GNLU LAW AND SOCIETY REVIEW

Access to Justice
Gender, Law and Sexuality

2024

Volume IV

ISSN: 2582-2446

GNLU
CENTRE FOR LAW AND SOCIETY

GUJARAT NATIONAL LAW UNIVERSITY

GNLU LAW & SOCIETY REVIEW

VOLUME IV

Access to Justice | Gender, Law and Sexuality

ISSN: 2582-2446

Published by:

Centre for Law & Society,

Gujarat National Law University,

Attalika Avenue, Koba, Gandhinagar – 382436,

Gujarat, India

E. glsr@gnlu.ac.in

EDITORIAL BOARD

CONTENTS

MESSAGE FROM THE DIRECTOR

With great pleasure, I extend my congratulations and appreciation to everyone involved in the publication of Volume IV of the GNLU Law and Society Review (GLSR). This annual publication, spearheaded by the GNLU Centre for Law and Society (GCLS), exemplifies our commitment to fostering rigorous scholarship and facilitating critical discourse. The interdisciplinary nature of Law and Society, as interrelated disciplines, relates to the very core of society, making academic debates and discussions in this realm undeniably integral.

The diverse and insightful contributions in this volume, exploring the intricate intersections of Gender, Law, and Sexuality, and Access to Justice, underscore the interdisciplinary nature of contemporary legal scholarship. I commend the scholars, authors and researchers whose insightful contributions have enriched the scholarly landscape of the Law and Society Journal. Appreciation to the Editorial Team, steered by Dr. Apoorva Patel, alongside our faculty editors and student editorial board members, for their meticulous work in curating this journal, ensuring its academic rigour and scholarly excellence. Your commitment to pushing the boundaries of legal scholarship is invaluable.

As we celebrate this milestone, let us continue our pursuit of academic excellence and collaborative scholarship. The GNLU Law and Society Review stands as a beacon of knowledge, illuminating the path for future generations of legal minds. Once again, congratulations to everyone involved in making this publication a resounding success. Your dedication to the pursuit of knowledge is truly inspiring.

Prof. (Dr.) S. Shanthakumar,
Director, Gujarat National Law University,
Gandhinagar, Gujarat, India

EDITORIAL NOTE

- *Dr. Apoorva Patel*[1]

It is an honour and a privilege to present Volume IV of the GNLU Law & Society Review (GLSR). An annual publication under the auspices of the GNLU Centre for Law and Society (GCLS), GLSR is a testament to the Centre's ongoing commitment to fostering rigorous scholarship and critical discourse. Serving as a double-blind peer-reviewed journal, it is dedicated to upholding the highest standards of scholarly publication.

The preceding volume, released in 2021, featured insightful contributions from various scholars from India and around the globe, including student authors, exploring themes within the purview of law and society.

Volume IV delves into intricate and nuanced issues surrounding Gender, Law, and Sexuality, and Access to Justice. It encapsulates the collaborative efforts of esteemed scholars, dedicated authors, and diligent external reviewers who have graciously contributed their time and expertise. The thematic breadth of this volume reflects the interdisciplinary nature of contemporary legal scholarship. The selected manuscripts delve into multifaceted issues, offering nuanced insights into the dynamic interface between law and society.

The articles in this volume provide insightful analysis and critiques, encouraging readers to contemplate the profound impact of legal frameworks on these vital areas. They cover a comparative analysis of rape laws across different legal systems, an examination of the status of Christian mothers under the Indian Succession Act, discussions on inclusive policies to bridge gender disparities in education, an exploration of the relationship between gender, law, and sexuality, and arguments for trusting the woman's word under Indian Criminal Law, alongside a call for legal intervention in cases of necrophilia in India. Complementing these, the Book Review section scrutinizes arguments surrounding abortion and morality.

On behalf of the Review, I express my sincere gratitude to Prof. (Dr.) S. Shanthakumar (Hon'ble Director, GNLU) for his invaluable guidance and constant encouragement for excellence. Heartfelt appreciation goes to our contributors' scholarly endeavours and our external reviewers including Dr. Krishna Aggarwal, Assistant Professor, Kurukshetra University, Dr. Kalpesh Kumar L Gupta, Independent Practitioner and Doctorate in Law from Gujarat National Law University, Dr. Apeksha Kumari, Assistant Professor, Faculty of Law, University of Delhi, Dr. Siddhartha

1 * Assistant Professor of Social Work and Head, Centre for Law and Society, Gujarat National Law University.

Misra, Assistant Professor, Faculty of Law, University of Delhi, Mr. Aditya Bhatt, Advocate, Gujarat High Court for their meticulous assessments. Gratitude also to Dr. Saurabh Anand and Dr. A. N. Rao, the Centre's faculty members. Acknowledgement is due to Mr. Ayush Rastogi, Teaching and Research Associate, for all his assistance. My special thanks go to the dedicated Student Editorial Board for anchoring the journal effectively, ensuring quality publication, and fulfilling the Review's and the Centre for Law and Society's goals and objectives. All of these collective efforts have culminated in a volume that, we believe, will stimulate thoughtful discussions and contribute to the advancement of legal scholarship.

We invite scholars, legal professionals, and students intrigued by contemporary issues at the intersection of law and society to explore the insightful contributions within this volume. I hope you find Volume IV of the GNLU Law & Society Review both thought-provoking and engaging.

With best wishes,
Dr. Apoorva Patel,
Head - GNLU Centre for Law and Society (GCLS),
Assistant Professor of Social Work, Gujarat National Law University, Gandhinagar

Overlooked and Undermined - A Critical Note on the Status of Christian Mothers under the Indian Succession Act

- *Adya Joshi*[2]

Introduction

One of the primary obstacles in achieving women's empowerment in India, is the entrenched patriarchy that underscores most personal laws in the country. While the Constitution guarantees equal protection to both sexes,[3] the unique nature of Indian secularism has often resulted in 'freedom of religion' prevailing over notions of gender justice – particularly in the spheres of marriage, divorce and succession.

No doubt, the in-built discrimination in personal laws has received significant government attention over the years, and several attempts have been made to ameliorate the situation through legislative amendments and judicial intervention. Issues such as a woman's right to receive maintenance irrespective of religion, the right of Hindu women to receive equal shares in ancestral property, and the outlawing of the customary Muslim practice of 'triple talaq', are just a few examples where the Parliament and Indian courts have interceded[4] in personal laws to combat gender inequality. Moreover, the enactment of a 'Uniform Civil Code' with gender-neutral provisions, is currently one of the most crucial political and policy issues that is being debated at the moment.

Notably, however, much of the spotlight remains on women belonging to the Hindu and Muslim communities, since there is a belief that Christian women are in a 'better' position as compared to their counterparts belonging to other religions in the country.[5] In fact, as per recent news reports, the Central government is allegedly planning to exclude Christians from the purview of the proposed Uniform Civil Code altogether.[6]

The reality however, starkly differs. While the primary legislation governing Christian succession,

---

2 Associate, Shardul Amarchand Mangaldas & Co.

3 INDIA CONST. art. 14.

4 *See* Mohd. Ahmad Khan v. Shah Bano Begum, AIR 1985 SC 945; Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1; Shayara Bano v. Union of India, (2017) 9 SCC 1; Hindu Succession (Amendment) Act, 2005, No. 39, Acts of Parliament, 2005 (India); The Muslim Women (Protection of Rights on Marriage) Act, 2019, No. 20, Acts of Parliament, 2019 (India).

5 Sravasti Dasgupta, *BJP Equates UCC With Gender Justice. But Can It End Discrimination In-Built in Personal Laws?* THE WIRE (July 1, 2023, 8:17 PM), https://thewire.in/women/bjp-ucc-with-gender-justice-discrimination-personal-laws.

6 Devesh Kumar,'*Christians, tribals likely to be exempted from UCC': Centre assures Nagaland*, Mint (July 2, 2023, 9:35AM), https://www.livemint.com/news/india/christians-tribals-likely-to-be-exempted-from-ucc-centre-assures-nagaland-11688725777702.html.

i.e., the Indian Succession Act, 1925 ("**ISA**"/ "the **Act**")[7], broadly supports gender equality, it is not immune from discrimination. In particular, Christian mothers under the ISA have been relegated to an inferior status without any justifiable reason. However, the public discourse and engagement in this regard is conspicuously absent.

Accordingly, this paper seeks to shed light on the rights of Christian mothers under the ISA, who have been overlooked and undermined for far too long.

Overview of Christian Succession in India

Prior to the introduction of the ISA, succession rights for communities that were not Hindu or Muslim, were disparate. Christian inheritance in particular, varied considerably since the various sects and denominations all followed different rules and customs.[8] Moreover, the application of these rules was equally inconsistent. In general, English law was applied to the Jews, Christians, Armenians, Parsis and Ango-Indians in the Presidency towns, while 'justice, equity and good conscience' was utilized by the courts in the Moffusil areas.[9]

The indeterminate approach led to several recommendations for a unified legislation, and in 1865 the first version of the ISA was introduced by Sir Henry Maine.[10] The Act codified both testamentary and intestate succession for these communities, and was largely based on English law. Subsequently, various other legislations were consolidated within the Act, and the final version of the ISA came into force in 1925, which has been amended twice thereafter.[11]

Notably, the ISA did not extend to the erstwhile states of Travancore and Cochin at the time of enactment, despite the significant Christian population. Instead, up until 1916, the Christians in these states followed their own customs with respect to inheritance and succession. Unfortunately, these were influenced by the regressive practices of the orthodox Hindu Mitakshara customs.[12] To illustrate, daughters were denied any property rights, and were simply provided 'stridhana' at the

7 Indian Succession Act, 1925, No. 39, Acts of Parliament, 1925 (India).

8 Sindhu Thulaseedharan, *Christian Women and Property Rights in Kerela-Gender Equality in Practice*, PROJECT UNDER THE KERALA RESEARCH PROGRAM(KRPLLD), CENTRE FOR DEVELOPMENT STUDIES (CDS), Trivandrum (July 5, 2023, 6:37PM), www.cds.ac.in/krpcds/report/sindhu.pdf.

9 M.P. JAIN, OUTLINES OF INDIAN LEGAL AND CONSTITUTIONAL HISTORY 470 (LEXISNEXIS, 2006).

10 Indian Succession Act, 1865, No. 10, Acts of Council of India, 1865 (India).

11 The Indian Succession (Amendment) Act, 1991 No. 51, Acts of Parliament, 1991 (India); The Indian Succession (Amendment) Act, 2002 No. 26, Acts of Parliament, 2002 (India).

12 Susan Vellapally and Markos Vellapally, *Repeal of the Travancore Christian Succession Act, 1916 and its Aftermath,* INDIA INTERNATIONAL CENTRE QUARTERLY VOL. 22, NO. 2/3, 182 (1995).

time of marriage, which was treated as their share of inheritance.[13] These customs were then codified by the Travancore Christian Succession Act, 1916 ("**Travancore Act**")[14] and the Cochin Christian Succession Act, 1921 ("**Cochin Act**")[15], without any attempts at reform. As a result, the aforementioned Acts were riddled with discriminatory provisions.

To illustrate, under Section 24 of the Travancore Act, a widow only had a life interest in her share of her deceased husband's property, and this too could be set aside by a son after 3 years of attaining majority.[16] In addition, this right was inalienable and she could not further will it off. Furthermore, daughters were given 1/4th of a son's share in the property, or Rs. 5000 whichever was lesser – and even this was not provided if she had been given stridhana.[17] The law was similar under the Cochin Act, where a daughter was only given 1/3rd of her brother's share and excluded if she had received stridhana at the time of marriage.[18] And even if the daughter had no brothers, the property did not go to her but instead devolved upon remote male descendants of any degree.[19] In fact, the discriminatory provisions in these Acts were upheld by the courts in *Mathoo Phillip vs Mathoo Ouseph*[20]and *Iyer Hariharasubramonia Iyer v. Mathu Thrasia,* [21] and an attempt to repeal the aforementioned acts through the Christian Succession Acts (Repeal) Bill[22] lapsed due to strong resistance.

Post- independence, the states of Travancore and Cochin were merged together to form the Part B State of Travancore-Cochin. Thereafter, in 1951, the Part B States (Laws) Act was introduced which extended the Central Acts and ordinances in its Schedule, including the ISA to the Part B States.[23] However when the Travancore Act was challenged for the first time in the case of *Kurien Augusty v. Devassy Aley,*[24] the High Court of Kerala upheld its validity on the ground that the ISA was not meant to interfere with personal laws. This was further endorsed by the Madras High

13 *Id.*

14 The Travancore Christian Succession Act, 1916 (India).

15 The Cochin Christian Succession Act, 1921 (India).

16 The Travancore Christian Succession Act, 1916, Section 24 (India).

17 The Travancore Christian Succession Act, 1916, Section 28 (India).

18 The Cochin Christian Succession Act, 1921 Section 20(b) (India).

19 Sebastian Champappilly, *Christian Law of Succession and Mary Roy's Case,* 4 SCC (JOUR) 9 (1994).

20 Mathoo Phillip vs Mathoo Ouseph AIR 1965 Ker 220.

21 Iyer Hariharasubramonia Iyer v. Mathu Thrasia, 13 Trav LJ 354 (FB).

22 The Christian Succession Acts (Repeal) Bill, 1958 (India).

23 The Part B States (Laws) Act, 1951, No. 3, Acts of Parliament, 1951 (India).

24 Kurien Augusty v. Devassy Aley, 1956 KLT 559.

Court in *D. Chelliah* v. *G. Lalitha Bai.*[25] Subsequently though, in *Solomon v. Muthiah*[26] a single judge of the Madras High Court upheld the ISA for Travancore and Cochin Christians stating that its provisions were of universal application. In this manner, the stance of the courts continued to fluctuate until the Supreme Court' of India's landmark decision in *Mrs. Mary Roy Etc. v. State Of Kerala & Ors ("***Mary Roy***").*[27]

In *Mary Roy*, a Syrian Christian woman challenged Sections 24, 28, 29 of the Travancore Act for being discriminatory towards women and therefore violative of Article 14 of the Indian Constitution. In its judgment, the Supreme Court held that in view of the Part B States (Laws) Act, the Travancore and Cochin Acts stood wholly repealed and the ISA became uniformly applicable to the Christian communities in these states.[28] This decision was widely celebrated for ensuring equal rights to Christian women and is till date considered the most important judgment in relation to Christian succession. Interestingly, however, the Supreme Court did not go into the merits of the case and determine the aspect of gender inequality. Instead, it premised its decision on the technical aspects of the applicability of the Part B States (Laws) Act to the states of Travancore and Cochin.

Nonetheless, post *Mary Roy*, it is generally considered that Christian succession is primarily neutral since the scheme of the ISA promotes gender equality. However, the author believes that this is a misconception, given that glaring inequalities continue to exist, especially with respect to Christian mothers under the Act.

Status of Christian Mothers under the ISA

A primary illustration of the inferior status of Christian mothers under the ISA, is reflected in the scheme of intestate succession under Sections 31 to 49 of the Act. As per Section 42 of the Act, in a situation where there are no lineal descendants of the intestate 1/3rd of the property is reserved for the widow, while the rest of the property devolves *entirely* on the ***father*** of the intestate.[29] If the father of the intestate is deceased, but his siblings and mother are alive, the remaining property

25 D. Chelliah v. G. Lalitha Bai, AIR 1978 Mad 66.

26 Solomon v. Muthiah, (1974) 1MLJ 53.

27 Mrs. Mary Roy Etc. v. State of Kerala & Ors, 1986 AIR 1011.

28 *Id.*

29 Indian Succession Act, 1925, Section42, No. 39, Acts of Parliament, 1925 (India).

is distributed amongst them equally.[30] Further, if there are no living siblings of the intestate, but the children of the siblings are living, the remaining property is divided equally between the mother and nieces/ nephews of the intestate.[31] It is only when neither the father of the intestate nor his/her siblings or their children are living, does the mother of the intestate succeeds to the property.[32]

Historically, Section 42 derives its basis from the patriarchal principle in common law that the father takes the whole of the property of the mother as if arising *jure mariti.*[33] This principle gives the husband a universal interest in the movable property of the wife at the time of marriage, including the right of alienation.[34] Notably, however, even the English law in this regard was reformed almost a century ago, with Section 46 of the Administration of Estates Act, 1925 providing equal rights to the father and the mother of the intestate.[35] Yet, the ISA continues to endorse this archaic and misogynist principle even in the 21st century.

Unfortunately, the above is not the only illustration of the discrimination faced by Christian mothers under the ISA. Another example is Section 22 – which states the property of a minor may be settled in contemplation of marriage only by the ***father***, or in his absence by the court.[36] Once again, there is no justifiable reason for the exclusion of the minor's mother the provision, and it is merely an extension of a patriarchal set-up where the father is the head of a household and therefore, takes all decisions. The provision not only ignores the role and contribution of a mother in bringing up a child, [37] but also fails to consider situations where the parents are separated/ divorced and the mother is solely responsible for bringing up the child.[38] Moreover, even in scenarios where the father is dead or absent or under a disability, the mother has no right to approve of the settlement of the minor's property, and an appropriate application must be made to the ***court.*** Therefore, the provision not only renders an inferior status as compared to the father but also indicates that she is not capable of making a decision *at all.*

30 *Id.,* Section 43.

31 *Id.,* Section 44, 45.

32 *Id.,* Section 46.

33 B.B MITRA, THE INDIAN SUCCESSION ACT, 98 (S.A. Khader, 14th ed., 2006).

34 PETER HALKERSTON, A TRANSLATION AND EXPLANATION OF THE PRINCIPAL TECHNICAL TERMS AND PHRASES USED IN MR. ERSKINE'S INSTITUTE OF THE LAW OF SCOTLAND, 40, (1829).

35 Administration of Estates Act, 1925, 15 & 16 Geo. 5. c. 23 (United Kingdom).

36 Indian Succession Act, 1925, Section22, No. 39, Acts of Parliament, 1925 (India).

37 POONAM PRADHAN SAXENA, SUCCESSION LAWS & GENDER JUSTICE IN REDEFINING FAMILY LAW IN INDIA, (Archana Parasar, Amit Dhanda ed., 2008).

38 Poonam Pardhan Sexana, *Property Rights of Women under the Indian Succession Act, 1925* in WOMEN LAW AND SOCIAL CHANGE 107, (Dr. Shamsuddin Shams ed., 1991).

Attempts at Reform

In 1985, the Law Commission of India published a report on the ISA proposing a number of amendments to the Act.[39] With respect to the rules governing intestate succession, the Law Commission specifically noted that Section 42 "*is not in conformity with current thinking as to the status of women. The law is in need of reform on this point.*"[40] This marked the first express acknowledgment of the discrimination towards Christian mothers since the enactment of the ISA. However, the Law Commission's noting in this regard was ignored, and for the next 30 years, no attempts were made to actually amend the Act.

Thereafter, in 2014, Law Commission of India revisited the issue and published a report specifically addressing the amendment of Sections 41 to 48 of the ISA.[41] In particular, the Law Commission proposed that Section 42 of the Act be amended to state that "*(w)here intestate's parents (father and mother) living. If the intestate's* ***parents*** *(****father and mother****) are living, they shall succeed the property* ***equally****.*[42] However, it has been approximately 9 years, and no efforts have been made to change these rules, which have discriminated against Christian mothers for almost a century.

Notably, the situation with respect to Section 22 of the Act is even more concerning. The Law Commission has only addressed the issue in its initial report in 1985, where it stated that "*Having regard to the present-day notions, we are of the view that the section should be amended, so as to provide that* ***if the father is dead or absent from India or under any disability, the mother can approve of the settlement of the minor's property.***" [43] However, despite expressly noticing the discrimination in the provision, the Law Commission only recommended the *inclusion* of the mother in Section 22, and shied away from stating that she should be *equal* to the father in this regard. Moreover, despite noting that a newspaper article had recently recommended that the word "*father"* in the provision be substituted with "*either parent*", the Law Commission opined that that would be going a step too far, since that would not be in consonance with the general law on guardianship.[44] In other words, rather than recommending that all the relevant provisions in this regard be amended

39 LAW COMMISSION OF INDIA, *Indian Succession Act, 1925*, Report No. 110, (February 1985).

40 *Id.,* 62.

41 LAW COMMISSION OF INDIA, *Sections 41 to 48 of the Indian Succession Act, 1925 – Proposed Reforms*, REPORT NO. 247, (SEPTEMBER 2014).

42 *Id.,*15.

43 LAW COMMISSION OF INDIA, *Indian Succession Act, 1925*, REPORT NO. 110, 48 (FEBRUARY 1985).

44 *Id.,* 49.

to ensure gender equality, the Law Commission put forward a toned-down sexist provision. In any case, the issue was not addressed by any subsequent reports and the provision remains unamended even in 2023.

Recommendations and Conclusion

As demonstrated through the course of this paper, the political and public apathy towards the rights of Christian women in India is writ large, particularly in respect of their rights under the ISA. As a result, the inferior status relegated to Christian mothers under the ISA remains unchanged in 2023, without there having been a single *attempt* by the legislature to amend the law. Moreover, as noted above, even the *recommendations* to amend the discrimination against Christian mothers by the Law Commission, fall short of proposing absolute gender equality.

The author believes that amendments to Sections 22 and 42 to reflect equality amongst Christian mothers and fathers is the need of the hour. A possible solution lies with the judiciary exercising its powers to 'read' up' the relevant provisions of the ISA, in order to bring the Act within the constitutional framework. To illustrate, both Sections 22 and 42 of the ISA can be read so as to declare that all references to the '*father*' be read as '*parent(s)'*. However, the author is cognizant of the fact that the Supreme Court may be reluctant to intervene in this regard at the current juncture, given the present government's intention to introduce a 'Uniform Civil Code' in the country.

At the same time, as per recent reports, the 'Uniform Civil Code' may not be extended to the Christian community. The author believes that irrespective of what the eventual provisions of a draft bill in this regard may contain, it is imperative to encompass the Christian community in its proposals in order to start a *discussion.* Otherwise, the status quo under the ISA may continue for time immemorial, considering the indifference shown by the legislature and the executive in this regard.

Ultimately, whether it is through legislative or judicial intervention, it is clear that action is required to end the discrimination against Christian mothers under the ISA, as they have been overlooked and undermined for far too long.

Evaluating Gender, Law, and Sexuality: Advancing Equality and Human Rights

- Baisali Bhattacharya[45]

Introduction

In recent years, the convergence of gender, law, and sexuality has gained significant importance in social, legal, and political discourse. The realisation that gender and sexuality are fundamental components of human identity has fueled campaigns to advance human rights and equality for people of all genders and sexual orientations. In order to illuminate the linkages between gender, law, and sexuality as well as the significance of developing a society that encourages diversity, this article undertakes a thorough analysis of the complex and ever-evolving terrain around these problems.

The first section of this article looks at historical viewpoints, detailing how gender and sexuality have been seen in various legal systems across time. It examines how colonialism and cultural influences have affected legal systems while recognising the importance of historical settings in influencing current legal environments. It also explores how legal protections and rights of the marginalised communities have changed over time, noting both the successes and roadblocks to advancement.

The examination then concentrates on legal frameworks and safeguards, both internationally and domestically. The importance of international law in advancing equality and human rights is highlighted as international human rights treaties and their provisions related to gender and sexuality are critically analysed. The study looks into the legal protections and restrictions that people within particular countries encounter in relation to gender identity, sexual orientation, and LGBTQ+ rights. It also emphasises how court rulings and constitutional law have shaped legal rights.

In order to acknowledge the particular difficulties experienced by people with marginalised gender identities and sexual orientations, the fundamental themes of discrimination and intersectionality of the article are addressed. The study investigates discrimination based on gender expression, sexual orientation, and non-conforming identities, illuminating the legal remedies and programmes intended to thwart discrimination and advance inclusivity. The acknowledgement of the intersectionality of identities highlights the significance of an inclusive and intersectional strategy in meeting the needs of

45 Baisali Bhattacharya is a practicing Advocate.

diverse populations.

It also looks at family law in regard to gender and sexuality. The legal acceptance of various family forms, including as same-sex marriages, civil unions, and domestic partnerships, as well as the rights of LGBTQ+ persons and couples to adoption and parenthood, are examined. Exploring the difficulties faced by transgender people in obtaining legal recognition of their gender identity and parenting rights draws attention to the flaws in the existing legal framework.

The article then examines laws that criminalise consenting same-sex relationships and transgender identities before delving into the complicated topics of criminalization and decriminalisation. It examines legal battles and advocacy campaigns for decriminalisation and decarceration while also illuminating the effects of criminalization on people's lives in communities with a diversity of gender and sexual orientations.

The study further looks into workplace discrimination based on gender identity and sexual orientation as well as employment and workplace rights. It looks at the legal protections for LGBTQ+ people at work, such as anti-discrimination laws, equal pay, and employment perks. Recognising the ongoing fight for inclusive and secure workplaces, the difficulties as well as already achieved accomplishments in establishing workplace equality have also been discussed.

The final section of the essay examines recent developments in the fields of gender, law, and sexuality. In acknowledgement of the expanding understanding of gender beyond the binary, it examines the legal protections and recognition of non-binary and gender non-conforming people. In order to understand how technology and social media are influencing society's beliefs and promoting discourse, the effects of these platforms on gender, law, and sexuality are also investigated. The study also discusses contemporary arguments and difficulties, noting the dynamic nature of the subject and the demand for ongoing involvement and advocacy.

Through this thorough investigation, this article hopes to add to the body of knowledge already available on gender, law, and sexuality. It also hopes to foster a better understanding of the difficulties marginalised communities face and to advocate for a society that upholds equality and human rights for everyone, regardless of gender identity or sexual orientation.

Historical Perspective

The Treatment of Gender and Sexuality in Legal Systems Over Time: Different cultures and historical periods have viewed gender and sexuality in their legal systems in different ways. Gender roles and sexuality were commonly governed by religious, social, and legal systems in many ancient societies, including ancient Mesopotamia, Greece, Rome, and diverse indigenous cultures. Traditional gender norms, such as the subordination of women and the importance of heterosexual partnerships, were often maintained by these frameworks. Marriage, divorce, adultery, and inheritance are just a few of the legal challenges that are frequently governed by gender roles and expectations.

Effect of Colonialism and Cultural Influences on Legal Frameworks Regarding Gender and Sexuality: Particularly in the colonised areas, colonialism had a significant impact on the legal systems governing gender and sexuality. The cultural and legal standards that colonial forces frequently imposed harmed indigenous gender relations and sexual practices while frequently strengthening patriarchal institutions. As a result, indigenous knowledge, customs, and practices pertaining to gender and sexuality were erased or suppressed. The legacy of colonial-era legislation that discriminates against marginalised people based on their gender identity, sexual orientation, or cultural practices is still a problem in many former colonies.

The Evolution of Legal Rights and Protections for Marginalized Communities Over Time: In terms of gender and sexuality, legal rights and protections for marginalised people have undergone major advancements throughout history. For instance, the women's rights movement in the 19th and 20th centuries led to legal changes that gave women in many nations the ability to vote, access to school and the workforce, and control over their reproductive systems. Similar to this, the LGBTQ+ rights movement has significantly altered laws and regulations, resulting in the decriminalisation of homosexuality, acceptance of same-sex unions, and, in some jurisdictions, legal safeguards against discrimination based on sexual orientation and gender identity.

Recognising that legal development has been uneven and impacted by a variety of elements, such as political, religious, and cultural contexts, is crucial. There are ongoing struggles for equal rights and

protections for women and LGBTQ+ people in many nations where discriminatory laws still exist. In recent years, legal frameworks have begun to recognise intersectionality, which acknowledges the overlapping oppressive systems that people experience based on their gender, race, class, and other identities. This has highlighted the need for more inclusive and all-encompassing approaches to gender and sexuality.

Legal framework and protections

- **An Analysis of the provisions on gender and sexuality in International Human Rights Treaties:** Gender and sexuality safeguards have advanced significantly owing to various International Human Rights Instruments. Regardless of the gender identity or sexual orientation of a person, these instruments offer a framework for fostering equality, non-discrimination, and respect for their rights and dignity. The following are significant clauses from pertinent International Human Rights Instruments:

1. **UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR, 1948)**[46]: The basic tenets of human rights are outlined in the Universal Declaration of Human Rights (UDHR)[47], which was adopted in 1948. Although it doesn't discuss sexual orientation or gender identity specifically, some clauses are pertinent to these topics. Discrimination on a number of grounds, including sex, which can be understood to include gender and sexual orientation, is prohibited by Article 2[48]. Everyone is protected from harm or persecution under Article 3[49] because of their gender identity or sexual orientation. It also states that everyone has the right to life, liberty, and security of person. The idea of equality before the law is upheld by Article 7[50].

46 Universal Declaration of Human Rights (UDHR, 1948), https://www.un.org/en/about-us/universal-declarationof-humanrights#:~:text=Drafted%20by%20representatives%20with%20different,all%20peoples%20and%20all%20nation

47 I*d.*

48 *Id.*

49 *Id.*

50 *Id.*

2. **INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR, 1966)[51]:** The ICCPR[52] safeguards civil and political rights, and states that have ratified it are bound by its provisions. Discrimination on a number of grounds, including sex, which can be understood to include gender and sexual orientation, is prohibited by Article 2[53]. Intimate relationships and individual identities, including gender identity and sexual orientation, have been defended using the right to privacy, which is recognised by Article 17[54]. The freedoms of expression, association, and peaceful assembly are also protected by the ICCPR, and these freedoms are essential for promoting gender and sexual rights.

