuse of a man below the age of sixteen “with consent”. The perpetrator is treated differently based on the gender of the victim. A man who vaginally rapes a 13 year old girl “with her consent” can be given a suspended sentence while a man who anally raped a 13 year old boy “with his consent” must be imprisoned for a term not less than ten years. This shows how the law has sexualized the girl while continuing to protect the boy.

<sup>75</sup> S.363(e).

<sup>76</sup> See Grave Crimes Abstract (2019) at [https://www.police.lk/images/crime\\_statistics/2019/Grave-crime-abstract-for-the-Year-2019.pdf](https://www.police.lk/images/crime_statistics/2019/Grave-crime-abstract-for-the-Year-2019.pdf)

<sup>77</sup> Explanatory Note on the Sentencing Policy with Regard to Statutory Rape and Matters Connected Thereto (Sri Lanka Law Commission) Available at [https://lawcom.gov.lk/web/images/stories/reports/explanatory\\_note\\_on\\_the\\_sentencing\\_policy.pdf](https://lawcom.gov.lk/web/images/stories/reports/explanatory_note_on_the_sentencing_policy.pdf).

A matter that causes even more concern relates to a sentencing practice developed by the courts relying on judicial precedent in an unreported case. This practice and its implications will be discussed under ‘Sentencing’ below.

## SENTENCING

In 2008, the High Court Judge from Anuradhapura High Court referred a matter to the Supreme Court inquiring whether the 1995 Amendment has removed the judicial discretion when sentencing an accused convicted for committing rape of a woman under 18 years of age under section 364(2) (e) of the Penal Code. The unanimous opinion of the Supreme Court was that “*the minimum mandatory sentence in Section 362(2) (e) is in conflict with Article 4 (c), 11 and 12(1) of the Constitution and that the High Court is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion notwithstanding the minimum mandatory sentence*”.<sup>78</sup>

As a result of this case, judges were no longer bound to impose the mandatory minimum sentence when a woman under 18 was raped. Unlike the proviso to s.364 (2) which applied only when the perpetrator was 18 years old, this rule applies irrespective of the age of the perpetrator.

Precedence set in this case gave rise to a judicial practice of giving suspended sentences to persons convicted of statutory rape. In *Maramba Liyanage Rohana v Attorney General*<sup>79</sup>, where the prosecutrix and the accused person were in a relationship, and the prosecutrix had asked the accused person to take her away from home, the Court followed the above case and gave a suspended sentence– “*The Accused is technically guilty of the offence described in Section 364(2) (e) of the Penal Code. However upon considering the facts of the case and the submissions of the Counsel, this is not a case where the Accused has to suffer a custodial sentence*”<sup>80</sup>.

Though it is generally accepted that judges can now use judicial discretion relying on the case from Anuradhapura High Court–SC Reference 3/2008, there is nothing preventing a judge from using judicial discretion to disregard the mandatory minimum sentence in cases where there is no consent.

In *AG vs. Samantha Sampath*<sup>81</sup>, following the case from Anuradhapura High Court, the Supreme Court imposed a suspended sentence. In this case there was no evidence indicating that the prosecutrix consented to sexual intercourse. There was no evidence of a romantic relationship between the two. The accused person was the brother-in-law of the prosecutrix. She was 15 years old at the time.

In determining that a custodial sentence is unwarranted the court discussed that a police complaint was not made by the parents. It was noted that the “victim girl did not make any complaint at that time to the Police”. The Court was seen weighing the rights of the child born to the prosecutrix as a result of rape against the rights of the prosecutrix who was also a child at the time the rape was committed. “*In the present case, we must look at the big picture with the*

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<sup>78</sup> SC Reference 3/2008, HC Anuradhapura Case No. 333/2004, SCM 15.10. 2008 - 2008 B.L.R. - Part III - BASL Law Journal (2008) Vol XIV - 160  
*Rohana alias Loku vs. AG* [2011] 2 SRI L.R. 174 available at <https://www.lawnet.gov.lk/wp-content/uploads/2017/01/Law-Report-part-7.pdf> page 178

<sup>79</sup> *Rohana alias Loku vs. AG* [2011] 2 SRI L.R. 174.

<sup>80</sup> See page 180

<sup>81</sup> *AG vs. Samantha Sampath* (2015) S.C. Appeal No. 17/2013 [http://www.supremecourt.lk/images/documents/sc\\_appeal\\_17\\_13.pdf](http://www.supremecourt.lk/images/documents/sc_appeal_17_13.pdf).

