

I WILL SURVIVE

A gender-based & intersectional
approach to violence, justice &
health for LGBTI survivors



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About

The Centre for Health Equity, Law & Policy (C-HELP) is a research, knowledge production and advocacy forum which works on law & policy issues related to health, embedding its work in the right to health as envisaged within India's constitutional framework and her international commitments. It is located at the Indian Law Society, Pune.

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Preface

While mostly invisible to the mainstream gaze, violence of various kinds and from multiple sites is meted out to the lesbian, gay, bisexual, transgender and intersex (LGBTI) community, with the burden being most on trans, non-binary and gender non-conforming individuals.

The Centre for Health Equity, Law & Policy (C-HELP) at the Indian Law Society in Pune has prepared this vital policy brief that traverses a range of related issues. It describes the varied manifestations of violence against LGBTI+ people (from within the home, in healthcare settings, online, at work, and in the criminal justice system, including carceral and related contexts), reviews relevant judicial orders, and draws attention to how the lack of neutrality, objectivity and gender-sensitivity among stakeholders such as the police, judiciary and lawyers often undermines survivors' access to justice.

While underscoring the duty of due diligence of governments to adopt preventive, punitive, and remedial measures in accordance with the Indian Constitution and international human rights norms, the brief makes extensive recommendations that are critical for relevant stakeholders to take ownership of.

C-HELP is pleased to publish this policy brief in hopes that it adds to the literature and knowledge on violence and its intersection with LGBTI+ individuals and communities, reveals the reform and redress that are vital if queer people are to truly live in safety and security, and contributes to a more equitable, rights-based enabling environment in the future.

Vivek Divan

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Executive Summary

As domestic and global developments progressively endorse the equality, dignity and autonomy of LGBTI people, the data on prevalence of gender-based violence in India merits an enquiry into the effectiveness of law and policy measures in responding to survivors' needs. In this policy brief, we particularly focus on the responsibilities of the criminal justice and healthcare systems, since their role as first-responders directly impacts the well-being of survivors in seeking recourse to law and/or mitigating the effect of violence.

As per the Indian Constitution and international human rights norms, adherence to a gender-based and intersectional framework can facilitate adequate prosecution of offences, providing support services to survivors and prevent re-occurrence of violence by identifying the root causes of violence. Since this framework treats LGBTI persons not as passive recipients of discretionary benefits but as active rights-holders, it has the capacity to motivate the participation of various stakeholders and promote intersectoral co-ordination in addressing gender-based violence as part of building respect for human rights.

LGBTI survivors' interface with the criminal justice system indicates that stakeholders (including but not limited to the police, protection officers, lawyers, public prosecutors, judges, prison officials, etc.) must be periodically trained on gender-based and intersectional perspectives in the application of substantive, procedural and evidentiary standards to effectively combat gender-based violence against women and LGBTI survivors. Central and State governments and Union Territories (UTs) are obliged to adopt preventive, punitive and remedial measures as per the due diligence standard as per the Indian Constitution and international human rights norms. Central/State governments and UTs must undertake criminal justice reforms in policing and prisons in a spirit of cooperative federalism. As the available grievance redressal mechanisms at the school and university level are capable of responding to the needs of LGBTI adolescents in need of care and protection, stakeholders in academic institutions must be periodically trained in gender-based and intersectional perspectives.

Although respondent-neutrality in the law on domestic violence necessitates a separate legal framework to govern gay and bisexual survivors, the vast majority of laws (including laws governing TF-GBV, sexual harassment, rape, acid attacks, witch hunting etc.) clearly permit coverage of LGBTI victims/survivors based on interpretation of statutes in a manner that regulates the gendered dynamics of power, domination and insubordination in society. The issue of respondent-neutrality under the sexual harassment law merits reasonable classification in applying policies by ICCs, given the evidence of the role of sexual orientation, gender identity and expression and sex characteristics (SOGIESC) in contributing to workplace inequality. Victim-neutrality must be coupled with the condition that male complaints can seek recourse against male perpetrators only, as there is no evidence to support framing women as perpetrators under the law. Article 15(3) strictly prohibits gender-neutrality in laws governing women but does not impede victim-neutrality under VAW laws to facilitate recourse of law to LGBTI survivors, wherever appropriate.

The medico-legal framework leads to the firm conclusion that Central and State governments and UTs bear a non-derogable duty to institutionalise a public health response to LGBTI survivors by adopting suitable legislative, executive, judicial and financial measures in a spirit of cooperative federalism. The range of interventions include ensuring the right to care, support and treatment for LGBTI survivors in accordance with the MOHFW (2014) guidelines, adopting LGBTI-affirmative healthcare practices, capacity building of stakeholders (including healthcare providers and service providers) in gender-based and intersectional perspectives and promoting comprehensive gender and sexuality education programmes. The collection and management of SOGIESC-disaggregated data on gender-based violence

by the National Crime Records Bureau (NCRB) and the National Family Health Survey (NFHS) will facilitate evidence-based decision-making with respect to the aforesaid interventions.

Although grievance redress mechanisms exist under disparate frameworks for some sexual and gender minorities, a liberal approach to extend the Support for Marginalised Individuals for Livelihood and Enterprise (SMILE) scheme from transgender beneficiaries in particular to LGBTI beneficiaries in general sets a precedent for policymakers to design and implement integrated ecosystems of support for gender-based violence (for instance, the One Stop Centre (OSC) scheme), wherever appropriate. This would authorise State governments and UTs to designate LGBTI collectives as service providers for facilitating recourse of LGBTI survivors of domestic violence to medico-legal services.

As Indian and global evidence overwhelmingly suggests, survivors refuse to seek sexual and reproductive healthcare services if mandatory reporting is enforced indiscriminately, especially those belonging to disadvantaged groups who fear secondary victimisation due to institutional bias from stakeholders of the criminal justice system. Therefore, periodic capacity building of healthcare providers must emphasise that survivors' right to therapeutic care, support and treatment must take precedence over the duty of mandatory reporting.

The critique of over-reliance on forensic evidence, viewed through the lens of sexual offences against transgender survivors raises concerns with respect to essentialising evidence of injuries, sex assigned at birth and/or status of gender affirming care. Although the cases arise at the stage of bail or revision, these extraneous factors are likely to be considered on merits during the stage of appreciation of evidence, which will ultimately impact the determination of guilt of the accused and relief to the survivor. This underscores the duty of stakeholders (including healthcare providers) to strictly conform to the medico-legal standards prescribed under the MOHFW (2014) guidelines, which can facilitate LGBTI survivors' recourse to the law, when freely chosen.

Central and State governments and UTs' inability to fulfil the right to care, support and treatment for LGBTI survivors due to resource constraints must be differentiated from their unwillingness to utilise maximum available resources towards this goal. In case of inability, the appropriate government bears the onus to justify that it has made optimal budgetary allocations to fulfil the obligation. While in the case of unwillingness, the appropriate government's refusal to allocate budgets violates India's obligations under the International Convention on Social, Economic and Cultural Rights (ICESCR), which can be held accountable before courts. As the Sustainable Development Goals are directly implicated in responding to LGBTI survivors in terms of universal access to health for all (Goal 3), gender equality, including universal access to sexual and reproductive health and rights (Goal 5) and eliminating discrimination, reducing inequality and promoting inclusion (Goals 10 and 16), Central and State governments and UTs are obligated to drive political action to fulfil the right to care, support and treatment for LGBTI survivors.

The policy brief concludes with key recommendations for an inter-sectoral coordinated response as well as law and policy reforms to ensure that legislative, executive, judicial and budgetary measures by Central and State governments and UTs comply with the duty of due diligence to prevent, punish and remedy gender-based violence.

01



INTRODUCTION

A systemic pattern of inequality between men and women that is deeply rooted in cultural norms (stereotypical roles), legal systems (devaluation of autonomy), economic status (inadequate access to resources) and politics (under-representation and limited opportunity to effect change), is the cause as well as effect of gender-based discrimination and violence against women.¹ In recognition of this phenomenon, the Indian government constituted the Committee on the Status of Women in India (1971-74) to devise better social policies for women's advancement. The committee noted that apart from biological sex-based discrimination, gender-based discrimination against Indian women based on socially constructed roles as per caste, religion, class and other determinants impede Indian women's participation in social and economic spheres. This inequality was evidenced by the declining sex ratio, low literacy rates, devaluation of women's labour within the home, gendered division of labour in the market, wage discrimination, low rate of participation in politics and marital inequality, among others. The committee issued a series of recommendations to urge social movements and the legislature, judiciary and executive to take action to reform socially constructed gender roles to improve the status of women.²

The phenomenon of violence against women is an acute manifestation of gender-based discrimination. While the *Indian Penal Code, 1860* (IPC) penalises a spectrum of violence against women, special legislations have been introduced to address domestic violence, sexual harassment and other violations. The *Criminal Procedure Code, 1973* (CrPC)³ and the *Indian Evidence Act, 1872* (IEA) focus on the rights of the accused in terms of protections mandated during investigation, trial and sentencing to prevent miscarriage of justice, due to the eminence of the right to personal liberty under Article 21 of the Constitution. However, due to an increase in violence against women, there is a heightened emphasis on the rights of victims/survivors to ensure they are not re-victimised during the course of prosecution of offences and empowered to seek recourse to law.⁴ As of 1 July 2024, the Parliament promulgated the *Bharatiya Nyaya Sanhita, 2023* ('BNS'), the *Bharatiya Nagarik Suraksha Sanhita, 2023* ('BNSS') and the *Bharatiya Sakshya Adhiniyam, 2023* ('BSA'), which repeal the IPC, CrPC and IEA respectively.

1.1 Historical engagement of feminist and LGBTI movements

At present, 'gender-based violence' (GBV) is largely synonymous with 'violence against women' (VAW) under Indian legal frameworks, reflective of the history of feminist movement in advancing the relationship between law, gender and social reform. The rising crimes against women and dismal conviction rates during the late 1970s drove the feminist movement to demand a strengthened legal response towards violence against women. These campaigns translated into legislative amendments to deconstruct violence against women in public and private realms by criminalising domestic violence in relation to dowry, judicial intervention to prohibit sexual harassment of women at the workplace and administration of special cells for women survivors.⁵

1 Beijing Declaration and Platform for Action, 1995

2 *Towards equality: Report of the Committee on the Status of Women in India* (1974), Ministry of Education and Social Welfare, Government of India, pages 3-8, 37-38, 83-101, 359-375

3 All offences in the IPC are classified as cognisable, non-cognisable, bailable or non-bailable in the First Schedule of the Cr.P.C.

4 *Engaging with the criminal justice system: A guide for survivors of sexual violence* (2014), Lawyers Collective Women's Rights Initiative

5 Agnes, F. (1992), *Protecting women against violence? Review of a decade of legislation (1980-89)*, Economic and Political Weekly

However, apart from cisgender, heterosexual women and children, gender-based violence disproportionately impacts lesbian, gay, bisexual, transgender and intersex (LGBTI) people.⁶ The rising mobilisation of LGBTI groups across India since at least the 1990s, the documentation of LBT women's suicides, high prevalence of HIV/AIDS among transgender women and gay and bisexual men and the criminalisation of same-sex relations, encouraged higher focus towards human rights violations against this group by researchers, civil society organisations (CSO) and policymakers.⁷ In this context, the feminist and LGBTI movements in India have collaboratively engaged with law reform initiatives seeking gender-sensitivity in prosecution of gender-based violence since at least the early 2000s.

In response to a plea to strengthen the prosecution of sexual offences against women and children in 1997,⁸ the Law Commission of India (LCI) proposed gender-neutrality vis-à-vis the offender and victim in 2000.⁹ In 2002, a national coalition of feminist, child rights and LGBTI groups critiqued the proposal of gender-neutrality in the rape law by highlighting that sexual violence is always gendered and demanded that the perpetrator be codified as male and the victim/survivor as female (including transgender women). As same-sex relations were criminalised at the time, the consensus was to defer recognition of gender-based violence after anti-discrimination law afforded protections against re-victimising LGBTI survivors under procedural and evidentiary standards.¹⁰ The groups collectively demanded that context-specific legal standards must govern their differential vulnerabilities on grounds of sex, age, sexual orientation and gender identity, as women, child and LGBTI survivors are confronted with distinct challenges in their interface with the criminal justice system.¹¹

As a consequence, the proposed sexual assault reforms bill based on the LCI's recommendations failed to gain traction and underwent periodic revisions by lawmakers. In 2012, the proposed bill re-entered public debate in the backdrop of the Justice Verma Committee's recommendation of victim-neutrality to strengthen the legal response to violence against women, children and LGBTI survivors. However, the ensuing bill's adoption of gender-neutrality re-united feminist and LGBTI groups to demand gender-sensitivity in law in order to avert framing women as perpetrators under a gender-neutral regime.¹²

Since then, the Indian Parliament passed the *Transgender Persons (Protection of Rights) Act, 2019* ('TPA'). However, there remain major gaps in adequately recognising and sentencing of gender-based violence

6 A note on use of 'women and LGBTI victim/survivors' in this report: Apart from the usage of the qualification of 'cisgender, heterosexual women' in this paragraph, the term 'woman' will no longer be accompanied with the said prefix, in order to ensure ease of reading. Although the term 'LGBTI' includes lesbian, bisexual, transgender and intersex women, we consistently use 'women and LGBTI victims/survivors' in this report to clarify the distinct experiences of discrimination and violence suffered by cisgender, heterosexual women and LGBTI victim/survivors.

7 Patel, V. and Khajuria, R. (2016), *Political feminism in India: An analysis of actors, debates and strategies*, Friedrich-Ebert-Stiftung

8 *Sakshi v. Union of India & Ors.*, (2004) 5 SCC 518

9 *Review of Rape Laws* (2000), 172nd Report, Law Commission of India

10 *Background to discussions by women's groups on sexual assault amendments (2001-2010)*, Partners for Law in Development. Available at: <https://feministlawarchives.pldindia.org/wp-content/uploads/background-to-discussions-by-womens-groups-to-sexual-assault-amendments.pdf>

11 Grover, V. et al (2002), *Response to 172nd Report of the Law Commission of India*. Available at: <https://feministlawarchives.pldindia.org/wp-content/uploads/Reposnes-to-the-172nd-Report-of-the-Law-Commission-of-India.pdf>

12 *Gender just, gender sensitive and not gender-neutral rape laws: Parliamentary Committee ignores Verma Committee* (2013). Available at: <https://feministlawarchives.pldindia.org/wp-content/uploads/press-release-urging-government-to-make-gender-just-laws.pdf>

against transgender persons under the statute. Despite of development of a robust anti-discrimination jurisprudence on sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) in the previous decade under the Indian Constitution, the promulgation of the BNS, BNSS and BSA – which repeal the IPC, CrPC and IEA but reproduce the VAW framework of its predecessors – indicates the legislature’s failure to re-conceptualise gender-based violence and prescribe the duty of state and non-state actors towards LGBTI survivors under extant Indian legal frameworks. As a consequence, even in 2025, LGBTI survivors’ recourse to law is largely contingent on the judiciary and executive’s discretion to beneficially apply the law.