3. **CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW, 1979)[55]:** The goals of CEDAW 1979 are to prevent discrimination against women and promote gender equality. It has been interpreted to encompass sexual orientation and gender identity even though these topics are not mentioned explicitly. Discrimination must end in the political, economic, social, and cultural arenas, according to CEDAW[56]. It draws attention to topics including the protection of reproductive rights and equitable access to healthcare, education, and work. The gender-based discrimination that might affect sexual orientation is addressed in part by these regulations.

4. **YOGYAKARTA PRINCIPLES (2006)[57]:** The Yogyakarta Principles, which were established in 2006, act as a framework for how international human rights legislation should be applied to issues of sexual orientation and gender identity. They include extensive guidelines on gender and sexuality-related concerns, such as protection from discrimination, access to justice, the right to privacy, the rights of families, and the right to health. The guiding principles stress how crucial it is to acknowledge and defend the human rights of each and every individual, regardless of their gender identity or sexual orientation.

51International Covenant on Civil and Political Rights (Iccpr, 1966), https://treaties.un.org/doc/treaties/1976/03/19760323%2006-17%20am/ch_iv_04.pdf.

52 *Id.*

53 Article 2, ICCPR, https://treaties.un.org/doc/treaties/1976/03/19760323%2006-17%20am/ch_iv_04.pdf.

54Article 17, ICCPR, https://treaties.un.org/doc/treaties/1976/03/19760323%2006-17%20am/ch_iv_04.pdf.

55 Convention On The Elimination Of All Forms Of Discrimination Against Women (Cedaw, 1979), https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/cedaw.pdf.

56 *Id.*

57 Yogyakarta Principles (2006), https://yogyakartaprinciples.org/principles-en/official-versions-pdf.

These international human rights treaties provide a foundation for addressing gender and sexuality issues in legal systems around the world. They have been utilised to promote the rights and safeguards of marginalised people, fight against discriminatory practices, and push for legal reforms. To ensure their full realisation and the effective protection of gender and sexuality rights worldwide, continuing efforts are required because the implementation and enforcement of these provisions differ among nations.

- **An overview of national legislation and regulations covering LGBTQ+ rights, sexual orientation, and gender identity:** In terms of LGBTQ+ rights, national laws and regulations differ greatly from one country to the next. Some nations have put in place thorough legal systems that safeguard people from discrimination, acknowledge same-sex relationships, and provide the legal recognition of gender. For instance, nations like South Africa, the Netherlands, and Canada have passed laws that expressly defend LGBTQ+ rights. Other nations, in contrast, continue to criminalise same-sex partnerships or do not offer sufficient legal safeguards. Assessing the degree of recognition and protection accorded to gender and sexuality rights requires an understanding of the legal environment at the national level.

Significant changes in legislation and regulations governing LGBTQ+ rights, sexual orientation, and gender identity have occurred in India in recent years. Here are some important factors to think about:

- **Section 377[58] of the Indian Penal Code** was a colonial-era regulation that made consenting to same-sex partnerships illegal. In contrast, the Supreme Court of India decriminalised homosexuality by ruling Section 377 unconstitutional in a landmark decision[59] in 2018. This decision marked a crucial turning point in India's recognition of the rights and dignity of LGBTQ+ people.
- **The Transgender Persons (Protection of Rights) Act, 2019[60]**, was passed to acknowledge and safeguard transgender rights. The Act recognises the right to one's own gender identification, forbids discrimination, and offers various welfare provisions, such as access to healthcare, education, and employment possibilities for transgender people. However, there

58 Section 377, Indian Penal Code.

59 Navtej Singh Johar vs. Union of India [Writ Petition (Criminal) No. 76 Of 2016].

60The Transgender Persons (Protection of Rights) Act, 2019, https://www.indiacode.nic.in/bitstream/123456789/13091/1/a2019-40.pdf

have been issues with several provisions of the Act, and campaigners continue to push for additional reforms and modifications.

- **Third-Gender Recognition**: In 2014, the Indian Supreme Court declared transgender people to be a "third gender" and upheld their rights to equality and non-discrimination61 This acknowledgement was an important step in recognising gender identities that go beyond the binary.
- **Adoption and Surrogacy Laws**: India's adoption and surrogacy laws for LGBTQ+ people have seen some changes. Transgender people can now be recognised as adoptive parents thanks to The Transgender Persons (Protection of Rights) Act of 201962 Even though, The Surrogacy (Regulation) Act, 2021[63], excludes same-sex couples, other members of the LGBTQ+ community, single men, and couples of a live-in relationship to avail surrogacy services.
- **Workplace and Education Policies**: Several businesses and educational institutions in India have non-discrimination policies in place that cover gender identity and sexual orientation. Despite the fact that there is still room for improvement on all fronts, these rules seek to establish environments that are inclusive and safe for LGBTQ+ people.

It is significant to emphasise that despite some encouraging achievements, India still faces difficulties in ensuring complete legal rights and societal acceptance for LGBTQ+ people. The legalisation of same-sex unions and comprehensive anti-discrimination laws are two measures that activists and organisations continue to push for. The successful protection of people's rights based on their gender identity and sexual orientation depends on the interpretation and enforcement of current laws and regulations.

- **The role of constitutional law and judicial decisions in shaping legal protections for Gender and sexuality**: Legal safeguards for gender and sexuality have been shaped globally through constitutional law and judicial decisions. Here are some important factors to think about:

61 National Legal Services Authority v. Union of India and others [Writ Petition (Civil) No.604 Of 2013].

62 The Transgender Persons (Protection of Rights) Act of 2019, https://www.indiacode.nic.in/bitstream/123456789/13091/1/a2019-40.pdf.

63The Surrogacy (Regulation) Act, 2021, https://dhr.gov.in/sites/default/files/Surrogacy%20Regulation%20ACT%202021.pdf.

- **Constitutional Protections:** Constitutions frequently include provisions that uphold fundamental rights and non-discrimination and equality ideals. These provisions form the basis for the recognition and protection of gender and sexuality rights. These include the right to equality (Article 14)[64], the prohibition of discrimination (Article 15)[65], the right to life and personal liberty (Article 21)[66], and the right to privacy (implicit in Article 21)[67]. These Articles lay the groundwork for India to recognise and defend the gender and sexuality rights of its citizens.
- **Judicial Interpretation**: Courts are extremely important in interpreting provisions of the Constitution and applying them to particular situations. Legal protections for gender and sexuality can be shaped by judicial decisions that broaden the application of already-existing rights or recognise new rights. The Indian judiciary has broadened the interpretation of constitutional clauses over time in order to uphold the rights of underrepresented groups, especially those that pertain to gender and sexual orientation. For instance, the Supreme Court recognised the right to self-identify one's gender identity as a basic right under Articles 14[68], 15[69], and 21[70] of the Constitution in the 2014 case of *National Legal Services Authority v. Union of India*[71]. This important decision established a framework for the legal acknowledgement of gender identity and upheld the rights of transgender people.
- **Striking down discriminatory laws:** Courts have the authority to overturn or nullify laws that discriminate against people based on their sexual orientation or gender identity. Courts can evaluate the legality of laws and determine whether they infringe on constitutional rights through judicial review. The demolition of discriminatory legal frameworks has been greatly aided by landmark judgements, such as the U.S. Supreme Court's decision in *Lawrence v. Texas*[72] (2003), which overturned anti-sodomy legislation. In India, the judiciary has been instrumental in overturning discriminatory statutes and practices that limit gender and sexuality rights. As previously established,

64 INDIA CONST. ART. 14.

65 INDIA CONST. ART. 15.

66 INDIA CONST. ART. 21.

67 *Id.*

68 INDIA CONST. ART. 14.

69 INDIA CONST. ART. 15.

70 INDIA CONST. ART. 21.

71 National Legal Services Authority v. Union of India [Writ Petition (Civil) No.604 Of 2013].

1. **72** Lawrence v. Texas, 539 U.S. 558 (2003).

Section 377[73] of the Indian Penal Code was invalidated by the Supreme Court in *Navtej Singh Johar v. Union of India*[74] in 2018, decriminalising consensual same-sex relationships. This decision represented a crucial turning point in the fight against societal prejudice and the affirmation of LGBTQ+ rights.

- **Progressive Interpretation of Judicial Activism**: Judicial activism is the proactive role of courts in establishing legal protections and advancing rights. Judicial activism in issues involving gender and sexuality might take the form of a desire to address societal inequality as well as a progressive reading of constitutional clauses. Judicial activism may result in broader legal safeguards for marginalised groups and more inclusive legal systems. Sexual minorities and transgender people have their identities and rights recognised by Indian courts. Courts have emphasised the necessity for legal recognition, protection from discrimination, access to healthcare, education, and career prospects for transgender people in addition to recognising their right to self-identify their gender identity. These judicial rulings help to increase legal safeguards for various sexual orientations and gender identities.
- **Impact on the World**: Important judicial decisions in one country can inspire and have an impact on legal developments in other nations. For instance, the Indian Supreme Court's decision to invalidate Section 377[75], which made homosexuality a crime, had a major impact on the movement for LGBTQ+ rights in other nations in the region and beyond. Despite recent progress, there are still obstacles to overcome until India's gender and sexuality rights are completely protected by the law and accepted by the general public. Organisations and activists continue to push for additional changes, such as the legalisation of same-sex unions, thorough anti-discrimination legislation, and addressing the violence and discrimination LGBTQ+ people experience in society.

Recently, in a turn of events, a five-judge bench of the Hon'ble Supreme Court of India unanimously ruled against legalising the marriage of a same-sex couple in the case of *Supriyo @ Supriya Chakraborty and Anr. v. Union of India.76* The Court also

73 Section 377, Indian Penal Code.

74 Navtej Singh Johar v. Union of India [Writ Petition (Criminal) No. 76 Of 2016]

75 Section 377, Indian Penal Code

76 Supriyo @ Supriya Chakraborty and Anr. v. Union of India [2023 INSC 920]

unanimously ruled that queer couples have the right to live together without fear of violence, harassment, or interference, but it held back on giving any instructions about whether or not such partnerships should be recognised as marriages.

Legal safeguards for gender and sexuality are shaped in part by constitutional legislation and judicial rulings. The foundation for recognising and defending rights is provided by constitutional provisions, while judicial interpretation and activism help to broaden the scope of the law and challenge discriminatory legislation. Significant rulings can have broad repercussions, influencing legal trends and igniting global initiatives.

DISCRIMINATION AND INTERSECTIONALITY

Examining gender identity, sexual orientation, and LGBTQ+ rights requires taking into account discrimination and intersectionality. The following are significant points about intersectionality and discrimination:

- **Discrimination based on Gender Expression, Sexual Orientation, and Non-Conforming Identities:** Gender identity and sexual orientation can be used as bases for discrimination in a variety of ways. People who are gender non-conforming or who do not adhere to conventional expectations of masculinity and femininity may experience prejudice, harassment, and violence. In the areas of work, housing, education, healthcare, and public services, LGBTQ+ people may face prejudice. Unfair treatment, exclusion, stigma, and violence can all be signs of discrimination.
- **Legal Remedies**: Legal remedies are essential in preventing discrimination and advancing inclusivity for those who identify as people of marginalised genders and sexual orientations. Anti-discrimination legislation that shield people from discrimination based on sexual orientation and gender identity are examples of this. Some nations have passed laws or regulations that expressly forbid discrimination and offer victims of discrimination legal redress. Additionally, programmes like public awareness campaigns, educational initiatives, and professional development can support the fight against prejudice, promote diversity, and challenge preconceptions.

- **Intersectional approaches to address discrimination**: Discrimination can only be properly addressed through intersectional approaches, which take into account the intersectionality of identities. The specific difficulties that people with multiple marginalised identities experience should be considered in policies and efforts. Understanding how many forms of prejudice cross and build upon one another is essential to intersectional methods. To ensure that the needs and experiences of all people are recognised and addressed, this can involve tackling systemic disparities, advocating inclusive policies, and interacting with various communities.
- **Support from the community and advocacy**: Advocacy is essential in eradicating prejudice and fostering inclusiveness. Numerous LGBTQ+ rights organisations, activists, and community organisations put in a lot of effort to spread the word, push for legal changes, and offer assistance to those who are discriminated against. These initiatives are crucial for bringing about change, developing acceptance, and advancing the rights and well-being of people who identify as people of marginalised gender identities and sexual orientations.

FAMILY LAW AND GENDER/SEXUALITY

Family law has a big impact on how different family configurations are legally recognised and how it deals with the rights of LGBTQ+ people and couples. For the queer community, marriage is about a variety of rights that they are prohibited from practising, as well as about dignity. One aspect is the violation of their rights as stated in Articles 1477, 1578, 1979, and 2180. The second aspect is how these groups' daily lives are made difficult for them to manage by depriving them of fundamental rights like having life or health insurance as partners. The following are important points about family law and gender/sexuality:

- **Legal recognition of diverse family structure:** In many nations, family law has developed to recognise and offer rights for a variety of family forms, including same-sex unions, domestic partnerships, and civil unions. These legal systems give LGBTQ+ couples the same

77 INDIA CONST. ART. 14.

78 INDIA CONST. ART. 15.

79 INDIA CONST. ART. 19.

80 INDIA CONST. ART. 21.

obligations and rights as heterosexual spouses, including control over property, inheritance, and decision-making.

- **Adoption and Parenting Rights:** Laws governing adoption and parental rights have expanded to include LGBTQ+ people, couples, and individuals, who are now able to adopt children or become parents through surrogacy or assisted reproductive technology. In many nations, discriminatory restrictions that once prevented LGBTQ+ people from adopting or being legally recognised as parents have been lifted. However, there may still be obstacles and inequalities in some jurisdictions, and the global legal environment differs.

- **Challenges Faced by Transgender People:** Transgender people may encounter special difficulties in obtaining parental rights and legal acknowledgement of their gender identification. Different jurisdictions may have quite different laws governing gender identity recognition, such as updating the gender markers on identification documents. These differences may impair a transgender person's capacity to establish parental rights and their ability to maintain a stable legal relationship with their children. Advocates frequently work to increase transgender people's legal protection and acknowledgement in family court cases.

- **Surrogacy and Assisted Reproductive Technologies**: Surrogacy and Assisted Reproductive Technologies create complicated legal issues pertaining to gender and sexuality. Laws and restrictions may have an impact on LGBTQ+ people, couples using these procedures to start families, and others depending on where you live. The rights and obligations of intended parents, surrogate mothers, and the child conceived as a result of these arrangements are frequently governed by legal frameworks.

- **Global perspective:** The application of family law and how it relates to gender and sexuality varies greatly between nations. While some countries have adopted family laws that acknowledge and defend the rights of LGBTQ+ people and families, others continue to have restrictive or discriminatory legislation in place. Understanding different worldwide viewpoints is essential for advancing legal equality and solving the problems LGBTQ+ people and families experience on a global scale.

Family law is essential in recognising and defending various family arrangements, addressing adoption and parental rights, and guiding transgender people through the difficulties associated with legal recognition and parental rights. To advance legal equality, combat prejudice, and make sure that family law takes into account the many realities and requirements of LGBTQ+ people and families, ongoing efforts are required.

CRIMINALIZATION AND DECRIMINALIZATION

Understanding the difficulties encountered by LGBTQ+ people and fighting for their rights requires a close examination of laws that make consensual same-sex partnerships and transgender identities illegal. Furthermore, it is crucial to comprehend how criminalization affects the lives of people in communities with a diversity of sexual orientations and genders. The advocacy campaigns and legal conflicts for decriminalisation and decarceration are also covered in this section.

- **Criminalization of Consensual Same-Sex Relationships:** Due to their sexual orientation, LGBTQ+ people are frequently the target of laws that criminalise consensual same-sex relationships. These laws, which are frequently based on historical prejudices and discriminatory ideas, help to marginalise, stigmatise, and violate the human rights of LGBTQ+ people. In addition to violating people's rights to privacy and autonomy, criminalization also helps to keep prejudice and discrimination alive in society.

- **Criminalization of Transgender Identities**: Some jurisdictions have laws that particularly target transgender people in addition to criminalising same-sex partnerships. These laws may impose limitations on the provision of healthcare that is gender-affirming, criminalise the expression of gender identity, or refuse to recognise the gender identification of transgender people. By restricting their access to services like healthcare, education, employment, and legal protections, this criminalization contributes to the difficulties transgender people already experience.

- **Campaigns for the Decriminalisation and Decarceration of Same-Sex Relationships and Transgender Identity:** These campaigns have been crucial in overturning and repealing laws that criminalise consensual same-sex relationships and transgender identities.

Organisations that support human rights, activists, and allies put in endless effort to increase public awareness, rally support, and promote legal reform. These initiatives include advocating for change, running educational campaigns, planning protests and rallies, and bringing legal actions against discriminatory legislation.

- **Legal battles for Decriminalisation and Decarceration**: Defending the legitimacy of laws that criminalise same-sex relationships and transgender identities requires legal battles for decriminalisation and decarceration. Legal advocacy groups and activists purposefully use litigation to push for the legalisation of transgender people's rights and the decriminalisation of consensual same-sex relationships. Legal reforms and the recognition of LGBTQ+ rights have been made possible by significant court cases and judicial rulings in a number of places. There have been ongoing campaigns to argue against the legitimacy of Section 377[81] and promote the decriminalisation of same-sex relationships over the years. To create awareness, rally support, and fight for the rights of gender and sexually diverse people in India, activists, non-governmental organisations, and LGBTQ+ organisations have put in countless hours of work. In 2009, the Delhi High Court heard the historic *Naz Foundation case*[82]. Consensual same-sex relationships between adults were decriminalised as a result of the court's 2009 ruling, which found that Section 377 was against the Indian Constitution's guarantees of equality and privacy. This landmark decision was a crucial milestone in India's decriminalisation of same-sex partnerships. In 2013, the Indian Supreme Court reinstated the illegality of same-sex partnerships after overturning the Delhi High Court's decision. The LGBTQ+ community and its allies were disappointed by this ruling, which sparked increased activity and renewed attempts to overturn Section 377. In the *Navtej Singh Johar case*[83], the Supreme Court of India issued a ground-breaking decision in 2018. The court ruled that Section 377 violated the constitution inasmuch as it made adult voluntary same-sex partnerships illegal. By decriminalising same-sex partnerships, this decision also recognised the rights and dignity of LGBTQ+ people.

81 Section 377, Indian Penal Code.

82 Naz Foundation v. Government of NCT of Delhi and Others[WP(C)7455/2001].

83 Navtej Singh Johar v. Union of India [Writ Petition (Criminal) No. 76 Of 2016].

- **Impact of criminalisation on gender and sexually diverse communities:** The effects of criminalization on groups with various identities in terms of gender and sexual orientation go far beyond the law and have a significant impact on people's daily lives. Criminalization contributes to social stigma and breeds prejudice, harassment, and violence. It fosters a climate of fear and secrecy, compelling people to conceal their identities and restricting their access to social support systems, basic services, and healthcare. Living in a criminalised atmosphere can have a significant negative impact on a person's mental and emotional health.

It is essential to comprehend how criminalization affects the lives of LGBTQ+ people in order to fight for their rights, repeal discriminatory legislation, and build an inclusive society. Progress towards achieving equality and justice for all people, irrespective of their gender identity or sexual orientation, can be made by amplifying the voices of those affected, increasing awareness of the negative effects of criminalization, and mobilising support for decriminalisation and decarceration.

EMPLOYMENT AND WORKPLACE PROTECTIONS

Protections in the workplace and at work are essential for safeguarding the equality and justice of LGBTQ+ people. Here are some crucial ideas on this subject:

- **Workplace Discrimination:** LGBTQ+ people frequently experience workplace discrimination based on their sexual orientation and gender identity, which has an effect on their lives and careers. Following are some important thoughts on the topic at hand:

    - **Disparate Treatment**: LGBTQ+ employees may encounter discrimination at work, including differences in job descriptions, salaries, promotions, and access to opportunities for professional growth. They could have obstacles and biases that prevent them from developing professionally and from contributing completely to the organisation.
    - **Harassment:** With occurrences ranging from derogatory remarks, jokes, or slurs to more severe types of harassment including bullying or physical threats, harassment is a major worry for LGBTQ+ employees. The well-being and productivity of the targeted individuals may suffer as a result of this hostile environment's ability to instil feelings of fear, anxiety, and isolation.

- **Denial of Job Opportunities:** Employers may discriminate against LGBTQ+ candidates throughout the recruiting process, basing their decisions on prejudice or stereotypes rather than their credentials and skills. When looking for jobs, they can run into obstacles, be rejected, or confront biased interview questions.
  - **Promotion Bias**: The problem when LGBTQ+ people are passed up for advancement possibilities despite their qualifications and performance is known as promotion bias. For LGBTQ+ employees, bias and preconceptions can result in a lack of representation and a glass ceiling in the workplace.
  - **Hostile Work Environments**: When there is a pervasive culture of prejudice, intolerance, and discrimination towards LGBTQ+ people, hostile work environments can develop. Employees may feel alienated, undesired, and unable to express their true selves in such a poisonous environment. Morale, job satisfaction, and general productivity may all suffer as a result.

Employers, policymakers, and society at large must all work together to address workplace prejudice in a multifaceted manner. Following are some crucial actions to discourage exclusion and combat discrimination:

- putting in place thorough anti-discrimination regulations that expressly shield staff members based on their sexual orientation and gender identity.
- putting on diversity and inclusion training programmes to inform staff about prejudices, LGBTQ+ concerns, and the value of fostering an inclusive workplace.
- establishing protocols and reporting mechanisms that are explicit for dealing with allegations of discrimination and harassment.
- assisting LGBTQ+ affinity networks and employee resource groups in their efforts to promote equality, establish a feeling of community, and offer assistance.
- establishing transparent, merit-based review procedures to provide equal career progression chances and eliminate promotion biases.
- promoting respectfulness and acceptance for all staff members by encouraging inclusive language and actions throughout the organisation.

Organisations may develop a culture that appreciates diversity, supports LGBTQ+ people, and unleashes the full potential of their workforce by aggressively addressing workplace prejudice and

promoting an inclusive atmosphere.

- **Legal Safeguards:** In order to guarantee equality and fairness for LGBTQ+ people in India, legal protections for the workplace and for employment are absolutely essential. Here are some significant legal measures that help safeguard the rights of LGBTQ+ people in the workplace:

    - **Anti-discrimination Laws:** Anti-discrimination laws aim to outlaw discrimination in the workplace based on sexual orientation and gender identity. The Supreme Court of India's momentous decision in the Navtej Singh Johar case[84] in 2018 acknowledged the rights of LGBTQ+ people and decriminalised same-sex relationships. The fight against discrimination in a variety of contexts, including the workplace, has been greatly impacted by this decision.
    - **Equal Opportunity Policies**: Businesses and organisations are able to create equal opportunity guidelines that expressly forbid discrimination on the basis of sexual orientation and gender identity. These regulations support diversity in the workplace and encourage justice in employee selection, advancement, and general treatment.
    - **Workplace Harassment Prevention**: Workplace harassment prevention laws and policies are designed to address and stop discrimination based on sexual orientation and gender identity. These policies clarify what is and is not acceptable behaviour, how complaints are handled, and what actions will be taken against offenders. Fostering a safe and welcoming workplace for LGBTQ+ people requires the implementation of comprehensive and efficient measures to prevent and resolve harassment.
    - **Affirmative Action Programmes and Diversity Initiatives**: These programmes and initiatives seek to ensure that LGBTQ+ people are equally represented and included in the workplace. These programmes may involve targeted recruitment attempts, diversity training sessions, and the formation of LGBTQ+-focused employee resource groups.
    - **Gender-Neutral regulations:** By putting gender-neutral regulations in place for things like dress standards, restrooms, and other facilities, you may make it easier for people who identify as transgender or who identify as gender non-conforming to feel more at home.

84 Navtej Singh Johar v. Union of India [Writ Petition (Criminal) No. 76 Of 2016].

The different gender identities of the workforce are acknowledged and respected by these regulations.

- **Legal acknowledgement of Gender Identity**: For transgender people to succeed in the job, legal acknowledgement of gender identity is essential. Laws that guarantee people's rights to use their preferred name and pronouns as well as those that permit people to modify their gender marker on official articles can all help to create a workplace that is more inclusive.

Employers, decision-makers, and society at large must actively support and put these legislative protections into practice. By doing this, they can foster an atmosphere in which people who identify as LGBTQ+ can work without worrying about harassment or discrimination and fully express their rights as equal workers.

- **Challenges and Advancements:** Despite legislative protections, there are still difficulties in establishing employment equality for LGBTQ+ people. The following are some pressing issues that require attention:

  - **Lack of Comprehensive Legislative Frameworks**: There may not be any comprehensive legislative frameworks that particularly address workplace discrimination based on gender identity and sexual orientation in several nations, including India. Even while there may be laws that decriminalise same-sex partnerships, there may not be enough or the right legislation to specifically forbid job discrimination. Because of this, there is a legal protection vacuum and it is challenging to hold employers liable for discriminatory actions.
  - **Limited Enforcement Mechanisms:** Even when legal safeguards are in place, their ability to be enforced may be restricted. This may be the result of things like insufficient funding, a lack of specialised training for law enforcement, or a lack of knowledge among LGBTQ+ people about their rights and how to seek remedies. To ensure that law provisions are implemented effectively, enforcement mechanisms must be strengthened and enforcement organisations must receive resources and training.

- **Resistance from Colleagues and Employers**: Discriminatory ideas held by co-workers and employers can pose serious obstacles to achieving workplace equality. The progress and general well-being of LGBTQ+ employees can be hampered by a hostile work environment that is fuelled by prejudice, stereotypes, and a lack of knowledge regarding LGBTQ+ concerns. Continuous education, training, and the development of an inclusive workplace culture that actively questions and addresses these biases are necessary for overcoming implicit bias.

Despite these obstacles, progress has been made towards establishing employment equality for LGBTQ+ people:

- **Increasing Awareness and Visibility:** Public campaigns, media representation, and advocacy work have all contributed to raising awareness of LGBTQ+ people and their rights. This greater visibility has the potential to dispel stigma, challenge misconceptions, and promote an inclusive workplace.
- **Corporate Diversity and Inclusion Initiatives:** Recognising the value of a varied workforce, many businesses and organisations have put diversity and inclusion initiatives into place. These initiatives promote LGBTQ+ employees by way of policy, training courses, employee resource groups, and inclusive perks. Such initiatives help to build more inviting and inclusive workplaces.
- **Employee activism and advocacy**: Employees who identify as LGBTQ+ and their allies have been vocally fighting for their rights at work. LGBTQ+ organisations, alliances, and employee resource groups have emerged to support individuals, promote awareness, and lobby for policy changes inside enterprises.
- **Legal precedents and case law**: Important court rulings and legal cases have contributed significantly to the advancement of employment equality for LGBTQ+ people. These cases and precedents offer direction for interpreting current legislation and extending safeguards for LGBTQ+ employees.

Employers, politicians, and society as a whole must maintain a commitment to addressing the issues and advancing workplace equality for LGBTQ+ people. It entails developing thorough legal frameworks, enhancing enforcement procedures, boosting education and awareness, encouraging an inclusive workplace culture, and proactively combating prejudice and discriminatory practices.

Significant progress can be made towards employment equality for LGBTQ+ people through concerted actions.

EMERGING ISSUES

A number of emerging issues have risen to the fore as social perceptions and discussions about gender, the law, and sexuality continue to develop. The following are three important new issues:

- **Recognition and legal rights for non-binary and gender non-conforming individuals:** Emerging problems that try to address the particular needs and experiences of people who do not strictly identify as male or female as being strictly male or female are the recognition and legal rights for non-binary and gender non-conforming people. Here are some crucial ideas on this subject:

    - **Gender Identity and Expression**: People who identify as neither male nor female traditionally and those who identify as gender non-conforming have a variety of gender identities and expressions. They could identify as either one of the two genders, neither gender nor a completely new gender. It is critical to acknowledge and respect the gender identities and manifestations that they have chosen for themselves.
    - **Legal acknowledgement:** Ensuring that people have access to appropriate identification documents that accurately reflect their gender identity is part of the legal acknowledgement of non-binary and gender non-conforming identities. This can include alternatives to the traditional male and female markers seen on passports, identification cards, and other official documents. It lessens the likelihood of discrimination and misgendering by enabling people to receive legal recognition consistent with their gender identification.
    - **Access to Healthcare**: It is essential to provide non-binary and gender non-conforming people with affirming and inclusive access to healthcare. This includes having access to medical treatments that promote gender affirmation, such as hormone therapy and gender-affirming procedures. Healthcare professionals should receive training on how to treat patients with a variety of gender identities in a way that is inclusive and culturally competent.

- **Protection from Discrimination**: People who identify as non-binary or gender non-conforming should be protected from being treated unfairly because of how they express their gender. Discrimination should be illegal in all contexts, including employment, housing, education, healthcare, and public places. To protect these people's rights and well-being, anti-discrimination laws and policies that are both strong and comprehensive are required.
- **Legal Frameworks Should Use Inclusive Language**: Legal frameworks should use inclusive language that respects and recognises the gender diversity of non-binary and gender non-conforming people. This involves the use of vocabulary that is inclusive of a variety of gender identities and gender-neutral phrases. A more inclusive and equitable society is facilitated by the use of inclusive language in laws, rules, and official documents.