*victim of rape, the Appellant, the father of the child born, and the 10 year- old girl child who was born into this world as a result of the victim having been raped*".<sup>82</sup>

Judicial discretion in cases such as this where the Courts disregard minimum mandatory sentences, contravenes the Code of Criminal Procedure Act 1979 which stipulates in section 303, that the court may suspend a sentence, where the court orders a sentence of imprisonment for less than two years.

Section 303 reads as follows:

303 (1) A court which imposes a sentence of imprisonment on an offender for a term not exceeding two years for an offence may order that the sentence shall not take effect unless, during a period specified in the order being not less than five years from the date of the order (hereinafter referred to as the "operational period"), such offender commits another offence punishable with imprisonment (hereinafter referred to as "subsequent offence").

It should be noted that the with regard to the offence of raping a woman under 18 years of age under s.364(2) (e) of the Penal Code, the statute has ensured that mandatory custodial sentences are imposed. Language of the statute is clear and it is evidence of legislative intent. The fact that the mandatory minimum sentence of ten years was brought about through the 1995 Amendment makes it clear that the legislature did not intend suspended sentences to be permissible in these instances. Therefore, it can be argued that the exercise of judicial discretion (which is not provided for by law) notwithstanding the letter of the law, is contrary to the law. There is opportunity to challenge this judicial practice by placing an appropriate judgement for review before the Supreme Court with a fuller bench—a three judge bench reviewed the matter in the case from Anuradhapura High Court. A bench with more than three judges can still adjudicate on the correctness of the judgement.

## **RULES ON EVIDENCE**

In Sri Lanka, the victim's sexual history can be presented before the court to impeach her 'character'. The notion that the 'loose character' of a woman can influence the outcome of a case fundamentally undermines the concept of *consent* which needs to be at the center of law relating to sexual violence.

The Evidence Ordinance<sup>83</sup> in s.155 makes provisions regarding how the character of a witness may be impeached by the adverse party, or with the consent of the Court by the party who calls such witness. Subsection (d) states that "*when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character*". This provision is a reinstatement of gender norms which demand that women should suppress their sexuality in order to be "good women". This is an example of how patriarchal values have seeped into the legal system.

In India, the law expressly prohibits evidence of a victim's sexual history. The Evidence Act as amended by the Act No. 13 of 2013 provides, in s.53 (A), "*where the question of consent is in*

<sup>82</sup> *ibid*

<sup>83</sup> Available at [http://hrlibrary.umn.edu/research/srilanka/statutes/Evidence\\_Ordinance.pdf](http://hrlibrary.umn.edu/research/srilanka/statutes/Evidence_Ordinance.pdf).

*issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent".*

In the paper titled "Rape and the Evidentiary Process in Sri Lanka", Priya Thangarajah discussed in detail problematic practices relating to evidence collection and presentation in cases of rape in Sri Lanka. One of the problematic practices with regard to evidence collection relates to the examination of the hymen and vaginal elasticity to assess a woman's sexual history.

The use of this practice in Sri Lanka is referred to in a paper by Dr. S. R Hulathduwa in 2010–*"Currently accepted method of examining/ sampling of female genitalia in alleged rape, formulated by experienced forensic physicians in the UK in 2003, does not include insertion of examiner's fingers in to the woman's vagina to access the hymenal orificial diameter. This rather unrewarding and embarrassing practice should be strongly discouraged though it is still in use among a fair number of doctors engaged in medico-legal work in Sri Lanka. It is common sense that any attempt to measure a stretchable body part by insertion of fingers is non-scientific"*<sup>84</sup>. *"It is generally accepted that due to hymenal elasticity, post-pubertal females can experience penile vaginal penetration without sustaining any hymenal deficits. This makes the mythical concept of virgintacta null and void. Again, do we readily acknowledge this?"*, he writes further.

Thangarajah, outlining the process of forensic evidence collection, pointed out that the 'two-finger test' epitomizes the understanding of sexual violence as mainly intercourse, and also highlights the lack of will to understand women's bodies or states of mind holistically, in instances of sexual violence. *"This practice, among others, in spite of being an integral part of the continuum of violence, is almost never viewed as such"*<sup>85</sup>.