1.2 The duty of due diligence to prevent, punish and remedy gender-based violence against LGBTI survivors

The spectrum of offences related to gender-based violence constitute a violation of the right to life with human dignity under Article 21 of the Indian Constitution.¹³ As per the settled position of law, Article 21 obliges the Central/State governments and Union Territories (UTs) to not only prosecute offenders for committing gender-based violence but also enjoins on them the duty to prevent the occurrence of such violence.¹⁴ **As per international human rights norms, the due diligence standard acts as an accountability tool to determine if member states have effectively met their obligations towards combating gender-based violence.** In order to achieve this goal, member states must adopt legislative, executive and judicial measures to prevent, investigate and prosecute gender-based violence.¹⁵

Apart from the Expert Committee on the Issues Relating to Transgender Persons (2013) that offered guidance on devising social policies for transgender persons’ advancement,¹⁶ the Central/State governments or UTs have not commissioned studies to collect evidence of LGBTI people’s inequality in order to catalyse political action. However, LBT researchers, activists and collectives have authored a large volume of studies, literature and books which significantly document the prevalence, nature and severity of violence committed by natal families, the police, intimate partners and other state and non-state actors against LGBTI survivors.¹⁷ The systemic marginalisation of LGBTI people in society and

13 *Bodhisattwa Gautam v. Subhra Chakraborty* AIR 1996 SC 922; *Vishakha and Ors v. State of Rajasthan and Ors* (1997) 6 SCC 241; *Chairman Railway Board v. Chandrima Das* (2000) 2 SCC 465; *State of Punjab v. Ramdev Singh* AIR 2004 SC 1290; *Lillu @ Rajesh v. State of Haryana* (2013) 6 SCALE 17

14 *Vishakha and Ors v. State of Rajasthan and Ors* (1997) 6 SCC 241; *In Re: Indian woman says gangraped on orders of village court published in Business and Financial News*, (2014) 4 SCC 786, paras. 16, 28

15 *In-depth study on all forms of violence against women* (2006), Report of the Secretary General, A/61/122/Add.1, paras. 139-141, 254-257; CEDAW General Recommendation No. 19: Violence Against Women (1992), adopted by the Committee on the Elimination of All Forms of Discrimination Against Women, Eleventh Session, paras. 8-9, 24(a); CEDAW General Recommendation No. 24: Women and health (1999), A/54/38/Rev.1, paras. 15, 17; CEDAW General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19 (2017), paras. 24-26

16 *Report of the Expert Committee on Issues Relating to Transgender Persons* (2013), Ministry of Social Justice and Empowerment, Government of India

17 *Humjinsi: A resource book on lesbian, gay and bisexual rights in India* (1999), India Centre for Human Rights and Law; Fernandes, B. and Gomathy NB (2003), *The nature of violence faced by lesbian women in India*, Tata Institute of Social Sciences; *Documenting and Mapping Violence and Rights Violations Taking Place in Lives of Sexually Marginalised Women to Chart Out Effective Advocacy Strategies* (2011), Sappho for Equality, *Breaking the Binary: Understanding Concerns and Realities of Queer Persons Assigned Gender Female at Birth Across a Spectrum of Lived Gender Identities* (2013), A Study by LABIA²– A Queer Feminist LBT Collective, Suchithra KK et al (2022), *Progressive Realisation of Rights: A Co-Traveller’s Reflections on Crisis Intervention*

law emboldens natal families to coerce them into ‘heterosexual’ marriages,¹⁸ which has driven forced migration of LBT persons in particular to cohabit with their partners of choice or die by suicide.¹⁹ LGBTI people often run away from natal families, as disclosure of their identities provokes ‘house arrest’, restrictions on communication with peers, cessation of education/employment opportunities, forced marriages and corrective rape.²⁰

The stay-at-home restrictions during the COVID-19 pandemic had the unintended consequence of spiking rates of domestic violence against women and LGBTI people. As LGBTI people were confined in hostile environments with unsupportive natal families, this increased their exposure to anxiety, depression and violence. The suicides of transgender persons, in particular, reveal their abandonment by state and non-state funded ecosystems of support, as natal families coerced them to undergo conversion therapies and isolated them from their networks of support.²¹ **LGBTI survivors’ testimonies indicate that seeking medico-legal support for violence by parents, siblings and relatives is acutely challenging because they are conditioned to blame themselves for these “disciplinary” actions.**²²

In case of LGBTI couples, natal families often file false missing complaints to track them across states in connivance with the police. They routinely file false charges of abduction and theft against the partners as well as their own adult children, as acts of retaliation, insidious means to seek their ‘custody’ and compel them into heterosexual expectations of society.²³ A forced heterosexual marriage typically translates into a compounding cycle of trauma of sexual assault by husbands, forced pregnancy and child-birth for lesbian/bisexual and intersex women and trans masculine persons.²⁴ Hijra sex workers, transgender women, gay and bisexual men report sexual assault by the natal family, intimate partners and the police that takes place with impunity.²⁵

A panel hearing by the National Network of Lesbian, Bisexual and Intersex Women and Transgender Persons and the People’s Union of Civil Liberties on violence by non-state (natal family, academic institutions, healthcare facilities) and state actors (police, ecosystems of support, courts) against LGBTI persons in April 2023 provides compelling evidence for establishing legally binding commitments for Central/State governments and UTs to adopt measures to prevent, punish and remedy gender-based violence against

18 *Less than gay: A citizens report on the status of homosexuality in India* (1991), AIDS Bhedbhav Virodhi Andolan

19 Vasudevan, D. (2001), *Lesbian suicides and the Kerala women’s movement*, Sahayatrika; *Law like love: Queer perspectives on law* (2011), Yoda Press

20 *Global Resistance to anti-gender opposition: LGBTQI+ activism in Colombia, India, Kenya, Peru and Serbia* (2023), Astraea Lesbian Foundation for Justice, pages 35-38; *This is Why We Became Activists: Violence Against Lesbian, Bisexual and Queer Women and Non-Binary People* (2023), Human Rights Watch

21 *Report of the study of impact of Covid-19 and lockdowns on the transgender community in Karnataka* (2020), Gamana Mahila Samuha; Sahai, V. et al (2020), *Exclusion amplified: Covid-19 and the transgender community*, Centre for Law and Policy Research

22 *Queer-Trans intimacies and communities: Envisioning rights and the way forward* (2022), Sappho for Equality

23 *The Unspoken: A Qualitative Research on Natal Family Violence* (2023), Shakti Shalini

24 *Sampoorna, A manifesto for rights of trans, intersex and gender non-binary persons* (2019). Available at: <https://sampoornaindiablog.wordpress.com/2019/02/25/a-manifesto-for-rights-of-trans-intersex-gender-non-binary-indians/>

25 *Human rights violations against the transgender community: A study of kothi and hijra sex workers in Bangalore* (2003), People’s Union for Civil Liberties Karnataka (PUCL-K); *Violence in intimate and family relationships of men who have sex with men, transgender women and hijras and its impact on HIV vulnerability in India* (2015), India HIV/AIDS Alliance

LGBTI survivors.²⁶ This critical mass of evidence has prompted broader re-conceptualisation of ‘gender’ and the nature of harm that constitutes violence, which is steadily gaining traction in law and policy frameworks. As a consequence, the Indian Supreme Court has noted that Central/State governments and UTs must ensure the freedom of expression of identity and sexuality, dignity and health of LGBTI people without the fear of violence.²⁷

In response to the vast body of evidence on gender-based violence against LGBTI persons placed before the court,²⁸ the minority opinion in *Supriyo Chakraborty & Ors. v. Union of India* (2023) issued directions with respect to establishing helplines to report violence, provide Garima Greh-like shelter homes for survivors at the district-level, outlining the role of police in protecting the liberty of LGBTI individuals or couples in conflict with natal families and prohibiting healthcare interventions aimed at undermining self-determination of SOGIESC, among other measures²⁹.

Although the majority opinion does not explicitly contradict the minority opinion’s aforesaid directions,³⁰ it adds that preventive, punitive and remedial measures on protecting inter-faith and inter-caste couples, outlined in *Shakti Vahini v. Union of India* (2018),³¹ shall be applied to LGBTI couples.³² As per settled law, if a majority opinion does not explicitly disagree with the minority opinion on a particular issue, the latter is a binding and enforceable component of the court’s judgment.³³ This view is validated by the Ministry of Home Affairs (MHA), which has issued an advisory to ensure compliance of the directions issued in the minority opinion.³⁴

The phenomenon of gender-based violence is ultimately a manifestation of women and LGBTI people’s socially and economically marginalised status in India. The feminist movement’s engagement with law since the late 1970s reveals that centring criminal law reform to combat gender-based violence has proven inherently limiting due to the systemic gender bias embedded in the police, lawyers and judges.³⁵ This experience informed LGBTI people’s demands³⁶ for legal reforms as well as social security in terms of horizontal reservations for transgender persons in academic institutions and employment, adequate housing and universal basic income, among other measures, before the High-Powered Committee (HPC)

26 *Apnon Ka Bahut Lagta Hai (Our Own Hurt Us The Most)*, *Centering Familial Violence in the Lives of Queer and Trans Persons in the Marriage Equality Debate* (2023), National Network of Lesbian, Bisexual, Intersex Women and Trans Persons and People’s Union for Civil Liberties (PUCL). Available at: https://pucl.org/wp-content/uploads/2023/05/Combined_all_2_compressed.pdf

27 *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438, paras. 49-50, 62, 81, 83, 118 and 135.5; *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, paras. 89, 376, 424-428, 435; *Supriyo Chakraborty & Ors. v. Union of India*, 2023 SCC Online SC 1348, paras. 8, 11, 14, 16, 17, 284, 303, 306, 364, 466, 564 (ix)

28 *Rituparna Borah & Ors. v. Union of India*, WP (C) No. 260 of 2023

29 *Supriyo Chakraborty & Ors. v. Union of India*, 2023 SCC Online SC 1348, paras. 364-366

30 *Supriyo Chakraborty & Ors. v. Union of India*, 2023 SCC Online SC 1348, paras. 348-363, 565-581

31 (2018) 7 SCC 192

32 *Supriyo Chakraborty & Ors. v. Union of India*, 2023 SCC Online SC 1348, para. 564

33 *M/s. Narinder Batra v. Union of India*, ILR (2009) IV Delhi, paras. 123-146

34 *Advisory on law-and-order measures to be taken such that queer community do not face any threat of violence, harassment or coercion* (2024), F. No. 11034/26/2024-IS-IV, Ministry of Home Affairs, Government of India

35 Mehra, M. (1998), *Exploring the boundaries of law, gender and social reform*, Feminist Legal Studies Vol. VI, No. 1

36 Sharma, M. et al (2024), *Joint submissions in reference to the stakeholder consultation on Supriyo Chakraborty & Ors. v. Union of India*, WP (C) No. 1011/2022. Available at: <https://feministlawarchives.pldindia.org/wp-content/uploads/c-help-joint-submissions-to-mosje-5-august-24.pdf>

in 2024.³⁷

Objective

This policy brief outlines the role of stakeholders in criminal justice and healthcare systems towards LGBTI survivors of gender-based violence. A gender-based and intersectional critique of these systematic inequalities focuses on structures of power, rather than identities per se, in order to adequately regulate gendered dynamics of power, domination and insubordination of women and LGBTI survivors. Apart from offering guidance to concerned stakeholders in their practice of law, medicine and service delivery to promote the autonomy, dignity and health of survivors, we hope this policy brief facilitates comparative dialogues amongst feminist and LGBTI movements to collaboratively envision gender justice for everyone.

Methodology

In July 2023, C-HELP convened two sets of virtual meetings to present a concept note on criminal justice and healthcare concerns of LGBTI survivors to a group of experts across feminist and LGBTI movements, who shared their invaluable recommendations in informing the terms of reference of this policy brief. A full list of participants in these meetings is provided in Annexure-1. The minutes of the consultations are on file with C-HELP.

The preparation of this policy brief was undertaken via desk-based review of court orders and literature governing the areas of criminal justice and healthcare concerns of LGBTI survivors. The draft chapters were submitted for external review to a panel of experts in cross-sectional areas of law, gender, public health and crisis intervention, whose guidance has contributed immensely in shaping this publication.

Limitations of the criminal justice system's analysis in the report

As legal frameworks governing gender-based violence are resistant to reform, LGBTI survivors, activists and lawyers often seek relief from High Courts,³⁸ which typically offer the limited remedy of police protection to survivors instead of investigating and prosecuting offenders. Although anti-discrimination jurisprudence is facilitating LGBTI survivors' reporting of violence at unprecedented rates, available judicial records do not accurately reflect the full scale of violence. This is chiefly on account of the non-recognition of gender-based violence in legal frameworks. Even as accurate data with respect to prevalence, nature and severity of violence are currently not available from the criminal justice system, a voluntary ecosystem of support, including peer counsellors, healthcare providers, lawyers and community-based organisations (CBOs) intervene during emergencies.³⁹

37 The HPC was constituted in *Supriyo Chakraborty* in order to propose administrative and legislative reforms to prevent discrimination and violence against LGBTI people, amongst other terms of reference. See: *Supriyo Chakraborty & Ors. v. Union of India*, 2023 SCC Online SC 1348, paras. 365-367, 564

38 Dhall, P. (2020), *No Lockdown on domestic and community violence against queer people during coronavirus pandemic*, The Gendered Contagion: Perspectives on Domestic Violence during Covid-19, The Centre for Women and Law, Vol. 7, pages 195-202

39 Ranganathan, G. (2020), *Law and violence: Gender diverse persons in lockdown*, The Gendered Contagion: Perspectives on Domestic Violence during Covid-19, The Centre for Women and Law, Vol. 7, pages 228-236

Despite this lacuna on the qualitative and quantitative aspects of gender-based violence against LGBTI survivors, the judicial orders (bail, revision, quashing, framing or charges, etc.) constitute a critical resource as reliable predictors of emerging patterns in LGBTI survivors' interface with the Indian criminal justice system. This data set represents early evidence for law reforms to adequately combat gender-based violence against LGBTI survivors. As a consequence of the limitations, although Chapter 3 covers significant substantive, procedural and evidentiary legal standards in the context of reported orders, survivors, lawyers and other concerned stakeholders are encouraged to refer to resources which provide comprehensive guidance on navigating the Indian legal system.⁴⁰

40 *Locating the survivor in the Indian criminal justice system: Decoding the law* (2014), Lawyers Collective Women's Rights Initiative

02



DEVELOPMENT OF THE FRAMEWORK OF GENDER-BASED VIOLENCE IN LAW & POLICY

At least since the early 1980s, significant critiques of the framing of gender and oppression have emerged from feminist organising internationally. These critiques stressed the lack of sexuality in the analyses and theorised how ‘compulsory heterosexuality’ underpinned the political and legal discourse.⁴¹ Against this backdrop, Indian lesbian and bisexual women’s groups, who were claiming their identity and space within the mainstream feminist movement, observed in 1999:

“ In our multiple struggles for lesbian rights and existence, we see the linkages with various other groups. We see ourselves as part of the women’s movement and the commonality of the challenges our lives and articulations of them pose to patriarchy and its institutions. We know that so far women who love women do not have much open space within the women’s movement. Yet there have been consistent efforts at creating this space. We need to work towards forging these links more strongly.”⁴²

In the 2000s, Indian feminist, lesbian and bisexual women revisited the concept of gender to open membership of women’s spaces for transgender persons, placed alongside debates which interrogated the marginalisation of women on account of caste, disability, religion, sex work and other markers of identity within mainstream feminist spaces.⁴³ As narratives of lived realities emerged with respect to persons assigned gender female at birth (PAGFB) that revealed the complexities in the experience of gender, borne out in testimonies of parallels between ‘butch’ lesbian women and trans masculine persons, intimate relationships where one partner identified as a man while another as a lesbian woman and persons assigned gender male at birth (PAGMB) who identify as lesbian women, an understanding collectively developed on the interplay between sex, gender and sexuality.⁴⁴

In a study by feminist LBT collectives, which records the diversity of the journey of self-determination of gender, the articulation on the ‘porosity of gender’ is instructive for envisioning fairer legal frameworks:

“ ...the very definitions of masculinity and femininity are highly nuanced in the articulations and lived realities of our respondents. Even when different people use the same terms to refer to themselves, the meanings of these terms may differ greatly. Boundaries between categories are also being pushed, pulled, squeezed, feeding off the energies of diverse genders. This means that there are already several movements from one gender category to another.