For the sake of creating inclusion, upholding individual liberty, and advancing equality, it is crucial to acknowledge and defend the rights of non-binary and gender non-conforming people. To question established norms and make sure that legal frameworks and laws are inclusive of all gender identities, takes continual activism, legal reform, and education.

- **Impact of technology and social media**: Technology and social media have a wide range of effects on gender, the law, and sexuality. The following are important considerations for this subject:

  - **Access to Knowledge and Awareness**: Social media sites and technology have greatly expanded access to sources of knowledge about gender, the law, and sexuality. Online forums give people a place to talk about gender and sexuality issues, share their experiences with others, and spread awareness. This has helped people accept and understand people with different identities and experiences better.
  - **Mobilization and advocacy:** Social media platforms have developed into effective tools for marginalised groups, especially LGBTQ+ people, to organise, mobilise, and campaign for their rights. Online campaigns and movements have aided activism by enabling people to interact with one another globally, increase visibility, and call for

change. Governments, organisations, and officials are now under more pressure to address gender and sexuality issues.

- **Online harassment and cyberbullying:** The anonymity and reach of technology and social media have also given rise to new types of harassment and bullying, including cyberbullying and online harassment. LGBTQ+ people frequently face hate speech, threats, and discrimination, especially if they are visible online. In addition to having negative psychological and emotional effects, cyberbullying can make it more difficult for people to openly express their gender and sexuality online.
- **Privacy and Data Privacy:** Concerns regarding privacy and data protection can arise from the frequent sharing of personal information that occurs when using technology and social media platforms. People who identify as LGBTQ+ may be more exposed to privacy violations and the abuse of personal information, which can have unexpected repercussions like outings or extortion. Protecting people's rights and safety online requires safeguarding personal information and fostering secure online environments.
- **Regulation and Ethical Use**: Legal and ethical frameworks frequently lag behind the quick development of technology. Establishing rules and regulations that address issues like online harassment, hate speech, and the ethical use of personal data is a challenge for governments, lawmakers, and online platforms.

In general, social media and technology have offered useful forums for communication, activism, and instruction in the fields of gender, law, and sexuality. Negative effects like online harassment and privacy issues, however, must be taken into consideration. To maximise the benefits of technology while minimising any potential drawbacks, ongoing efforts must be made to solve these issues through regulation, instruction, and ethical behaviour.

- **Current Debates and Challenges**: There are still active discussions about gender, the law, and sexuality. Disputes that are currently raging include:

    - **LGBTQ+ Rights and Equality**: Although many nations have made strides in this area, it is still difficult for LGBTQ+ people to enjoy complete legal equality. Issues including same-sex marriage, adoption rights, job protections, and transgender rights

are the subject of heated debates. Discussions about how to strike a balance between LGBTQ+ rights and religious freedom continue.

- **Violence and Hate Crimes**: The prevalence of violence and hate crimes committed against people because of their sexual orientation or gender identity is a major cause for worry. The advancement of the safety and wellbeing of groups with a diversity of gender and sexual orientations depends in large part on ensuring legal protections, combating systematic discrimination, and pushing hate crime legislation.
- **Education and Awareness**: There is ongoing discussion over the value of inclusive and thorough sex education. Education that covers topics like gender identity, sexual orientation, consent, and healthy relationships is supported by proponents. Arguments regarding how schools should promote diversity and fight discrimination may arise if opponents object to the inclusion of LGBTQ+ issues in the curriculum of the schools.
- **Conflicts between Religion and Culture**: It is still a hotly debated topic how to balance the rights of LGBTQ+ people with religious and cultural values. The topic of discussion is how to accept various religious and cultural viewpoints while maintaining human rights and avoiding prejudice.
- **A world perspective:** Discussions about gender, the law, and sexuality transcend national boundaries. Discussions about international human rights norms and the interconnectedness of gender and sexuality issues are ongoing in light of issues like the criminalization of homosexuality in some nations, the treatment of LGBTQ+ asylum seekers and refugees, and the role of international organisations in promoting LGBTQ+ rights.

The complexity and changeability of gender, law, and sexuality are highlighted by these discussions and difficulties. To enhance equality, inclusivity, and the achievement of human rights for all people, regardless of gender identity or sexual orientation, they call for continual debate, engagement with varied perspectives, and a commitment to human rights principles.

CONCLUSION

The investigation of gender, law, and sexuality is essential for advancing equality and human rights, I

will say. We've looked at several facets of this complicated subject in this essay, emphasising historical perspectives, legal frameworks and protections, intersectionality and discrimination, family law, criminalization and decriminalisation, workplace protections, and developing challenges.

We can comprehend the effects of colonialism and cultural influences on judicial systems by tracking how gender and sexuality have been treated historically. We have observed how, as a result of societal developments and advocacy activities, the legal rights and protections for marginalised communities have developed over time.

The development of recognising and defending LGBTQ+, sexual orientation, and gender identity rights has been illuminated by the research of national and international human rights laws. In developing legal protections and fostering equality, we have also recognised the crucial role of constitutional law and judicial rulings.

Examining discrimination and intersectionality has highlighted the particular difficulties experienced by people who identify with marginalised gender identities and sexual orientations. Recognising the value of continual efforts to dispel preconceptions and build a more inclusive society, we have looked into legal options and programmes designed to fight prejudice and promote inclusivity.

A variety of family variations, such as same-sex unions, domestic partnerships, and civil unions, are now recognised by family law. The legal acknowledgement of parental rights and gender identity for transgender people still faces obstacles, nevertheless.

Consensual same-sex partnerships and transgender identities have received great attention over their criminality and decriminalisation. In order to acknowledge the negative effects of criminalization on the lives of people living in communities with a diversity of gender and sexual orientations, we have addressed advocacy activities and legal conflicts for decriminalisation and decarceration.

Protections in the workplace and at work are crucial for safeguarding the equality and justice of LGBTQ+ people. We have looked at gender identity and sexual orientation discrimination in the workplace and emphasised the necessity for legal protections, like anti-discrimination laws, equal pay, and employment benefits, to promote inclusive workplaces.

Technology and social media have both positive and harmful effects on gender, the law, and sexuality. In addition to giving marginalised people a place to network and advocate for their rights, these platforms have also given rise to new problems including online abuse and the exploitation of personal information. To safeguard people's rights and safety, technology use must be ethical and responsible.

Finally, we have emphasised the discussions and issues that are currently being faced in the areas of gender, law, and sexuality. Ongoing discussions on transgender rights, conversion therapy, reproductive freedom, intersectionality, inclusion, and international viewpoints are some of these. To meet the changing demands and difficulties faced by different populations, these concerns necessitate continual discussion, activism, and legal reform.

In order to advance equality and human rights, it is critical to consider how gender, law, and sexuality interact. We may work to create a more inclusive and just society for all people, regardless of their gender identity or sexual orientation, by understanding the historical, legal, and social components of this issue.

Trusting the Woman's Word: A Critique of the 'Sterling Witness Threshold' in Cases of Rape under Indian Criminal Law

- Mallika Dandekar[85]

ABSTRACT:

Currently, in India, the testimony of a survivor in cases of sexual harassment and rape is admissible as evidence. However, their testimony is only admissible as that of a "witness" to the crime. In cases where the survivor is the only "witness" to the crime, their testimony is subjected to a rigorous test of admissibility called the "sterling witness threshold". This essay examines the sterling witness threshold, and attempts to make a case for why this test is not laid down with the survivor's reality kept in mind, and consequently, why the threshold needs to be lowered. Firstly, this essay goes on to examine the importance of sole testimonies of survivors, in light of how no other evidentiary piece can meaningfully conclude the presence or absence of consent during the act of rape. Secondly, the sterling witness test is critiqued in this essay as one that is created in the absence of a holistic understanding of a rape survivor's experiences and trauma, which can have lasting implications on victims including severe re-traumatization. In order to understand how this test cannot meaningfully provide justice, this essay also delves into the societal barriers acting on a survivor in cases of rape. Lastly, this essay proposes a solution and alternative to the sterling witness test in the form of an affirmative consent standard, in order to take the focus off from victims' testimonies and displacing it to have the accused prove that they obtained positive consent, which is in line with Article 114A of the Indian Evidence Act.

I. INTRODUCTION:

Feminism, as a movement, traces origins to an effort at amending the letter of the law. The history of modern versions of feminism began with the women's suffrage movement in the United States of America fighting for inclusion of sex in the text of the Fourteenth Amendment, which was also the first feminist change successfully achieved. In India too, emancipation of gendered oppression has used the tool of legislative change to target the elimination of societal atrocities, for instance, the movement pushing for the dowry to be outlawed, which lead to the passing of the Dowry Prohibition Act in 1961. Another milestone was the creation of various gender specific legislation to combat other forms of violence, primarily sexual violence, like the Protection of Women from Domestic

85 Advocate, High Court of Bombay

Violence Act, 2005, and The Sexual Harassment Of Women At Workplace (Prevention, Prohibition And Redressal) Act, 2013 among other reforms in the Indian Penal Code.

The reason why feminist reform has been aimed at putting the State's legal apparatus under a microscope, is because law is a tool, both in the hands of pre-existing power structures to reinforce themselves, when created without social justice perspectives, as well as being one that has the capacity to create a rights-based protection regime accompanied by the enforcement of the same by the state required to correct the said social imbalances. However, even while the letter of the law has been successfully amended post various feminist rallies and calls for change, the ways in which law enforcement and the judiciary operate and apply those laws have largely still remained rooted in patriarchal ways of practice.

The importance of addressing the criminal procedure relating to sexual crimes is ever-growing, in proportion to the rise in these crime statistics. As per the latest National Crime Records Bureau (NCRB) report for the year 2021, an average of 86 rape cases were registered daily in India in 2021. Cases registered under "Crimes against women" rose by 15.3% relative to 2020.[86] With respect to these statistics, we must acknowledge that part of the increase could be attributable to a rise in the rate of reporting said crimes with time. Taking into account the reality of social construction, where men have greater agency and power and less accountability for their actions against women, this essay analyses the enactment of the Criminal Law Amendment that takes into account this reality and shifts the burden of proof on to the accused to prove that they had obtained consent instead of complainants having to prove the lack of consent.

The law relating to the testimony of the victim in rape cases has changed over time. Post the Nirbhaya case in 2012[87], the Parliament passed the Criminal Law Amendment Act, 2013 (hereinafter "The Amendment") that amended various provisions relating to gender-based violence in the IPC, CrPC, and the Evidence Act.[88] The Amendment substituted Section 114A of the Evidence Act that reverses the presumption of guilt in cases of rape. According to the amended section, if sexual intercourse is proven, the presumption is that consent was not given by the victim, and it would be the burden of the accused to prove then that they had obtained consent, and hence, are not guilty of the crime.[89] Despite this change in the letter of the law, its interpretation by Indian Courts has been barely

86 *India lodged average 86 rapes daily, 49 offences against women per hour in 2021: NCRB data*, THE HINDU, (April 30, 2023, 11:00 AM), https://www.thehindu.com/news/national/india-lodged-average-86-rapes-daily-49-offences-against-women-per-hour-in-2021-government-data/article65833488.ece#; *NCRB 2021 Data: India Sees 15% Jump in Crimes Against Women, Delhi Most Unsafe,* THE QUINT, (April 30, 2023, 11:00 AM), https://www.thequint.com/gender/ncrb-2021-data-india-sees-15-jump-in-crimes-against-women-delhi-most-unsafe#read-more.

87 Mukesh & Anr. v. State for NCT of Delhi & Ors., (2017) 6 SCC 1.

88 Criminal Law (Amendment) Act 2013, No. 13, Act of Parliament, 2013 (India). ["CLAA"]

89 CLAA 2013, §26.

included these measures of social justice for the survivors.

The Amendment also inserted a provision to the effect of not questioning the complainant's past sexual activity, and it having no bearing on the question of whether they had provided consent for the alleged crime under investigation.[90] However, it has been observed that courts, even post the this Amendment, consider past sexual conduct of survivors, or any other indications of the survivor's lifestyle that seem to go against their idea of a morally upright way of life as having a bearing on whether consent was given by the survivor, among other practices that make meaningful access to justice difficult to access for survivors.[91]

A consideration to note here would be that India's rape laws are gendered such that only individuals assigned female at birth are recognized as potential victims of the crime.[92] It is beyond the scope of this essay to critique the scope of application of rape laws; however, it is important to acknowledge that sexual violence cannot be envisaged merely as occurring between a man and woman, or where the victim can only be a cis-gendered woman. Feminist scholars have long stood by the fact that rape laws should not be gender neutral as then it would not take into account the gendered power dynamics which would be antithetical to the social reality of the crime.[93] However, this Essay does align itself with feminist advocacy that has called for recognizing that rape can occur between same-sex individuals, and the applicability must extend to trans-women as well, especially recognizing the extent of violence levied against transgendered individuals.[94]

II. THE NEED FOR HIGHER ACCEPTANCE FOR SOLE WITNESS TESTIMONIES:

Although, as per the letter of the law, sole witness testimonies are not in and of themselves insufficient for prosecuting any accused,[95] they are in practicality juxtaposed with other evidence like medical evidence, and witness testimonies.[96] In terms of medical evidence, locating of the truth of

90 CLAA 2013, §28.

91 State v. Tarunjit Tejpal, Sessions Case No. 10 of 2014, Additional Sessions Judge, Mapusa Goa, decided on May 21, 2021.

92 Rape laws do not currently recognize the distinction between sex and gender.; The Indian Penal Code, No. 45 of 1860, Act of Parliament, 1860 (India). ["the Code"] [Although § 375 of the Code reads "..rape is said to have been committed when a man has sexual intercourse with a woman.." , which alludes to the gender and not sex of the victim and perpetrator under ordinary use of language, the Code in § 10 defines a man as a " male human being of any age" and a woman as a " female human being of any age", effectively erasing the distinction between sex and gender.]

93 Flavia Agnes, *Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law*, 37 EPW 844 (2002); Nivedita Menon, *Gender Just, Gender Sensitive, Not Gender Neutral Rape Laws*, Kafila (April 26, 2023, 11 AM) https://perma.cc/2GK7-KE4N.

94 National Legal Services Authority (NALSA) v. Union of India, AIR 2014 SC 1863 (per K.S. Panicker J., concurring) ¶ 55 ["Non-recognition of the identity of Hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police. Sexual assault, including molestation, rape, forced anal and oral sex, gangrape and stripping is being committed with impunity and there are reliable statistics and materials to support such activities. Further, non-recognition of identity of Hijras/transgender persons results in them facing extreme discrimination in all spheres of society, especially in the field of employment, education, healthcare etc... Since, there are no separate toilet facilities for Hijras/transgender persons, they have to use male toilets where they are prone to sexual assault and harassment."].

95 Krishan Kumar Malik v. State of Haryana (2011) 7 SCC 130.

96 Central Forensic Science Laboratory, Guidelines for Forensic Medical Examination in Sexual Assault Cases, 5-10 (2018); Candida L Saunders, *Rape as 'One Person's Word against Another's': Challenging the Conventional Wisdom* 22 TIJEP 161 (2018).

rape in not oral testimony, but bodies have been a long-time colonial medical jurisprudential practice.[97] The kind of evidence collected by medical practitioners is wide in status quo. It includes testing for presence of bodily fluids of the accused, marks of resistance, and other specific markers of violence like scratches or bruises,[98], however they also extend to practices that attempt to assess the 'trustworthiness' of victims through the two-finger test.[99]

Such reliance on external evidence is largely difficult, as rape is a unique crime, whereby there is a high unlikelihood of the presence of any witnesses, as it usually occurs in private places where no testimony remains available other than those by the victim themselves.[100] Even if witnesses exist, there is no witness protection reform in Indian Law Enforcement, which makes witnesses highly susceptible to turning hostile.[101] In order to understand the extent of why these crimes occur in private, we must look at the data relating to acquaintance rapes. Approximately 95% of all rapes are acquaintance rapes, that is, by persons known to the victim, which include assault by their own partners, friends, and family members.[102]

Additionally, material evidence like fluids, presence of semen and other biological evidence can determine the factum of sexual intercourse,[103] but cannot determine the presence of consent or lack thereof. Given this lacuna in medical assessment, the evidence that society, and as a consequence legal practitioners and courts have relied upon to determine lack of consent are usually the presence of marks of resistance and physical violence. The former, i.e., occurrence of marks of resistance, are based on the assumption that rape victims fight or engage in physical resistance against their perpetrators. Another stereotype regarding 'working or labour class women' is that because they have bodies that are accustomed to physical activity, they are "likely to engage in physical resistance", a notion that has been problematically affirmed by medical practitioners.[104] However these notions are deeply unfounded, as sexual harassment, rape, or any non-consensual advances are perceived by the victim as a threat or trauma, and the most common response to such trauma has been seen to be a freeze response,[105] i.e. stupefying, or trying to negotiate with the perpetrator.[106]

Another kind of problematic evidence standard applied in these cases, is assessing the "behaviour"

97 PRATIKSHA BAXI, PUBLIC SECRETS OF LAW: RAPE TRIALS IN INDIA, 63 (Oxford University Press, 2014)

98 Central Forensic Science Laboratory, Guidelines for Forensic Medical Examination in Sexual Assault Cases, 5-10 (2018).

99 PRATIKSHA *supra* note 11, at 81.

100 Candida L Saunders, *Rape as 'One Person's Word against Another's': Challenging the Conventional Wisdom* 22 TIJEP 161 (2018).

101 HUMAN RIGHTS WATCH, EVERYONE BLAMES ME: BARRIERS TO JUSTICE AND SUPPORT SERVICES FOR SEXUAL ASSAULT SURVIVORS IN INDIA, 38-39 (2017).

102 Crime in India, Chapter 5: Crime Against Women, 85 (National Crimes Record Bureau, 2015).

103 Durba Mitra & Mrinal Satish, *Testing Chastity, Evidencing Rape Impact of Medical Jurisprudence on Rape Adjudication in India*, 41 EPW 51, 52-55 (2014).

104 PRATIKSHA *supra* note 12, at 68-69.

105 James W. Hopper, *Why Many Rape Victims Don't Fight Or Yell*, Washington Post (June 23, 2015, 3:51 PM) https://www.washingtonpost.com/news/grade-point/wp/2015/06/23/why-many-rape-victims-dont-fight-or-yell/.

106 Martin Symonds, *The Rape Victim: Psychological Patterns Of Response*, 36 THE AMER. J PSYCH. 27, 32 (1976).

of the victim post the act in order to determine if it was "an act likely for a victim to engage in". This assumption that victims of sexual assault or rape "act a certain way", and stereotyping of a rape victim plays into deeply alienating cultural norms about victims, and are unsupported by the psychological assessment and studies of sexual assault victims.[107] Not only do we see a range of responses from victims, but also, we see certain behaviour patterns that Courts hold as behaviour which is not "victim-like". An example of this is that survivors often fall asleep after the assault occurred as a coping mechanism,[108] despite similar acts being seen as "unnatural" for a victim by the Bombay High Court.[109] As seen, these pieces of evidence usually have no way of determining consent, and often are in fact detrimental to justice that victims can access, given the implicit understanding Courts assign to certain acts as signalling a presence of consent.

Rape laws are not currently constructed in a manner truly inclusive of all subjective experiences of non-consensual sex, where non-tacit acceptance and lack of resistance is drawn out to be consent. This excludes the free will and exercise of personhood of women, while also simultaneously ignoring the social factors a woman experiences. The manner in which consent is framed within our social and legal spheres, makes women participate in sex, not as active individuals but as a passive, responsive objects in a primarily male performance of sex on her body—in this construction, sex is an act that the women assent to rather than engages in.110 In addition to a construction that sees women as passive receivers in sexual acts, laws actively ignore the gender-based power imbalance in society. What is seen as "consent" is often negotiated and coerced assent given to violent masculine sexual acts or undesirable intercourse because they lack an effective choice, and "consent" is safer than resistance. In the understanding of consent, these pieces of external evidence do not criminalize all "unwanted" forms of sex, that need to be categorised as rape due to the lack of positive consent,[111] which need to be criminalized for the want of protection of choice, autonomy, and bodily integrity which are to be protected as per the morality under which law itself is constructed, i.e., the social contract.[112]

Even in the case of *Bhoginbhai Hirjibhai v. State of Gujarat*,[113] when the Apex Court recognized that

107 Lynn H. Schafran, Barriers to Credibility: Understanding and Countering Rape Myths https://www.nationalguard.mil/Portals/31/Documents/J1/SAPR/SARCVATraining/Barriers_to_Credibility.pdf

108 Martin, s*upra* note 20, at 32.

109 Rakesh B. v. State of Karnataka, Criminal Petition No. 2427/2020, High Court of Karnataka, Jun. 26, 2020 (India).

110LOUISE DU TOIT, THE CONDITIONS OF CONSENT, IN CHOICE AND CONSENT: FEMINIST ENGAGEMENTS WITH LAW AND SUBJECTIVITY, 61 (2007) ["This one-sidedness, this asymmetry with regard to sexual agency and subjectivity, the law assures us, is not the problem. It is, on the contrary, natural, and the normative background against which the deviation of rape has to be gauged. If heterosexual intercourse is something *men do*, then the other side of the coin is that sex is something that *women* naturally, or normally, undergo, passively experience, and *consent to*. Rape law thus both presupposes and naturalizes women's consent to sex – 'consent' is the manner in which women 'engage in' sex, 'have' sex, and have *a* sex."].

111 STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (Harvard University Press 1998).

112 *Id.* at 111 [arguing that "[e]ven without making threats that restrict the exercise of free choice, an individual violates a woman's autonomy when he engages in sexual conduct without ensuring that he has her valid consent"].

113 Bharwada Bhoginbhai Hirjibhai Vs State Of Gujarat, 1983 AIR 753.

testimonies of victims must be accepted without corroboration, in the same was done in relation to some problematic narratives. In attempting to showcase believability of victims, the judges believed it came from the "Indianness" of their values.[114] These values were connected to honour culture that locates the honour of societies in the "purity" of its women before marriage, and submission to their husband after, and sees rape as an event eroding that honour. The reason laid out by the court may provide backing for why women are unlikely to register false complaints, but on the flip side, it reinforces the shame and honour cultural feminists have tried to eradicate for ages. Although, it is not within the mandate of this essay to analyse the depth of the honour culture, it is important to note that the honour culture is the basis on which courts and law enforcement agencies assume certain behaviour on the part of victims, like resistance, because they believe victims would protect their honour at all costs. These assumptions, however, do not account for the individual interests of the victim or the nuances of the response to trauma in such cases.

III. THE LEGAL TEST FOR THE VALIDITY OF SOLE TESTIMONIES

Courts have in fact upheld that sole victim testimonies can be used to convict the accused, however the testimony must meet a specific standard which is the standard of the "sterling witness" test. This test was laid down by the Apex Court in a 2012 judgment,[115] and was upheld as the standard for viable rape victim's testimony in a 2020 judgment.[116]

The test has certain requirements to be met by the victim's testimony-

- consistency of the statement from the first complaint to the final testimony in Court,
- the victim should withstand the cross-examination of any length and however strenuous it may be and should give no room for any doubt regarding the occurrence, the persons involved, as well as the sequence of the criminal act,
- it must correlate with every other piece of supporting material found, as well as any exert opinion,
- It should consistently match with the versions of other witnesses, and
- There should be no missing link in the chain of circumstances mentioned in the testimony.[117]

IV. THE THRESHOLD OF THE 'STERLING WITNESS TEST': CRITIQUE AND LACUNAE:

Firstly, the requirement of consistency in the statement from the police report up to testifying in the Court seems to be a threshold unlikely to be reached by any victim post a traumatic event. This in its

114 PRATIKSHA, *supra* note 12 at 32.

115 Rai Sandeep alias Deepu v State (NCT of Delhi) (2012) 8 SCC 21.

116 Santosh Prasad @ Santosh Kumar vs The State Of Bihar, in Criminal Appeal No. 264 of 2020 arising out of SLP (Criminal) No. 3780/2018.

117 *Supra* note 28, at ¶15.

conception seems to be blind to the traumatic reality of any rape or sexual assault survivor.[118] Victims usually do not have average perceptibility during and after the incident. Research has shown that victims of rape and sexual assault are affected by PTSD that affects that their recollection of the event significantly.119 Often victims close their eyes, shut off perception, during the act, in response to the trauma they feel, and in furtherance of the freeze response, to make their mind believe they are safe.[120] Furthermore, recollection, for both ordinary and traumatic events, is such that their gist is usually more accurately remembered than their specific episodic details, and central information tends to be remembered better than peripheral details for both types of events.[121] The standard to have no missing links is one that does not even see application in any other crimes, which makes it seem fairly unreasonable. If this standard is motivated by a fear of keeping any false complaints away, once again it seems driven by fear stemming from patriarchal loss of control, as false complaints in cases of rape are no more common than false complaints in the case of any other crime.[122]

Secondly, this test risks re-traumatization of the victim. Re-traumatization is already pervasively present during litigation for most victims of gendered violence, due to the manner in which our legal system is structured. Our legal system is adversarial and allows for any "tactical" attack on the litigating parties by opposing counsels. This is present even in cases of gendered violence where the prosecution often harrowingly questions the victim about their past sexual activity and questions their character and morality.[123] Also, judges are often seen to not be compassionate to the victim, so as to be impartial. Compassionate judges often are described as having a "good-natured" behaviour that helps make survivors feel welcome in the Court to express the concern for their suffering, and to mobilize resources on their behalf.[124] On the contrary, the absence of compassionate judges that are bureaucratic, distant, condescending, and harsh, not only makes the victim feel unwelcome, but it is also not aligned with the presumption in favour of the victim as laid down by the law.[125] This approach exercised by judges, requires the victims' testimonies to meet same standards as testimonies

118 B. J. CLING, RAPE AND RAPE TRAUMA SYNDROME, SEXUALIZED VIOLENCE AGAINST WOMEN AND CHILDREN A PSYCHOLOGY AND LAW PERSPECTIVE, 19 (The Guilford Press, 2004) ["Traumatic events that are experienced directly include, but are not limited to, military combat, violent personal assault (sexual assault, physical attack, robbery mugging)" (American Psychiatric Association, 1994, p. 424, emphasis added). The section continues, "The disorder [PTSD] may be especially severe or long lasting when the stressor is of human design (e.g., torture, rape)" (emphasis added). Further, explaining some of the typical symptomatology of PTSD, it states, "Intense psychological distress (criterion B4) or physiological reactivity (criterion B5) often occurs when the person is exposed to triggering events that resemble or symbolize an aspect of the traumatic event (e.g., . . . entering an elevator for a woman who was raped in an elevator)"]; at 22 ["In addition to the research on PTSD specifically, Frazier also reviewed studies of rape victims involving other psychological symptomatology, such as depression, fear, anxiety, social adjustment, general health problems, and substance abuse."].

119 *Ibid.*

120 Martin, s*upra* note 20, at 31.

121 Madelyn Simring Milchman, *From Traumatic Memory to Traumatized Remembering: Beyond the Memory Wars, Part 1: Agreement,* 5 Psychol. Inj. and Law 37, 45 (2012).

122 Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 Vanderbilt Law Review 1321, 1330-31 (2005).

123 LOUISE DU TOIT, THE CONDITIONS OF CONSENT," IN CHOICE AND CONSENT: FEMINIST ENGAGEMENTS WITH LAW AND SUBJECTIVITY, 65 (Rosemary Hunter & Sharon Cowan eds., Routledge-Cavendish, 2007) ["It is no wonder that, given the law as it stands, lawyers for the defense zoom in on the state of mind of the rape victim, since that provides a particularly vulnerable target: the ambiguous zone of female sexual subjectivity."].

124 Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 567, 630 (2003) [citing James Ptacek, *Battered Women In The Courtroom: The Power Of Judicial Responses* 99, 106 (1999)].

125 James Ptacek, *Battered Women In The Courtroom: The Power Of Judicial Responses* 99, 145-48 (1999).

in other non-triggering experiences. Ideally, lower thresholds, as well as support to the victim by disallowing intense questioning, is required. In the absence of this, the scales are tipped in favour of the accused directly by making testifying and recollection in courtrooms traumatic and hence more difficult for the victims.126

In addition to these two major forms of re-victimization, the formal and bureaucratic procedure is confusing and complex.[127] Duress in the procedural process is also caused as the victim is made to revisit the incident over and over through rounds of testifying and questioning by multiple officers, which can cause the victim to be re-traumatized.[128] This is especially true because of the lack of sensitivity, mental health and social justice training to our law enforcement.129 Victims often then give distorted or fragmented testimonies as they aren't given the time or support to recollect the event compassionately.

Lastly, the requirement of an unfettered narration and stability to be maintained by the victim during cross examination needs to be taken in the context of how the defence often engages in tactics of humiliation and harrowing psychological questioning directed at the victim.[130] The victim is often also required to detail her body parts and what the accused did to each of them in excruciating detail, which requires not only revisit the traumatic event but also leaves her vulnerable for the defence, judges, and even the media to redraw the trauma in ways that sexualise her and draw her as a pornographic caricature.[131] With these stressors present in the courtroom that retraumatize a victim, it puts her back in the shoes of the occurrence of the incident.