In practice, how does this test really become relevant? When a victim goes through a medical examination, the Judicial Medical Officer or a medical practitioner would examine and record among other things, any injuries observed, type of hymen, hymen elasticity, and whether there has been 'repeated penile penetration'. If the medical officer examines 'repeated penile penetration', but the victim in her statement states that she has never had sexual intercourse with a man, her credit as a witness can be impeached under s.155 of the Evidence Ordinance. It is 'vaginal elasticity' that informs the medical officer whether there has been 'repeated penile penetration'. The issue is that there is no scientific evidence to show that vaginal elasticity increases due to sexual intercourse.

The National Guidelines on Examination, Reporting and management of Sexually Abused Survivors for Medico-Legal Purposes compiled by the College of Forensic Pathologists in Sri Lanka in 2014, however, does not recommend two-finger test<sup>86</sup>. It provides that if necessary a glass rod or a speculum can be used to examine the genital area. However, the Guidelines call for opinion on evidence of recent, previous or repeated penetration<sup>87</sup>.

The procedure has been banned in Balgladesh<sup>88</sup>. It is also banned in India. In 2013, the Indian Supreme Court pointed out that "the two finger test and its interpretation violate the right of rape survivors to privacy, physical and mental integrity, and dignity".<sup>89</sup>

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<sup>84</sup> S. R. Hulathduwa, 'Some Common Pit-falls in the Practice of Forensic Medicine in Sri Lanka. A Review of International Literature', Sri Lanka Journal of Forensic Medicine, Science & Law 2010 Vol.1 No.1 pp.15-21. Available at <https://sljfm.sljol.info/articles/abstract/10.4038/sljfm.v1i1.2711/>

<sup>85</sup> Priya Thangarajah, "Rape and the Evidentiary Process in Sri Lanka", The Search for Justice: The Sri Lanka Papers, Kumari Jayawardena & Kishali Pinto-Jayawardena (Editors), Zubaan, 2016.

<sup>86</sup> The College of Forensic Pathologists of Sri Lanka, National Guidelines on Examination, Reporting and management of Sexually Abused Survivors for Medico-Legal Purposes, 2014. Available at <http://medical.sjp.ac.lk/downloads/forensic-medicine/Medico%20Legal%20Purposes.pdf>

<sup>87</sup> See page 16

<sup>88</sup> See news report at <https://www.thedailystar.net/frontpage/hc-bans-2-finger-taste-1562242>.

# RECOMMENDATIONS

In view of the discussion above, four changes to the law relating to rape can be recommended.

## 1. Redefining the offence of rape

The offence of rape needs to be redefined with consent at the center. The use of the phrase 'with the consent when...' in s.363 (b) to (e) in the Penal Code allows for the misconstruction that mere communication of willingness even in the absence of such willingness, in fact, constitutes consent.

The following is an example how the section on rape can be rephrased with consent at the center.

### Rape

1. A man commits rape if he causes a penetration of a sexual nature without the consent of any woman.
2. The following acts when committed without consent constitute rape:
  - Insertion of the penis into the vagina, anus, or mouth of a woman.
  - Insertion of any part of the human body other than the penis, or any object into the vagina or anus of a woman.

### **Explanation 1**

Consent is the clear and active communication of willingness to engage in sexual intercourse.

Consent must be voluntarily given and cannot be obtained through force or coercion.

Consent cannot be obtained by putting her or any person in fear of death, rape, grave sexual abuse, grievous hurt, or hurt.

A woman of unsound mind, a woman who is unconscious, or a woman who is under the effects of alcohol or drugs cannot consent to sexual intercourse.

Consent cannot be given to a man who falsely impersonates a woman's husband or unmarried partner, by a woman who believes that man to be her husband or unmarried partner.

A girl below the age of 16 cannot give consent.

A woman in the custody of the Police or in prison cannot give consent.

Consent can be revoked at any time during sexual activity.

### **Explanation 2**

The mere absence of physical resistance does not imply consent.

### **Explanation 3**

The penetration of labia majora is sufficient to complete the act of insertion of the penis, any part of the human body other than the penis, or any object into the vagina.

<sup>89</sup> Rajesh & Anr vs. State of Haryana (2013) Available at <https://indiankanoon.org/doc/78844212/>

Also note that this definition effectively criminalizes marital rape. It expands the scope of the offence to include anal and oral penile penetration, and penetration of the vagina and anus using an object or part of the human body other than the penis.