While the respondents spoke of these rich variations, their lives and narratives are also stunning records of the continuous violence many faced in their homes, schools, colleges, public spaces, work places, from their communities, friends and strangers, and at every transgression of the norms of gender and sexuality. This violently enforced gender norm must give way to a more egalitarian and voluntary system of gender. The flexibility that we see in individual lives needs to become part of our societal collective consciousness.

41 Martin, RM (2022), *Towards an intersectional feminism in law; Gender-based violence and public policies: building up feminist and intersectional responses*, IDEAS, Ministry of Equality and Feminism & Centre for Study of Contemporary Issues

42 Stree Sangam (1999), *Women coming together; Humjinsi: Lesbian, bisexual and gay rights in India*, Compiled by Bina Fernandez, India Centre for Human Rights and Law; page 98

43 Mahajan S. (2008), *Questioning norms and bodies, Unequal Status: A symposium on new challenges before the women’s movement*. Available at: https://www.india-seminar.com/2008/583/583_shalini_mahajan.htm

44 *Breaking the Binary: Understanding Concerns and Realities of Queer Persons Assigned Gender Female at Birth Across a Spectrum of Lived Gender Identities* (2013), A Study by LABIA - A Queer Feminist LBT Collective, pages 93, 98

*Whether the world is more or less gendered, gender categories must be less rigid; strict gender prescriptions need to be relaxed. When the boundaries between categories themselves are blurred, the decrease in controls and rules will help them become porous. This will allow individuals greater choice of moving across, straddling, claiming and redefining varied gender identities...*⁴⁵

In the Indian context, a consensus for laws and policies being responsive to such lived realities is emerging, which recognises the need for gender-based violence cover SOGIESC-based violence.⁴⁶ Therefore, outlining the development of the framework of gender-based violence at the national, regional and international level is necessary to shape appropriate responses for LGBTI survivors, as this framework provides a collective set of norms which govern development programmes and legal interventions that are used to hold state and non-state actors accountable to respect, protect and fulfil the rights of survivors.

The evolving understanding of different forms of gendered and sexualised violence against LGBTI persons by academics, humanitarian agencies and policymakers has motivated a broader re-framing of gender-based violence in order for state and non-state actors to provide effective interventions for survivors. For instance, humanitarian workers frequently grapple with questions of whether denial of support services to transgender persons who are internally displaced in disaster settings, because the sex on their documentation might not match their gender, exacerbates their vulnerability and condones gender-based violence.⁴⁷ Hence, the progressive shifts in understanding of ‘gender’ and the nature of harm that constitutes ‘violence’

2.1 What is ‘gender’ in law and policy?

This section outlines a brief history of the concept of gender and its impact on the evolution of the framework of gender-based violence, based on a review of international human rights norms and the Indian Constitution.

After the Second World War, the prosecution of sexual violence gained significant momentum in international humanitarian law, which is applicable in times of armed conflict and binding on state and non-state armed groups. After the Tokyo and Nuremberg Trials acknowledged sexual violence as a war crime, in parallel, the Geneva Conventions (1949) recognised rape, forced prostitution and indecent assault as prohibited conduct against women during armed conflict. These principles grew within the jurisprudence of international humanitarian law in dialogue with international human rights norms, to move beyond aggravated bodily harm and begin the process of outlawing any conduct which violated a woman’s dignity.⁴⁸ Thereafter, the scale of sexual violence perpetrated against women in conflicts in the 1990s, including the prosecution of such offences as crimes against humanity before the ad hoc International Criminal Tribunals for former Yugoslavia and Rwanda, provided the impetus to women’s

45 *Ibid*, page 110

46 This research is based on data from an unpublished study on gender-based violence by Janaki Devi Memorial College, Women Power Connect and Friedrich Ebert Stiftung (India) in 2022, whose complete findings are available on request from the authors.

47 Gender-based violence: a confused and contested term (2014), Sophie Read-Hamilton, *Humanitarian Practice Network*, Issue No. 60. Available at: https://odihp.org/wp-content/uploads/2014/02/HE_60_web_1.pdf

48 Viktor Madrigal Borloz (2022), *Armed Conflict*, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/75/235, paras. 7-9, 13-14, 18

rights advocates in the international community to demand recognition of a broad spectrum of gender-based violence under international human rights law.⁴⁹

Amid these international developments, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979) defined discrimination against women in Article 1 as such:

“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”⁵⁰

While Article 1 is rooted in inequality on the basis of sex, Article 5 of CEDAW reflects inequality on the basis of gender, whereby member states are mandated to adopt measures to eliminate ‘stereotypical roles’ of men and women.

The Committee on the Elimination of All Forms of Discrimination Against Women issues general recommendations to guide member states in implementation of the convention. General Recommendation No. 19 (GR19, 1992) frames discrimination as a broader category of legal harm, which includes violence against women as the most egregious form of such inequality:

“The Convention in Article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately...”⁵¹

The United Nations Declaration on the Elimination of Violence Against Women (DEVAW, 1993) defines violence against women in Article 1 as such:

“any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”⁵²

Article 2 elaborates on the forms of gender-based violence: battery, child sexual abuse, dowry-related violence, marital rape, intimate partner violence, sexual assault, female genital mutilation, sexual harassment, trafficking and violence perpetrated or condoned by the state. A combined reading of GR19

49 Solange Mouthaan (2010), *The Prosecution of Gender Crimes at the ICC: Challenges and Opportunities*, Legal Studies Research Paper No. 2010-17, University of Warwick, School of Law, pgs. 4-10; Janet Halley (2009), *Rape at Rome: Feminist Interventions in the Criminalisation of Sex-Related Violence in Positive International Criminal Law*, Michigan Journal of International Law

50 United Nations General Assembly (UNGA) Resolution 34/180 of 18 December 1979

51 General Recommendation No. 19: Violence Against Women, adopted by the Committee on the Elimination of All Forms of Discrimination Against Women, Eleventh Session (1992)

52 UNGA Resolution 48/104 of 20 December 1993

and DEVAW indicates that the expressions ‘violence against women’ and ‘gender-based violence’ are used interchangeably, signifying international feminist movements’ engagement with law and policy concerns and the inter-governmental duty to adopt preventive, remedial and punitive measures.

The Indian Constitution adopted in 1950 provides the general guarantee of anti-discrimination in Article 15(1) “on grounds ‘only’ of religion, race, caste, sex, place of birth or any of them”, whereas Article 15(3) authorises the state to adopt special provisions for women and children. In *Dattatraya Motiram More v. State of Bombay* (1953),⁵³ the interplay between the guarantee of anti-discrimination on the basis of ‘sex’ in Article 15(1) vis-à-vis the state’s duty to adopt special provisions for ‘women’ in Article 15(3) was explained by the Bombay High Court by contrasting illustrations of maternity homes and reservation. The court observed that special provisions for women under Article 15(3) are not controlled by the text of Article 15(1). If special provisions for women were limited to only sex-based measures, there was no need for the Constituent Assembly to insert Article 15(3), because Article 15(1) would adequately justify providing facilities like maternity homes for women without this constituting unfair treatment towards men as they do not have the capacity for pregnancy. The mandate of Article 15(3) is to remedy ‘backwardness’ of women as compared to men, which necessitates adopting broader measures like providing reservation.

This reflects an implicit recognition of the difference and linkage between sex and gender-based inequalities under the Indian Constitution at inception. However, Article 15(3) served a dual purpose in its original form: (1) positive discrimination, i.e., promoting the rights of women, and (2) protective discrimination, i.e., exclusion of women in favour “of the country or of the race”. This reading of Article 15(3) is reflected in the opinion of members of the Constituent Assembly, who debated the corresponding Article 9(2) of the draft Constitution on 29 November 1948.⁵⁴ In the context of positive discrimination, courts have observed that the mandate of Article 15(3) is to provide for special measures that improve women’s social and economic conditions to remedy their historical marginalisation, including reservation in public education and employment,⁵⁵ economic security for wives⁵⁶ and leniency in the criminal justice system towards women,⁵⁷ among others.⁵⁸

At the same time, a limited conception of sex-based discrimination combined with the theory of protective discrimination served the foundation for courts to routinely declare that Article 15(3) authorised the government to provide ‘separate but equal’ education facilities for women,⁵⁹ criminalise extra-marital relationships of wives,⁶⁰ condone violence against married women in divorce law⁶¹ and restrict or exclude women’s opportunities in employment ostensibly on basis of health, marital obligations or security

53 AIR 1953 Bom 311, pages 847-848s

54 *Constituent Assembly Debates*, Volume 7, 29 Nov 1948. Available at: <https://www.constitutionofindia.net/debates/29-nov-1948/>

55 *Govt. of Andhra Pradesh v. PB Vijayakumar*, (1995) 4 SCC 520

56 *Thamsi Goundan v. Kanni Ammal*, AIR 1952 Mad 529; *Partap Singh v. Union of India*, (1985) 4 SCC 197

57 *Chokhi v. The State*, AIR 1957 Raj 10

58 *Independent Thought v. Union of India*, (2017) 10 SCC 100, paras. 54-60

59 *Anjali Roy v. State of West Bengal*, AIR 1952 Cal 825

60 *Yusuf Abdul Aziz v. State of Bombay*, AIR 1954 SC 321

61 *Dr. Dwaraka Bai v. Professor Nainan Mathews*, AIR 1953 Mad 792

concerns,⁶² among others.⁶³ Apparent from classical Indian jurisprudence on Article 15 is that gendered aspects of sex discrimination were not treated as discriminatory per se because they were premised not ‘only’ on grounds of biological sex, but were informed by social and economic conditions of women which necessitated ‘protectionist’ measures.⁶⁴ As the overwhelming majority of the reported cases of sex-based discrimination attest that discrimination on the basis of sex is gendered, a decontextualised interpretation of Article 15 allowed courts to separate biological sex from gender in order to validate flagrantly discriminatory laws and policies targeting women.⁶⁵

A major departure from this trend arrived in *Anuj Garg v. Hotel Association of India & Ors.* (2008),⁶⁶ where the court’s analysis confronted the undisputed practice of placing reliance on social and economic conditions of women as a pretext to undermine their rights, posing a doctrinal contest to protective discrimination. The Supreme Court observed that while freedom from violence is a legitimate concern, the right to self-determination is an essential component of gender justice, which must ensure that protectionist laws and policies do not undermine autonomy of women. Instead of uncritically limiting women’s opportunities, the state shall refocus its attention towards improvement of social and economic conditions of women and ensure proportionality of measures in achieving legitimate goals (health, marital obligations, security etc.) in order to withstand ‘strict scrutiny’. The court’s articulation of how sex and gender-based inequalities operate distinctly yet are inextricably linked is instructive for its contribution towards the idea of sex-stereotyping:

“ Stereotype roles...

Professor Williams in The Equality Crisis: Some Reflections on Culture, Courts, and Feminism, published in 7 Women’s Rts. L. Rep., 175 (1982) notes issues arising where biological distinction between sexes is assessed in the backdrop of cultural norms and stereotypes. She characterises them as ‘hard cases’. In hard cases, the issue of biological difference between sexes gathers an overtone of societal conditions so much so that the real differences are pronounced by the oppressive cultural norms of the time. This combination of biological and social determinants may find expression in popular legislative mandate. Such legislations definitely deserve deeper judicial scrutiny. It is for the court to review that majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy. This is the backdrop of deeper judicial scrutiny of such legislations world over.”⁶⁷

CEDAW’s GR No. 28 (2010) subsequently advanced the discourse from sex-based discrimination to gender-based discrimination, while underscoring that discrimination against women is based on sex as well as gender. The Committee noted:

62 *R.S. Singh v. State of Punjab*, AIR 1972 P&H 117; *Air India v. Nergesh Meerza*, (1981) 4 SCC 335; *Dayandeo Dattatraya Kale v. State of Maharashtra*, (1995) 2 LLJ 597; *A.M. Shalia v. Cochin Port Trust*, (1995) 2 LLJ 1193; *Air India Cabin Crew v. Yeshaswinee Merchant*, (2003) 6 SCC 277; *Leela v. State of Kerala*, (2004) 2 KLT 220

63 *Sri Sri Mahadev Jiew v. Dr. B.B. Sen*, AIR 1951 Cal 563; *M.I. Shahdad v. Mohd. Abdullah Mir*, AIR 1967 J&K 120; *Sucha Singh Bajwa v. State of Punjab*, AIR 1974 P&H 162; *Ambika Prasad v. State of Uttar Pradesh*, (1980) 3 SCC 719;

64 Atrey, S. (2016), *Through the looking glass of intersectionality: Making sense of Indian discrimination jurisprudence under Article 15*, Equal Rights Review, Vol. 16, pages 171-175

65 Jaising, I., *Gender Justice and the Supreme Court* in Kirpal, B.N. et al (eds.), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India*, Oxford India Paperbacks, 2000, page 294

66 (2008) 3 SCC 1, paras. 34-38, 43-51

67 *Ibid*, para. 41

“ Although the Convention only refers to sex-based discrimination, interpreting article 1 together with articles 2 (f) and 5 (a) indicates that the Convention covers gender-based discrimination against women. The term “sex” here refers to biological differences between men and women. The term “gender” refers to socially constructed identities, attributes and roles for women and men and social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community.”⁶⁸

The articulation of the doctrine of intersectionality in GR28, wherein the committee noted that women belonging to minority groups, rural women and women with disabilities, among others, are disproportionately impacted by violence, led to recognition of sexual orientation and gender identity-based claims under the convention. In particular, GR28 noted:

“ Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognise such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences...”⁶⁹

As a consequence, several general recommendations under CEDAW enjoin member states to adopt measures to prevent discrimination against LGBTI women in areas of protection of older women’s rights (GR27), women’s access to justice (GR33), gender-based violence against women (GR35), women’s right to education (GR36), gender-related concerns in addressing climate change (GR37), indigenous women’s rights (GR39) and gender-related concerns of refugees (GR32). Although intersectionality was explicitly articulated under Indian law only recently in *Navtej Singh Johar* (2018), Indian courts are accustomed to implicitly applying this analysis in moulding relief for emergency and maternity healthcare services for tribal women in rural and hilly areas,⁷⁰ prevention of maternal and child malnutrition deaths among tribal communities⁷¹ and granting social security measures to inter-caste couples (including intersex women).⁷²

The International Criminal Court relies on GR28 to inform the definition of gender as “the two sexes, male and female, within the context of society” by acknowledging that the social construct of gender varies within societies and changes over time, for facilitating the prosecution of gender-based violence

68 General Recommendation No. 28 on the core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, para. 5

69 *Ibid*, para. 18

70 *Kali Bai v. Union of India & Ors.*, 2017 SCC Online Chh 1081

71 *Dr. Rajendra Sadanand Burma & Anr. v. State of Maharashtra*, Public Interest Litigation No. 133/2007

72 *Arunkumar and Sreeja v. Inspector General of Registration & Ors.*, (2019) 4 Mad LJ 503

against women and LGBTI survivors alike as crimes against humanity.⁷³ This understanding is crucially supported by the Office of the Prosecutor's (OTP) review of evidence of gender-based violence against LGBTI persons in conflicts of Afghanistan, Colombia, Iraq, Libya, Myanmar, Syria, Nigeria and Yemen. In the Syrian context, the OTP has treated sexual and gender-based crimes against men as offences under the Rome Statute, while underscoring that this must not undermine efforts to address the historical and longstanding structural inequality and discrimination experienced by women and girls in all societies.⁷⁴

In 1997, the United Nations Special Rapporteur on Violence Against Women (UNSR-VAW) drew moral equivalence in experiences of heterosexual women, lesbian and bisexual women, as their autonomous, gender-non-conforming choices with respect to partners, marriage and childbirth exposed them to gender-based violence.⁷⁵ The UNSR-VAW recognised the role of sexual orientation and gender identity as contributory factors in increasing the vulnerability of LGBTI persons to discrimination and gender-based violence (natal family violence, identity-based extortion, police abuses, prison assault, murder and "social cleansing") and recommended that all member states adopt an intersectional approach to respond to gender-based violence.⁷⁶ During her mission to India, the UNSR-VAW particularly noted that structural inequality against women on basis of sex, caste, class, ability, sexual orientation and gender identity contribute to subordination of Indian women.⁷⁷

Therefore, long before the special procedure of the UN Independent Expert on Sexual Orientation and Gender Identity (UNIE-SOGI) was constituted for LGBTI concerns on the international stage, it is amply discernible that existing treaty mechanisms and special procedures devoted to violence against women initiated the process of developing consensus on applying a gender-based and intersectional framework to effectively prevent and combat gender-based violence for women and LGBTI people alike.

As per settled law, human rights norms in international covenants, treaties and declarations constitute binding commitments for application by the legislative, judicial and administrative branches on ratification by the Indian government, in the absence of domestic law to the contrary.⁷⁸ This contributed to an expansive interpretation of 'sex' under Article 15 to include SOGIESC-status through a series of landmark cases, which read-in the consensus of international human rights norms applicable to LGBTI persons, including the *Yogyakarta Principles*.⁷⁹

73 *Policy Paper on Sexual and Gender-Based Crimes* (2014), The Office of the Prosecutor, International Criminal Court; *Policy on the Crime of Gender Persecution* (2022), The Office of the Prosecutor, International Criminal Court

74 *International, Impartial and Independent Mechanism Gender Strategy and Implementation Plan* (2022), United Nations

75 Radhika Coomaraswamy (1997), Report of the Special Rapporteur on violence against women, its causes and consequences, E/CN/4/1997/47, at paras. 8, 152

76 Rashida Manjoo (2011), Report of the Special Rapporteur on violence against women, its causes and consequences, A/HRC/17/26, at paras. 22, 47, 58, 67, 73, 76, 104

77 Rashida Manjoo (2014), Mission to India, Report of the Special Rapporteur on violence against women, its causes and consequences, A/HRC/26/38/Add.1, at para. 7; Rashida Manjoo (2012), Report of the Special Rapporteur on violence against women, its causes and consequences, A/HRC/20/16, at paras. 71-76

78 *Laxmi Mandal & Ors. v. Deen Dayan Harinagar Hospital & Ors.*, (2010) 172 DLT 9, para. 27; *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438, paras. 51-60

79 *The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007) and *The Yogyakarta Principles Plus 10 Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics* (2017) provide the following definitions:

Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or

In *Naz Foundation v. Government of NCT of Delhi* (2009), the Delhi High Court observed that the purpose underlying anti-discrimination on the ground of sex is to prevent unfair treatment for gender non-conforming behaviour, thus leading to the pioneering interpretation that sexual orientation is a ground analogous to sex and discrimination on such basis is barred under Article 15.⁸⁰ Although this verdict was overruled on appeal in *Suresh Kumar Koushal v. Naz Foundation* (2013),⁸¹ a 9-judge bench of the Supreme Court validated this opinion in *J. KS Puttaswamy* (2017).⁸²

The Supreme Court in *National Legal Services Authority v. Union of India* (NALSA, 2014) declared that prohibition of sex-based discrimination under Article 15 bars “all forms of gender bias and gender-based discrimination”, in order to remedy the impact of non-recognition of transgender persons in terms of social and economic violations.⁸³ In particular, the court’s framing of sex and gender identity-based inequality is notable:

“Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognising that sex discrimination is a historical fact and needs to be addressed. The Constitution-makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalisations of binary genders. Both gender and biological attributes constitute distinct components of sex. The biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one’s self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of ‘sex’ under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity.”⁸⁴

This analysis informed the court’s decision to recognise transgender persons (including *hijra, kothi, aravani, thirunangi, jogappa, shiv-shakti*) and declare self-determination of gender without medical intervention as protected by Article 21 (right to life).⁸⁵

In *Arunkumar & Anr. v. Inspector General of Registration* (2019), the Madras High Court applied NALSA’s

more than one gender.

Gender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

Gender expression as each person’s presentation of the person’s gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references, and noting further that gender expression may or may not conform to a person’s gender identity.

Sex characteristics as each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.

80 *Naz Foundation v. Government of NCT of Delhi*, 2009 (111) DRJ 1(DB), pages 45-46

81 (2013) 4 SCC (Cri) 1

82 *Justice KS Puttaswamy & Anr. v. Union of India*, (2017) 10 SCC 1, paras. 142-147

83 (2014) 5 SCC 438, paras. 62, 63

84 *Ibid.*, para. 66

85 *Id* at 83, paras. 47, 73-75, 114, 135.2, 135.5

analysis in order to forbid violations on the basis of sex characteristics, as the binary conception of sex, beliefs regarding ‘normal’ bodies and heteronormative gender roles circumscribe the lives of intersex people.⁸⁶

The Supreme Court authoritatively held that Article 15 prohibits targeting people based on sexual orientation in *Navtej Singh Johar v. Union of India* (2018). It observed that the criminalisation of same-sex relationships perpetuated traditional gender roles:

“...one cannot simply separate discrimination based on sexual orientation and discrimination based on sex, because discrimination based on sexual orientation inherently promulgates ideas about stereotypical notions of sex and gender roles.”⁸⁷

Apart from the SOGIESC analysis in *Navtej Singh Johar*, the court made significant advancements on its interpretation of sex-based discrimination in *Anuj Garg* by applying the doctrine of intersectionality to eschew protectionist laws and policies impacting women. The court declared:

“Article 15 prohibits the State from discriminating on grounds only of sex...The view was that if the discrimination is justified on the ground of sex and another factor, it would not be covered by the prohibition in Article 15

...

This formalistic interpretation of Article 15 would render the constitutional guarantee against discrimination meaningless. For it would allow the State to claim that the discrimination was based on sex and another ground (‘sex plus’) and hence outside the ambit of Article 15. Latent in the argument of the discrimination, are stereotypical notions of the differences between men and women which are then used to justify the discrimination. This narrow view of Article 15 strips the prohibition on discrimination of its essential content. This fails to take into account the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context...Such a formalistic view of the prohibition in Article 15, rejects the true operation of discrimination, which intersects with various identities and characteristics.”⁸⁸

The court concluded that Article 15 covers the anti-stereotyping principle, which provides that laws and policies founded on stereotypical roles based on sex are liable to be struck down as invalid. This framework is instructive in resisting the foundational sex stereotypes of compulsory heterosexuality and the gender binary, which contribute towards the larger effort to end gender inequality for women and LGBTI people alike.⁸⁹ This is evident from courts routinely applying the anti-sex stereotyping analysis to remedy the exclusion of women from places of worship on the basis of their menstrual status and sexuality,⁹⁰ striking

86 (2019) 4 Mad LJ 503, paras. 21-22, 28

87 (2018) 10 SCC 1, paras. 397-400

88 *Ibid*, paras. 387, 389

89 *Id* at 87, paras. 390-394, 399-400

90 *Indian Young Lawyers Association & Ors. v. State of Kerala*, (2019) 11 SCC 1, paras. 297-301

down the adultery law that perpetuated women's status as chattel in marital relations⁹¹ and promoting women's role in armed forces without the pretext of health, marital obligations, security concerns or physiological differences limiting their opportunities⁹² for removal of gender-based inequality.

In reference to the application of intersectionality to redress gender-based violence, as Dalit feminist academics have argued that the 'gender ideology' inscribed in Hindu religious texts render Dalit women most vulnerable to caste and gender-based violence,⁹³ **legal remedies, preventive efforts and systemic changes that are informed by the additive effects of multiple and intersecting vulnerabilities of survivors are indispensable to law and policy responses.**⁹⁴ This view is reflected in the Supreme Court's articulation of the role of intersectionality in moulding appropriate relief in prosecution of gender-based violence in *Patan Jamal Vali v. State of Andhra Pradesh*,⁹⁵ by focusing on the effects of sexual assault at the intersection of gender, caste and disability which shape individual and collective experiences of inequality.

In order to drive political action to promote social and economic justice for women and LGBTI people alike, the UN Working Group on Discrimination Against Women and Girls (UNWGDAGW) conceptualises the idea of 'gender' as such:

“Gender is neither a substitute for the term women nor it is a term which refers only to transgender persons: rather, it refers to social systems that operate at different levels to create vulnerabilities and privileges for all gendered people. It is both a system of domination and an individual expression formed in the social context of gender (and other systems of) inequality. While it is not located solely in the individual or in interpersonal relationships, it manifests itself in personal identities and in social interactions.”⁹⁶

The UNIE-SOGI's conception of gender is consistent with the UNWGDAGW's, which frames it as an organising principle for persons in societies that dictates stereotypes, power asymmetries, inequality and violence, while simultaneously providing a context for the development of identity and socialisation.⁹⁷ **Apparently, the concept of gender is qualitatively different in feminist theory and queer studies. The former states that socially constructed roles, behaviours, and attributes assigned on the basis of sex lead to inequality between men and women, whereas the latter contrasts the gender binary with the deeply felt internal and individual experience of gender as manifest in the lived realities of transgender persons. Yet, a common feature of the manner in which women as well as LGBTI persons frame gender**

91 *Joseph Shine v. Union of India*, (2019) 3 SCC 39, paras. 179-186, 220.2, 272.1-272.4

92 *Secretary, Ministry of Defence v. Babita Puniya & Ors.*, (2020) 7 SCC 469, paras. 67-70; *Union of India & Ors. v. Lt. Commander Annie Nagaraja*, (2020) 13 SCC 1, paras. 83-84

93 Rege, S. (1996), *Caste and gender: Violence against women in India*, European University Institute Working Paper RSC No. 96/17

94 Atrey, S. (2015), *Lifting As We Climb: Recognising Intersectional Gender Violence in Law*, Onati Socio-Legal Series

95 AIR 2021 SC 2190

96 *Gender equality and gender backlash* (2020), Mandate of the Working Group on discrimination against women and girls. Available at: <https://www.ohchr.org/en/special-procedures/wg-women-and-girls/gender-equality-and-gender-backlash>

97 Viktor Madrigal Borloz, *The Law on Inclusion* (2021), Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/47/27, para. 14

is their resistance to the dominant ideology.⁹⁸

2.2 The ‘gender ideology’ backlash and the gender-based and intersectional forward slash

The analysis of gender that emerges from a critical body of Indian and international human rights law attests to the fact that sex is as much biographical (shaped by culture, society, politics) as it is biological.⁹⁹ This idea underpins the gender-based and intersectional framework, which, far from erasing the category of sex as critics allege,¹⁰⁰ retains at its core the commitment to respect for women’s bodily integrity, while simultaneously promoting the freedom of LGBTI persons from policing of their sexuality, gender expression and bodily diversity.