Hence, this test and its requirements fuel the already existing imbalance that creates a harrowing experience for survivors that step forward to register complaints. As a consequence, survivors don't wish to come forward and report their crimes as well.[132] Conclusively, this test further equates victims of gender-based violence to witnesses in other crimes, applying the same standards of memory, which is an equation that is devoid of both fact and empathy. Even though courts have clarified, that victims

126 *Ibid.*

127 Alesha Durfee, *Usually it's Something in the Writing": Reconsidering the Narrative Requirement for Protection Order Petitions*, 5 U. MIAMI RACE & SOC.JUST. L.REV. 469, 471 (2015) ["[V]ictims must navigate a bureaucracy that uses specialized language and specific procedures—for example, they must know the definitions of 'petitioners,' 'respondents,' and 'service'—all at a time where they are traumatized, sleep deprived, and have more basic needs to meet such as shelter, food, clothing, and safe transportation to work, school, and/or court."; "Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and bureaucratic procedures that they may not understand and over which they have no control."].

128 Negar Katirai, *Retraumatized In Court*, 62 ARZ. LAW REV. 81, 107 (2020) ["In Joan's experience, she gave her testimony on one day of trial, but was then cross-examined by Anthony's attorney on another day several weeks later due to the court's busy calendar. The spacing between her testimony was difficult on Joan, who also felt surprised to find herself, on cross-examination, having to explain the reasoning behind her decisions, when in her eyes the focus should have been on Anthony's bad behaviour"].

129 HUMAN RIGHTS WATCH, EVERYONE BLAMES ME: BARRIERS TO JUSTICE AND SUPPORT SERVICES FOR SEXUAL ASSAULT SURVIVORS IN INDIA, 54 (2017).

130 Amita Dhanda, *Psychologising Dissent: Psychiatric Labelling and Social Control*, *in* ENGENDERING LAW—ESSAYS IN HONOUR OF LOTIKA SARKAR, 321-38 (Eastern Book Company, 1999).

131 PRATIKSHA, *supra* note 12, at 344.

132 HUMAN RIGHTS WATCH, EVERYONE BLAMES ME: BARRIERS TO JUSTICE AND SUPPORT SERVICES FOR SEXUAL ASSAULT SURVIVORS IN INDIA, 15-17 (2017).

are not to be treated as witnesses or accomplices,[133] even today we see Courts placing the same burdens on victims for their testimonies to be admissible.

V. THE SOCIAL RESTRAINTS ON AGENCY AND JUSTICE:

We must also take into account the social construction of women's behaviour in light of Gender-based violence (hereinafter "GBV") that this test actively ignores. Michael Foucault, in his book *Discipline and Punish*, lays down the central idea that power is "visible and unverifiable". Power as described by Foucault, creates coercions that act upon bodies, which are calculated manipulations of their behaviour and gestures. It breaks down and rearranges bodies, creating the politics of anatomy, where individuals now act as the holder of power wishes, down to even the efficiency, speed and techniques one desires. Thus, power produces "docile" bodies.[134] The power in status quo extrapolates to the power cis-men and a largely patriarchal society hold on women and gender minorities. They are, as Foucault puts it, *"..[seeking] to transform the minds of those individuals who might be tempted to resist it, not merely to punish or imprison their bodies. This requires two things: a finer control of the body's time and its movements a control that cannot be achieved without ceaseless surveillance and a better understanding of the specific person..."*. This theory of patriarchal power can be seen in practice in multiple ways with respect to GBV and rape. First, women remain not merely objects of oppression, but simultaneously also a subject, self-policing themselves to adhere to patriarchal values.[135] Being controlled by patriarchal power, survivors' responses to rape are limited, and important to understand in the context of feminist agency.[136] They likely apply values of patriarchal honour culture and objectification, to themselves in times when they face GBV or crimes. Women's bodies are seen as that of a "guilty" pre-victim, where in their bodies and movements, the defence of the sexual offender are created- she was at a place or time she "should not" have been out, carrying herself in a free-spirited manner, hence conveying that she has let go of self-surveillance.[137] Thus, justifying her attack in the eyes of society, that applies negative connotations to non-compliant women during sex, to women who "raise their voices" as difficult women that have contexts of social shame attached to their behaviour. In the presence of these narratives, it is increasingly unlikely for women to stand up to their perpetrator, and supports the statistics relating to how few women actually fight back their oppressor. The more overt dilemma of women usually being smaller and feeling like they are unlikely to successfully fight back their larger, stronger perpetrators, also adds to the issue.

133 State of Maharashtra Vs. Chandraprakash Kewalchand Jain (1990) 1 SCC 550.

134 MICHAEL FOUCUALT, DISCIPLINE AND PUNISH, 138 (New York Vintage, 1979).

135 Sandra L. Bartky, *Foucault, Femininity and the Modernization of Patriarchal Power, in* WRITING ON THE BODY: FEMALE EMBODIMENT AND FEMINIST THEORY 129, 148 (Katie Conboy, Nadia Medina, and Sarah Stanbury (eds.), 1997).

136 See Amy Allen, *Foucault, Feminism, and the Self, in* FEMINISM AND THE FINAL FOUCAULT 235, 243 (Dianna Taylor & Karen Vintges eds., 2004) [quoting Foucault and his definition of technologies of the self as "techniques that permit individuals to effect, by their own means, a certain number of operations on their own bodies, their own souls, their own thoughts, their own conduct... "].

137 Ann J. Cahill, Foucault*, Rape, and the Construction of the Feminine Body*, 15(1) Hypatia 43, 52 (Winter ed., 2000).

Secondly, the State in its law enforcement and judiciary takes the place of this pervasive Panopticon. This theory was originally put forth by Foucault in respect of political power of the State, which makes this superimposition of patriarchal Panopticon on the state, makes it even more important, as it helps us understand how power of the State is used to apply and uphold larger social structures of oppression like Foucault's theory pondered.[138] The State in rape cases, turns its gaze on the victims to justify their responses, asses their memory, and require complete perfection in performance and compliance to this patriarchal standard of perfection that women have to adhere to in order to be seen as a victim worth being given justice.[139]

Offenders try to assign any and every cue to meaning presence of women's consent, except explicit asking and receiving of affirmative consent by them.[140] The police and judiciary, seem to step into the offender's shoes, and also try to read these cues to find consent in these interactions, akin to an unseen power overlooking victims, despite a woman explicitly saying with words, that they do not consent, legitimizing such view of the offender. For example, as most rapes are acquaintance rapes in status quo,[141] Courts rarely convict the accused, as they assume past relationships or sharing private space as manifestations of consent.[142] If the function of the State is to correct social oppression, then the State occupying the place of the Panopticon is antithetical to the ends of justice. If justice is to be bestowed upon women in Gender Based Violence, the agents of the State, i.e. the Police and the judiciary, need to get outside the Panopticon, and apply the contexts of social realities in each case. The first thing the Courts must understand then in the context of GBV, is that its occurrence is more common than not. The assumption of innocence of men, is antithetical to the social realities of how men romantically and sexually interact with women. As stated earlier, men look for cues to assume consent in cases of date rapes, or in cases of partner violence believe in the liberty they have to access their partner's sexual being at all times. Even in cases of stranger rapes, which are the rarer occurrence, men tend to view clothing or presence of women in public at late hours as manifestations of consent, or mere disregard for personhood of women with the intent to control and assert power over her being, as reasons to engage in rape and sexual violence.[143]

In support of this view, the earlier mentioned Section 114A of the Evidence Act shifts the assumption to be in favour of occurrence of rape in cases where sexual intercourse is proven. Even

138 Stephen W. Sawyer, *Foucault and the State*, 36(1) La Revue Tocqueville 135, 140-41 (2015).

139 PRATIKSHA, *supra* note 12.

140 Ann J. Cahill, *Foucault, Rape, and the Construction of the Feminine Body*, 15(1) Hypatia 43, 55-56 (Winter ed., 2000).

141 Crime in India, Chapter 5: Crime Against Women, 85 (National Crimes Record Bureau, 2015).

142 Bahuli Sharma, *Ms X v Mahmood Farooqi: A Dangerous Precedent for Interpreting Consent in Rape Cases in India*, Oxford Human Rights Hub (23 Apr. 2018), https://perma.cc/8ZZD-RD3E. ["In addition to the incorrect definition of consent, the High Court has asked for a higher threshold for 'lack of consent' in cases where the survivor knew the accused or is/was in a relationship with him."].

143 Lani Anne Remick, *Read Her Lips: An Argument For A Verbal Consent Standard In Rape*, 141 U.PENN LAW REV. 1103, 1124-1125 (1993).

then, Courts have not applied this presumption in favour of assuming lack of consent. In the recent *Tarun Tejpal* judgment, the Goa Sessions Court even after the factum of sexual intercourse was proven, did not take question the accused as to evidence to prove he had taken the victim's consent, but rather went on to assess the victim's past behaviour as being morally reprehensible, and even the behaviour she elicited post the incident, as "not being one of a victim".[144]

VI. AFFIRMATIVE CONSENT STANDARD: A SOLUTION

A potential solution for Courts would be the strict application of the burden of proof envisaged under Section 114A, and as a consequence apply an affirmative consent standard. An affirmative consent standard is one where the accused would have to establish the proof for the steps they took to ascertain the complainant's consent. This standard is envisaged in UN recommendations[145] and CEDAW's Communication in the case of *Vertido v. The Philippines*.[146] The affirmative consent standard has been documented in feminist legal research widely, and is seen as the *de jure* solution to the *de facto* problem of assumption of women's consent in spaces where there is a lacuna in understanding whether consent was given.[147] The benefits of applying the affirmative standard test include reducing the burden of scrutiny on women's subjective experiences and actions during and after the incident, protects complainants from assumptions made by judges to find consent where there is none established, and acknowledges female sexual autonomy.[148]

As per the letter of the law, i.e., Section 375 of the IPC, does require "unequivocal voluntary agreement" in its definition of consent. However, as evidenced with the analysis in the rest of this essay, in practice, such affirmative agreement is not looked into by the Courts of the land. Critics of the affirmative consent standard have hypothesised it to fall short and not address the issue of power dynamics between perpetrators and survivors. That, coerced consent shall be extracted from victims and be held to be sufficient under rape laws.[149] This criticism seems to be unfounded, as the law, across substantive areas be it crimes or civil constructions, interprets consent to be valid only when freely given without any fraud or coercion.[150] In light thereof, if freely given consent is the standard

144 *Supra* note 6.

145 UN DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, HANDBOOK FOR LEGISLATION ON VIOLENCE AGAINST WOMEN, 26-28 (2010).

146 Committee on the Elimination of Discrimination against Women [CEDAW], *Communication No. 18/2008 Vertido v. The Philippines*, 15-17 (2010) [CEDAW issued the determination and clarified guidelines in response to a Filipino national who reported that she was a victim of discrimination against women within the meaning of Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women and stated that the Philippines, a party to the Convention, violated her rights under the same].

147 SUSAN CARINGELLA, ADDRESSING RAPE REFORM IN LAW AND PRACTICE, 97 (Columbia University Press, 2008)

148 Anupriya Dhonchak, *Standard of Consent in Rape Law in India: Towards an Affirmative Standard*, BERK. J. GENDER, LAW & JUSTICE, 29, 69 (2019).

149 Jozkowski K, *Barriers to Affirmative Consent Policies and the Need for Affirmative Sexuality*, 47 UNIVERSITY OF THE PACIFIC LAW REVIEW, 741, 750 (2017).

150 Indian Contract Act, 1872, Section 14, No. 9, Act of Parliament, 1872 ["Consent is said to be free when it is not caused by—" (1) coercion, as defined in section 15, or (2) undue influence, as defined in section 16, or (3) fraud, as defined in section 17, or (4) misrepresentation, as defined in section 18, or (5) mistake, subject to the provisions of sections 20, 21 and 22. Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake."]; The Code, § 375 [As highlighted earlier, consent must be "voluntary" and not influenced].

practically applied by the courts of the land, then the burden of proving that such consent has been obtained lies on the accused (being in line with Section 114A), therefore, alleviating to a certain degree, the psycho-social repercussions on the survivor of being retraumatized through the process of the trial.

VII. CONCLUSION:

This essay first explores why testimonial evidence of complainants are so important in the context of rapes, given the nature of the crime, and how even other forms of evidence like medical evidence are construed in a patriarchal light by our courts and law enforcement. Then, we move to examine the problems with the "sterling witness test" as applied by our Courts to rape complainant's testimonies. The essay conclusively explains how the test is not unlikely to be passed by most complainants, and additionally also does not take into account the trauma victims of rape go through, and risks re-traumatization of victims through the components of the test. The essay suggests that in order to meaningfully move away from the Sterling witness threshold, and take into account the traumatic realities of rape victims in India in the creation of a fair judicial test, judicial practitioners, legislators, and judges need to understand the constraints on women's freedom and agency that operate not just if they are a victim during the act, but in their day-to-day realities. Reversing the burden of proof under Section 114A as enacted by the Criminal Law Amendment 2013 is essentially important to take into account such material realities in the criminal law practice. Further, this essay attempts to deconstruct the various ways in patriarchal conditions superimpose themselves on women and limit their agency and responses to rape. Firstly, by women internalizing what actions are considered valid for women to participate in; Secondly, by the state organs like the law enforcement and courts applying certain tests and assumptions to find consent of women in situations that have no bearing on consent, and lastly, by perpetrators that seem to assume consent in non-verbal cues like the clothes women wear or any other actions or gestures, further legitimized by state organs in their approach towards prosecuting and investigating the matter. This essay finally concludes by reiterating the importance of strict practical application of 114A that would also complementarily require the application of an affirmative consent test that has been studied and advocated for widely by scholars of feminist jurisprudence.

Book Review: Arguments About Abortion: Personhood, Morality, and Law

- Swarna Latha R[151]

The book 'Arguments About Abortion: Personhood, Morality and Law'152 written by Kate Greasley[153] (hereinafter referred to as 'the author') offers a comprehensive exploration of the multi-faceted arguments surrounding abortion, encompassing historical, legal, ethical, philosophical, and social perspectives to offer new angles of the conventional argumentation. She looks into the intricacies of abortion ethics to analyze the divide concerning the contentious issue of abortion.
The book aims to address the questions surrounding the morality and legality of abortion through a sensitive and holistic perspective on what the abortion argument should truly encompass. It delves into topics such as the threshold of personhood, the principles and pragmatism that underlie the regulation of abortion. Drawing upon interdisciplinary sources, the author argues that the determination of 'fetal personhood' is of pre-eminent importance in the legal-ethical consideration of abortion, While the author does not propose any novel theory of personhood, the book offers an alternative account to the reputable arguments of Ronald Dworkin and Judith Jarvis Thompson.

The author conducts a philosophical and legal analysis of abortion, adopting an interdisciplinary approach to provide a broader understanding of the issues involved. Seamlessly navigating a range of topics, the author divides the book into several smaller sections, each focusing on a distinct aspect of the abortion debate. In total, the book comprises of ten chapters structured into three major parts.

Ordering the argument

This part considers the relevance of pre-natal personhood for the moral and legal evaluation of abortion. It explores different ideas and concepts related to abortion, including Ronald Dworkin's view[154] and Judith Jarvis Thompson's argument[155]. The author discusses the framework within which the abortion argument should be situated, the use of the Good Samaritan thesis, the justification for abortion as a form of homicide, and analogical arguments to address issues related to gender equality.

The Threshold of Personhood

This part delves deeper into personhood and its relationship with abortion. It includes chapters that

151 Doctoral Research Scholar, South Asian University.

152 **Kate Greasley,** *Arguments About Abortion: Personhood, Morality, and Law* **(Oxford: Oxford University Press, 2017), 269 pages. ISBN: 9780198766780.**

153 Kate Greasley has been an Associate Professor of Law and Tutorial Fellow at Hertford College, Oxford, since 2018. Before this, she was a Lecturer in Law at University College London and a Junior Research Fellow in Law at University College Oxford. She completed her doctorate in the law and ethics of abortion at the University of Oxford in 2014. Her monograph was published by Oxford University Press in 2017. For more details, visit https://www.hertford.ox.ac.uk/staff/kate-greasley.

154 Dworkin believed that newborn infants should be treated as persons from a moral and legal point of view, even though they are not self-conscious, and the latter characteristic may be a requirement for being a person from a philosophical point of view.

155 Thompson presented a defense to abortion that even if it is granted that a fetus is a person, abortion is still morally permissible under some circumstances.

explore personhood thresholds, the role of dualism and substantial identity in determining personhood, the application of the precautionary principle, and the significance of human embodiment. Additionally, this part examines the critical features of the conventional debate such as the human equality problem and the difference between abortion and infanticide. The author advocates for treating personhood as a property that exists along a spectrum and placing the threshold for moral personhood at birth. She criticizes the implausibility of the punctual view, which suggests that personhood is gained instantaneously.

Principle and Pragmatism

This part shifts the focus to the practical implications and regulation of abortion, including the examination of the 'back-street abortion argument'[156] which is based on the counter-productiveness of regulation. It examines the legal aspects of abortion and explores the varying attitudes towards abortion, including sex and disability-selective abortion. The author exhibits a person-denying view of abortion, which does not accord the foetus, a full moral status and justifies abortion. If that be the case, why prospective parents mourn miscarriages if a foetus has no personhood at all. Additionally, the author's view would not hold good if the possibility of gestation outside the womb could be realized in the future, where there would be no traditional 'birth' as a threshold for personhood. The book concludes with a note on conscientious objection which is a recent controversy surrounding the abortion debate. Striking a balance between respect for the individual's right to act in accordance with their conscience and ensuring that pregnant persons' access to legal and safe abortion services is not unduly hindered is challenging as it involves larger ethical and legal discussions.

Evaluation of the contents

While the book's central theme isn't groundbreaking, the author presents a sustained argument in the midst of an emotionally charged debate. The author emphasizes that abortion is not merely a taboo and emotive subject but one that requires careful and thorough analysis grounded in moral and legal principles. However, the author acknowledges the complexities of applying conventional principles to the unique nature of abortion and the fetus. Despite the challenges, the author contends that understanding the moral and legal permissibility of abortion is crucial with implications beyond the abortion debate.

In contrast to those who hold the view that abortion is wrong because the unborn possesses moral status, the author advocates the position that abortion is legally permissible if the fetus lacks (complete) moral status. The book focuses on the debates surrounding the moral and legal viability

156 Back-street abortion arguments are against restrictive abortion laws and regulations that lead to unsafe and illegal abortions. The term 'back-street' is a metaphorical reference to these procedures' clandestine and often dangerous nature when they are driven underground due to legal restrictions.

of abortion and the idea of fetal personhood. The author emphasizes the significance of specific wording, such as using the term "fetus" instead of "baby" or "unborn child" and referring to pregnant people as "pregnant women" in order to maintain a neutral status within the discourse.

Additionally, the author acknowledges the distinction between the moral and legal dimensions of abortion, understanding that what may be morally acceptable may not necessarily align with what can be legally enforced. She highlights that the moral and legal responses to abortion can intersect but also diverge, particularly based on varying beliefs about the nature of the fetus including factors such as its sexuality, which relegates the question of personhood irrelevant.

Throughout the book, the author engages in normative legal and moral philosophy, focusing on the argumentative sustainability of broad propositions regarding the nature of abortion nature and morally and legally permissible conduct. She addresses the common objections to thought experiments in ethics and defends their use in exploring the ethical quandaries around abortion, life, personhood, and bodily autonomy. The author engages with prominent scholars and their arguments, including Ronald Dworkin, Judith Thomson, Jeff McMahan, Christopher Tollefsen, and Robert P. George. Notably, she does not discuss the Actual Future Principle by Elizabeth Harman, which suggests that the moral value of a fetus depends on its survival.

The book then turns its gaze to sex-selective abortions and disability-selective abortions. It makes a comparative analysis of their moral justifications, providing insight into the fundamental differences between Sex-Selective Abortions ("**SSA**") and Foetal Abnormality Abortions ("**FAA**") within the spectrum of the morality of abortion. The author ultimately arrives at the significance of women's right to choose in questions of abortion. in doing so, she touches upon the crux of the entire debate- the determination of the fetus's personhood as the pivotal factor to measure the threshold for permissible abortions. This book enlightens why pro-life and pro-choice advocates must be open to questioning their preconceptions about abortion and why the law cannot operate on such preconceived notions.

Critical analysis

At the outset, this book is undeniably a well-researched and comprehensive contribution to the existing literature on the abortion debate. Presenting a well-rounded understanding of the issue's complexities, the author's ability to comprehensively examine competing perspectives and provide a balanced and nuanced analysis of the arguments on abortion is commendable. She considers arguments both in support of and in opposition of the fetus's moral status, acknowledging the

inherent difficulties in altogether avoiding reductio-type counterarguments. As the author meticulously records and amplifies the diverse arguments, her book deeply engages with existing literature, making it valuable for scholars and researchers in abortion ethics. Moreover, the interdisciplinary approach in specific chapters, such as the analysis of analogical arguments, offers insights applicable to other areas of applied ethics.

While the author's placement of the threshold for personhood at birth may be open to debate, she presents a thoughtful argument based on the physical presence and embodiment of newborns compared to fetuses. She asserts that newborns have a separate, physical presence in the world that is essential for sharing in an embodied human life, while fetuses lack this physical presence. Greasley's argument is based on the idea that personhood is tied to the ability to exist outside of the womb and engage in embodied experiences. However, the author of the book review raises two concerns regarding Greasley's argument. Firstly, they question why prospective parents often mourn miscarriages if the fetus has no personhood. This suggests that there may be an emotional connection to the fetus that goes beyond its physical presence. Secondly, the author raises the issue of future advancements in technology that may allow for gestating fetuses outside the womb in artificial devices, eliminating the traditional "birth" as a threshold for personhood. So, the author's person-denying view of abortion may not adequately address these potential scenarios.

It is also pertinent to note that the pro-choice use of Sorites paradox claiming that just because it is challenging to pinpoint the exact moment at which personhood begins in fetal development does not mean that personhood itself is arbitrary, it commits a logical fallacy: the fallacy of the heap. This fallacy is not an appropriate argument to use in the abortion debate. However, the book could have addressed counterarguments and potential future developments, such as the possibility of gestating fetuses outside of women's bodies (ectogenesis and ex-utero fertilization) in artificial womb facilities. The sections narrating the attitudinal differences towards selective abortion are well-executed, but the chapter on conscientious objection could have benefited from a more comprehensive engagement with the expanding literature on the topic.

One notable limitation is that the book focuses primarily on philosophical, ethical, and moral aspects to determine the legality of abortion, somewhat neglecting the cultural and societal context that shapes the abortion debate across different jurisdictions. Further, the legal status of abortion is dependent upon the various religious beliefs that are deeply ingrained in the cultural fabric of the society. Socio-cultural institutions, including family, religion, education and healthcare systems also play an important role in shaping individuals beliefs, values and choices. Though conformity to socio-cultural institutions is not universally necessary and members of the society have always challenged

and sought to change these norms, their influence cannot be over-looked. Additionally, this book does not take into account the debates and laws of abortion in non-western societies, failing to provide a global perspective. The diverse cultural, ethnic and religious values that influence their stance in abortion have not been explored to understand the policy dynamics and approaches to abortion debate, reflecting unique socio-political dimensions. Nevertheless, the book, provides a detailed analysis and study of the abortion controversy, skillfully addressing a wide range of significant arguments, making it a valuable resource for readers interested in exploring the ethical implications of abortion.

Conclusion

This book is an invaluable resource for anyone looking to gain a comprehensive grasp of viewpoints outside of the traditional pro-life and pro-choice arguments. It exemplifies a methodical approach by thoroughly addressing a wide range of arguments in the abortion debate while also acknowledging the topic's inherent complexity and the impossibility of conclusively answering the question of abortion and fetal personhood in the confines of a single book. This book is a critical contribution that has the potential to shake the conventional debate on abortion. It urges us to reconsider the argument about abortion from a fresh perspective, opening up multiple avenues for further research. While this book is primarily centered on the philosophical dimensions of abortion, the author duly recognizes the significance of women's interests in accessing abortion and the author unequivocally acknowledges the importance of reproductive autonomy for women and underscores the detrimental consequences of denying them this essential control over their reproductive choices.

Making Secondary Education Accessible For Girls In India

- Ashita Sharma[157]

Examining longitudinal data, this paper attempts to highlight the disparities in education between male and female children, and inequalities in access, participation and completion of education experienced by girls in the absence of initiatives that effectively advance access to universal secondary education for them. The complex and specific needs of girls to be equally empowered 'in' and 'by' education have been demonstrated, that require the immediate intervention of the Government by way of changes in laws and policies relating to education, educational opportunities, financial distribution, infrastructure, and monitoring and tracking mechanisms, so as not to exclude girls from realizing actual access. The author also proposes an informed, gender-specific intervention to universalize secondary and higher secondary education (classes 9thth to 12th) by extending the mandate of the Right to Education Act, 2009 upto the age of 18 years for all female children in India. The need for this amendment and its policy implications draw on evidence of significantly-worse educational attainment rates of girls due to gender, socio-religious, economic and power asymmetries, and have been carefully analyzed to advocate that such secondary education be free and not compulsory.

I. INTRODUCTION

Universal access to education, as discussed by the Central Advisory Board of Education158, is an interwoven concept that envisages the removal of physical, social, cultural and economic barriers faced by a child that alienate and 'push-out' children leading to their involuntary withdrawal from school. For instance, for a child belonging to a marginalized community, access would include the provision of a discrimination-free environment as much as physical availability of a school in their neighborhood. Universalization has two dimensions: universal provision, and universal participation. The former is associated with the provision of free education by the State, while the latter, mandates the compulsory participation of all students.

The 86th Constitutional (Amendment) Act, 2002 by way of which Article 21A of the Constitution of India159 was introduced, and the subsequent Right of Children to Free and Compulsory Education Act, 2009 ("RTE Act"160) that guarantee the fundamental right to education for all children between the ages of 6 to 14 years, came as a watershed moment towards actualizing

157 Policy Consultant, Kailash Satyarthi Children's Foundation.

158 GOI. (2005). Report of the Central Advisory Board of Education committee—Universalization of secondary education. New Delhi, India: MHRD.

159 Article 21A, the Constitution of India, 1950.

Right to education: - The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

160 Ministry of Law and Justice. 2009. The Right of Children to Free and Compulsory Education ACT, 2009

access to elementary education for all children in the country. The landmark Act is one of the most significant catalysts in accelerating school attendance in that age group to nearly 93.3%161 in 2021 and decreasing Out-of-School-Children ("OoSC"). The other flagship programme of the Government of India, the Integrated Child Development Services (ICDS), ensures the provision of primary education in the form of Early Childhood Care and Education (ECCE) to all children aged zero to 6 years.

The educational framework of India, however, lacks a targeted policy for children between 15 to 18 years that ensures completion of school education of every child from pre-primary to higher secondary-level, allowing all students to develop to their full potential and act as a bridge to tertiary and higher education. The data on the subject highlights the extremely high incidence of early school drop-out of children beyond elementary education due to socio-economic and family issues. This challenge is particularly acute for female children, ultimately barring them from realizing their rights under the United Nations Convention on the Rights of the Child, 1989162, and Sustainable Development Goals 4.1 and 4.5163 that call for universal completion of higher secondary education by 2030, and elimination of gender disparities in education, respectively.

The Ichleon Declaration, to which India is a signatory, in Article 6obligates all State governments to provide 12 years of free, publicly funded, equitable primary and secondary education, of which 9 years are compulsory. Article 14 commits all States to allocate atleast 4 to 6% of their GDP and/or at least 15 – 20% of their total public expenditure to education.164

At present, India has two centrally sponsored schemes, Samagra Shiksha Abhiyan ("SMSA")165 and National Scheme of Incentive to Girls for Secondary Education (NSIGSE)166, aimed to support the secondary education of girls belonging to SC/ST communities by facilitating conditional cash transfers (CCT) to provide income support to their families. The SMSA provides for upto Rs. 2,000 per grade to be granted to girls to complete their secondary/senior secondary education through NIOS/SOS, while the NSIGSE provides for the amount of Rs. 3,000 plus interest to be granted. The schemes, although target to overcome the financial restrictions

161 International Institute for Population Sciences (IIPS) and ICF. 2021. National Family Health Survey (NFHS-5), 2019-21: *India: Volume I.* Mumbai: IIPS.

162 Article 28, UN Convention on the Rights of the Child, 1989

163 Transforming Our World: The 2030 Agenda for Sustainable Development. Target 4.1: By 2030, ensure that all girls and boys complete free, equitable and quality primary and secondary education leading to relevant and effective learning outcome. See also, Target 4.5: By 2030, eliminate gender disparities in education and ensure equal access to all levels of education and vocational training for the vulnerable, including persons with disabilities, indigenous peoples and children in vulnerable situations

164 This has also been proposed in the National Education Policy, 2020 and is the recommendation of the report of the education commission, Government of India, 1964-1966 under Dr. D.S. Kothari.

165 The Samagra Shiksha Abhiyan subsumes the Rashtriya Madhyamik Shiksha Abhiyan (RMSA) and also provides for hostels to be formed for girls studying in classes 9th to 12th.