This definition would also criminalize rape committed on a woman who is intoxicated due to alcohol or drugs administered herself. Excluding a woman from the protection of the law if she uses alcohol or drugs is an unjustifiable discrimination based on patriarchal gender norms.

Punitive section of the offence needs to carry clear instructions for sentencing. Law has to address the issue of imposing suspended sentences for offences which carry a mandatory minimum sentence. While judicial discretion is necessary for the law to evolve progressively, when gender norms and stereotypes seep into the judicial system, judicial discretion can lead to unfair outcomes for women. At the same time, law must be clear, predictable and not arbitrary.

If the judiciary finds the provisions for sentencing unreasonable, reforms should be made to the legislation. This way, it can be ensured that law is clear and is applied equally to everyone. When the judiciary exercises discretion, how does one eliminate the presence of prejudices, biases, and misconceptions in the process, for example those based on gender stereotypes?

## 2. Repealing s.365 and s.365B

Both these sections criminalize voluntary sexual activity between consenting adults. These laws are a remnant of 19<sup>th</sup> century Victorian morality that sought to criminalize homosexuality. It is unjustifiable to criminalize same-sex sexual activity when science has shown that homosexuality is not an unnatural disorder. It was nearly 50 years ago that the American Psychiatric Association depathologised homosexuality<sup>90</sup>.

Section 365B criminalizes, in addition to sexual activity between consenting adults, acts of gross indecency in public. Therefore, one may argue that s.365B needs to be retained to protect the public from exhibitions of sexual activity. But the section 7 (1) (b) of the Vagrants Ordinance No. 04 of 1841 already criminalizes acts of gross indecency in public.

## 3. Redefining the offence of grave sexual abuse

This offence too needs to be developed with consent at the center, similar to the example given above under 'Redefining the offence of rape'.

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<sup>90</sup> The New York Times 'Psychiatrists, in a Shift, Declare Homosexuality No Mental Illness', 16/12/1973. Archived at <https://www.nytimes.com/1973/12/16/archives/psychiatrists-in-a-shift-declare-homosexuality-no-mental-illness.html>.

The following is an example how this section can be rephrased:

### **Grave Sexual Abuse**

1. A person commits grave sexual abuse if such person, for sexual gratification, does any act by the use of his genitals or any part of the human body or any instrument on any orifice or part of the body of another person, being an act which does not amount to Rape under 363, without the consent of another person.

#### **Explanation 1**

Consent is the clear and active communication of willingness to engage in sexual intercourse.

Consent must be voluntarily given and cannot be obtained through force or coercion.

Consent cannot be obtained by putting the person against who grave sexual abuse is committed or any other person in fear of death, rape, grave sexual abuse, grievous hurt, or hurt.

A person of unsound mind, a person who is unconscious, or a person who is under the effects of alcohol or drugs cannot consent to sexual intercourse.

Consent cannot be given to a person who falsely impersonates a spouse or unmarried partner, by a person who believes such impersonating person to be his/her spouse or unmarried partner.

A child below the age of 16 cannot give consent.

A person in the custody of the Police or in prison cannot give consent.

Consent can be revoked at any time during sexual activity.

#### **Explanation 2**

The mere absence of physical resistance does not imply consent.

#### **Explanation 3**

The penetration of labia majora is sufficient to complete the act of insertion of the penis, any part of the human body other than the penis, or any object into the vagina.

Punitive measures for rape and grave sexual abuse need to be the same. At the same time, the offence of grave sexual abuse needs to carry aggravated offences– instances of grave sexual abuse which would carry heightened punishment due to circumstances such as grave sexual abuse by a person in authority or gang rape –identical to those attached to the offence of rape.

#### 4. Repeal s.155 (d) of the Evidence Ordinance

Allowing the defense to bring in evidence of the sexual history of the prosecutrix to impeach her credit as a witness functions as an impediment to obtain justice for rape. This practice also undermines the importance of *consent*, the lack of which constitutes the central element of the offence of rape.

To strengthen the prohibition on evidence of sexual history, and to expand this protection to all persons, the following language can be added to the Evidence Ordinance:

A person's sexual history is inadmissible in a trial on any form of sexual violence caused against such person.

While the above recommendations will help remove some of the key concerns surrounding the law relating to rape in Sri Lanka, reforming the substantive law alone will not ensure justice for victims and the end of impunity for perpetrators. Education reforms, including legal education reforms, that focus on equality and respect is necessary to achieve lasting change.



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