However, the gender-based and intersectional framework is opposed by an alliance of religious conservatives, gender-critical feminists and anti-rights actors promoting ‘family values’, who are united in their position that legal frameworks must reflect sex as immutable and repudiate the ‘gender ideology’ for its contribution towards LGBTI rights.¹⁰¹ This reactionary view has gained political traction, witnessed in judicial classification of gender-critical speech as legitimate philosophical belief in the United Kingdom,¹⁰² legislative non-compliance with treaty obligations that mandate adherence to gender-based and intersectional frameworks by Hungary, Turkey and Bulgaria¹⁰³ and executive orders which limit ‘sex’ to a biological category in the United States of America.¹⁰⁴

A contest over identity, rights and resources formed the bedrock of the recent United Kingdom Supreme Court decision on the status of women vis-à-vis transgender persons under the *Equality Act, 2010* (‘EA 2010’). The court ruled that while transgender persons are entitled to anti-discrimination remedies on the basis of gender identity under the EA 2010, the terms ‘sex’, ‘man’ and ‘woman’ in the EA 2010 are to be interpreted to mean biological sex, man and woman to ensure women’s access to single-sex services like rape shelters, toilets and cervical cancer screenings to protect the ‘privacy, health and safety’ of women

98 *Id* at 96

99 Araneta, A. (2022), *Sex, gender and other little words: some notions to help understand the biographies of women, adolescents and girls with transgender life experience; Gender-based violence and public policies: building up feminist and intersectional responses*, IDEAS, Ministry of Equality and Feminism & Centre for Study of Contemporary Issues

100 Cabral Grinspan, M. et al (2023), *Exploring TERFnesses*, DiGEESt Journal of Diversity and Gender Studies, Vol. 10, Issue 2

101 *Global resistance to anti-gender opposition: LGBTQI+ activism in Colombia, India, Kenya, Peru and Serbia* (2023), Astraea Lesbian Foundation for Justice

102 *Maya Forstater v. Centre for Global Development, Europe & Ors.*, UK Employment Tribunal, Case No. 2200909/2019

103 Viktor Madrigal Borloz, *Practices of Exclusion* (2021), Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/76/152, para. 41(e)

104 *Defending women from gender ideology extremism and restoring biological truth to the federal government* (2025), The White House. Available at: <https://www.whitehouse.gov/presidential-actions/2025/01/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal-government/>

and promote their representation on public authorities, trade unions, employer organisations etc. to redress sex-based disadvantages.¹⁰⁵

Although ensuring adequate representation of women on professional bodies is a legitimate goal, the court's analysis on single-sex services does not engage with any witness testimonies, qualitative data or statistical evidence to support the finding that participation of transgender persons in shared spaces had any adverse impact on the rights of women. Instead, this reveals an animus against transgender persons underlying political campaigns that masquerade as legal interventions.¹⁰⁶ The participation of gender-critical feminists in the anti-rights campaign exposes not only their ideological incoherence but also the fallacy of this ecosystem, given that reversal of the gender-based and intersectional framework poses direct and imminent harm to women's interests. This is evidenced by anti-rights actors' avowed long-term vision to defund social services for gender-based violence survivors and oppose abortion.¹⁰⁷

The Indian judiciary's experience with cases of transgender women seeking equality of opportunity in roles of Accredited Social Health Activist (ASHA),¹⁰⁸ Sub-Inspector of Police (Woman)¹⁰⁹ and National Cadet Corps (Women's Division),¹¹⁰ where litigants, judges or the government frame women and transgender persons' claims over identity, rights and resources in conflict, foreshadows the non-adherence to gender-based and intersectionality frameworks in the context of gender-based violence against LGBTI survivors, as reviewed in the next chapter. **Apart from the dignitarian harm of 'separate but equal' regimes,¹¹¹ the exclusion of transgender persons from gender-based and intersectional frameworks by critics, ostensibly on the ground of diversion of scarce resources reserved for women, exemplifies social and economic conservatism. Instead of establishing solidarity against austerity and transphobia, such political campaigns suggest a zero-sum conception of rights by disavowing mutual cooperation.¹¹²**

The UNIE-SOGI has engaged with anti-rights actors in the course of its mandate, who seek to place limits on formal recognition of transgender persons, out of concern that such claims would make invisible the challenges, discrimination and violence suffered by women on account of sex in policy and practice. The UNIE-SOGI has issued a notable response to this backlash on four levels.

- In matters of human rights, a possibility of violation or few cases of abuse do not merit closing off access to rights per se. The onus of preventive efforts must be borne by the state as the duty bearer and cannot be thrust upon historically disenfranchised communities, who are rights holders.
- Reliance on the framework of intersectionality and the global evidence on gender-based violence

105 *For Women Scotland Ltd. v. Scottish Ministers*, [2025] UKSC16

106 Garcia Blum, D. and Patrick McCarthy, T. (2025), *Understanding the implications of the UK Supreme Court's ruling defining 'sex' in the Equality Act*, Carr-Ryan Centre for Human Rights, Harvard Kennedy School. Available at: <https://www.hks.harvard.edu/centers/carr-ryan/our-work/carr-ryan-commentary/understanding-implications-uk-supreme-courts-ruling>

107 *Gender equality and the Istanbul Convention: A decade of action* (2021), Council of Europe, pages 17-20

108 *Sumita Kumari v. State of West Bengal & Ors.*, WP (W) 8911/2015, order dated 01.07.2015

109 *K. Annapoornam v. Secy. to the Government, Personnel and Administrative Reforms Dept.*, 2016 SCC Online Mad 15928

110 *Hina Haneefa v. State of Kerala & Ors.*, WP (C) No. 23404/2020 (A), order dated 15.03.2021

111 *Brown et al v. Board of Education of Topeka*, 347 US 483 (1954)

112 House, C. (2023), 'I'm real, not you': Roles and discourses of trans exclusionary women's and feminist movements in anti-gender and right-wing populist politics, DiGEeSt Journal of Diversity and Gender Studies, Vol. 10, Issue 2

do not support the conclusion that protection of transgender persons' rights is irreconcilable with women's rights.

- A vast majority of available data overwhelmingly suggests that transgender women pose no risk to women; in fact, such concerns are often rooted in moral panic about gender and motivated by the denial of self-determination of gender.
- Legal recognition of transgender persons is a human rights imperative of all governments, which must undertake measures on policymaking and legal reforms to prevent violence and discrimination from all areas of life for transgender persons.¹¹³

The recognition of SOGIESC-based inequality in law and policy responses to gender-based violence does not de-prioritise the inequality of women. Instead, the fight against trans/homo/bi-phobia benefits the fight against misogyny and other forms of gender-based inequalities because it breaks down the foundations on which all forms of domination operate.¹¹⁴ As borne out by the critique of substantive, procedural and evidentiary standards of the criminal justice system in the next chapter, locating LGBTI survivors within this legal framework inevitably bolsters the fight to counter violence against women. The UNIE-SOGI, hence, advocates for the adoption of gender-based and intersectionality frameworks to guarantee the protection of human rights of women and LGBTI persons as such:

“ The biological reality of sex characteristics must not be conflated with the social construct of gender. Human beings have sex characteristics, which are biological features including genitalia and other sexual and reproductive anatomy, chromosomes, hormones and secondary features emerging from puberty: these are indeed a physical reality. While powerful, the roles, behaviours, forms of expression, activities and attributes assigned to this biological reality by dominating social forces are constructs, and individuals must be able to ignore, shatter or subvert them as an exercise of freedom. This is the conceptual crossroads between the freedom of women from biological determinism (and hence respect for their bodily autonomy and their sexual and reproductive rights), and the freedom of trans and gender-diverse persons from the policing of their gender identity and expression (and hence respect for their right to legal recognition).”¹¹⁵

The acts of forced medical procedures, corrective rape, forced pregnancy and childbirth in relation to lesbian and bisexual women violates their bodily integrity by compelling them into motherhood. Whereas, the same violations pose the additional burden to identity construction and bodily transformation for trans masculine persons, by undermining the self-determination of gender. Accordingly, the UNIE-SOGI recommends that gender must be interpreted widely in national policies and legislations to account for concerns of LGBTI persons.¹¹⁶ The UNSR-VAW, the UNIE-SOGI and the UNSR on the Right to Health (UNSR-RTH) affirm the growing consensus in international human rights law, noting that in order to

¹¹³ *Id* at 97, paras. 38-47

¹¹⁴ Zarate, MR (2022), *Intersectionality: conceptualisation, implementation and challenges; Gender-based violence and public policies: building up feminist and intersectional responses*, IDEAS, Ministry of Equality and Feminism & Centre for Study of Contemporary Issues

¹¹⁵ *Id* at 103, para. 16

¹¹⁶ *Id* at 48, paras. 5, 16, 47, 68

effectively respond to all forms of violent masculinity, particularly, gender-based violence, international and national legal systems must recognise that sex, gender and SOGIESC-status are different concepts which are inextricably linked. This finding is buttressed by the fact that whether in the global north or south, regional courts and commissions are applying laws to prevent and combat gender-based violence to provide remedies to LGBTI persons.¹¹⁷

Although we witness retreats on gender-based and intersectional approaches, the overwhelming consensus on the linkages between sex, gender and SOGIESC-status within international human rights norms is growingly reflected in regional instruments on gender-based violence. This is apparent both in the global north, such as the Council of Europe's *Convention on Preventing and Combating Violence against Women and Domestic Violence, 2011* (Istanbul Convention),¹¹⁸ as well as in the global south, such as the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 1994* (Convention of Belem do Para).¹¹⁹ As a consequence, these regional instruments enjoin member states to address gender-based violence against LGBTI women. In fact, the Istanbul Convention goes beyond and encourages member states to prevent and combat domestic violence against gay, bisexual men and trans masculine persons too.¹²⁰

Postscript

The view that violence against LGBTI persons is 'gender-based violence' is irrefutably established by a critical mass of evidence¹²¹ and the history of 'gender' under the Indian Constitution and international human rights norms. The Indian Supreme Court has noted that Central and State governments and Union Territories (UTs) shall ensure the freedom of expression of identity and sexuality without the fear of violence, dignity and health of LGBTI people.¹²² Criminal justice and healthcare systems must adopt the gender-based and intersectional framework to respect, protect and fulfil the rights of LGBTI survivors, as this framework facilitates prosecution of offences, providing support services to survivors and prevents re-occurrence of violence by identifying the root causes of violence. This framework treats LGBTI persons not as passive recipients of discretionary benefits but as active rights-holders. Hence, this framework is vital to motivate the participation of various stakeholders and promote intersectoral coordination in addressing gender-based violence as part of building respect for human rights.

117 Position of the UN Special Rapporteur on violence against women, its causes and consequences, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Independent Expert on sexual orientation and gender identity, and the Working Group on discrimination against women and girls on the International Criminal Court policy on gender-related prosecutions (2022), United Nations Human Rights Special Procedures, pgs. 3-5

118 Council of Europe (2022), *Ensuring the Non-Discriminatory Implementation of Measures Against Violence Against Women and Domestic Violence: Article 4, Paragraph 3 of the Istanbul Convention*

119 Inter-American Commission on Human Rights (2015), *Violence against Lesbians, Gay, Bisexual, Trans and Intersex Persons in the Americas*, OAS/Ser.L/V/II.rev.1 Doc 36, para. 52

120 Council of Europe (2011), *Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence*, paras. 39-56, 87

121 *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity* (2011), Report of the United Nations High Commissioner for Human Rights, A/HRC/19/41, at paras. 20-39

122 NALSA (2014), paras. 49-50, 62, 81, 83, 118 and 135.5; Navtej Singh Johar (2018), paras. 89, 376, 424-428, 435; Supriyo Chakraborty (2023), paras. 8, 11, 14, 16, 17, 284, 303, 306, 364, 466, 564 (ix)

The conceptualisation of violence is an evolving discipline, which includes framing value judgments on actions and intentions of perpetrators and the harm and impact on victims. While interpersonal violence directly inflicts harm (murder), structural violence focuses on accountability of social, economic and political norms that allow people to die (poverty-related malnutrition and death).¹²³ In countries where LGBTI people are demonised, pathologised and/or criminalised, gender-based violence is routinely condoned and/or perpetuated.¹²⁴ As a consequence of the progressive shifts in the understanding of gender and the nature of harm that constitutes violence, we explore legal remedies for direct violence (domestic violence, sexual harassment, rape, etc.) via the criminal justice system and structural violence (witch-hunting, conversion therapies, anti-begging laws, etc.) via the international standard of due diligence in forthcoming chapters.

123 Sylvia Walby et al (2017), Chapter 3. Conceptualising Violence and Gender: The Concept and Measurement of Violence, Bristol University Press

124 Mofokeng, T. (2022), *Violence and its impact on health*, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/50/28, paras. 68-75

03



LOCATING LGBTI VICTIMS/SURVIVORS IN THE CRIMINAL JUSTICE SYSTEM

3.1 Technology-facilitated gender-based violence

Introduction of the internet has meant that structural imbalances of the real world are reflected in online spaces, as women and LGBTI people are targeted and suffer serious consequences of technology-facilitated gender-based violence (TF-GBV). Any act that is committed, assisted or aggravated in part or fully by the use of information and communication technology (ICT – such as mobile phones, smartphones, the internet, social media platforms, email etc.), that results in, or is likely to result in, physical, sexual or psychological harm or suffering, including threats of such acts, coercion or arbitrary deprivation of liberty, constitutes TF-GBV.¹²⁵

Any assessment of the impact of TF-GBV must take into account the full spectrum of harms, including offline ramifications of digital violations.¹²⁶ In the context of non-consensual disclosure of intimate images (NCDII), the ‘embodiment’ of personal data provides a new lens to understand the nature and severity of the harm caused to victims/survivors.¹²⁷ Doxing (circulating sensitive personal data like contact information, residential address, identification cards, images, etc. on public platforms), identity-based harassment, cyber-stalking, hate-speech and threats of sexual violence against Dalit women,¹²⁸ gender non-conforming persons¹²⁹ and Muslim women¹³⁰ represent the real and imminent threat of physical, sexual, psychological and economic harms of TF-GBV.

The IPC/BNS¹³¹ and the *Information Technology Act, 2000* (‘IT Act’)¹³² primarily govern TF-GBV. In *State of West Bengal v. Animesh Boxi* (2018),¹³³ the trial court convicted a man for disclosing a woman’s intimate images and videos without her consent under the IPC¹³⁴ and the IT Act.¹³⁵

125 Dubravka Simonovic (2018), *Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective*, A/HRC/38/47

126 *Cyberviolence*, Council of Europe. Available at: <https://www.coe.int/en/web/cyberviolence>

127 Kovacs, A. (2020), *When our bodies become data, where does that leave us?* Medium. Available at: <https://deepdives.in/when-our-bodies-become-data-where-does-that-leave-us-906674f6a969>

128 Salim, M. (2021), *How women from marginalised communities navigate online gendered hate and violence: Re-thinking legal-institutional approaches to sexist hate speech in India*, IT for Change

129 Minj, N. (2024), *India’s queer youth find both hope and despair online*, Scroll. Available at: <https://amp.scroll.in/article/1063618/indias-queer-youth-find-both-hope-and-despair-online>

130 Hussain, E. (2021), *Sulli Deals: Online Platforms Fuel Cyber Sexual Violence Against Muslim Women*, BehanBox. Available at: <https://behanbox.com/2021/07/18/sulli-deals-online-platforms-fuel-cyber-sexual-violence-against-muslim-women/>; Hussain, E. (2022), *Bulli Bai: How State Inaction Has Emboldened Cyber Harassment of Muslim Women*, BehanBox. Available at: <https://behanbox.com/2022/01/06/bulli-bai-how-state-inaction-has-emboldened-cyber-harassment-of-muslim-women/>

131 Section 354 (assault or criminal force to woman with intent to outraging her modesty), Section 354A (sexual harassment and punishment for sexual harassment), Section 354C (voyeurism), Section 354D (stalking), Section 499 (defamation), Section 292 (sale, etc., of obscene books, etc.), Section 506 (punishment for criminal intimidation), and Section 509 (word, gesture or act intended to insult the modesty of a woman)

132 Section 66C (punishment for identity theft), Section 66D (impersonation), Section 66E (punishment for violation of privacy), Section 67 (punishment for publishing or transmitting obscene material in electronic form), Section 67A (punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form), Section 67B (punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form)

133 Case No. GR: 1587/2017, order dated 07.03.2018, Court of Judicial Magistrate

134 Section 354A (sexual harassment), Section 354C (voyeurism), Section 354D (stalking) and Section 509 (insulting the modesty of a woman) of the IPC

135 Section 66E (violation of privacy), Section 66C (identity theft), Section 67 (electronically publishing obscene material) and Section 67A (electronically publishing material containing sexually explicit act) of the IT Act

The judgment is noteworthy for its lack of moral policing. The court framed the central issue as a violation of the woman's consent, who voluntarily shared her images with the man, who later disclosed the images without her consent on a website because she refused to date him. Although the judge's rhetorical use of the term 'virtual rape' to describe the impact of non-consensual disclosure of intimate images is critiqued for lack of precision as per criminal law standards, the order is commendable for bridging the gap between online and offline violations that shape our understanding of actionable harm. While the direct impact is often framed as a privacy violation, a feminist approach that is cognisant of victims' lived experiences takes into account how such threats of privacy violations lead to offline consequences too - of restrictions on autonomy due to patriarchal control within the natal family and/or the violation of bodily integrity by the accused through coercive sex/relationship.¹³⁶

However, *Animesh Boxi* is an outlier. An extensive review of reported TF-GBV cases during 2015-21 suggests that there are significant gaps in access to justice. TF-GBV is routinely treated as less serious than physical offences – less rigorous bail conditions or inadequate sentencing - which indicates courts' failure in conceiving the continuum of online-offline offences, where the threat of commission of online offences like NCDII (which constituted 75% of reported cases) is often leveraged by perpetrators to commit offline offences like non-consensual sex. A 'protectionist' approach is routinely adopted by courts towards survivors; they are frequently morally policed for violating patriarchal notions of sex, gender and sexuality, which poses a chilling effect to survivors' recourse to the law.¹³⁷

Maharaja v. Inspector of Police (2024),¹³⁸ where the accused allegedly sexually assaulted the gay or bisexual male survivor and extorted valuables under threats of fatal violence¹³⁹ after meeting via Grindr, exemplifies the protectionist approach vis-à-vis LGBTI survivors.