166 The NGIGSE is now on-board on the National Scholarship Portal (NSP). The Scheme also covers girls who have completed their elementary education from Kasturba Gandhi Balika Vidyalayas.

hampering education, are not focused towards removing barriers restricted to access and are limited in their application.

The National Education Policy, 2020, ("NEP, 2020") in provision 8.8, expands the scope of the RTE Act to provide universal, free and compulsory access to high-quality and equitable schooling from early childhood till higher secondary education from age 3 upto class 12th to further India's progress towards achieving SDG Goal 4.167 However, the policy is yet to be implemented by the Central and all State Governments in the country.

II. RATIONALE FOR ENHANCING ACCESS TO SECONDARY EDUCATION

With respect to female children, advancing enrollment and completion of secondary education (classes 9th and 10th) and higher secondary education (classes 11th and 12th) has a three-fold rationale: Empowerment, Economic Security, and Improved Health Outcomes.

1. EMPOWERMENT

A cycle of complete education for girls up to class 12th promotes individual freedom, dignity and autonomy that serve as indispensable means to *empower* them against exploitative and hazardous practices such as child labour, trafficking, sexual exploitation and violence, to which OoSC are particularly vulnerable. Education, also being a transformative and multiplier right, instils self-esteem and self-confidence that liberates girls to challenge gender stereotypes, and break cycles of marginalization. Girls with no education are at thrice the risk of being child brides as compared to girls with secondary or higher secondary education.168

2. ECONOMIC SECURITY

Performance of unpaid care work, predominantly undertaken by girls (and women) in India, due to hindered access to formal education and skill development, limits not only their individual earning capacity, agency and control over resources, but also encumbers them into an intergenerational cycle of low socio-economic status and inequality (also known as the "*feminization of poverty*"169). Girls with access to higher secondary education are significantly less likely than girls without secondary education to work in vulnerable employments, as unpaid workers, without benefits, and without formal contracts170. Additionally,their earnings increase by 10% each year for each additional year of schooling171; and the annual economic gain for the

167 National Education Policy 2020, Ministry of Human Resource Development, Government of India. Provision 8.8

168 UNFPA (2012) 'Marrying too young'. UNFPA: New York. Page 34.

169 UN Women, 2000. Feminisation of Poverty; http://www.un.org/womenwatch/daw/followup/session/presskit/fs1.htm

170 UNESCO, Education for people and Planet: Creating Sustainable Futures for All, 2016

171 UNESCO, Education Counts - Toward the Millennium Development Goals, Global education monitoring report, 2011

country increases by 0.3% per capita for every 1% increase in the secondary education of girls172 due to increased female labour force participation, leading to poverty alleviation.

3. IMPROVED HEALTH OUTCOMES

Lengthening of school education, and the provision of safe spaces and learning environments, prevents children from experiencing adverse short-term and long-term social and occupational health problems caused as a result of engagement in child labour such as malnutrition, tuberculosis, and asthma.173 Child victims of sexual abuse are at high risk of sexually-transmitted diseases, drug addiction, and grievous physical and psychological injuries due to violence174. Further, empowered and educated children are better placed to identify, avoid and report abuse175. Continuity of education for each additional year also reduces adolescent pregnancies from child marriages, and fertility rates reduce by 10%.176

III. EDUCATION OF GIRLS AT SECONDARY AND HIGHER SECONDARY LEVELS: A STATISTICAL ANALYSIS

Despite steady progress being made towards universal access, transition and completion of education for all children in India at primary and elementary levels, there remain considerable inequalities in the participation of girls, particularly at secondary and higher secondary levels, as has been acknowledged in NEP, 2020177. The literacy among females at 64.6% is much lower than the literacy among men at 80.9%, and the reduction in gender gap in literacy rates has been only 5.3% since 2001 to 2011.178

1. STRUCTURE

Secondary education in India is a part of the 10+2 approach to schooling from classes 9th to 12th. It includes the stages of (a) lower secondary education of two years upto class 10th where basic programmes taught during elementary school are continued, and; (b) higher secondary education of two years upto class 12th where study is organized to provide field and subject-specific specializations by teachers with higher qualifications.

2. ACCESS AND INFRASTRUCTURE

172 Dollar D., Gatti R. (1999). Gender Inequality, Income, and Growth: Are Good Times Good for Women? World Bank Policy Research Report on Gender and Development, Working Paper Series 1. Washington, D.C: World Bank. *See also,* World Bank, Measuring the Economic Gain of Investing In Girls, Policy Research Working Paper 5753, 2011

173 UNICEF 1997 The State of the Worlds Children 1997. Oxford: Oxford University Press. See also, Goel K. Ahmad S. Bansal R, Parashar P. Pant B. and Goel P. (2012). The Social and Occupational Health Problems of Child Labour: A Challenge the World is Facing. Indian Journal of Community Health. Vol 24, No. 1, PP. 53-57; Yadav S.K and Sengupta G (2009). Environmental and Occupational Health Problems of Child Labour: Some Issues and Challenges for Future. Journal of Human Ecology. 28 (2), PP. 143-148.

174 Ibid.

175 Committee for Children, 2016. Prevention of Child Sexual Abuse: A Policy Briefing

176 UNESCO, Education Counts - Toward the Millennium Development Goals, Global education monitoring report, 2011

177 National Education Policy 2020, Ministry of Human Resource Development, Government of India. Provision 6.1.

178 Based on the literacy rate for ages 7 and above. Census 2011, Government of India.

According to the National Family Health Survey – 5 ("NFHS – 5") for the reference year 2020-21, 28% females in India have never attended school, in comparison to 13% males. While only 1 in 3 females (31%) have completed upto 7 years or less of school, only 16.6% had completed 12 years or more. The median number of years of school completed by females is 4.9 and males is 7.3 years.179

Level of schooling among females (%)	**Rural**	**Urban**	**Muslim**	**OBC**	**SC**	**ST**	**Lowest Wealth Quintile**	**Highest Wealth Quintile**
No schooling	33.2	17.4	29.1	28.8	32.6	38.5	45.7	11.4
< 5 years complete	16.5	13.4	18.5	15.2	16.4	16.8	19.9	10.3
5-7 years complete	15.9	15.4	17.7	16.0	15.6	14.7	15.1	13.1
8-9 years complete	13.6	13.2	13.6	13.1	13.6	13.2	11.7	11.7
10-11 years complete	9.0	13.4	9.7	10.5	9.0	7.3	4.3	15.2
12 or more years complete	11.8	27.1	11.4	16.3	12.8	9.4	3.2	38.2
Median number of years of schooling completed	**4.0**	**7.5**	**4.3**	**4.8**	**4.1**	**2.7**	**0.4**	**9.3**

(source: NFHS -5)

A consistent decline in continuity and longevity in education among females can be observed from the above table. The data highlights the heavy influence of wealth on the completion of secondary school, with 38.2% women in the highest wealth quintile having completed 12 years or more of schooling as opposed to only 3.2% women in the lowest wealth quintile.180 Amongst marginalized communities, the lowest levels of education were of females who belonged to scheduled tribes, followed by females in rural areas whose levels of schooling was much lower than their urban counterpart.

In terms of the number of schools available, of the 14.89 lakh schools in India, merely 2.9 lakh schools (19.7%) provide secondary and higher secondary-level education (10.1% and 9.6%

179 International Institute for Population Sciences (IIPS) and ICF. 2021. National Family Health Survey (NFHS-5), 2019-21: *India: Volume I.* Mumbai: IIPS; https://www.dhsprogram.com/pubs/pdf/FR375/FR375.pdf

180 Ibid.

respectively).[181] However, India has an estimated 12 crore adolescents between the ages of 15 to 19 years, who constitute 24.6% of the total population of children, of which 11.7% are adolescent girls.[182] In comparison, for children between 0 to 4 years that comprise 24.2% of the total population of children, 7.6 lakh (51.1%) primary schools have been established, and for those between 5 to 14 years i.e. 51.3% of the population, 4.3 lakh (29.3%) elementary schools. (*Details of number of schools and enrollment rates by management of schools have been provided in Annexure P-1*)

The highest percentage of girls are enrolled in Government-run and Government-aided schools to access education at secondary and higher secondary levels, followed by private unaided schools. Regardless, there exists a deficiency in the number of public as well as private schools available to them. Girls attending private schools notably belong to the higher income families, upper caste and/or located in urban areas, while girls attending public schools belong to lower wealth quintiles, lower castes and/or rural areas.183

Details of school by management (%)184	**Secondary (9th and 10th)**		**Higher Secondary (11th and 12th)**	
	Schools	**Girls Enrolled**	**Schools**	**Girls Enrolled**
Government	39.5	49.2	40.7	44
Government Aided	22.1	19.6	13.7	21.1
Private Unaided Recognized	42.1	30.4	44.6	34.5
Others	2.4	0.8	0.9	0.4

(source: UDISE+ 2021-22)

Rule 6, RTE Rules, 2010 provides for the establishment of elementary schools within 3 km walking distance from all neighborhoods, however no such statutory limit has been prescribed for setting up of secondary and higher secondary institutions. Resultantly, 95.5% villages are covered by secondary schools located upto 5 kms away, while 90.5% villages are covered are

181 Unified District Information System for Education Plus (UDISE+) 2021-22. Department of School Education and Literacy, Ministry of Education.

182 Census 2011, Government of India. *See also,* Ministry of Health and Family Welfare, Report of the Expert Group on Population Projection, June 2020. Page 26.

183 68th NSSO round. See also, P. Prudhvikar Reddy, V. Nagi Reddy, and D. Sree Rama Raju (2020). Universal Secondary Education in the Telugu-Speaking States: Prospects and Challenges. J. B. G Tilak (ed.), Universal Secondary Education in India. Council for Social Development 2020. Poornima M., & Nair, J. L. (2019). Universalisation of Secondary Education. Social Change, 49(3), 538–550.

184 Government schools are fully financed by either Central or State governments and in States managed by either government or local bodies. Aided schools are managed privately by individuals, trusts, societies or corporate bodies but funded largely by government. The government is responsible for the entire recurring costs for these schools while the management is responsible, fully or partially, for the physical facilities and administration. The aided schools are an important way in which the government makes use of the private sector to provide education.

higher secondary schools located upto 7 kms away.185 These distances are difficult for girls to travel as discussed in the later sections.

Further, in some States, over 50% secondary schools enroll as many as 50 to more than 150 students in each class,186 leading to low pupil-teacher ratio's and an overwhelming burden on existing secondary school machineries to accommodate the high influx of students. These problems are further exacerbated by the inadequacy of basic facilities in schools and under-qualification of teachers to teach secondary level courses.187

3. PARTICIPATION AND TRANSITION

The Gross Enrollment Rates (GER)188 of girls at secondary-level drops to 79.4%, and to 58.2% at higher secondary-level, from 104.8% at primary-level, and 94.9% at elementary level. While the Net Enrollment Rates (NER)189 for girls at secondary level is at 48% and at higher-secondary level is only 35%. The Adjusted Net Enrollment Rate (ANER)190 for girls at secondary level is 64.7% and the most important indicator, the Age-specific Enrolment Rate (ASER) for girls between the ages of 14 to 15 years stands at 72.6% and for those between 16 to 17 years at 42.9%, as opposed to 97.5% for girls between 6 to 13 years. Notably, the rates of enrolment were much lower for girls belonging to marginalized and intersectional communities.

Girls enrolled to total enrolment (%)	**OBC**	**Muslim**	**All minority groups**	**CWSN**
Elementary (1 to 8)	45.1	15.6	18.8	1.2
Secondary (9^{th} and 10^{th})	45.0	13.4	17.2	0.2
Higher Secondary (11^{th} and 12^{th})	43.9	11.7	16.0	0.1

(source: UDISE+ 2021-22)

In school attendance, the NFHS-5 data reveals sharp disparity that widens with age between girls in rural and urban settings, where 63.5% girls in rural areas aged 15-17 years attend schools

185 Steps taken by Government to provide education to poor students. Press Information Bureau Government of India Ministry of Education 11 July, 2019 https://pib.gov.in/Pressreleaseshare.aspx?PRID=1578389

186 International Institute for Educational Planning and UNESCO. (2016). Universalizing secondary education in India.

2. 187 International Institute for Educational Planning, under UNESCO (2016). Universalizing secondary education in India.

188 Gross Enrolment Ratio (GER) is the total enrolment in a particular level of school education, regardless of age, expressed as a percentage of the Population of the official age-group which corresponds to the given level of school education in a given school year.

189 Net Enrolment Rate (NER) is the Total number of pupils enrolled in a particular level of school education who are of the corresponding official age group expressed as a percentage of the population of the official age-group which corresponds to the given level of school education in a given school year.

190 Adjusted Net Enrolment Rate (ANER) is the Total number of pupils enrolled either in the corresponding level or a higher level of the school education who are of the corresponding official age group expressed as a percentage of the population of the official age-group which corresponds to the given level of school education in a given school year.

as opposed to 78.8% girls in urban areas.

Age-wise School Attendance of Girls (%)	Rural	Urban
Between 6-10 years in age	94.1	96.2
Between 11-14 years in age	89.4	94.2
Between 15-17 years in age	63.5	78.8

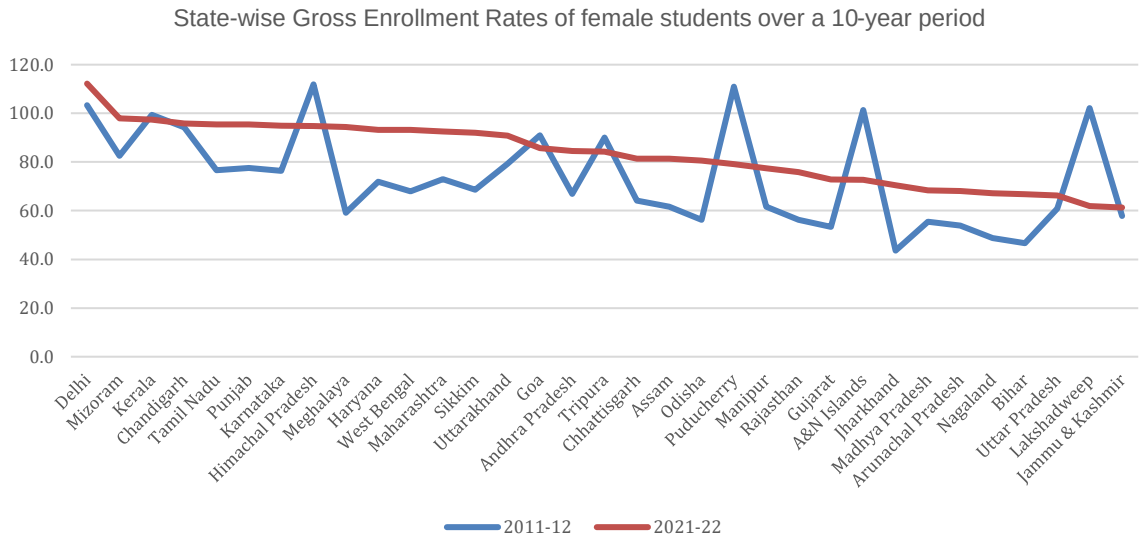
(source: NFHS -5)

Similarly, the Net Attendance Ratio (NAR) indicates differential access between girls in urban-rural settings at secondary level, with only 70% girls attending school in rural areas and 76% in urban areas.191 At secondary level, attendance also increases with the increase in household wealth as the NAR for girls from the highest wealth quintile was 83% compared with 57% girls from lowest wealth quintile. Similar trends can be observed in the Gross Attendance Ratio (GAR).

The transition rate for girls, in 2021-22, from elementary to secondary level was 87.8% and from secondary to higher secondary level was 79.3%, as compared to the transition rate of 93.4% from primary to elementary level.

In 2021-22 terms of state-wise variation in GER of female students at secondary education level, Delhi and Mizoram recorded the highest GER amoung all States and UTs at 112.2% and 97.9% respectively, as opposed to the lowest GER in Jammu and Kashmir at 61.3% and Lakshadweep at 61.9% respectively. Further, in terms of the progress made in GER in over a tenyear period, Meghalaya, Jharkhand, West Bengal and Odisha have made the highest progress with an improvement of over 24.4% and above, while the GER in Lakshadweep, Puducherry, Andaman and Nicobar Islands and Himachal Pradesh has fallen by over 17%. The trend is similar for GER of girls over 10 years at higher secondary level.*(State-wise details on GER have been provided in Annexure P-2)*

191 International Institute for Population Sciences (IIPS) and ICF. 2021. National Family Health Survey (NFHS-5), 2019-21: *India: Volume I*. Mumbai: IIPS.



(source: UDISE data for 2011-12192 and 2020-21)

4. COMPLETION AND PASS PERCENTAGES

The retention rate for girls who complete the last grade of the level, in secondary-level was 64.5%, and 44.2% at higher secondary level , as compared to 96% at primary level and 82.1% at secondary level. As per a report by the NCPCR193 39.4% girls between the ages of 15 to 18 years drop out of schools, of which, 64.8% girls listed family pressure to undertake household chores or beg on streets as the primary reason for dropping out. The school completion rates of girls belonging to scheduled caste communities studying in rural government and private aided schools are significantly lower than the school completion rates of girls studying in private unaided schools.194 The education of a girls' mother also had a significantly positive impact on the SCR of upper caste male and female children in rural areas.195

In terms of final examinations, less than half of all age-appropriate children take board examinations196, and the pass percentage is roughly 85% for both class 10th and 12th examinations. The percentage of girls who repeated secondary and higher secondary education was 3% each for secondary and higher-secondary levels.197

Total number of female students appeared and passed in Board examinations, 2020	**Students Appeared**	**Students Passed**	**Pass %**
Secondary	90,88,324	77,74,688	**85.55**

192 Bureau of Planning, Monitoring & Statistics, Ministry of Human Resource Development, Government of India. (2014) Statistics of School Education 2011-12.

193 NCPCR, 2017. Vocational & Life Skills Training of Out-of-School Adolescent Girls in the age group 15-18 years. National Colloquium Report; http://ncpcr.gov.in/showfile.php?lang=1&level=1&&sublinkid=1357&lid=1558

194 National Statistics Office. (2020) NSS 75th Round Report (2017-18)

195 National Statistics Office. (2020) NSS 75th Round Report (2017-18)

196 International Institute for Educational Planning and UNESCO. (2016). Universalizing secondary education in India.

197 National Statistics Office. (2020) NSS 75th Round Report (2017-18)

Higher Secondary	71,69,479	61,45,805	**85.72**

(source: DoE Results of Secondary and Higher Secondary Examinations 2021[198])

5. BUDGET ALLOCATION AND STATE-WISE SPENDING

Financing secondary and higher secondary education for children may be done through public expenditure borne by the Central or State Government though fiscal transfer, and private costs borne by the individual student.

In the annual budget for 2022-23, there are no special schemes and budgetary allocations towards the provision of secondary education to adolescent girls. No amount has been allocated towards NSIGSE where Rs. 1 Crore was allotted in 2020-21, whereas the cumulative amount of Rs. 7,000 crores was transferred to the Department of School Education and Literacy to support the Secondary as well as Higher Education of all children including girls, (Madhyamik and Uchhatar Shiksha Kosh).199 Similarly, the cumulative amount of Rs. 37,381 crores has been allocated towards the SMSA towards education at all-levels.

The expenditure on education as a percentage of GDP is merely 3.1% in 2022200, where priority is given to elementary education, higher education, technical education above secondary education (see table below)

Sector-wise share of expenditure by Centre	**2009-10**		**2019-20**	
	In Crore	**Percent**	**In Crore**	**Percent**
Elementary	Rs. 21705.24	48.74	Rs. 47471.30	51.19
Secondary	**Rs.6939.14**	**15.58**	**Rs. 8973.13**	**9.68**
University and Higher Education	Rs. 9278.32	20.84,	Rs. 19743.87	21.29
Technical	Rs.5792.02	13.01	Rs. 15574.67	16.80
Others	Rs. 817.49	1.84	Rs. 970.67	1.05

(source: DoE Analysis of Budgeted Expenditure on Education 2019-21[201] and 2007-12[202])

The budgeted expenditure in 2020 by various State Governments (not including Union

198 Statistics Division, Department of School Education & Literacy, Ministry of Education, Government of India. (2021). Results of Secondary and Higher Secondary Examinations, 2020.

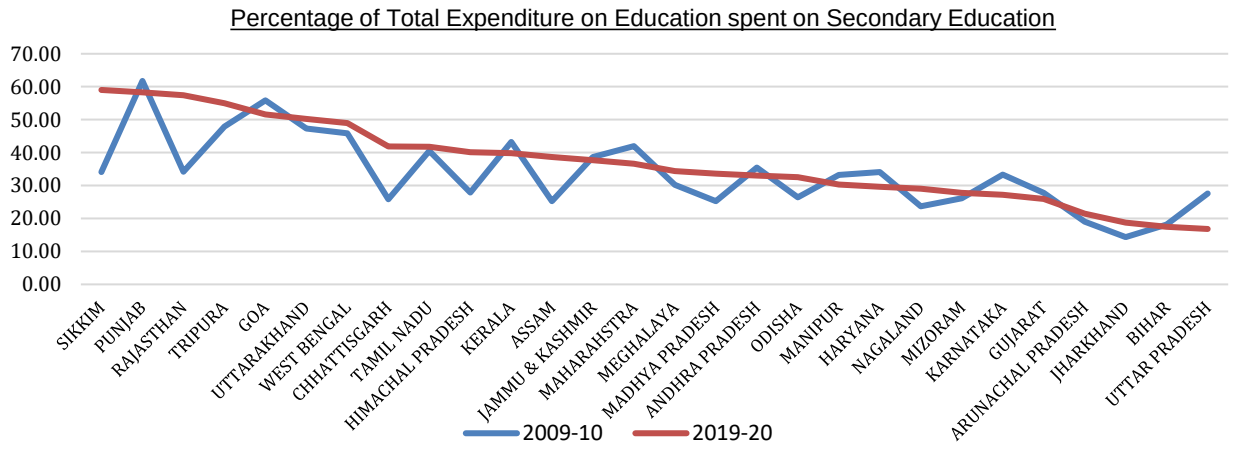
199 Ministry of Finance Budget Division, Government of India. (2022) Expenditure Profile 2022-2023.

200 Ministry of Finance Budget Division, Government of India. (2022) Expenditure Profile 2022-2023. See also, https://www.indiatoday.in/business/budget-2022/story/union-budget-education-budget-2022-increases-by-11-86-major-areas-of-budget-allocation-education-schemes-education-plans-1907451-2022-02-01

201 Planning, Monitoring and Statistics Bureau, Department of Higher Education, Ministry of Education, Government of India. (2022). Analysis of Budgeted Expenditure on Education (2019-2021)

202 Planning, Monitoring and Statistics Bureau, Department of Higher Education, Ministry of Human Resource Development, Government of India. (2011) Allocation and Plan

Territories) on Secondary Education was 35.13% (Rs. 1,75,432.78 crore) as compared to 34.41% (Rs. 50,083.42 crore) in 2010. The table below also indicates that there exist wide disparities in the amounts allocated by different State Governments with Sikkim spending 59.02% of its total expenditure on education towards secondary education to Uttar Pradesh spending only 16.82%. Further, the increase in percent increase in spending over a 10-year period by all States has been marginal except for Sikkim, Rajasthan, Chattisgarh, Assam and Himachal where the increase has been of over 10 percentage points. Notably, the spending decreased in Uttar Pradesh, Karnataka, Maharashtra, Haryana and Goa by nearly 5 to 10 percentage points. *(State-wise details on spending have been provided in Annexure P-3)*



(source: DoE Analysis of Budgeted Expenditure on Education 2019-21 and 2007-12)

6. EXPENDITURE PER STUDENT

The average expenditure per student to pursue secondary education in India is Rs. 9,013 on average. The same varies between Rs. 5,856 in rural areas to Rs. 17,518 in urban areas.203 At higher education level this amount is Rs. 13,845, that varies between Rs. 9,148 in rural areas to Rs. 23,832 in urban areas.

The variation between average expenditure in government institutions and private unaided institutions is also stark. At secondary level, the cost is Rs. 4,078 in government schools against Rs. 20,804 in private schools. At higher secondary level, the cost is Rs. 7,001 in government schools against Rs. 25,852 in private schools.

The percentage of girls availing free education at secondary and higher secondary level is 42.8%

Expenditure during XI Plan - (2007 - 2012)

203 National Statistics Office. (2020) NSS 75th Round Report (2017-18) *See also*, Statistics Division, Department of School Education & Literacy, Ministry of Human Resource Development, Government of India (2018) Educational Statistics - At a Glance – 2018. Page 17.

and 24.5% respectively, against 38.1% and 20% boys. Further, the need for financial assistance is greater in girls among rural areas.

Percentage of girls	Receiving free education'		Receiving scholarship/ stipend/ reimbursement		Receiving Free/subsidized textbooks	
	Rural	Urban	Rural	Urban	Rural	Urban
Secondary	48.6	27.2	23.2	11.5	45.0	29.1
Higher Secondary	28.5	15.7	24.2	13.8	19.8	16.6

(source: NSS 75th Round 2017-18)

IV. BARRIERS RESTRICTING ACCESS TO EDUCATION AT SECONDARY AND HIGHER SECONDARY LEVELS FOR ALL GIRLS

Several roadblocks in accessing education, particularly secondary and higher secondary education, are faced by girls that are a result of not one but numerous intersecting and overlapping factors. The multiple discriminations and deprivations ascribe lesser opportunities, resources and support to girls to access education as compared to other social groups, and are perpetuated by other inequalities of caste, class and religion, that compound with gender to render their access to education as inaccessible.

Gendered division of labour undervalues their contribution and confines girls to perform duties in the household/domestic sphere or undertake unspecialized work that is widely perceived to not require many years of schooling.204 Heavily imposed on adolescent girls of the family and closely related to male ideals of chastity and appropriateness, this mindset burdens girls with the responsibility of caring for their siblings and other family members, restricts their mobility to access schools and also limits the time left with them to attend classes.205 Notably, this work is also invisible in the statistical count of child labour in India. External child labour performed by girls to supplement their household incomes, is also more common among adolescent girls and gravely constrains them from continuing schooling.

The social identity of the girl further compromises her ability to access education in environments where oppressive and discriminatory practices rooted in caste, tribe or religious profiles of the

204 UN Women (2016). Discussion Paper: The Indian Labour Market: A Gender Perspective.

205 Santhya, K.G., Shireen J. Jejeebhoy, A.J. Francis Zavier, Rajib Acharya, and Neeta Shah. 2014. "Supporting girls in their transition to secondary education: An exploratory study of the family, school and community environments of adolescent girls in Gujarat." New Delhi: Population Council

child are repeatedly abused by other students, staff and teachers.206 The difficulty in the implementation of the Mid-day Meal Scheme ("MDM")207 due to firmly-embedded biases is one such example.

Child marriage, adolescent pregnancies and childcare are equally critical causes for drop-out of adolescent girls.208 Migration and displacement of girls, also due to child marriages, further uproots them and leads to more girls withdrawing from schools. The culture of male preference among parents also disproportionately harms girls acting as a economic disincentive that limits the educational opportunities of girls specifically when the 'additional financial burden' is faced by lower income householders.209 Among female students belonging to economically weaker section in private schools, the difficulty in integration with non-EWS students can add to their difficulty.210

Sexual and verbal harassment, sexual abuse, physical violence, bullying, and corporal punishment in schools create unsafe spaces for girls in co-educational schools.211 This includes harassment experienced by girls, particularly, adolescent girls, during their commute to schools, within the school boundaries, and cyber-crimes. Sexual abuse and voyeurism in school toilets212 and outside the school gates have been frequently reported213, and interfere with the continuity of the education of the child. Where secondary schools are located beyond 2-3 km or in areas with poor transport facilities, girls are discouraged from attending due to high risks of sexual abuse and abduction.214

Other factors include the lack of sanitation and menstrual hygiene facilities in schools required by girls once they attain puberty215, inadequacy in the number of secondary schools, shortage and absenteeism of teachers216, and arbitrary allotment of 'arts' streams to girls by school managements.

206 Vani K. Borooah and Sriya Iyer (2005). Vidya, Veda, and Varna: The Influence of Religion and Caste on Education in Rural India

207 The MDM is now known as Poshan Abhiyan.

208 Plan International (2017) The Right to Inclusive, Quality Education – Plan International Position Paper

209 Journal of Economic Issues (2014). Son Preference in India: Implications for Gender Development.

210 Poornima M., & Nair, J. L. (2019). Universalisation of Secondary Education. Social Change, 49(3), 538–550. doi:10.1177/0049085719863907

211 Supra note 33. Santhya, K.G., Shireen J. Jejeebhoy, A.J. Francis Zavier, Rajib Acharya, and Neeta Shah. 2014. "Supporting girls in their transition to secondary education: An exploratory study of the family, school and community environments of adolescent girls in Gujarat." New Delhi: Population Council.https://www.newindianexpress.com/cities/chennai/2022/nov/24/school-staff-booked-for-sexually-harassing-girls-in-chennai-2521528.html

212 https://www.bbc.com/news/world-asia-india-63146269

213 https://www.girlmuseum.org/no-time-for-fear-politicking-girls-indian-girls-hunger-strike-to-protest-sexual-harassment/

214 Das, B., & Das, A. (2021). Is Distance to Secondary School a Barrier to Secondary and Higher Education in India? Millennial Asia, 0(0).

215 UNICEF and FCDO (2021) Mapping Social Protection Intervention Pathways to Address Barriers to Girls' Education: A Visual Guide

216 Supra Note 33.. Santhya, K.G., Shireen J. Jejeebhoy, A.J. Francis Zavier, Rajib Acharya, and Neeta Shah. 2014. "Supporting girls in their transition to secondary education: An exploratory study of the family, school and community environments of adolescent girls in Gujarat." New Delhi: Population Council.

Owing to the covid-19 pandemic, the dropout rates among girls increased multi-fold due to an increase in domestic responsibilities upon girls combined with the impact of school closures, economic stress, child marriages, pregnancies, parental deaths, domestic violence, online child sexual abuse, and the unequal access of girls to technology.217

It must therefore be realized that the systemic inequalities and disparities that constrain girls from realizing education, and specifically secondary and higher secondary education, have a reciprocal relation with said inequalities, as it is only through the provision of education that these inequalities may be curbed. Girls who are out of school are more vulnerable and hence, in greater need of care and protection as victims of drug addiction, prostitution, begging, trafficking and violence.

V. SUGGESTIONS TO REALIZE ACCESS OF GIRLS TO EDUCATION AT SECONDARY AND HIGHER SECONDARY LEVELS

The previous sections have highlighted that although significant progress has been made towards the attainment of both primary and elementary education of all children in India, there is still a considerable distance to cover before the goal of universal access to secondary and higher secondary education by girls is achieved. The comparative data also breaks down the gendered differences in educational attainment that are exacerbated by power inequalities and the discriminations endured by persons from marginalized communities. At the ongoing rate, the UNESCO Global Monitoring Reportpredicts that India shall achieve universal primary education only by 2050, universal secondary education by 2060, and universal higher secondary education by 2085.218

In light of these challenges, the author recommends the following five strategies relating to legislative, policy, and schematic changes that are imperative to implement while employing a gender-sensitive, gender-responsive approach:

A. ENSURE PROVISIONING OF 12 YEARS OF FREE, PUBLICLY FUNDED, FORMAL, EQUITABLE ELEMENTARY AND SECONDARY EDUCATION TO EVERY GIRL

The mandate of the RTE Act should be extended to provide that every girl between the ages of 15 to 18 years shall have the right to free education in a neighborhood school till the completion

217 Population Council of India. (2022). Gendered Effects of Covid-19 School Closures: India Case Study. See also, ASER Centre. (2022). Annual Status of Education Report (Rural) 2022.

218 UNESCO. (2016, Apr 21). Universalizing secondary education in India, UNESCO-IIEP. See also, P. Prudhvikar Reddy, V. Nagi Reddy, and D. Sree Rama Raju (2020). Universal Secondary Education in the Telugu-Speaking States: Prospects and Challenges. J. B. G Tilak (ed.), Universal Secondary Education in India. Council for Social Development 2020

of her higher secondary education. This affirmative action would be in furtherance of Article 15(3) of the Constitution of India that ensures equity and social justice towards women and children, and Article 46 that seeks to protect the educational interests of SC, ST and weaker sections. The proposed mandate may not necessarily provide for such education to be compulsory *(universal participation)*, but rather secure the availability of secondary education, and overcome structural challenges to eradicate inequality in access, and tackle enrollments restricted by affordability *(universal access)*. To this end, rules and regulations relating to school admission should also be revised to ensure that girls and women who drop out due to child marriage, pregnancies etc. are able to easily seek readmission and relocation where required.

B. PRESCRIBE 3 KM AS THE AREA OR LIMITS OF NEIGHBORHOOD WITHIN WHICH SECONDARY, HIGHER SECONDARY SCHOOLS MUST BE ESTABLISHED

The RTE Rules, 2010 should be amended to provide for the establishment of a school within the geographical limit of 3 km walking distance from residential neighborhoods, in respect of female students in classes 9th to 12th, in rural and urban areas alike. This would expand the geographical accessibility and physical infrastructure of educational institutions to adequately cater to the educational needs of all OoSC. This may be done by expanding the number of classrooms in already existing secondary schools to accommodate more children, by upgrading elementary schools to also provide secondary and higher secondary education, or by setting up new secondary schools.

C. ENSURE SEGREGATION, ADEQUACY OF FUNDING FOR SCHEMES TARGETED TOWARDS SECONDARY EDUCATION OF GIRLS

Since the fiscal year 2018-19, the Central Government levies an integrated 'Health and Education Cess' of 4% as an additional surcharge onto corporations and individuals, that is utilized to fund more than 60% of its schemes including the Sarva Shiksha Abhiyan, MDM Scheme and SMSA. The merging of the health cess with the education cess has led to difficulty in discerning the distribution and allocation between the two heads, and may be a reason for insufficient resources at the level of secondary/higher secondary education of girls in the country. Similarly, the integration of the various schemes for education from pre-primary upto university level reduces the inadequacy of resources at secondary level. The cess as well as the heads under the Union Budget should be segregated to prioritize the proportionate and adequate distribution of the funds collected towards secondary education. Further, State Governments must also segregate the funds allocated towards secondary education of girls to not only ensure availability of resources but also aid in maintaining transparency and efficiency in public expenditure. Critical aspects that must be taken into consideration while determining the distribution of resources, at

both Centre and State-levels, include expenditure per-child, inequalities in rural-urban geographies, and state-wise variations in enrollment rates. This segregation could also pave the financial pathway for universalization of secondary education.

D. ENSURE ONE AWC NEAR EACH SECONDARY, HIGHER SECONDARY SCHOOL TO RELIEVE THE BURDEN OF CAREGIVING UPON ADOLESCENT GIRLS

As noted in the above section, a key reason for adolescent/elder girls dropping out of schools is the disproportionate amount of time spent by them as caregivers to younger siblings. This is often the result of a lack of available social and economic support with the family and/or the preoccupation of primary caregivers. To alleviate this burden, Eearly childhood care and education centres should be attached to secondary and higher secondary schools, that would allow adolescent girls to recieve their support in supervising their siblings while attending school, and utilize the time otherwise spent on caregiving responsibilities in the advancement of their education.

E. PROMOTE PUBLICLY FUNDED RESEARCH TO IDENTIFY EARLY INDICATORS TO PREDICT, PREVENT DROPS, AND IMPROVE TRANSITION RATES AMONGST GIRLS AT SECONDARY, HIGHER SECONDARY LEVELS

Although there has been considerable effort to advance research on the role of primary and elementary education of children including girls in India, there is a lack of reliable, aggregated and disaggregated data, and qualitative and quantitative research on various aspects of secondary education. The available data focuses predominantly on the measures of actual participation and completion rates, and research into the gendered patterns that result in more out of school girls beyond elementary education is absent. The non-availability of this research affects the formulation of informed policies that can promote the prioritization of secondary and higher secondary education for all girls in the country, hinders the identification of effective points of interventions that can reduce inequalities in access, and disrupts the installation of monitoring and tracking mechanisms to be undertaken from district to national level.

VI. CONCLUSION

This paper revisited the well-documented issue of gender bias in educational attainment in India and raised some critical policy issues, the most pressing of which is the broken promise of secondary education. It is evident that the introduction of the RTE Act has reduced gender discrimination and inequality at the level of elementary education for girls in India, however,

with the large population of female children still out of school at the level of secondary education, it is time that the policy framework at this stage be revised.

There is need for an urgent policy response that increases investment towards the issue, prioritizes educational access – in every form, and targets persisting multiple barriers to education. A possible policy intervention proposed is the provision of free or heavily subsidized secondary education by way of an amendment to the RTE Act so as to reduce the cost of education for families, where the Central Government may put into place quality norms as criterion for State Governments to receive grants from the Center. While the spate of the proposed amendment and other recommendations of the paper are surely an expensive proposition, the returns would more than justify the expenditure and make a true breakthrough to control gender-specific school drop-out.

Annexure P-1

Detailed Break up of Number of Schools and Enrollment Rates by Management of Schools

Number of schools by management (UDISE+)	**Government**	**Government Aided**	**Private Unaided Recognized**	**Others**	**Total**	**% of all schools in India**
Secondary (9th and 10th)	59416	33208	63297	3618	1,50,452	10.1%
Higher Secondary (11th and 12th)	58023	19570	63500	1305	1,42,398	9.6%

(source: UDISE+ 2021-22)

Enrolment Rates by Management of Schools	**Management**	**Boys**	**Girls**	**Total**
Secondary School (9th and 10th)	Government	8693396	9077606	17771002
	Government Aided	4011259	3620975	7632234
	Private Unaided Recognized	7229787	5617494	12847281
	Others	137476	140638	278114
Total: Secondary		20071918	18456713	38528631
Higher Secondary School (11th and 12th)	Government	5586742	6083308	11670050
	Government Aided	3234985	2923697	6158682
	Private Unaided Recognized	5879924	4773497	10653421
	Others	46081	50816	96897
Total: Higher Secondary		14747732	13831318	28579050

(source: UDISE+ 2021-22)

Annexure P-2

State-wise GER* of female students enrolled

S.No.	State/Union Territory	Secondary (classes 9th and 10th)			Higher-secondary Level (classes 10th and 11th)		
		2011-12	2020-21	Increase in GER	2011-12	2020-21	Increase in GER
1	A&N Islands	101.4	72.7	-28.7	84.7	70.2	-14.5
2	Andhra Pradesh	66.9	84.5	17.6	51.0	58.3	7.3
3	Arunachal Pradesh	53.9	68.1	14.2	44.7	56.1	11.4
4	Assam	61.7	81.3	19.6	13.8	42.2	28.4
5	Bihar	46.6	66.8	20.2	33.3	36.2	2.9
6	Chandigarh	94.2	95.8	1.6	85.1	89.4	4.3
7	Chhattisgarh	64.1	81.4	17.3	34.5	73.6	39.1
8	Delhi	103.3	112.2	8.9	79.7	99.5	19.8
9	Goa	90.9	85.7	-5.2	72.9	76.3	3.4
10	Gujarat	53.3	72.8	19.5	33.4	47.8	14.4
11	Haryana	71.9	93.2	21.3	66.9	76.0	9.1
12	Himachal Pradesh	111.9	94.8	-17.1	82.8	95.3	12.5
13	Jammu & Kashmir	57.8	61.3	3.5	43.7	52.9	9.2
14	Jharkhand	43.6	70.5	26.9	15.7	48.0	32.3
15	Karnataka	76.4	94.9	18.5	47.5	58.8	11.3
16	Kerala	99.4	97.4	-2.0	84.7	88.4	3.7
17	Lakshadweep	102.2	61.9	-40.3	96.1	60.0	-36.1
18	Madhya Pradesh	55.4	68.4	13.0	46.5	50.7	4.2
19	Maharashtra	73.0	92.5	19.5	54.8	70.9	16.1
20	Manipur	61.6	77.4	15.8	38.7	69.7	31.0
21	Meghalaya	59.1	94.4	35.3	17.2	52.7	35.5
22	Mizoram	82.5	97.9	15.4	46.7	65.7	19.0
23	Nagaland	48.8	67.1	18.3	27.0	38.8	11.8
24	Odisha	56.2	80.6	24.4	23.0	45.4	22.4
25	Puducherry	111.0	79.1	-31.9	82.5	73.1	-9.4

26	Punjab	77.6	95.4	17.8	52.7	83.1	30.4
28	Rajasthan	56.3	75.8	19.5	38.7	66.3	27.6
27	Sikkim	68.6	92.0	23.4	41.5	72.0	30.5
29	Tamil Nadu	76.6	95.5	18.9	56.2	85.9	29.7
30	Tripura	90.1	84.3	-5.8	29.8	60.4	30.6
31	Uttar Pradesh	60.8	66.2	5.4	39.6	48.3	8.7
32	Uttarakhand	79.2	90.8	11.6	62.3	80.6	18.3
33	West Bengal	68.0	93.2	25.2	42.7	70.6	27.9
India		**63.9**	**79.4**	**15.5**	**43.9**	**58.2**	**14.3**

(source: UDISE data for 2011-12219 and 2020-21)

**excludes Daman & Diu, Dadra and Nagar Havelli, Telangana and Ladakh*

Annexure P-3

Percentage of Total Expenditure on Education by Various States

S.No.	State	2009-10	2019-20	Increase in Spending
1	Andhra Pradesh	35.47	32.99	-2.48
2	Arunachal Pradesh	19.08	21.47	2.39
3	Assam	25.29	38.63	13.34
4	Bihar	18.12	17.52	-0.60
5	Chhattisgarh	25.86	41.90	16.04
6	Goa	55.90	51.61	-4.29
7	Gujarat	27.82	25.95	-1.87
8	Haryana	34.07	29.64	-4.43
9	Himachal Pradesh	27.87	40.09	12.22
10	Jammu & Kashmir	38.68	37.67	-1.01
11	Jharkhand	14.35	18.76	4.41
12	Karnataka	33.37	27.20	-6.17
13	Kerala	43.21	39.83	-3.38
14	Madhya Pradesh	25.23	33.59	8.36
15	Maharashtra	41.96	36.64	-5.32
16	Manipur	33.27	30.29	-2.98
17	Meghalaya	30.18	34.38	4.20

219 Bureau of Planning, Monitoring & Statistics, Ministry of Human Resource Development, Government of India. (2014) Statistics of School Education 2011-12.

18	Mizoram	26.13	27.79	1.66
19	Nagaland	23.74	29.00	5.26
20	Odisha	26.47	32.55	6.08
21	Punjab	61.76	58.25	-3.51
22	Rajasthan	34.16	57.42	23.26
23	Sikkim	34.06	59.02	24.96
24	Tamil Nadu	40.54	41.81	1.27
25	Telangana	-	43.66	-
26	Tripura	47.90	55.01	7.11
28	Uttar Pradesh	27.59	16.82	-10.77
27	Uttarakhand	47.35	50.25	2.90
29	West Bengal	45.82	48.97	3.15
TOTAL: ALL STATES		**34.41**	**35.13**	**0.72**

(source: DoE Analysis of Budgeted Expenditure on Education 2019-21 and 2007-12)

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

- Anika Bhoot220 and Yashika Lakhotia221

1. Abstract

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

Finally, a solution-oriented section has been incorporated which transplants favourable features of rape laws of different legal systems and adopts them to the unique Indian context.

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

2. Introduction

The offence of rape is a cruel manifestation of corrupted human nature and a profane blot on humankind that must be eradicated via laws and societal rewiring.

Rape was first described in the Code of Hammurabi in 1900 B.C., as a "man trying to force sex upon another's wife or a virgin woman living in her father's house." [222] The law dictated that such a man should be put to death. This view of rape was followed for centuries until the seventeenth century English law changed the definition to "the carnal knowledge of any woman above the age of ten years against her will."[223] In 1860 laws against rape were codified for the first time in India under the Indian Penal Code, 1860 (hereafter 'IPC')- which came as a much-needed change in the patriarchal society, wherein the status of women was deplorable and in dire need of empowerment and protection.

---

220 Student, Year II, Hidayatullah National Law University.

221 Student, Year II, Hidayatullah National Law University.

222 Sally Gold, *The Rape System: Old Roles and New Times,* 27 CATHOLIC UNVIERSITY LAW REVIEW 695-727 (1978) (Jan. 25, 2023), https://scholarship.law.edu/cgi/viewcontent.cgi?article=2391&context=lawreview.

223 *ibid.*

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

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

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

In the first chapter of the paper, the authors critically analyse the gender specificity present in the anti-rape laws of India by examining the legal history of the same through various law commission reports, amendments and various judgements given by courts of various tiers.

The authors then evaluate the sociological and the psychological reasons for the gender-bias apparent in the present law. The paper also discusses the varying perceptions of gender-neutral rape laws.

The authors proceed to assess the provisions for rape and sexual offences in Canada and Japan, highlighting the absence of gender-specificity and its impact on the legal system of these countries.

A comparative analysis is presented, juxtaposing the Indian, Canadian, and Japanese legal provisions from the perspective of gender biases inherent in each law and their resulting consequences. The authors also offer a broader global comparison, considering gender neutrality in rape laws and its absence on a global scale. Furthermore, the authors put forth recommendations for reforming the Indian legal provisions, emphasising the importance of respecting an individual's right to life, dignity, and bodily autonomy. These proposed reforms aim to address the limitations and biases of the existing legal framework, thereby promoting a more equitable and inclusive legal system.

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

India's current rape law constructs a skewed narrative wherein only a male can rape a female creating a gender specific perspective. The emboldened words in the provision below substantiate the same.

The laws against rape in India are codified in the IPC under Section 375 and Section 376 (defines

punishments for the same).

Section 375 states-

> "*A* ***man*** *is said to commit "rape" if he--*
>
> *(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a* ***woman*** *or makes her to do so with him or any other person; or*
>
> *(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a* ***woman*** *or makes her to do so with him or any other person; or*
>
> *(c) manipulates any part of the body of a* ***woman*** *so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*
>
> *(d) applies his mouth to the vagina, anus, urethra of a* ***woman*** *or makes her to do so with him or any other person,*
>
> *under the circumstances falling under any of the seven descriptions*
>
> * * * * * *
>
> *Exception 1-A medical procedure or intervention shall not constitute rape.*
>
> *Exception 2- Sexual intercourse or sexual acts by a man with his* ***own wife,*** *the wife not being under fifteen years*[224] *of age, is not rape"*

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

Section 377 of IPC reads-

> *"Unnatural offences —* ***Whoever*** *voluntarily has carnal intercourse against the order of nature with any* ***man, woman*** *or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*
>
> *Explanation. —Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."*

This section allows for the perpetrator to be of any gender, but the victim can only be either a man or a woman.

It is pertinent to ask why there exists a differentiation between these two provisions.

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

From a cursory reading of the two sections above, it is clear that IPC does not provide adequate reliefs to those who do not subscribe to heteronormative behavioural patterns. It also distinguishes between sexual abuse of a woman and a man by terming the former as 'rape' but latter as 'unnatural offences.' At this juncture, it is pertinent to raise the question as to why this differentiation is being made.

The notion that men cannot be raped[225] needs to be disbanded. There have been various instances where men were raped by another person, be it male, female, or any other gender.

One such instance was observed in Jalandhar, Punjab, where four women allegedly temporarily blinded a man by spraying some chemical and sexually assaulted him in a car.[226]

During the '#MeToo' movement, Actor Rahul Raj Singh also spoke about being sexually assaulted when he was 19 years of age.[227]

The Print also published a piece where a male sexual abuse survivor shared his incident of being abused when he was 15.[228]

Times of India reported a case where a bench of judges of the Nagpur High Court instructed the police superintendent to lodge a complaint of a transgender who was allegedly raped in Nagpur Central Jail.[229]

The incidents cited above give us a glimpse of the significant number of unattended and unreported cases relating to sexual assault because of a lack of legal aid for these victims. The traditionalist and rigid provision of India has created loopholes which can be misused by certain genders, which results in obscuring of justice. One such case is that of Priya Patel v. State of Madhya Pradesh[230] where the question of a female perpetrator in gang rape was taken up.

Section 376D of the IPC states that-

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

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

226 S P Kundu, *Four women 'rape' a man in Jalandhar: Gender-neutral laws are crying need of hour,* FIRST POST (Dec. 4, 2022), https://www.firstpost.com/opinion-news-expert-views-news-analysis-firstpost-viewpoint/four-women-rape-a-man-in-jalandhar-gender-neutral-laws-are-crying-need-of-hour-11747931.html.

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

228 Lokesh Pawar, *I am a sexual abuse survivor. No, I am not a woman*, THE PRINT (April 18, 2021), https://theprint.in/opinion/i-am-a-sexual-abuse-survivor-no-i-am-not-a-woman/641099/.

229 S Bose, Transgender alleges rape in jail, moves HC, THE TIMES OF INDIA (Mar. 25, 2021), https://timesofindia.indiatimes.com/city/nagpur/transgender-alleges-rape-in-jail-moves-hc/articleshow/81676465.cms.

230 (2006) 3 SCC (Cri) 96.

The wording conveys that the perpetrators of a gang-rape could be of any gender and the Madhya Pradesh High Court held that although women cannot rape, they can facilitate in gang-rapes. The Supreme Court however took the stance that women cannot be rapists under Section 375 and this can be extrapolated to gang rape cases as well. It held that even in cases where they facilitate, they cannot be prosecuted under gang-rape section. It also stated that for gang-rape, there needs to be a common intention to rape and women cannot intend to commit rape.[231] Such grey areas need to be resolved so that some do not evade the hand of justice.

Various judgements and reports have advocated for gender-neutral rape laws in India. It was in *Sudesh Jhaku v KC Jhaku*[232] where the issue of gender neutrality first arose.[233] Herein, the Delhi High Court was to determine whether rape only meant penile-vaginal penetration, or other kinds of penetration would also come under the definition provided in Section 375 of the IPC. Singh, J, going beyond his mandate, opined that rape laws should be redefined to include gender-neutrality.[234]

Subsequently, in 2000, the *172nd Law Commission Report on Review of Rape Laws* (hereafter Commission) recommended changes in Section 375 of IPC to make it more gender-neutral. The Commission proposed changing the term 'rape' in the abovementioned section to 'sexual assault' so as to include all other crimes that do not fall in the definition of rape, but infringe a person's bodily integrity in the same manner. It was also recommended to replace gender-specific terms like 'man' and 'woman' with 'any person/ other person' to make it gender-neutral.[235] Further, the Commission proposed the deletion of Section 377 of IPC to the extent of carnal intercourse between human beings, as this would come under the recommended Section 375.[236]

The *Justice Verma Committee* that submitted its finding in 2013 in the report titled 'Report of the Committee on Amendments to Criminal Law' also reiterated the fact that there is a possibility of sexual assault on men, homosexuals and transgenders, the rape provisions of India should recognize the same and amend accordingly.[237] Thereafter, the Criminal Law (Amendment) Ordinance, 2013 was presented in the Parliament meditated to make the rape laws of India gender-neutral.[238] However, due to vehement opposition by feminists groups, the ordinance was not enacted[239], and was replaced by the Criminal Law (Amendment) Act, 2013 instead.[240]

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

232 (1996) 62 DLT 563.

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

234 *ibid.*

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

236 *ibid,* at para 3.6.

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

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

239 *Activists join chorus against gender neutral rape laws,* THE TIMES OF INDIA (Mar. 7, 2013), https://timesofindia.indiatimes.com/india/activists-join-chorus-against-gender-neutral-rape-laws/articleshow/18840879.cms.

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

Another instance arose when the Kerala High Court observed that there could be cases where a woman tricks a man into sexual relationship on a false promise of marriage. A bench headed by A Muhammad Mustaque, J opined that the laws for rape should be made gender neutral to counter such cases as illustrated above.[241]

A trial court in Delhi, while sentencing an offender, also remarked that rape and sodomy were same, and there should be no difference between the two.[242]

The most recent instance of postulating for gender-neutral laws was seen in 2019, when a private member bill was introduced in Rajya Sabha by Mr. KTS Tulsi, named Criminal Law (Amendment) Bill, 2019, which rewrote anti-rape laws of India to make them gender inclusive[243], along with extending the ambit of sexual assault offences by inserting a new section, namely Section 375A.[244]

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

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

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

Causes and Consequences of Gender-Bias in Rape Laws-

The gender-lopsided conception of rape can be attributed to the stereotypes that colour all women as 'weak and lacking autonomy' and 'innocuous', and men's nature as one 'driven by impulses' and 'overpowering'.

The mere thought of a female perpetrator or a male victim can seem incomprehensible to many.[245] Such an attitude is responsible not only for notions of patriarchy but also chivalry– which stands for a normative protection of women and treatment of them as easily dominated. *Hostile sexism* outrightly emphasises men's dominance over women whereas *benevolent sexism* portrays men as protectors of women. The latter is misconstrued as a positive outlook, when in reality it is a subtler form of

241 PTI, *Gender neutral rape law? Legal experts disagree, call it flawed understanding of law,* THE INDIAN EXPRESS (June 12, 2022), https://indianexpress.com/article/india/gender-neutral-rape-law-legal-experts-flawed-understanding-kerala-high-court-7965675/.

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

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

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

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

condescension by men over women and is used to perpetuate the traditional gender roles.[246] Hence, even benevolent sexism can pose a damaging challenge to perceiving women as perpetrators and males as victims.

Physical violence towards women can be viewed as an extension to domination and control and power, which are socially and historically constructed.[247]

Rape myths dictate how men and women are expected to behave in sexual situations and any deviation gets dismissed both by laws and the society at large.[248] Victim-blaming can be thus explained as well by taking the classic historical notion that a woman ought to behave modestly and acts such as dressing unconventionally or consuming liquor invites social censure and can be used to justify any highly disproportionate enormity she might face.[249] Also, a cognitive bias towards the ideas of justice and a fair world cannot digest the fact that such a cruel act of rape can happen to anyone, even children, completely unprovoked, and hence by resigning to the idea that the victim "got what they deserved" provides a kind of illusive cognitive comfort to the society. It gives a predictability and a connection between the consequences and the victim's 'risky behaviour'.

Visibility bias also plays a role in the sense that reporting of male rape seldom gets proper media coverage or societal outcry and so it's perception as something 'alien' boldens. What's more is that these attitudes also affect how victims view their own plight resulting in them falling prey to denial, trivialisation and repression of their victimisation. *Socialisation* process for males seeks to make them self-reliant and stoic, which becomes an obstacle when they have to admit their vulnerability which gets equated with a flawed masculinity.[250]

The criminal justice system caters to the women in cases involving sexual offences. False allegations and the fear of losing custody over children drives the resolve to not report or leave a relationship that is abusive towards men.[251] Also, there are no laws to protect non-female rape victims.

The assumption that males can defend themselves or have a strong *unconditional desire* for arousal further impedes any credibility to the male victim's confession of abuse.

There also exists a tendency to explain women's violence through reason, such as provocation or self-defence vis-a-vis the inherent nature of men to inflict the same violence. Even in bi-directional or mutual violence, a reluctance is present in labelling the woman as an equal perpetrator.[252]

The fact that the law views a non-female victim as one subjected to sexual assault or *unnatural offence*, when the victim was actually raped is not only unjust with respect to difference in the punishment,

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

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

248 *ibid.*

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

250 *supra,* at note 26.

251 *supra,* at note 26.

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

with the former having less severe sanctions, but also evasive of the emotional recognition a victim needs from the laws to back their grievances. The same has the potential to take the form of a barrier to help-seeking in the very first stage.[253]

Perception of a Gender-Neutral Rape Law-

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

The current rape law in essence, dehumanises the individuals involved and withdraws the agency from the men and women and places them in a *sexual script* where their actions are deemed uniform and foreseeable. Gender-neutrality seeks to rid the law of such dispositions towards what usually happens and also include in its ambit, the other possibilities so that no one feels unrepresented by the laws.[254]

The argument that gender-neutral law will *decontextualise* rape and expect both the genders to behave alike is also flawed. The Indian judiciary has stated that mere lack of physical resistance by women cannot amount to consent and the judges are to take into account the specific circumstances in which the alleged rape occurred.[255]

A common contention raised is that men and women are not similarly affected by rape. This is indicative of the assumption that the society does not judge raped men unfavourably and treats such men less harshly than female victims. However, men also face similar, if not severer mental and physical stress that women victims face.[256] The two genders may not be affected identically but the effect is adverse nonetheless. It is a myth that men get less affected and traumatised by such acts. It is high time that the crime of rape be viewed as outraging an individual's sense of bodily autonomy and dignity rather than merely in terms of the social consequences and social connotations.

Another objection raised is that gender-neutral law will be misused to *unnecessarily harass* women and *counter-accuse* women of rape as a dilatory tactic. Citing an imperfect justice system and overlooking the social stigma that hampers males to report any sexual assaults against them in the first place,

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

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

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

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

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

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

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

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

cannot be the grounds to deny justice to non-female victims.[257]

The excuse that males cannot really be sexually assaulted is already rebutted by The Protection of Children from Sexual Offences Act, 2012 (POCSO) which recognizes the same in India. The National Commission for Protection of Child Rights (NCPCR) recently found a link between juvenile male survivor of sexual abuse and *propensity to inflict violence* upon women and children later in life.[258] Insia Dariwala conducted a survey of 1500 men and found that 71% had been abused in childhood and 84% had not reported this with the reasons being shame (55%), confusion (50%), fear (43%) and guilt (28%).[259] It seems absurd that the law acknowledges rape of boys but not men. When there is concrete evidence of minor male victims, it is sensible to discard the idea that these experiences cannot continue in major ages.

Any gender-neutral law essentially seeks the promotion of equal rights to consent to sexual activity and they can help dismantle the assumption of 'men will be men' and other problematic conceptions that will also benefit women victims.[260] Also, sexual assault of and by homosexual, transgender and gender non-conforming will be brought under the purview of a formal legal system.

The following chapter introduces anti-rape provisions of Japan and Canada and assesses it in terms of neutrality and implications.

5. Provisions for rape in Japan and Canada

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

i. Japanese provision for rape

The 1907 Penal Code of Japan[261] defined rape and its punishment under Section 177.

It read as-

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

257 *supra,* at note 34.