During bail proceedings, the Madras High Court made extraneous observations to the effect that such apps are used for "illegal activities" and recommended that the investigating officer submit a report to the Ministry of Electronics and Information Technology (MEITY) to take suitable action against the app, including blocking the app as per law. The judge issued a disclaimer that the reference to illegal activities must not be construed as a comment on the sexuality of gay or bisexual men, but as a comment on the app's promotion of "*prurient purpose and the sexual interest of the parties*". The court granted bail to the accused on the condition that he shall permanently stop using such apps and surrender his mobile phone to the investigating officer. However, efforts to block the app would be unlawful as facially neutral measures which disproportionately impact LGBTI people violate Article 15's prohibition of gender-based discrimination and Article 21's standards of legitimacy and proportionality.¹⁴⁰

In the context of dating apps, facilitating recourse to adequate remedies for survivors can ensure a balance between security and autonomy. Although *Maharaja* warranted only the application of Section 387 of the IPC, threats of disclosing sexual orientation and/or engaging in consensual sex with a person

136 Bhandari, V. and Kovacs, A., (2021), *What's sex got to do with it? Mapping the impact of questions of gender and sexuality on the evolution of the digital rights landscape in India*, Internet Democracy Project, pages 69-72

137 Rajkumar, M. and Sen, S. (2023), *The judiciary's tryst with online gender-based violence: An empirical analysis of Indian cases and prevalent judicial attitudes*, IT for Change

138 CRL OP (MD) No. 13287/2024, order dated 13.08.2024, paras. 3,6

139 The FIR records Section 294 (obscene acts and songs), Section 377 (unnatural offence), Section 387 (putting person in fear of death or of grievous hurt, in order to commit extortion) and Section 506 (punishment for criminal intimidation) of the IPC

140 *Lt. Col. Nitisha & Ors. v. Union of India*, 2021 SCC Online SC 261, paras. 54-66, 88-97

of the same sex to extort gay and bisexual men is highly prevalent.¹⁴¹ A limited reliance on Section 388 (extortion by threat of accusation of offence punishable with death or imprisonment for life) or Section 389 (putting person in fear or accusation of offence, in order to commit extortion) – which explicitly penalise disclosure of engaging in oral/anal sex to extort as a special offence with harsher punishment – can contextualise this gendered violence, instead of treating it as a property-related offence. Although the police are unaware or unwilling to invoke Sections 388-389, on survivors' pleas, between 201 and 2018 trial courts have framed charges to prosecute offenders for putting gay or bisexual men in fear of accusation of committing the 'offence' of oral/anal sex to commit extortion.¹⁴² As Section 377 was read down to exclude consensual oral/anal sex from the scope of criminalisation, the viability of Sections 388-389, IPC in offering a remedy to survivors between 2018-24 must be evaluated.

Although Indian courts do not offer clarity in this regard, the *Wolfenden Committee Report* (1957) in the UK offers guidance on the identical law's rationale. During a comprehensive review of the validity of criminalising homosexuality under the *Sexual Offences Act, 1956*, British lawmakers observed:

“...English law has recognised the special danger of blackmail in relation to buggery and attempted buggery in Section 29 of the Larceny Act, 1916.

We know that blackmail takes place in connection with homosexual acts. There is no doubt also that a good many instances occur where from fear of exposure men lay themselves open to repeated small demands for money or other benefit...Most victims of the blackmailer are naturally hesitant about reporting their misfortunes to the police, so that figures relating to prosecutions do no afford a reliable measure of the amount of blackmail that actually goes on...

*...We have found it hard to decide whether the blackmailer's primary weapon is the threat of disclosure to the police, with the attendant legal consequences, or the threat of disclosure to the victim's relatives, employer or friends, with the attendant social consequences. It may well be that the latter is the more effective weapon...*¹⁴³

Despite the decriminalisation of sex between consenting adults under Section 377, the social consequences of disclosure of sexual orientation and/or engaging in oral/anal sex endure for gay/bisexual men, rendering them at high risk of extortion. Thus, in order to do complete justice to gay/bisexual male survivors of blackmail, it is critical for trial courts to factor the underlying purpose of Sections 388-389,

141 Parussini, G. (2015), *Online dating fuels new danger for gays in India*, The Wall Street Journal. Available at: <https://www.wsj.com/articles/online-dating-fuels-new-danger-for-gays-in-india-1436392001>; Dore, B. (2015), *How Section 377 is being exploited by the police and blackmailers to extort gay men*, The Caravan. Available at: <https://caravanmagazine.in/vantage/how-section-377-became-payday-extortionists-and-police-alike>; Ansar, S. (2018), *Behind Grindr lies a world of sexual assault, rape and blackmail*, The Print. Available at: <https://theprint.in/featured/behind-grindr-india-lies-a-world-of-sexual-assault-rape-and-blackmail/76538/>; Sharma, Y. (2018), *Meet the lawyer helping men exploited by blackmailers and the police under Section 377*, Vice. Available at: <https://www.vice.com/en/article/meet-the-lawyer-helping-men-exploited-by-blackmailers-and-police-under-377/>; Sarathi Biswas, P. (2023), *Pune sees a rise in cases of extortion targeting gay men*, The Indian Express. Available at: <https://indianexpress.com/article/cities/pune/rise-extortion-cases-targeting-gay-men-8900921/>; *Gang busted for cheating over 50 youths using gay dating app, 4 arrested* (2025), Free Press Journal. Available at: <https://www.freepressjournal.in/pune/pune-gang-busted-for-cheating-over-50-youths-using-gay-dating-app-4-arrested>

142 Sanap, S. (2016), *Using criminal law to mitigate the effects of Section 377*, Gaylaxy. Available at: <https://www.gaylaxymag.com/exclusive/using-criminal-law-to-mitigate-the-effects-of-section-377/>

143 *Report of the Committee on Homosexual Offences and Prostitution* (1957), Scottish Home Department, pages 39-41

IPC in adjudicating these offences as gender-based violence and informing their analysis on conviction and sentencing. However, as Section 308 (6-7) [extortion] of the BNS erases corresponding provisions, prosecuting offenders after July 2024 does not permit a gender-based and intersectional analysis and risks downgrading such offences as property-centric.

The duty of Central/State governments and UTs to prevent TF-GBV must be balanced with LGBTI persons' right to information, building solidarity and finding community in digital spaces. The appropriate response is to promote safety through digital literacy with respect to online risks, active engagement of users in the design of initiatives aimed at fostering online safety and requiring businesses to identify, prevent and mitigate risk to vulnerable groups when using digital media.¹⁴⁴

Hate speech based on SOGIESC

The absence of any reported cases of TF-GBV against LGBTI persons in the aforesaid study period of 2015-21 does not mean that LGBTI persons did not suffer violations in the digital sphere. Instead, it reflects the gaps in laws to remedy SOGIESC-related violations. In 2023, in response to a petition that highlighted hate speech on social media by a support group for LGBTI persons, the Kerala High Court ordered police officials and government authorities to take measures to prevent online misinformation and hate speech against LGBTI persons, by highlighting its ramifications in the offline world. The petition has been disposed of after 2 FIRs were registered against the perpetrators under instructions of the court.¹⁴⁵ However, the order does not reveal the provisions of law invoked in the case.

As LGBTI Indians are targeted four times as often as heterosexual and cisgender men and women with respect to identity-based harms, privacy violations, harassment and NCDII in the online sphere,¹⁴⁶ legal frameworks must adapt to gender-based and intersectional perspectives to prevent, punish and remedy the associated harms. The offences relating to 'hate speech' are governed by a range of legislations relating to speech covering religion-based enmity,¹⁴⁷ political speech,¹⁴⁸ caste-based verbal abuse,¹⁴⁹ etc., which can potentially result in stigma, discrimination and/or violence towards an individual and perpetuate structural inequalities of social, economic and political marginalisation of the protected group. However, no equivalent legislation explicitly recognises gender-based hate speech that can be invoked by women and LGBTI people. In this regard, the Law Commission of India (LCI) has noted:

144 General Comment No. 20: Implementation of rights of the child during adolescence to the Convention on Rights of the Child (CRC), CRC/C/GC/20 (2016), para 48

145 *Daya Gayathri & Ors. v. State of Kerala & Ors*, WP (C) No. 40030/2023, orders dated 30.11.2023, 21.12.2023 and 09.01.2024

146 Kovacs, A. (2024), *The cost of transgression: Gender, sexuality and online violence in India*, Supporting a Safer Internet Paper No. 5, Centre for International Governance Innovation

147 Section 153A (Promoting enmity between different groups on ground of religion, etc. and doing acts prejudicial to maintenance of harmony), IPC

148 Section 8 (Disqualification on conviction for certain offences), Section 123 (Corrupt practices) and Section 125 (Promoting enmity between classes in connection with election) of the *Representation of the People Act, 1951*

149 Section 7 (Punishment for other offences arising out of 'untouchability') of the Protection of Civil Rights Act, 1955 and Section 3 (Punishment for offences atrocities) of the *Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989*

“Hate speech generally is an incitement to hatred primarily against a group of persons defined in terms of race, ethnicity, gender, sexual orientation, religious belief and the like (Sections 153A, 295A read with Section 298 IPC). Thus, hate speech is any word written or spoken, signs, visible representations within the hearing or sight of a person with the intention to cause fear or alarm, or incitement to violence.”¹⁵⁰

The LCI’s reference to Section 153A (promoting enmity between different groups), IPC with reference to gender and sexual orientation-based hate speech is instructive. In addition to grounds of religion, race, place of birth, residence, language, caste or community, the provision penalises hate speech on “any ground whatsoever” – which raises the question whether the law is capable of a gender-based and intersectional interpretation to remedy hate speech against women and LGBTI people. Although reported cases do not reveal application of the law to hate speech on grounds which are not explicitly identified, the Supreme Court has interpreted Section 153A (1)(a-b) as covering hate speech on the grounds of SOGIESC in *Amish Devgan v. Union of India* (2021).¹⁵¹

This interpretation can facilitate recourse to the law for LBT women as they face a disproportionate burden of online misogyny, homophobia and transphobia.¹⁵² In this context, ‘misgendering’¹⁵³ transgender persons is conceivably liable for prosecution under Section 153A, IPC/Section 196, BNS as this form of hate speech reflects malice on behalf of the perpetrator,¹⁵⁴ resulting in adverse psychological impact on victims.¹⁵⁵ In *Apsara Reddy v. Joe Michael Praveen & Anr.* (2024),¹⁵⁶ the Madras High Court affirmed the view that gender-critical speech is an actionable offence.

In the context of privacy-related violations and gender-based harassment in digital spaces, survivors are entitled to demand that intermediaries (search engines, social media channels, gaming platforms, etc.) take action without having to seek judicial remedies, as per the *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021* (‘IT Rules’).¹⁵⁷ A gender-based and intersectional application of the IT Rules suggests intermediaries must be receptive to grievances of women and LGBTI survivors, without compelling them to resort to judicial remedies.

150 *Hate Speech* (2017), Report No. 267, Law Commission of India, para. 6.31

151 (2021) 1 SCC 1, para. 78

152 *Forging a survivor-centric approach to online gender-based violence* (2023), IT for Change

153 Sehgal, D. and Nambiar, L. (2024), *Online gender-based violence on short form video platforms: An enquiry into platform policies and safeguards*, Centre for Internet and Society

154 *Amish Devgan v. Union of India*, (2021) 1 SCC 1, para. 96

155 *Annamalai v. V. Piyush*, 2024 SCC Online Mad 186

156 2024 SCC Online Mad 1

157 *Mrs. X v. Union of India*, 2023 DHC 2806

3.2 Protection of LGBTI persons from domestic violence

Intimate partner violence

Intimate partner violence against transgender, including hijra persons, is a manifestation of hetero-patriarchal norms, wherein the spectrum of violence ranges from verbal abuse with respect to transgender women's lack of capacity to reproduce, masculine partners inflicting sexual violence on feminine partners in same or mixed gender relationships and child sexual abuse within the family against gender non-conforming minors.¹⁵⁸ As a consequence, the emotional, verbal, economic, physical and sexual abuse often leads to the abandonment of transgender, including hijra persons, without any recourse to law or support systems.¹⁵⁹



In *Vithal Khatri v. Sagar Kamble @ Sakshi Khatri* (2023), the Bombay High Court declared that transgender women who do not possess a certificate of identity as per the TPA but have undergone gender affirming surgery can seek redressal against intimate partner violence. A harmonious reading of Section 2(a) of the *Protection of Women from Domestic Violence Act, 2005* (DV Act) and *NALSA* led the court to conclude that transgender women survivors are covered by 'aggrieved women'.¹⁶⁰

At present, the Supreme Court is seised of the appeal,¹⁶¹ wherein the husband contends that the DV Act only covers biological women, or alternatively, transgender women's recourse to the DV Act must be limited on the basis of a certificate of identity.¹⁶² However, the articulation of anti-sex stereotyping principle in *Union of India & Ors. v. Lt. Commander Annie Nagaraja* (2020)¹⁶³ and the right of transgender and intersex persons in heterosexual relationships to solemnise and register marriages as per *Supriyo Chakraborty*¹⁶⁴ requires courts to affirm that transgender and intersex women are entitled to remedies for intimate partner violence under the DV Act in particular and VAW laws in general.