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

259 R Chatterjee, *'The mindset is that boys are not raped': India ends silence on male sex abuse*, THE GUARDIAN, (2018), https://www.theguardian.com/global-development/2018/may/23/indian-study-male-sexual-abuse-film-maker-insia-dariwala.

260 *supra,* at note 34.

261 Japan Penal Code, No. 45 of 1907.

As seen, the law presumed the victim to be a female only, while the perpetrator could be of any gender. Additionally, the provision only mentioned forcible 'intercourse' to be termed as rape, thus, making penile penetration a requisite. Sexual offences of other kind, for example, assault by inserting finger, hand, objects, or anything else through the genitals of a female would not be considered 'rape', but 'indecency' and would be punishable under Section 176 of the Penal Code.[262]

Japan ranked 116th in the Gender Gap Report 2022[263], falling from 110th in 2018.[264] It is apparent that Japan holds different genders in unequal positions, and the same can be seen through their rape provision. The inherent gender-bias is reflective of the societal prejudices[265] that Japan held. After a period of 110 years, the anti-rape laws were finally amended by the Penal Code Amendment Pertaining to Sexual Offenses[266], which replaced the old provision, with a gender neutral one.

The amended provision read-

> *"A* ***person*** *who, through assault or intimidation forcibly engages in vaginal intercourse, anal intercourse or oral intercourse (hereinafter referred to as "sexual intercourse") with* ***another person*** *of not less than thirteen years of age is guilty of the crime of forcible sexual intercourse, and is punished by imprisonment for a definite term of not less than 5 years. The same applies to a person who engages in sexual intercourse against another person under thirteen years of age.[267]"*

The amended provision replaced the gender-specific victim ('female') with a more gender inclusive phrase ('another person'). It also expanded the ambit of the section by replacing 'rape' with 'forcible sexual intercourse' while including oral and anal intercourse in the definition. The new law accepts the fact that victims can be from any gender, and thus accepts the fact that men and other genders, along with females, can be victims of sexual intercourse. The provision has also increased the minimum punishment for the offence, from 3 years to 5 years, recognising the severity of the crime. It is important to note that the amended provision still does not recognize forcibly inserting finger, hand or any object through the vagina, anus or mouth of another person as 'sexual intercourse' and the abovementioned offence still comes under 'indecency' and holds a lower minimum punishment. Japan does have separate provisions for 'Quasi-rape', or 'Forcible Indecency' in its Code under Section 178 which is to involve cases where the woman was violated when unconscious or unable to resist.[268]

The law, however shifts the burden to prove non-consent upon the victim, which implicitly requires

---

262 *ibid*, S. 176.

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

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

265 Harriet Gray, *Rape and Sexual Assault in Japan: Potential Gender Bias in Pre-Trial Procedures*, 11 REINVENTION: AN INTERNATIONAL JOURNAL OF UNDERGRADUATE RESEARCH, https://warwick.ac.uk/fac/cross_fac/iatl/reinvention/archive/volume11issue1/gray.

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

267 *ibid* at para 2.

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

the victim to establish that resistance was given.[269] Punishment for rape is a minimum of 3 years, gang-rape for 4 years and forcible indecency 6 months. While the focus of the comparison is on the basis of gender neutrality, it is pertinent to note that the given punishment for such heinous crime is inadequate to actually create a deterrence in the society.[270]

ii. Canadian model of rape law

Canada introduced gender-neutral laws of sexual offences in 1983. There is no specific rape law but rather an umbrella sexual assault provision that accommodates varying degrees of the sexual offence.[271] The relevant sections in the *simplified* form are-

> *"Section 271: Sexual assault occurs if a* ***person*** *is touched in any way that interferes with their sexual integrity: this includes kissing, touching, intercourse and any other sexual activity without his/her consent.*
> *Section 272: Sexual assault with a weapon, threats to a third party or causing bodily harm occurs if a* ***person*** *is sexually assaulted by someone who has a weapon or imitation weapon and threatens to use it; the offender threatens to harm a third person, a child or a friend if the* ***person*** *does not consent to a sexual act; the offender causes harm to the person; or more than one offender assaults the person in the same incident.*
> *Section 273: Aggravated sexual assault occurs if the* ***person*** *assaulted is wounded, maimed, disfigured, beaten or in danger of losing her/his life while being sexually assaulted."*[272]

The Canadian provision also states that no one under the age of 17 can consent to sexual intercourse with a figure of authority (like a coach), and an intoxicated or unconscious person can never consent. Anyone of the age 12-13 cannot consent to sexual activity to anyone more than 2 years older and anyone aged 14-15 cannot consent to anyone more than 5 years older.

Depending upon the severity of physical aspects of the assault, the offence is classified under level 1, level 2 or level 3 sexual assault. Any non-consensual sexual act can fall under these provisions, which also clearly lays down the definition of consent. Thus, it is an accommodative provision. Additionally, the sentencing is presented as a range corresponding to the absence or presence of a weapon by the offender, from a minimum of 4 years to a maximum of life sentence. The Code has

269 *ibid.*

270 *supra*, at note 47.

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

272 The Criminal Code of Canada, 1985.

laid down rules that determine admissibility of specific evidence so as to deter any stereotypes or discriminatory myths about how the sexual assault victims are expected to behave.[273]

The Bill C-51, introduced in 2017 [274], brought major changes to the sexual assault law viz.

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

The 'justice gap' still exists, between the written text and actual courtroom practice. In practice, the counsel has been permitted at times to present sexual records for misleading purposes. The Criminal Code falls short when it comes to the inherent prejudices of the judges manifested in the type of questioning done in the court (scrutiny over the victim's style of scream and not fighting back).[275]

The Canadian government tries to take on a proactive role to ensure an unbiased temperament in the judiciary through various schemes. In the 2017 Budget, the Canadian Judicial Council was provided with $2.7 million for 5 years and $0.5 million per year thereafter for access to gender-sensitivity training for judges.[276] In 2020, the Canadian Government introduced a legislation that sought to train judges in sexual assault law and social context.[277]

The next chapter deals with a comparative study over the rape laws of India, Japan and Canada and seeks to juxtapose the spirit and letter of the law and its translation into the real world.

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

This chapter focuses on three countries namely India, Japan and Canada, examining their respective rape laws and identifying areas of similarity and difference.

India's system borrows from the common, civil customary and religious law sources, while Japan is a civil law system and Canada is a bi-jural (common and civil) legal system.

Canada is an exemplary western nation that has the widest sexual assault provision of the three

273 *supra,* at note 50.

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

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

276 *supra* at note 50, at 11.

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

countries. Japan, like India, is an Asian-value driven nation, but ahead in terms of acknowledgment of sexual crimes against other genders comprising the minority of these cases.

Drafting of the Law

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

The ambit of each law depends on how the provisions are worded. The rape law provisions of India and Canada have a wider ambit than that of Japan. Japan considers vaginal, anal and oral intercourse that occurs due to force as 'sexual intercourse'[278], and does not cover forcible insertion of finger, objects or anything else while the other two countries do take such incidences into account as well. In this regard, Japan has the narrowest anti-rape provision.

No express provision outlaws marital rape however through case laws, it has been made a criminal offence in Japan.[279] India's IPC expressly excluded marital rape from the purview of the Section 375. Canadian legal reforms of 1983 explicitly treat marital rape as a crime in Canada.[280]

A Comparison of the Reporting Rates of Non-female Rape

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

India

The National Crime Records Bureau of India reported 31677 rape cases in 2021, an average of about 87 cases each day.[281] The figure represents the reported cases of rapes where women were victims. As rape doesn't acknowledge men as victims, there are no official records of men who have been raped.

The Centre for Civil Society conducted an independent survey that found that among some 300 men, 41 percent of those aged 35-44 had been coerced into sex by a woman and 20 percent above 45 years had been coerced into sex by a man. On an average, 18% men reported being coerced into sex, with 16% claiming a female perpetrator and 2% claiming a male one, indicating that female-on-male rape

278 *supra,* at note 46.

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

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

281 *Table 1.2*, IPC CRIMES (2019-21),
https://ncrb.gov.in/sites/default/files/CII-2021/TABLE%201.2.pdf.

is more prevalent than male-on-male rape.[282]

In a 2017 PIL introduced by advocate Sanjiv Kumar, in Delhi High Court, it was stated- "Male rape is far too prevalent to be termed as an anomaly or a freak incident."[283]

Japan

The National Police Agency reported 1388 cases of forcible sexual assault and 4283 cases of forcible indecency in the year 2021.[284]

The 2018 report stated that out of the 1300-1400 cases reported of sexual assault, there were only 50-70 cases where the victim was a male, comprising just 3% to 5% of the total cases.[285]

A Cabinet Survey by Japan reported that 47.3% of sexual assault victims did not report the incident with the law enforcement, nor did they share it with anybody else.[286] The reasons for this were that they felt that it was too shameful to narrate (36%), the crime wasn't serious enough (32.2%) or that there was no use talking about this (28.5%), while some victims were unsure about who to consult (25.7%).[287]

Canada

A 2019 report by the Canada Government recorded 24,672 cases of sexual assault that were reported to the police in 2017.[288] Out of 1000 women, 37 women faced sexual assault, while out of 1000 men, only 5 men faced the same.[289] This reflects the higher victimisation women face than men.

According to a 2014 GSS, only 5% of the cases were reported, while 83% of the incidents were not reported. In the male sample group[290] 70% of the sample did not report sexual abuse by adult.[291] This is because of a pre-existing notion that the society will not believe the men, or the feeling of shame that they may have to face.[292]

From the figures mentioned above, it is clear that there are instances of men being sexually assaulted, but there is either gross under-reporting or non-reporting of these crimes. While India does not report sexual assault crimes against any gender, excluding females, Canada has the highest percentage

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

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

284 Crime situation in 2021 (2021)
https://www.npa.go.jp/english/crime_situation_in_2021_en.pdf.

285 *Many male sex crime victims still hesitate to report abuse in Japan,* THE JAPAN TIMES (2022), (Jan. 30, 2023),
https://www.japantimes.co.jp/news/2022/12/28/national/male-sexual-abuse-victims/.

286 *47.3% of those who experience sexual violence in Japan stay quiet, survey finds,* THE JAPAN TIMES (2022),
https://www.japantimes.co.jp/news/2022/06/17/national/sexual-violence-cabinet-survey/.

287 *ibid.*

288 *Sexual Assault*, GOVERNMENT OF CANADA (2019)
(Jan. 30, 2023), https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2019/apr01.html.

289 *ibid.*

290The male sample group was part of a larger sample group. The larger group had 3 divisions- female, northern, and as mentioned above, the male group.

291*supra*, at note 67.

292*supra,* at note 67.

of under-reported crimes of the discussed nature. The main reasons for the same include the apprehension that no one would believe male victims and the shame that they feel293. Even though Canada has gender-neutral laws, there is a lack of trust in the people towards the law-enforcement which has led to a dismal number of reported incidents.[294]

It is worthwhile to note that even though Japan amended the rape laws only in 2017, the reporting rate of the crime is more than that of Canada whose laws were changed in 1983.

A Comparison of the Queer Stakeholders

In Canada, the queer population touched 1 million in 2021[295], while in Japan it 1 in 10 identify as part of the LGBTQ community[296] (roughly 10 million). In India, according to the 2011 data, an estimate of about 45 million individuals do not identify as straight in India. The statistic only involves the openly queer people of the country.[297] When considering the significant number of individuals affected by gender-neutral rape laws, particularly in India with its substantial queer population, there is a pressing need to include them in the relevant legal provisions given that such inclusion is essential to ensure that the rights and protections provided by the law extend to all members of society, regardless of their sexual orientation or gender identity.

Social Comparison of the Nations

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

There also exists a correlation between gender-neutral rape law and the rights of the LGBTQ+ community in a country. The legal recognition of same-sex marriage and the overall production of LGBTQ+ rights are indicative of a more inclusive and equitable legal framework. India, does not recognise same-sex marriages and only allows for unregistered cohabitation, whereas gay marriage is legal in Canada. In Japan, the legality of such marriage varies across regions. Canada ranks the highest in the LGBT Equality index for 2021 (90/100) whereas India is the lowest among the three (63/100).[298]

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

294 *ibid.*

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

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

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

298LGBT rights, EQUALDEX (2021)
https://www.equaldex.com/region/india

India

Centre for Civil Society in India conducted an anonymous online survey among 305 men on whether they believe men can be raped by women and 79.3 percent of them said yes with a cent percent agreement from those aged above 45 and only 71 percent from those in the age-group 18-24.[299] Hence, there is a disconnect between society's stance and the regressive rape laws of India.

Recommendations for gender-neutral modifications to the existing rape law of India have been opposed by certain feminist groups who view rape as an explicitly patriarchal and gendered crime.[300] Under IPC, punishments for various crimes including sexual offences can extend till even capital punishment, under the Transgender Persons (Protection of Rights) Act, 2019, offences involving mental, sexual or physical abuse of a transgender individual invite relatively lenient punishments involving only 6 months to 2 years of imprisonment. The Act also requires an Identity Certificate and out of the 9064 applications received, 22% remain pending (16% of which have been pending for 7-12 months, despite the provision directing issuance or rejection within 30 days) and 13% have been declared ineligible as per National portal for transgender persons.[301]

Japan

The Japanese police provide a hotline service and a public women consultation service. However, there exists no 24-hour rape crisis services to cater to immediate medical care and counselling or protection shelters for the victims.[302] Various NGOs have linked prejudice of the police, judges and advocates, lack of trust in the justice system, re-victimising judicial procedures through consideration of prior sexual history, as the major reasons for the underreporting of rape cases. They also found that the systematic gender-sensitivity training of prosecutors and judges is not undertaken as per the norms and the hospitals and NGOs that seek to provide post assault care are heavily underfunded. Also, the disparate power relations between the offender and victim are seldom attended to. Cases wherein the offender abuses his authority or position to coerce sexual participation by the victim are many a times interpreted to be consensual.[303]

Canada

Sexual assault cases keep getting dismissed throughout the Canadian justice system where only 50% of the suspects face prosecution and of these, only half get convicted. In reality, false reports of

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

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

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

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

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

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

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

assault cases are not higher than other crimes. Still, the misconceptions that the police hold drive their decisions as to who is a genuine victim in need of protection.[304]

In the Justice Canada studies[305], the most widely felt reasons for not reporting child and/or adult sexual abuse were the fear of disbelief by others, embarrassment and shame, unawareness as to whether reporting can be done, and absence of family support.

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

The Global Scenario-

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

COUNTRY	VICTIM-NEUTRAL	PERPETRATOR-NEUTRAL
India	No	No
UK	Yes	No
USA	Yes	Yes
Japan	Yes	Yes
Canada	Yes	Yes
New Zealand	Yes	Yes
China	Yes	Yes
South Africa	Yes	Yes
Australia	Yes	Yes
France	Yes	Yes
Russia	Yes	Yes
Bangladesh	No	No
Brazil	Yes	Yes

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

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

Pakistan	No	No
Indonesia	No	Yes

Out of the 96 countries studied by the Centre for Civil Society, 63 had neutral, 6 had partly neutral and 27 had gender-specific rape laws.[306]

The following countries have gender-neutral laws but prescribe a harsher punishment for women victims than non-female ones[307] :

- Bahrain
- Egypt
- Ethiopia

According to the CCS data, 14 out of the 19 Sub-Saharan countries have gender-neutrality in rape laws. The continent with most gender-specific rape laws is Asia whereas there are none in Western Europe and North America.[308] This correlates with the 2022 Global Gender Gap Report in which out of the top 10 gender-parity nations, 6 were from Western Europe. It will take Asia an average of 172 years to close the gender gap and Western Europe and North America an average of 59.5 years to do the same.[309]

7. CONCLUSION

India certainly needs reforms in rape provisions involving substituting 'man', 'woman' with 'a person' to be palatial enough to involve all types of offenders and victims.

Making a gender-neutral rape law will *not affect the gravity* with which rape cases are treated or render the law ineffectual. All it will ensure is that the *right to equality* and *equal protection of laws*, justice and dignity is not denied to a great many that get side-lined far too often.

The Indian provisions in IPC against sexual harassment (Section 354A), voyeurism (Section 354C) and stalking (Section 354D) are also gender-specific. Crafting a gender-impartial rape law could start a *domino effect* and these provisions may follow suit to foster an inclusive justice system.

However, it is also to be kept in mind that just making the law gender-neutral without altering the prevailing courtroom practices and improving the reporting coverage is futile. The same has also been noted in the nations of Japan and Canada, where there is a paucity of appropriate judicial attitude and grassroot level availability of redressal mechanisms.

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

307 *ibid.*

308 *ibid.*

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

Ultimately, society has to become less judgemental and more empathetic towards the victims, regardless of their gender, so that the ubiquitous stigma around even reporting of the crime gets abated. The legal professionals and police are not impenetrable to societal attitudes, and hence any change for the better in society's tolerance will permeate into the justice system as well.

Through the first chapter, the current rape provision of India was examined with respect to lack of gender-neutrality. The gender-rigidity of the law allows only the females to be able to report rape. The fallacy that other genders cannot be raped was set aside by providing non-stereotypical instances in India.

The second chapter highlighted the consequences of a gender-biased provision for rape such as perpetuation of rape myths and stereotyped sexual scripts. The causes for the tendency to view men as perpetrators and females as victims were seen to be a result of socialisation. The misconceptions impeding support for gender-neutral rape laws such as threat of counter-accusations and decontextualization were further rebutted.

Finally, a comprehensive comparison with two foreign legal systems was conducted on the parameters of presence of gender-neutrality in rape provisions, rates of reporting of such offences and the social impact ensuing from such provisions. Japan's rape law sits at a partly progressive approach where although it is gender-neutral, what constitutes rape is spelled out in a restrictive manner.

The Canadian law is a multi-levelled and condensed law that looks at the intensity of the offence and the sexual situation of every case, and spurns preconceived gender myths. In this regard, it looks at rape from an individual perspective, as an abuse of one's autonomy and integrity. Such a setup could be considered as a model for the Indian rape law to metamorphosise around.

Death and Desire: Necrophilia and the Need for Legal Intervention in India

- *Tanya Verma*[310] *and Tejaswini Kaushal*[311]

I. Introduction

"I would love your eyes sunken in, your lips silenced, your sex frozen, if only you were dead; unfortunately, you have the bad taste to be alive."[312] Necrophilia, characterized by the pursuit of sexual satisfaction through engaging in sexual acts with corpses, has undergone a significant transformation in societal perception.[313] Initially, it was subject to literary romanticization, portraying a disturbing manifestation of abnormal and perverse sensuality.[314] However, over time, it has evolved into a societal taboo, generating widespread repulsion and condemnation. In his influential work 'Psychopathia Sexualis,' Richard von Krafft-Ebing characterized necrophilia as a manifestation of sadism.[315] Meanwhile, Abraham A. Brill, in one of the earliest comprehensive studies on necrophilia conducted in 1941, portrayed necrophiles as mentally deficient and psychotic individuals who could not establish a consenting partnership.[316] It was legal theorist John Troyer who highlighted the issue of concern in his seminal 2008 journal article, asserting that '*the dead body is a quasi-subject before the law*.'[317] The ambiguous legal status of human corpses in cases of necrophilia exacerbates the sexual aberrance associated with necrophiliacs and their actions. Recognizing the urgent need to expand the scope of criminal jurisprudence to encompass the rights of deceased individuals within the existing legal framework, this paper emphasizes on establishing the legal personhood of corpse to remedy the legal void.

This article initiates by examining the distinction between necrophilia and accidental necrophilic acts to establish the degree of culpability attributed to the offender. Subsequently, it delves into the complexities associated with classifying necrophilia within existing legal provisions, particularly those pertaining to unnatural offenses and the offense of rape. It explores the challenges related to determining the legal status of a deceased individual and the ability to provide consent in such circumstances. Furthermore, the article critically assesses the ineffectiveness of current provisions within the Penal Code in addressing the issue of necrophilia. Lastly, it puts forth a proposal for the implementation of additional policies as a means to address this escalating concern.

---

310 Student, Year III, Dr. Ram Manohar Lohiya National Law University, Lucknow.

311 Student, Year III, Dr. Ram Manohar Lohiya National Law University, Lucknow.

312 Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1300 (1991).

313 Anand Kumar Vasudevan et al., *Necrophilia: A Study of the Psychoanalysis in the Characteristics of the Offenders Who Sexually Molest the Dead*, MEDICO-LEGAL UPDATE, Jul.-Dec. 2019 at 12, 20.

314 Adam Briedik, *Post-modernism, Paraphilia, Sadism, Necrophilia, and Sexually Motivated Homicide: An Interdisciplinary Reading of Dennis Cooper's "Frisk" (1991)*, INTERNATIONAL JOURNAL OF ENGLISH LITERATURE AND SOCIAL SCIENCES (2023) https://ijels.com/upload_document/issue_files/59IJELS-10420237-Post-modernism.pdf.

315 Richard von Krafft-Ebing, *Psychopathia Sexualis*, CG CHADDOCK, TRANS. PHILADELPHIA, PA: DAVIS (1886).

316 Abraham A. Brill, *Necrophilia*, JOURNAL OF CRIMINAL PSYCHOPATHOLOGY, 2 (1941) 433-443.

317 John Troyer, *Abuse of a corpse: A brief history and re-theorization of necrophilia laws in the USA*, MORTALITY, 2008 at 132-152.

II. Exploring Necrophilia vis-à-vis Necrophilic Acts

Historically, sailors transporting deceased individuals across nations were accused of necrophilia due to extended journeys, isolation, lack of witnesses, and the absence of social norms.[318] Today, gravediggers and mortuary attendants implicated in necrophilia cases may engage in such acts due to loneliness and convenient access to corpses, with individuals potentially gravitating towards these professions due to the unrestricted availability of bodies. This section undertakes a comprehensive classification, identifying two distinct categories. The first category involves cases where necrophilia is conceptualized as a manifestation of underlying psychological issues. The second category encompasses instances where the criminal act originates as a rape, subsequently resulting in manslaughter, either intentionally or unintentionally, and ultimately culminating in post-mortem sexual intercourse. Furthermore, this section elucidates the differential culpability associated with these categories, shedding light on the potential exploitation of the 'necrophilia defense' claim by the perpetrators.

A. Classifying the Offence

1. Offence Postmortem

Necrophilia, often understood as a sexual attraction towards corpses, is characterized by the DSM-V as an "*other specified paraphilic disorder, involving recurrent and intense sexual interest in corpses*."[319] According to this classification, necrophilia involves the presence of repetitive and intense sexual fascination with corpses.[320] It largely consists of individuals who engage in fantasies involving post-mortem sexual acts rather than actively participating in sexual intercourse with deceased bodies.[321] Conversely, those who practically act on their necrophilic desires may employ methods such as theft from morgues, grave exhumation, or preservation of their deceased partners. Nevertheless, instances exist where necrophilia is preceded by homicide, leading to charges of both culpable homicide amounting to murder and necrophilia.[322] Its categorization as a mental illness warrants consideration for treatment rather than imprisonment. However, jurisprudence across nations has emphasized the importance of imprisoning necrophiliacs to maintain societal order.

The classification of necrophilic acts as rape poses a challenge regarding comprehension. B. Kemal Pasha, J. addressed this issue in the case of **State of Kerala v. Govindswamy,**[323] wherein it was

318 *Last Rights: The Dead, the Missing and the Bereaved at Europe's International Borders*, OHCHR (2017), https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/36_42/TheLastRightsProject.pdf.

319 American Psychiatric Association, (2013) Diagnostic and statistical manual of mental disorders (5th ed.). ARLINGTON, VA: AMERICAN PSYCHIATRIC PUBLISHING, Mar 25, 2017.

320 Anil Aggarwal, *A new classification of necrophilia*, JOURNAL OF FORENSIC AND LEGAL MEDICINE, 316-320 (2009).

321 Khadija Khan, *What is necrophilia and is it an offence in India?*, INDIAN EXPRESS (Jun. 5, 2023, 10:05AM), https://indianexpress.com/article/explained/explained-law/what-is-necrophilia-and-is-it-an-offence-in-india-8644222/

322 Stephen J. Morse, *Culpability and control*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, Vol. 142, No. 5 (May, 1994) 1587-1660.

323 State of Kerala v. Govindswamy, ALL SC 2016.

observed that the accused engaged in necrophilic behavior by sexually assaulting a girl who had fallen from a train. In another instance in **Mumbai,**[324] during an investigation of a rape and murder case, the police discovered that the perpetrator engaged in unnatural sexual acts with the deceased after strangling her with her jeans. Moreover, the **Andhra Pradesh**[325] police, while examining a series of murder cases, identified the perpetrator as an infatuated necrophile who had killed numerous girls. In several instances, the accused themselves confessed to engaging in acts of necrophilia following the murder of their victims.[326] A similar incident occurred involving a minor girl in **Assam**.[327]

The incarceration of individuals engaged in necrophilia can be justified based on their inherent risk to society and the well-established probability of recidivism.[328] Judicial perspectives from both Canada and the United States support this argument. In Canada, the case of **R. v. J.-L.J.**[329] acknowledged that the level of detail required to establish a 'standard profile' may vary depending on the conclusiveness of individual elements. This suggests that in cases involving necrophilia, specific evidence can be crucial in demonstrating an offender's alignment with the characteristics of individuals who would commit such a crime. Similarly, in **R. v. Malbœuf,**[330] expert evidence was admitted to establish the distinctive psychological trait of necrophilia as a necessary factor for committing the offense. This demonstrates the importance of psychological analysis in identifying and understanding individuals prone to necrophilic behaviors.

In the United States, several cases illustrate the significant public risk associated with necrophilia. In **Grennier v. Frank,**[331] Richard Grennier, convicted of multiple crimes including first-degree murder, was consistently denied parole due to concerns about his sexual disorders and perceived public risk, with his necrophilic tendencies contributing to his classification as a 'sex offender.' In **Stevens v. McBride,**[332] the prosecution inadvertently influenced the jury against Stevens by introducing evidence of his future dangerousness, a factor prohibited under Indiana law as an aggravating circumstance. This highlights recognizing the potential danger necrophilic individuals may pose to society. Lastly, in **Ross v. State,**[333] Eddie Lee Ross was convicted of murder and rape, including necrophilic acts following the killing. Ross's death sentence was upheld, underscoring the severity of

324 *Palghar stunned by necrophilia, a man raped woman's corpse*, THE TRIBUNE (Jul. 04, 2020, 01:50 PM), https://www.tribuneindia.com/news/nation/palghar-stunned-by-necrophilia-a-man-raped-womans-corpse-108480.

325 *Nayeem, the gangster who knew too much, shot dead*, THE TIMES OF INDIA (Jun. 2, 2023, 10:10 PM), https://timesofindia.indiatimes.com/city/hyderabad/nayeem-the-gangster-who-knew-too-much-shot-dead/articleshow/53609263.cms.

326 *Youth gets life in jail for killing teen, sexually abusing her body*, THE INDIAN EXPRESS (Dec. 10, 2010, 02:42 PM), http://archive.indianexpress.com/news/youth-gets-life-in-jail-for-killing-teen-sexually-abusing-her-body/722762/.

327 *Assam man arrested for necrophilia*, THE NEW INDIAN EXPRESS (May. 22, 2022, 06:04 PM), https://www.newindianexpress.com/nation/2020/may/22/assam-man-arrested-for-necrophilia-2146703.html.

328 Shirley S. Abrahamson, *Some enlightenment on crime*, MICHIGAN LAW REVIEW (1985).

329 R v. J.LJ, MANU/SCCN/0047/2000.

330R v. Malboeuf, [1997] O.J. No. 1398 (QL) (C.A.).

331Grennier v. Frank, MANU/FEVT/0355/2006.

332 Stevens v. McBride, MANU/FEVT/0115/2007.

333Ross v. State, 254 Ga. 22.

offenses related to necrophilia and the need for appropriate legal measures to protect society. Collectively, these cases from both Canada and the United States provide a basis for justifying the imprisonment of individuals engaged in necrophilia.

2. *Offence Perimortem*

While the traditional analysis may overlook certain factors, recent studies have introduced the concept of Post Mortem Sexual Interference Offenders (PMSIOs), constituting a distinct category of offenders. Carter has defined PMSIOs as *"homicide offenders whose offense contained at least one of the following characteristics: the perpetrator disclosed post-mortem sexual assault, there was evidence of post-mortem sexual behavior from a pathologist, the perpetrator admitted to post-mortem sexual behavior, there was evidence of sex with an unconscious or dead victim, or the perpetrator disclosed post-conviction that they sexually assaulted the victim after killing them."*[334] It is important to note that PMSIOs represent a heterogeneous group of offenders who engage in post-mortem sexual activities without necessarily having a persistent sexual attraction to corpses, distinguishing them from 'true' necrophilia.[335] The concept of PMSIOs aims to differentiate between individuals who commit sexual acts after death and those diagnosed with necrophilic paraphilia according to the criteria established in the DSM V.[336]

An illustrative example that highlights this distinction involves a scenario in which a violent rape leads to the death of a living female, and subsequent sexual penetration occurs after her demise. In such cases, it can be observed that the perpetrator did not possess the intention or desire to engage in sexual acts with a corpse but rather incidentally did so following the victim's death. The transition from antemortem to post-mortem engagement, typically characterized as manslaughter or culpable homicide not amounting to murder, introduces forensic ambiguity and culpability challenges.[337] The term 'necrophilia', therefore, is inappropriate for such scenarios since the accused lacks a precise diagnosis of the disorder under the DSM criteria. Otherwise, this discrepancy has led to conflicting definitions, categorizations, and legal ramifications when dealing with such offenses.[338] The terminology of PMSIOs highlights cases that do not neatly fit into the diagnostic framework of necrophilia.