Although the Supreme Court has affirmatively settled that transgender persons must not be forced to undergo hormonal therapy, sterilisation or any other medical procedure for legal recognition of gender,¹⁶⁵ District Magistrates are unable or unwilling to issue certificates of identity due to inconsistency between

158 *Violence in intimate and family relationships of men who have sex with men, transgender women and hijras and its impact on HIV vulnerability in India* (2015), India HIV/AIDS Alliance

159 *Study on Human Rights of Transgender as a Third Gender* (2017), National Human Rights Commission, pages 49, 53

160 WP No. 4037/2021, order dated 16.03.2023

161 *Vithal Manik Khatri v. Sagar Sanjay Kamble @ Sakshi Vithal Khatri*, SLP (Crl) Diary No. 34425/2023, order dated 30.10.2023

162 Sebastian, S (2023), *Can trans woman invoke Domestic Violence Act? Supreme Court to consider*, Livelaw. Available at: <https://www.livelaw.in/top-stories/supreme-court-set-to-examine-whether-transgender-woman-can-file-complaint-and-seek-maintenance-under-domestic-violence-act-241441>

163 (2020) 13 SCC 1, paras. 83-84

164 *Supriyo Chakravorty & Ors. v. Union of India*, 2023 SCC Online SC 1348, paras. 365 (m-n), 533

165 *Supriyo Chakraborty* (2023), paras. 364(a)(viii) and 564(xi-xii)

the statutory condition of surgery¹⁶⁶ and the rules' acceptance of counselling.¹⁶⁷ In this context, limiting transgender women's recourse to VAW laws based on a certificate of identity essentialises biological sex, which violates Article 14¹⁶⁸ as their conformity to women's physiology bears no rationale for prosecuting a spectrum of gender-based violence beyond peno-vaginal offences. **As the harm of denying preventive, punitive and remedial measures to transgender women survivors is far outweighed by proposed benefits of requiring them to produce a certificate of identity under a flawed legal gender recognition system, a policy to limit rights of transgender persons due to the lack of a certificate of identity violates the doctrine of proportionality.**

All courts are mandated to follow *Sakshi Khatri* as High Court decisions on central laws are applicable on a national level.¹⁶⁹ However, the Bombay High Court's reliance on proof of gender-affirming care must not be construed as derogating from the survivor's self-determined gender per se. Rather, it must be appreciated as the best evidence available to the transgender survivor in the circumstances. As courts are obliged to adjudicate rights of transgender litigants in accordance with their self-determined gender, this can be ascertained as follows:

- a certificate of identity issued under the TPA;
- official identity documents (Aadhaar, Voter's ID, ration card etc.);
- an affidavit of self-declaration.¹⁷⁰

The grossly inadequate framework of the TPA is conceivably a crucial determinant in informing transgender women's decision to seek remedies under VAW laws. The DV Act provides for an inter-sectoral response to the needs of survivors by mandating coordination between ministries/departments of law, home affairs, health and human resources.¹⁷¹ This provides wide-ranging relief through protection orders,¹⁷² residence orders¹⁷³ and monetary relief.¹⁷⁴ Regrettably, these aspects are glaringly missing from the TPA. Instead, Section 18 (offences and penalties) of the TPA is an omnibus provision which penalises acts of forced labour, denial of access to public spaces, forced removal from a residence or village and gender-based violence with a uniform sentence ranging from 6 months to 2 years and a fine.

The criminal justice system already lacks precision in sentencing guidelines by failing to account for the nature and gravity of the offence, aggravating factors, recidivism,¹⁷⁵ among other factors, to ensure adequate deterrence of gender-based violence in society. Section 18, TPA compounds these pre-existing inequalities by violating the principle of proportionality in sentencing. Although tougher sentencing is

166 Section 7 (change of gender), TPA

167 Rule 6 (procedure for issue of a certificate of identity for change of gender) of the *Transgender Persons (Protection of Rules)*, 2020 ('TP Rules')

168 *State of West Bengal v. Anwar Ali Sarkar*, AIR (1952) SC 75

169 *Kusum Ingots & Alloys Ltd. v. Union of India*, (2004) 6 SCC 254, paras. 21-22

170 *Sensitisation Module for the Judiciary on LGBTQIA+ Community* (2022), Supreme Court of India. Available at: <https://ecommitteesci.gov.in/document/sensitisation-module-for-the-judiciary-on-lgbtiqa-community/>, page 86

171 Section 11 (Duties of government), DV Act

172 Section 18 (Protection orders), DV Act

173 Section 19 (Residence orders), DV Act

174 Section 20 (Monetary relief), DV Act

175 *The Committee on Reforms of Criminal Justice System* (2003), Ministry of Home Affairs, Government of India, chaired by Dr. Justice VS Malimath

not proven to lower rates of violent crimes against vulnerable groups,¹⁷⁶ proportionality in sentencing for gender-based violence against all victims/survivors must be a minimum standard in law.

Until the *Criminal Law (Amendment) Act, 2013* (CLA, 2013), violence against women beyond the purview of peno-vaginal rape was largely invisibilised and/or penalised leniently because these offences ostensibly did not impinge on “family honour”.¹⁷⁷ Section 18, TPA is evocative of this patriarchal valuation of crime and punishment based on reproductive capacity of transgender women. This not only ignores that trans-masculine persons can bear the consequences of unwanted pregnancy due to peno-vaginal offences but also merits condemnation in criminal justice systems founded on the rule of law.

In this context, Rule 11(4) [provisions for non-discrimination] of the TP Rules is instructive in bridging the gap with respect to transgender survivors. The rule states:

“*The appropriate government shall be responsible for the supervision of timely prosecution of individuals charged under Section 18 of the Act, or under any other law for similar offences committed against transgender persons.*”

The provision draws a legal equivalence between the acts of “physical abuse, sexual abuse, verbal and emotional abuse and economic abuse” under Section 18(d) of the TPA with ‘any other law for similar offences’. In particular, the stipulation of these offences corresponds to the enumeration of domestic violence under Section 3 (definition of domestic violence) of the DV Act. Therefore, **Rule 11(4), TP Rules appears to explicitly sanction the legal position that transgender women can seek legal redress under the DV Act in particular and VAW laws in general.** Although a judicial interpretation of this provision is yet untested, a textual and purposive reading of the provision suggests the interpretation offered here to be legally sustainable. Hence, protection officers, lawyers and courts must facilitate recourse to remedies for transgender women under the DV Act.

Domestic violence (including dowry-related offences)

The reviewed cases of dowry-related cruelty against transgender and intersex wives below merit attention against a backdrop of strategic application of civil and/or criminal law, given that the DV Act¹⁷⁸ authorises courts to frame criminal charges¹⁷⁹ if the facts concern dowry.

In *Somnath Bhakat v. State of Bihar* (2017)¹⁸⁰, in an anticipatory bail application that was rejected by the Patna High Court, the FIR recorded the woman’s allegations of torture by the husband and her in-

176 Segura, L. (2012), *Do hate crime laws do any good? Against equality: Prisons will not protect you*, Edited by Ryan Conrad, pages 185-192

177 Agnes, F. (2002), *Law, ideology and female sexuality: Gender-neutrality in rape law*, Economic and Political Weekly

178 Section 31(3) (penalty for breach of protection order)

179 Section 304B (dowry death) and Section 498A (husband or relative of husband of a woman subjecting her to cruelty), IPC and the *Dowry Prohibition Act, 1961* (DPA)

180 Criminal Miscellaneous Petition No. 8569/2017, order dated 23.08.2017

laws due to refusal to meet dowry demands and her subsequent eviction from the matrimonial home.¹⁸¹ During the pendency of the application for anticipatory bail, the matter was referred to a mediation centre, when the husband revealed that he did not intend to cohabit with the wife on account of her being transgender. However, the wife claimed that the husband and the in-laws had mistreated her since the solemnisation of the marriage, and he was falsely relying on her gender to evade his marital duties. The order in this case does not detail whether the wife disputed the husband's contention on her gender because she is a cisgender woman or that she identifies as a (transgender) woman.

The wife's eviction from her matrimonial home clearly violates the right to reside in a shared household under the DV Act,¹⁸² whether or not she holds any right, title or interest in the residential property.¹⁸³ In case the shared household is registered in the right, title or interest of the wife's in-laws, courts are obliged to harmonise the wife's right to residence with the in-laws' right to property.¹⁸⁴

In its anxiety to prevent "misuse" of the law under Section 498A, IPC in 2017, the Supreme Court authorised District Legal Services Authorities (DLSA) to constitute Family Welfare Committees (FWC), which were empowered to seek a settlement between parties and file for closure of proceedings.¹⁸⁵ As this mechanism conflicted with the settled position, wherein only High Courts are empowered to quash non-compoundable offences in their extraordinary jurisdiction on settlement between parties,¹⁸⁶ the Supreme Court set aside the directions on FWC in 2018.¹⁸⁷ As borne out by *Somnath Bhakat*, courts must be vigilant against referral of wives' complaints of acute domestic violence to mediation, as such extra-judicial processes trade prevention of domestic violence with 'family welfare'.

In *Ankit Kumar @ Hitesh v. State of Haryana* (2021),¹⁸⁸ related to a bail application, the FIR recorded allegations that the deceased intersex woman was murdered by her husband and in-laws on the natal family's failure to meet repeated dowry demands.¹⁸⁹ The husband contended that he was unaware of her intersex status before marriage and that the woman purportedly died by suicide on account of the distress arising from gender dysphoria. The medical report corroborated that the deceased woman was intersex and concluded that the death occurred as a consequence of strangulation and ruled out death by suicide. The prosecution sought rejection of the bail application as the court must presume the husband's culpability if the married woman died within six months of the marriage.¹⁹⁰ The Punjab and Haryana High Court observed that the presumption of guilt of the accused will operate during trial on the determination of facts and ultimately granted bail on the ground of necessity to de-congest prisons due to COVID-19.

181 The FIR registered charges under Section 498A and Section 34 (acts done by several persons in furtherance of common intention), IPC read with Section 3 (penalty for giving or taking dowry) and Section 4 (penalty for demanding dowry) of the DPA

182 Section 17 (right to reside in shared household), DV Act

183 *Satish Chander Ahuja v. Sneha Ahuja*, (2021) 1 SCC 414

184 *S. Vanitha v. Deputy Commissioner*, 2020 SCC Online SC 1023

185 *Rajesh Sharma v. State of Uttar Pradesh*, (2018) 10 SCC 472

186 *Gian Singh v. State of Punjab*, (2012) 10 SCC 303; *Narinder Singh v. State of Punjab*, (2014) 6 SCC 466

187 *Social Action Forum for Manav Adhikar & Anr. v. Union of India*, (2018) 10 SCC 443

188 CRM-M-32639/2021, order dated 18.11.2021

189 The FIR registered charges under Section 304B (dowry death), Section 34 and Section 120B (punishment for criminal conspiracy), IPC

190 Section 113A (presumption as to abetment of suicide by a married woman), IEA

In *Vishwanathan Krishna Murthy v. State of Andhra Pradesh* (2025),¹⁹¹ the husband's family contested charges of dowry harassment¹⁹² in a quashing petition filed by the transgender wife/daughter-in-law. The matrimonial family raised doubts about her gender due to her inability to conceive and sought a declaration of non-maintainability of her complaint. However, the Andhra Pradesh High Court rejected these submissions, observing that her self-determined gender and right to solemnise a heterosexual marriage amply clarified that transgender women are entitled to recourse for dowry-related violence. The court concluded that the denial of legal remedies to transgender survivors based on gender-critical beliefs on reproductive capacity violates Article 14, Article 15 and Article 21.

However, *Vishwanathan Krishna Murthy* represents one step forward for transgender survivors in particular but two steps back for survivors of cruelty in general, since the court quashed the criminal proceedings as the FIR did not unambiguously reveal dowry-related charges. The explanation to Section 498A (husband or relative of husband of a woman subjecting her to cruelty), IPC is notable in this regard: cruelty means (a) acute domestic violence (including acts that are likely to drive a woman to commit suicide) or (b) dowry-related harassment. The FIR recorded the matrimonial family's issuance of death threats to the transgender woman for seeking to cohabit with her husband, who abandoned her within three months of marriage. This *prima facie* allegation of acute domestic violence was sufficient for the court to refuse quashing the case and permit trial. Although, due to a common misconception within the criminal justice system that Section 498A, IPC is limited only to dowry-related harassment, the police routinely coerce wives to add charges of dowry as a precondition to register FIRs on acute domestic violence. In court, when allegations of dowry are not borne out by evidence, such cases are erroneously deemed as "false" and women are deemed as "liars", even though such embellishment of facts occurs at the behest of the police.¹⁹³

At the pre-trial stage in Section 498A, IPC/ Sections 85-86, BNS cases, if courts are of the opinion that the case does not unambiguously reveal ingredients of dowry-related offences, they can resort to procedural checks and balances in the criminal justice system to ensure complete justice to aggrieved women. An interplay of Section 216 (court may alter charge), Section 221[1-2] (where it is doubtful what offence has been committed) and Section 464 (effect of omission to frame, or absence of, or error in, charge) of the CrPC/Sections 239, 244 and 510, BNSS ensures a fine balance between a fair trial for the accused with the survivor's recourse to law. As survivors have a right to be heard and contest quashing petitions filed by the accused,¹⁹⁴ wives' private advocates should articulate these procedural safeguards to save the proceedings.

The manifestation of dowry-related cruelty in the above cases attests to the social recognition of transgender and intersex women as women by matrimonial families, which routinely deny knowledge about the gender or intersex status of female partners/wives as a pretext to evade their obligations.

As a consequence, courts must review disputes over female partner/wife survivors' gender or intersex status with heightened scrutiny, as *Sakshi Khatri, Ankit Kumar @ Hitesh, Somnath Bhakat* and *Vishwanath Krishna Murthy* attest to the fact that male partners/husbands raise these disputes to partially or completely diminish their culpability under VAW laws. Although courts have refused to direct sex or

191 Criminal Petition No. 6783, 7064 and 6830/2022, order dated 16.06.2025

192 The FIR recorded Section 498A and Section 34 of the IPC read with Sections 3-4 of the DPA

193 Agnes, F. (2017), *Are Women Liars? Supreme Court's judgment ignores lived reality of married women*, Economic and Policy Weekly, Vol. 52, Issue No. 35. Available at: <https://www.epw.in/engage/article/women-are-liars-says-supreme-court>

194 *JK International v. State (Govt. of NCT of Delhi)*, (2001) 3 SCC 462

gender determination of wives as a rule,¹⁹⁵ the Madhya Pradesh High Court allowed this procedure in a matrimonial case to ascertain whether the husband's desertion of the wife was 'reasonable' and supported by evidence.¹⁹⁶ The court added a vital caveat – that if this practice is employed in unwarranted circumstances by male partners/husbands to “harass, scandalise or demoralise” female partners/wives, heavy costs for such malpractice would be imposed.