The jurisprudence surrounding necrophilic acts presents a complex and evolving landscape, leading to challenges in the legal treatment of such cases. In the case of **Marong v. R.**[339] in New Zealand,

334 Tamsin Higgs et al., *Toward Identification of the Sexual Killer: A Comparison of Sexual Killers Engaging in Post-Mortem Sexual Interference and Non-Homicide Sexual Aggressors*, SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT (2015).

335 *Sexual Homicide and Paraphilias: The Correctional Service of Canada's Experts Forum 2007*, CORRECTIONAL SERVICE CANADA, https://www.csc-scc.gc.ca/research/shp2007-paraphil11-eng.shtml.

336 Tamsin Higgs et al., *Toward Identification of the Sexual Killer: A Comparison of Sexual Killers Engaging in Post-Mortem Sexual Interference and Non-Homicide Sexual Aggressors*, SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT (2015).

337 Serafettin Demirci & Kamil Hakan Dogan, *Death Scene Investigation from the Viewpoint of Forensic Medicine Expert,* FORENSIC MEDICINE (2010), https://www.intechopen.com/chapters/19160.

338 Tyler T. Ochoa & Christine Jones, *Defiling the Dead: Necrophilia and the Law*, 18 WHITTIER L. REV. 539 (1997).

339 Marong v. R, SC-36-2020.

the court relied on a post-mortem examination to establish intercourse and rejected the defendant's claim of consensual sex with the victim before her death. A minimum period of imprisonment of 17 years or more was imposed, highlighting the seriousness with which the court viewed the offense. Similarly, in **R v. Courts**[340], the Wales Court of Appeal addressed a case where an act of sex resulted in rape due to death occurring during the act. Although the defendant was ultimately convicted of murder rather than rape, the court acknowledged the need for a minimum term for necrophilia. The absence of specific anti-necrophilia laws in some jurisdictions raises a paradox for prosecutors, as they navigate the challenge of pursuing rape charges to protect sexual autonomy.[341]

Contrasting approaches can be observed within different states. For example, in **Lipham v. State**[342], the Georgia Supreme Court upheld a conviction for rape and murder in a perimortem rape case. The defendant attempted to raise a 'necrophilia defense', arguing that engaging in sexual acts with the victim after her death would only constitute necrophilia. However, the court rejected this argument, affirming the rape conviction and emphasizing that the rape statute applies when deadly force is used to achieve sexual intercourse. This differentiation between perimortem rape and necrophilia highlights the court's distinction between engaging in sexual intercourse with a live victim using violence versus engaging in sexual acts with a corpse encountered after death.[343] On the other hand, **Comm v. Waters**[344] dealt with a case in Massachusetts where an individual was convicted of aggravated rape for engaging in sexual intercourse with a deceased victim. While Massachusetts law does not prohibit sexual intercourse with a dead body, the evidence warranted a finding of sexual intercourse without consent.[345] Therefore, the court concluded that the victim's death preceding or following the sexual attack was not a determining factor.

These cases reflect the intricate legal interpretation and categorization of post-mortem sexual acts, with varying definitions and legal consequences across jurisdictions. The treatment of such acts remains a subject of ongoing debate, raising important questions regarding the rights and interests of victims and the application of consent laws concerning corpses. The complexities surrounding these legal issues necessitate continued examination and thoughtful consideration within the legal framework.

B. Determining Proportionate Punishment

In cases where both murder and necrophilia happened, forensic sciences often face challenges in

340 R v. Courts, UKCR-0023-2005.

341 *Supra*, note 17 at 5.

342 Lipham v. State, 364 S.E.2d 840, 842–43.

343 Kim D. Ricardo, *Necrophilia: A New Social-Harm Taxonomy of U.S. Laws*, 27 WM. & MARY J. WOMEN & L. 351 (2021), https://scholarship.law.wm.edu/wmjowl/vol27/iss2/4.

344 Comm v. Waters, 420 Mass. 276 (1995).

345 *Massachusetts law about sex*, https://www.mass.gov/info-details/massachusetts-law-about-sex.

determining the sequence of events, such as whether the rape occurred before or after the murder, which is crucial in determining appropriate penalties.[346] Convictions in such cases heavily rely on the confession of the accused. Still, this approach faces difficulties due to legal considerations, such as **Section 27 of the Indian Evidence Act,**[347] which dismisses any information extracted from the accused in police custody. Consequently, the penalty for necrophilia combined with murder may be less severe than the penalty for rape combined with murder, creating a potential incentive for perpetrators to claim postmortem rape to exploit loopholes in the justice system, ultimately affecting victims' rights.

Traditionally, jurisdictions with conservative and traditionalist tendencies have exhibited a predilection for enacting legislative provisions that uphold and reinforce the prevailing social order.[348] On the other hand, jurisdictions with more liberal inclinations generally have a lesser propensity to adopt comparable measures. Notably, both South Africa[349] and New Zealand[350] have acknowledged necrophilia as a criminal offense within their legal frameworks, underscoring their commitment to address and prohibit such acts. In the United Kingdom, the deliberate act of engaging in sexual penetration with a deceased individual is criminalized under Section 70 of the Sexual Offences Act of 2003.[351] In Canada, necrophilia is addressed under Section 182 of the Criminal Code of Canada, 1985, rendering it punishable by law.[352]

Similarly, the United States categorizes necrophilia as a felony offense, albeit with variations in the severity of penalties across different states. Instances have been reported where individuals facing charges related to rape and murder have resorted to claiming reduced punishment under laws on necrophilia.[353] In **Lipham v. State,**[354] the Georgia Supreme Court stated that *"there is nothing in this code section which precludes a finding of rape if the victim is not alive at the moment of penetration. . . if the element of force is satisfied when the victim has used less than deadly force to overcome resistance and allow the defendant to have carnal knowledge. In that case, the element of force is surely no less satisfied when the defendant has used deadly force to accomplish their aim."*

Kelly[355] and **Thompson**[356] have examined the question of whether a defendant can be charged with attempted rape, depending on whether they believed the victim to be alive at the time they initially

346Ramesh Sharma, *Having sex with dead body not an offence in India: Why a high court wants a law against necrophilia*, INDIA TODAY, https://www.indiatoday.in/law/story/having-sex-with-dead-body-not-an-offence-in-india-why-a-high-court-wants-a-law-against-necrophilia-2388582-2023-06-04.

347 Indian Evidence Act, 1872, §27, No. 1, Acts of Parliament, 1872 (India).

348 *Social justice in an Open World*, UN-DEPT. OF ECONOMICS AND SOCIAL AFFAIRS, https://www.un.org/esa/socdev/documents/ifsd/SocialJustice.pdf.

349 Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, §14, No. 32, Acts of Parliament, 2007 (South Africa).

350 Crimes Act, 1961, §150, No. 43, Acts of Parliament, 1961 (New Zealand).

351 Sexual Offences Act, 2003, §70, c. 42, Acts of Parliament, 1961 (Canada).

352 Criminal Code of Canada, 1985, §182, C-46, Acts of Parliament, 1961 (Canada).

353 Stephen J. Morse, *Culpability and control*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, Vol. 142, No. 5 (May, 1994) 1587-1660.

354 *Supra*, note 31 at 7.

355 People v. Kelly, 1 Cal. 4th 495.

356 People v. Thompson, 12 Cal. App. 4th.

attempted to engage in sexual intercourse. **People v. Hunter**[357] addressed this matter, noting that *"murdering a person to sexually assault that person's dead body"* could support a conviction of first-degree premeditated murder and that a felony murder conviction may also be sustained if the victim dies while attempting to perpetrate the underlying crime.

Recognizing the fundamental significance of upholding the dignity of deceased bodies, Justice Prafulla Chandra Pant, Acting Chairperson of the National Human Rights Commission (NHRC), has proposed advocating for legislation to safeguard the rights of the deceased.[358] Regardless of the circumstances surrounding an individual's death, be it natural or unnatural, it becomes the State's responsibility to protect the deceased's rights and prevent any form of mistreatment or criminal acts perpetrated against their bodies.[359] In light of the legal complexities surrounding necrophilia juxtaposed with murder and rape, it becomes imperative to establish precise definitions and delineate distinct criminal liability. Such measures are vital not only for the administration of justice but also for preserving victims' rights in these grave matters, which brings us to the next section of this article.

III. Shortcomings of Existing Provisions in Addressing Necrophilia

To extend the reach of criminal jurisprudence to deceased individuals, it is essential to establish their legal personhood within the legal framework. The Supreme Court of India has previously acknowledged that the right to dignity, as guaranteed by Article 21 of the Constitution, encompasses both living and deceased individuals.[360] Judicial interpretation has further elucidated that the term 'person' in Article 21[361] encompasses the entitlement of a corpse to be treated with dignity, comparable to the treatment accorded to a living person.[362] Furthermore, the definition of a 'person' provided by Section 3(42)[363] of the General Clauses Act, 1977 encompasses living individuals, corporate entities, and groups of individuals, irrespective of their incorporation status.[364] The IPC, under Section 10,[365] defines 'man' and 'woman' as individuals belonging to the male or female gender without any age restrictions. Although deceased bodies lack vital signs, they retain their legal status as 'humans' even after death.[366] This recognition underscores the notion that the concept of personhood transcends the boundaries of life, affirming the entitlement of deceased individuals to be treated with dignity under the auspices of the law. The issue at hand pertains to the appropriate

357 People v. Hunter, 530 NW2d 174.

358 *NHRC issues Advisory to the Centre and States to ensure dignity and the rights of the dead (14.05.2021)*, NHRC, https://nhrc.nic.in/media/press-release/nhrc-issues-advisory-centre-and-states-ensure-dignity-and-rights-dead-14052021.

359 *Advisory for upholding the dignity and protecting the rights of the dead*, NHRC, https://nhrc.nic.in/sites/default/files/NHRC%20Advisory%20for%20Upholding%20Dignity%20%26%20Protecting%20the%20Rights%20of%20Dead.pdf.

360 Pt. Parmanand Katara, Advocate v. Union of India & Anr., (1995) 3 SCC 248.

361 INDIA CONST. art. 21.

362 P. Rathinam v. Union of India, 1994 SCC (3) 394.

363 General Clauses Act, 1977, § 3(42), No. 20, Acts of Parliament, 1977 (India).

364 Nikitha Akkara, *Rights of the Deceased: Article 21,* 1(2) JURISPERITUS (2018).

365 The Indian Penal Code, 1860, § 10, No. 45, Acts of Parliament, 1860 (India).

366 Nivedita Tiwari, *Legal Status of a Person after Death*, JLRJS (Jul. 10, 2023, 9:29 AM), https://jlrjs.com/legal-status-of-a-person-after-death/.

placement of necrophilia within the penal code. There are arguments advocating for its classification under unnatural crimes or rape, accompanied by corresponding penalties or the inclusion of provisions similar to those found in other legislations. However, this approach raises concerns, as elaborated upon below.

A. Placing Necrophilia under Unnatural Offences

In the recent judgment by the Karnataka High Court,[367] arguments have been put forth suggesting that Section 377[368] of the IPC could potentially apply to acts of necrophilia. This section encompasses voluntary carnal intercourse against the order of nature, provided that certain conditions are fulfilled. To establish culpability, three essential elements must be satisfied: [i] voluntary engagement in intercourse, [ii] violation of the natural order, and [iii] involvement of a man, woman, or animal. To address the issue, it is often proposed that specific terms be added to Section 377 to include acts of necrophilia. However, this proposal is erroneous for three reasons.

1. Element of 'Voluntariness'

"The notion of consent . . . the law's line between intercourse and rape, is so passive that a dead [woman] could satisfy it."[369]

The concept of 'voluntariness' presents a significant challenge under the debate on the applicability of Section 377 in cases of necrophilia.[370] While engaging in sexual intercourse with a corpse is considered unnatural and falls within the purview of an unnatural offense, one of the key elements of this section is the requirement of 'voluntariness.'[371] Since consent cannot be obtained from a corpse, the absence of consent renders the intercourse involuntary, thereby dissuading the application of this section.[372]

Section 377 has undergone modifications, wherein consensual sexual activity between adults is no longer punishable under the law. In this regard, the judiciary has introduced the element of consent as grounds for exemption from criminal prosecution under Section 377.[373] Considering that a corpse cannot provide consent, the crucial element of voluntariness is absent in cases of necrophilia. Although necrophilia can be categorized as unnatural, the element of voluntariness or consent cannot be fulfilled.

367 Rangaraju @ Vajapeyi v. State Of Karnataka, Criminal Appeal No.1610/2017

368 The Indian Penal Code, 1860, § 377, No. 45, Acts of Parliament, 1860 (India).

369 *Supra*, note 1 at 3.

370 Mohd Ayan & Shabih Fatima, *Section 377, IPC & the Curious Case of Necrophilia in India*, CRIMINAL LAW RESEARCH & REVIEW (Jul. 11, 2023, 03:29 PM), https://crlreview.in/2021/05/27/section-377-ipc-necrophilia-in-india/.

371 *Necrophilia; is it an Offence? – Rostrum's Law Review*, ROSTRUM'S LAW REVIEW (Jul. 13, 2023, 9:50 AM), https://journal.rostrumlegal.com/necrophilia-is-it-an-offence/.

372 *Supra*, note 10 at 4.

373 Navtej Singh Johar and others v. Union of India, (2017) 10 SCC 1.

To this, the Karnataka High Court states, *"A careful reading of Sections 375 and 377 of the IPC makes it clear that a dead body cannot be called a human or person. Therefore, the provisions of Section 375 or 377 would not be attracted."*[374] The rationale behind this perspective lies in the fact that rape inherently involves an act committed against a living person, predicated on the absence of consent and the violation of an individual's will. As a deceased body cannot provide consent, express dissent, or experience fear of immediate bodily harm, it cannot be subjected to rape. The absence of emotions and the inability to experience outrage render rape inapplicable to a deceased individual. It is important to note that non-consensual sexual activity among adults, as well as sexual activity with minors or animals, continues to be a punishable offense.

2. *'Dead' as a Person*

Section 377 refers to intercourse with a man, woman, or animal.[375] However, a dead body is called a dead 'body' precisely because it is no longer a 'person.'[376] Although deceased individuals are still human, they are legally considered quasi-subjects or non-persons.[377] The legal status of a dead body, as discussed above, further complicates the notion of necrophilia, especially when considering the sacredness attributed to a corpse by many families. Despite the person's demise, they remain a cherished individual. A dead body assumes the status of 'property' for the next of kin, making necrophilia an act of vandalism rather than a sexual assault against a person.[378] Therefore, due to the absence of voluntariness and the legal status of a dead body, it is not appropriate to interpret Section 377 as applicable to acts of necrophilia. Alternative legal mechanisms should be explored to address this sexual violation.

3. *Ambiguity of Scope*

The language employed in Section 377, specifically the phrase "*against the order of nature*," provides a minimal indication that it is directed towards specific sexual orientations. To enforce Section 377, it becomes imperative to distinguish between what is natural and what is considered unnatural. Furthermore, determining whether necrophilia is against the order of nature assumes significance. It can be explained away by portraying examples from Indian history of its normality, for instance, by the necrophilic custom wherein if an engaged female died before marriage, her fiancé had to deflower her before she could be cremated.[379]

374 *Supra*, note 56 at 10.

375 *Section 377 and the Dignity of Indian Homosexuals*, ECONOMIC AND POLITICAL WEEKLY (Jul. 10, 2023, 9:29 AM) (Jul. 07, 2023, 11:29 AM), https://www.epw.in/journal/2006/46/special-articles/section-377-and-dignity-indian-homosexuals.html.

376 Meenakshy Sasikumar, *Karnataka High Court Ruling: Why Is Indian Law So Ambiguous About Necrophilia?*, THE QUINT (Jul. 09, 2023, 5:20 AM), https://www.thequint.com/news/law/karnataka-high-court-necrophilia-ruling-dignity-of-dead-rape-unnatural-offences.

377 *Supra*, note 6 at 3.

378 *Supra*, note 64 at 12.

379 A. Aggarwal, *Forensic and Medico-Legal Aspects*, 6 CRC PRESS, NEW YORK (2011).

The commentary associated with Section 377 suggests that the law intends to punish acts such as sodomy, buggery, and bestiality.[380] In other words, the law targets sexual practices rather than the sexual subjects who come to embody socially constructed perversities, such as homosexuality.[381] Over time, states have become arenas where new ideas and 'truths' on sexuality are disseminated.[382] There exists an inherent inconsistency between perceiving Section 377 as a mechanism for state power and arguing that it predominantly regulates same-sex sexual subjects.[383] The Indian judiciary has grappled with determining what constitutes 'carnal intercourse against the order of nature' since 1860.[384]

Contemporary judgments in India have further broadened the scope of the law to incorporate other sexual acts, beginning with inclusion of 'buggery', as an unnatural sexual act against the will of God and man, thus, criminalizing anal penetration, bestiality and homosexuality, in a broader sense.[385] The absence of a distinction based on consent in the offense has equated homosexual sex with rape and portrayed homosexuality as a form of sexual deviance.[386] A principle that unifies all these sexual acts can be found as early as 1935 in the **Khanu v. Emperor,**[387] wherein the court declared that "*the natural object of sexual intercourse is the conception of human beings, which is impossible in the case of coitus per os (oral intercourse).*" To this day, we see extant changes post Naz Foundation judgement in the ambit of 377 which, though related to decriminalization of consent-based sexual acts between same sex couple.

B. *Placing Necrophilia under Rape Laws*

The concept of consent is crucial in determining the legality and ethicality of sexual acts.[388] Certain groups of individuals are considered incapable of giving consent, including minors under seventeen years of age, individuals with mental disabilities or incapacities, those who are physically helpless, and individuals under custody, supervision, or medical care.[389] It raises the question of why a similar argument cannot be made for the deceased.

Internationally, while some states use the term "necrophilia" in their statutes, others have laws that indirectly address such acts. For instance, the **Criminal Code of Canada** makes necrophilia illegal under Section 182,[390] which prohibits indecent or improper behavior or offering any indignity to a

380 Shivam Goel, *Coitus Per OS and 'Against the Order of Nature': Section 377 of the Indian Penal Code, 1860*, SSRN (2018), https://doi.org/10.2139/ssrn.3270242.

381 Kanad Bagchi, *Transformative Constitutionalism, Constitutional Morality and Equality: The Indian Supreme Court on Section 377*, 51 VERFASSUNG IN RECHT UND ÜBERSEE 367 (2018), https://doi.org/10.5771/0506-7286-2018-3-367.

382 *Id* at 10.

383 Abir Mondal, *Section 377: A legal & political outlook of India*, 2 RUNAS. JOURNAL OF EDUCATION AND CULTURE (2021), https://doi.org/10.46652/runas.v2i3.30.

384 *Supra*, note 69 at 12.

385 *Supra*, note 70 at 12.

386 John Sebastian, *The opposite of unnatural intercourse: understanding Section 377 through Section 375*, 1 INDIAN LAW REVIEW 232 (2017), https://doi.org/10.1080/24730580.2018.1453748.

387 Khanu v. Emperor, AIR 1925 sind. 286.

388 Alan Wertheimer, *What Is Consent? And Is It Important?*, 3 BUFFALO CRIMINAL LAW REVIEW 557 (2000), https://doi.org/10.1525/nclr.2000.3.2.557.

389 *Supra*, note 32 at 7.

390 Criminal Code, 1985, § 182, C-45, Acts of Parliament, 1985 (Canada).

dead body or its remains. Similarly, the **French Penal Code** does not mention necrophilia, but its interpretation of Article 225-17[391] encompasses such acts.[392] In contrast, certain jurisdictions, such as Louisiana, North Carolina, Oklahoma, and Kansas, do not criminalize engaging in sexual acts with corpses, making necrophilia legal.[393] In **Gibson v. Jackson,[394]** the court stated that for the petitioner to be guilty of rape, the victim must have been a living human being, and therefore, engaging in sexual penetrative acts with a dead body does not constitute rape.

A similar interpretation was seen in **Rangaraju,[395]** where the prosecution opposed the plea, arguing that rape with dead bodies is punishable under Section 376[396] of the IPC as per the amendments made in 1983. However, the Karnataka High Court overturned the charge of rape under Section 376 and upheld the charge of murder under Section 302.[397] The court decided on Section 46[398] of the IPC, which states that a dead body cannot consent or protest against rape or any associated bodily harm.[399] As a dead body cannot experience outrage, it does not fulfill the requirements for rape charges. The court further emphasized that sexual intercourse with a dead body is considered necrophilia, and rape laws exclusively apply to living female human beings. While the murder conviction was upheld, the court acquitted the defendant of rape, as no provision in the IPC punishes the rape of a dead body.

Instances similar to the **Rangaraju** are not uncommon in India, where offenders are erroneously made liable under Section 376, read with Section 302, since the legislative framework lacks a distinct provision for necrophilia. This pattern is not limited to a single precedent, as Indian courts have similarly disposed of numerous cases.[400] In **Krishna Rajgaur v. The State of Assam,[401]** the court confirmed a death sentence for offenses under Sections 302, 363, and 201[402] of the IPC. However, the accused was never charged with rape regardless of committing sexual activity on a deceased seven-year-old following her murder and subsequent engagement in necrophilia, resulting in the alteration of the sentence to life imprisonment due to a lack of opportunity to present a defense against the rape charge.

391 Penal Code, 1810, art. 225-17, Acts of Parliament, 1810 (France).

392 F. Bellivier, *Human remains in French law: The snare of personification,* CAMBRIDGE UNIVERSITY PRESS, 135-151 (2014).

393 *Supra*, note 32 at 7.

394 Gibson v. Jackson, 443 F. Supp. 239 (M.D. Ga. 1977).

395 *Supra,* note 65 at 12.

396 The Indian Penal Code, 1860, § 376, No. 45, Acts of Parliament, 1860 (India).

397 The Indian Penal Code, 1860, § 302, No. 45, Acts of Parliament, 1860 (India).

398 The Indian Penal Code, 1860, § 46, No. 45, Acts of Parliament, 1860 (India).

399 *Supra,* note 65 at 12.

400 *Supra,* note 27 at 7.

401 Krishna Rajgaur v. The State of Assam, 2021 SCC OnLine Gau 945.

402 The Indian Penal Code, 1860, § 302, 363, and 201, No. 45, Acts of Parliament, 1860 (India).

IV. Addressing the legal void

The existing legal framework in India regarding corpses is limited to Section 297[403] IPC, which addresses trespassing on burial grounds.

Section 297: Trespassing on burial places, etc.—Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or on any place of sepulchre, or any place set apart from the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

To be punished under this section for necrophilia, a person must have trespassed into a burial ground to offer an indignity to the corpses, including engaging in sexual intercourse with them.[404] This narrow scope of Section 297 creates a gap in the Indian legal system, as it excludes individuals who commit necrophilia without trespassing into a burial ground. In view of most scholarship, this punishment is insufficient for unnatural offenses involving offering an indignity to a human corpse through sexual intercourse.[405] It seems that the drafters of the IPC did not intend for necrophilia to be punished under Section 297; otherwise, they would have mentioned it in the Code and prescribed a more appropriate punishment.

The limitations of the existing legal framework become evident through the examination of prominent cases, such as the **Nithari**[406] case where, despite engaging in acts of necrophilia, Mohinder Singh, the house owner, was acquitted due to insufficiency of evidence, while Surendra Koli, his servant, faced charges encompassing kidnapping, rape, murder, and desecration of the bodies of women and girls postmortem. Similar instances have been recorded in other contexts, such as a 2017 case in **Mumbai**[407] where a psychotherapist lured, assaulted and committed necrophilia on a young girl. Similarly, a laborer from **Gurugram**[408] confessed to participating in necrophilic acts with his rape victims in 2018, and a serial killer in **West Bengal**[409] was apprehended in 2019 for murdering women and engaging in sexual acts with their deceased bodies. These cases exemplify situations

403 The Indian Penal Code, 1860, § 297, No. 45, Acts of Parliament, 1860 (India).

404 Nico Swartz, *The Judicial Implications of Necrophilia*, 5 ADVANCES IN RESEARCH 1 (2015), https://doi.org/10.9734/air/2015/14731.

405 *Supra*, note 59 at 11.

406 Surendra Koli v. State of Uttar Pradesh. & Others, AIR (2014) 16 SCC 494.

407 *Physiotherapist case: Accused performed necrophilia*, THE ASIAN AGE (Jul. 14, 2023, 5:25 AM), https://www.asianage.com/metros/mumbai/040217/physio-case-accused-performed-necrophilia.html.

408 *Gurugram rape accused admits to necrophilia*, TRIBUNE INDIA (Jul. 04, 2023, 6:20 AM), https://www.tribuneindia.com/news/archive/haryana/gurugram-rape-accused-admits-to-necrophilia-687352.

409 *Serial killer who had sex with women after killing them arrested in West Bengal*, INDIA TODAY (Jul. 11, 2023, 8:27 AM), https://www.indiatoday.in/crime/story/west-bengal-burdwan-serial-killer-1542256-2019-06-04.

where the existing legal framework fails to address and penalize necrophilic acts adequately.

To address this gap in the law, this article proposes the introduction of a new provision, such as Section 297A, specifically targeting necrophilia, as follows:

Section 297A: Offenses Related to Necrophilia

> *(1) Any person who engages in sexual acts or any form of sexual intercourse with a corpse, whether within or outside a burial ground, shall be deemed to have committed the offense of necrophilia.*
>
> *(2) The offense of necrophilia shall be punishable with imprisonment for a term not less than three years but may extend to ten years, and shall also be liable to a fine.*
>
> *(3) If a person previously convicted of necrophilia under this section is found guilty of committing the offense again, he/she shall be deemed a reoffender.*
>
> *(4) Reoffenders of necrophilia shall be subject to enhanced punishment. The punishment for a reoffender shall be imprisonment for a term not less than five years but may extend to fifteen years, and shall also be liable to a fine.*
>
> *(5) For the purposes of this section, "reoffender" refers to a person who has been previously convicted of necrophilia under section 297A of the Indian Penal Code.*
>
> *(6) The provisions of this section shall be in addition to and not in derogation of any other provision of law relating to offenses against the human body or sexual offenses.*
>
> *(7) The burden of proof shall lie with the prosecution to establish beyond reasonable doubt that the accused engaged in sexual acts or intercourse with a corpse.*
>
> *(8) This section shall be non-bailable, and the accused shall not be released on bail unless there are exceptional circumstances warranting such release, as determined by the court.*
>
> *(9) The provisions of this section shall apply to both males and females, irrespective of their age or mental capacity.*
>
> *(10) The provisions of this section shall apply regardless of whether the corpse is within a burial ground, a morgue, or any other location where a dead body is kept.*
>
> *(11) Nothing in this section shall prevent the application of any other provision of law that may be relevant to the offense committed, including provisions related to rape, unnatural offenses, or any other sexual offense.*

Note: This provision is a draft and should be reviewed, revised, and enacted by the competent legislative authority before being incorporated into the Indian Penal Code.

This provision outlines the offense of necrophilia and prescribes punishments, including imprisonment and fines. It also addresses the issue of reoffending, enhances punishment for re-offenders, and ensures that the burden of proof lies with the prosecution. Additionally, it clarifies that this provision does not override other relevant laws relating to offenses against the human body or sexual offenses. Implementing such a provision is crucial to combat necrophilia, protect the dignity of the deceased, and fill the existing gap in the legal framework.

V. The Way Ahead

Moving forward, it is imperative for the Indian legislature to strike a delicate balance between safeguarding the sanctity of the dead and preserving the rights of the living individuals, incapable of knowing the nature of the act, involved in necrophilic acts. While acknowledging the universally taboo nature of necrophilia, it is crucial to address the contemporary relevance of this issue in the Indian context. Currently, India's laws pertaining to necrophilia are weak and ambiguous, leading to doubts and debates regarding its criminalization under Sections 297 and 377 of IPC. To address this pressing issue, introducing a novel provision such as Section 297A addressing necrophilia within the IPC becomes necessary. Such a provision would provide much-needed clarity on the criminalization of necrophilia, preventing catastrophic incidents and ensuring the protection of the dignity and sanctity of the deceased. Recognizing the urgency of the situation, India must implement strict laws to address and combat necrophilia. Inaction in this matter can have severe and disruptive consequences. By prioritizing prevention over remedy, society can be safeguarded against the manifestation of necrophilia. However, it is essential to approach the formulation and implementation of such laws with caution. The legislative measures should carefully consider the rights and perspectives of all stakeholders involved, including legal experts, medical professionals, and representatives from civil society. Striking a balance between criminalizing necrophilia and ensuring that the rights and interests of individuals are upheld is vital.

GNLU LAW AND SOCIETY REVIEW

Published by:

GNLU Centre for Law and Society, Gujarat National Law University, Attalika Avenue, Koba, 382426 Gandhinagar, Gujarat.

Email – gcls@gnlu.ac.in