As the phenomenon of dowry is a manifestation of distinct inequality within heterosexual relationships, Section 498A, IPC/Sections 85-86, BNS do not appear to require victim-neutrality. However, trans-masculine persons' testimonies of acute domestic violence in forced 'heterosexual' marriages¹⁹⁷ demand novel approaches to the law. **A gender-based and intersectional application of this provision must focus on the structures of power, rather than identities per se. This means that the law must not be read as delineating only women survivors; rather, the provision must also cover trans masculine survivors to effectively regulate the gendered dynamics of power, domination and insubordination in acute domestic violence.**¹⁹⁸ In *X v. Principal Secretary, Health and Family Welfare Department* (2022),¹⁹⁹ the Supreme Court's clarification that all persons apart from cisgender women shall receive access to safe abortions under the *Medical Termination of Pregnancy Act, 1971* sets the precedent for this interpretation.

Therefore, it is critical that stakeholders of the criminal justice system apply dowry-related laws in favour of offering protection to transgender and intersex wives based on *Vishwanathan Krishna Murthy, Annie Nagaraja, Supriyo Chakraborty, Kusum Ingots & Alloys Ltd. v. Union of India*, (2004) and Rule 11(4), TPR. In addition, trans-masculine survivors can be covered by adopting a gender-based and intersectional interpretation of dowry-related laws on the basis of *Principal Secretary*.

Conflict with the natal family

When enacted in 2005, the DV Act defined a respondent as any adult male person in a domestic relationship with a woman, against whom she has sought relief under the law.²⁰⁰ In *Hiral P. Harsora v. Kusum Narottamdas Harsora* (2016),²⁰¹ in a matter concerning a dispute between the female relatives of the husband with his wife and daughters, the Supreme Court struck down the words 'adult male', thereby making the respondent gender-neutral, i.e., a woman can seek redress for domestic violence against any person within a family.

Harsora is blind to the history of feminist interventions in the law-making process that articulated the rationale for the law in the statement of objects and reasons of the statute, which contextualised the epidemic of domestic violence as a consequence of the structural inequalities between men and women.

195 *Archana Kumari v. State of Bihar*, Criminal Miscellaneous No. 42950/2019, order dated 05.08.2019; Thapliyal, N. (2024), *Delhi High Court refuses to entertain husband's plea to determine if wife is transgender*, Livelaw. Available at: <https://www.livelaw.in/high-court/delhi-high-court/delhi-high-court-husband-allege-wife-transgender-273381>

196 *Surbhi Trivedi v. Gaurav Trivedi*, Misc. Petition No. 4820/2018, order dated 04.10.2019

197 *Understanding violence against queer women and transmasculine persons in forced marriages: An exploratory study from India* (2025), Nazariya: A queer feminist resource group

198 Fredman, S. (2016), *Intersectional discrimination in EU gender equality and non-discrimination law*, European Commission, pages 35-36

199 2022 SCC Online SC 1321, para. 11

200 As per Section 2(q) of the DV Act, in addition to the husband or male partner, women can seek action against their relatives for domestic violence

201 (2016) 10 SCC 165

The law provided for the respondent as an adult male based on domestic and international statistical evidence that men commit the vast majority of acts of gender-based violence against women.²⁰² The feminist movement and lawmakers recognised that women face domestic violence from within natal and matrimonial families. However, framing the respondent as an adult male person was an informed decision, since providing for a gender-neutral respondent would lead to the undesirable and unintended consequence of female relatives of male perpetrators weaponising the law against wives or female partners.²⁰³

An uncritical approach to gender-neutrality can exacerbate pre-existing inequalities of given social and economic conditions of women, by exposing them to an unwarranted position as duty-bearers to men under laws on maintenance, gender-based violence and other gender-specific measures that are framed as special measures for women under Article 15(3) of the Constitution. As Indian law has advanced from the standard of formal equality of seeking inclusion in law to substantive equality of redressing systemic discrimination,²⁰⁴ a policy of gender-neutrality without application of mind would harm women's interests. The adoption of such measures by legislative, judicial or administrative authorities must be discouraged, especially in the context of campaigns of patriarchal subversion of feminist laws.²⁰⁵ In fact, GR28 (CEDAW) explicitly cautions member states from adopting gender-neutral laws, policies or practices as they perpetuate structural inequality between men and women.²⁰⁶

In *Supriyo Chakraborty*, the court's analysis on 'gender-neutrality' is notable:

“Gender neutral interpretation, much like many seemingly progressive aspirations, may not really be equitable at times and can result in women being exposed to unintended vulnerability, especially when genuine attempts are made to achieve a balance, in a social order that traditionally was tipped in favour of cis-heterosexual men. The purpose of terms like ‘wife,’ ‘husband,’ ‘man,’ and ‘woman’ in marriage laws (and other laws on sexual violence and harassment as well) is to protect a socially marginalised demographic of individuals...

Furthermore, if provisions ... are to be construed as gender neutral ... it would be possible for a cis-woman's husband to file a case or create a narrative to manipulate the situation. Gender neutral interpretation of existing laws, therefore, would complicate an already exhausting path to justice for women and leave room for the perpetrator to victimise them. A law is not merely meant to look good on paper; but is an effective tool to remedy a perceived injustice, addressed after due evaluation about its necessity. A law which was consciously created and fought for by women cannot, therefore, by an interpretive sleight be diluted.”²⁰⁷

202 *Violence that is not gender-neutral* (2016), Centre for Law and Policy Research. Available at: <https://clpr.org.in/blog/violence-that-is-not-gender-neutral/>

203 *Bringing Rights Home: Review of the Campaign for a Law on Domestic Violence* (2009), Indira Jaising, Economic and Political Weekly, Vol. 44, Issue No. 44. Available at: <https://www.epw.in/journal/2009/44/review-womens-studies-review-issues-specials/bringing-rights-home-review-campaign>

204 *Lt. Col. Nitisha* (2021), paras. 54-66, 88-97

205 The submissions of Men Welfare Trust and Hridayda in *RIT Foundation v. Union of India*, 2022 SCC Online Del 1404, paras. 13-16

206 General Recommendation No. 28 on the core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, para. 16

207 *Supriyo Chakraborty* (2023), paras. 510-511

The critique that gender-neutrality in VAW laws will re-victimise women survivors is borne out by the criminalisation of ‘giving or taking dowry’ under Section 3 of the DPA. As the admission of giving dowry would expose women survivors and natal families to criminal liability, this not only leads to a chilling effect on seeking recourse to law for dowry-related offences but emboldens male perpetrators and matrimonial families to file counter-complaints to ‘settle’ the matter. However, in recognition of the gendered imbalance of power in heterosexual relationships, courts have applied victim-centric provisions of the DPA beneficially to exempt women survivors and natal families from prosecution for ‘giving dowry’.²⁰⁸

In *Chinmayee Jena @ Sonu Krishna Jena v State of Odisha & Ors* (2020),²⁰⁹ in a habeas corpus petition by a trans masculine person seeking the release of his female partner from the natal family’s unlawful detention, after directing the woman to be set at liberty, the Orissa High Court issued a *suo moto* observation that the DV Act would govern the partners. The implication of reading Section 2(q) of the law to include trans masculine persons as ‘respondents’ leads to unwarranted consequences of casting them in the role of violent masculinity.

However, a critical mass of evidence establishes that LGBTI persons are more likely to be victims of domestic violence by the natal family, which includes a wide-spectrum of violations ranging from everyday forms of violence (emotional neglect, attribution of ‘sickness’, cessation of education and/or employment opportunities) and acute forms of violence (forced marriages, corrective rape, evictions), for not adhering to stereotypical norms of gender.²¹⁰ Apparent from the habeas corpus litigations between 2018 and 2025 is the glaring lack of an adequate remedy for domestic violence by the natal family,²¹¹ which compels LGBTI survivors to approach High Courts for protection orders.²¹² Although High

208 *A. Balasubramaniam v. State*, (2000) II DMC 218; *Ram Gopal Shah v. State of Jharkhand*, (2009) 2 DMC 848; *Pooja Saxena v. State & Anr.*, 2010 SCC Online Del 3652; *Yashpal Kumar v. Bhola Nath Khanna & Anr.*, 2012 SCC Online Del 1261; *Raj Kumar Mishra v. State of Uttar Pradesh*, 2013 SCC Online All 1019; *Jamaluddin Ansari Azad v. State & Anr.*, 2013 SCC Online Del 6630; *Chitranjan Dev Goel & Ors. v. State*, 2016 SCC Online Del 2130; *Ram Charitra Tiwari v. State of Uttar Pradesh*, 2021 SCC Online All 464

209 Writ Petition No. 57 of 2020, order dated 24.08.2020

210 *Apnon Ka Bahut Lagta Hai (Our Own Hurt Us The Most)*, *Centering Familial Violence in the Lives of Queer and Trans Persons in the Marriage Equality Debate* (2023), National Network of Lesbian, Bisexual, Intersex Women and Trans Persons and People’s Union for Civil Liberties (PUCL). Available at: https://pucl.org/wp-content/uploads/2023/05/Combined_all_2_compressed.pdf; *The nature of violence faced by lesbian women in India* (2003), A Study by Bina Fernandes and Gomathy N.B., Tata Institute of Social Sciences, *Documenting and Mapping Violence and Rights Violations Taking Place in Lives of Sexually Marginalised Women to Chart Out Effective Advocacy Strategies* (2011), Sappho for Equality, *Breaking the Binary: Understanding Concerns and Realities of Queer Persons Assigned Gender Female at Birth Across a Spectrum of Lived Gender Identities* (2013), A Study by LABIA’- A Queer Feminist LBT Collective, *Progressive Realisation of Rights: A Co-Traveller’s Reflections on Crisis Intervention*’ (2022), Suchithra K K, Deeptha Rao V N & Sathyakala K K

211 *Queer Vulnerabilities, The Gendered Contagion: Perspectives on Domestic Violence during Covid-19* (2021), The Centre for Women and Law, Vol. 7, pages 193-254

212 *Mansur Rahman v Superintendent of Police*, 2018 SCC Online Mad 3250; *Sadhana Sinsinwar and Anr. v State & Ors.*, WP (Crl) No. 3005 of 2018, order dated 01.10.2018; *Bhawna and Ors. v State and Ors.*, WP (Crl) No. 1075 of 2019, order dt. 12.04.2019; *Paramjit Kaur and Anr. v State of Punjab and Ors.*, CRWP No. 5042/2020, order dated 20.07.2020; *Sultana Mirza and Anr v State of Uttar Pradesh*, Writ Petition (C) 17394/2020, order dated 02.11.2020; *Poonam Rani and Anr v State of UP and 5 others*, Writ Petition (C) No. 1213 of 2021, order dated 20.01.2021; *S. Sushma & Anr. v Commissioner of Police*, WP No. 7284/2021, order dated 07.06.2021; *Rajni Bala & Anr. v. State of Punjab & Ors.*, WP (Crl.) No. 3791/2021, order dated 22.06.2021; *Srirangam Susan v. State of Odisha*, WP (Crl.) No. 151/2022, order dated 24.11.2022; *Sumayya Sherin v. Director General of Police & Ors.*, WP (Crl) No. 555/2023, order dated 19.06.2023; *Devu G Nair v. State of Kerala & Ors.*, SLP (Crl.) Diary No.5027/2023, order dated 06.02.2023; *Afeefa CS & Sumayya Sherin v. Director General of Police & Ors.*, WP (C) No. 21974/2023, order dated 05.07.2023; *Adithya Kiron v. Station House Officer & Ors*, WP (Crl.) No. 704/2024, order dated 01.07.2024; *Jennifer Thomas v Govt. of NCT of Delhi*, WP (Crl.) No. 1763/2024, order dated 30.05.2024; *Chadalavada Pallavi v. State of Andhra Pradesh*, WP No.

Courts have granted relief in innumerable cases, in a significant minority of cases, courts have accorded undue deference to the natal family and foreclosed relief to LGBTI people on the pretext of preserving the family.²¹³ In *Devu G Nair v. State of Kerala & Ors* (2024),²¹⁴ the Supreme Court endeavoured to remedy this gap by issuing guidelines for High Courts. These guidelines apply a gender-based and intersectional framework to habeas corpus adjudication, thereby directing High Courts to examine the detenu in-chamber, grant interim police protection and prohibit ‘counselling’ survivors to reunite with the natal family, among other measures.

The UNIE-SOGI has recommended that trans masculine persons’ recourse to law must be promoted by amending existing VAW laws to provide for victim-neutrality or introducing fresh laws which respond to the needs of LGBTI survivors.²¹⁵ Since the respondent is gender-neutral under the DV Act, victim-neutrality will have the unintended consequence of framing women as duty-bearers to husbands/male partners, as abundantly cautioned by *Dattatraya Motiram More*, *Supriyo Chakraborty* and GR28. As such, it is desirable that Section 2(a), DV Act cover LGBTI persons based on *Annie Nagaraja*, *Principal Secretary* and Rule 11(4) of the TPR, as this ‘porosity’ can effectively regulate the gendered dynamics of power, domination and insubordination in natal families.

Unless respondent-neutrality is reversed under the DV Act, a fresh law would be the desirable route for adult gay and bisexual male survivors of domestic violence, who possess the remedy of approaching High Courts in the interim period. As far as domestic violence against gay and bisexual male survivors who are minors is concerned, the DV Act’s provisions on protection orders, residence orders and monetary relief are capable of providing them relief as aggrieved women’s dependants.

3.3 Sexual harassment and gender-based discrimination

In public spaces

In *Anamika v. Union of India & Ors* (2018),²¹⁶ the Delhi High Court declared that transgender women could report offences of sexual harassment in public spaces under Section 354A, IPC on the basis of *NALSA*’s principle of self-determination of gender.

In *Renu Pradhan v. State of West Bengal* (2021),²¹⁷ a matter on preventive measures on sexual harassment against women in public transport, the Calcutta High Court allowed a transgender advocate to intervene and recommend preventive measures that are devised with gender-based and intersectional perspectives. The court is monitoring the state’s response to suggestions, including displaying a crisis response and legal aid helpline number within buses and at bus stands, whether separate or inclusive

28297/2024; *M.A. v. Superintendent of Police & Ors.*, HCP No. 990/2025, order dated 22.05.2025

213 *SSG v State of West Bengal*, Writ Petition No. 23120(W) of 2018, order dated 29.01.2019; *Monu Rajput v State*, 2019 SCC Online Del 9154; *Madhu Bala v State of Uttarakhand and Ors*, 2020 SCC Online Utt 276; *Raunak Roy v State of Karnataka*, WP (C) 85 of 2020, order dated 14.12.2020

214 2024 INSC 228

215 Viktor Madrigal Borloz, *The Law on Inclusion* (2021), Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/47/27, para. 81; Viktor Madrigal Borloz, *Practices of Exclusion* (2021), Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/76/152, para 17

216 WP (Crl.) No. 2537/2018, order dated 17.12.2018

217 WPA (P) 198/2021, orders dated 23.07.2021, 12.08.2021

for women and transgender persons. While the court has requested the Additional Solicitor General to examine the desirability of replicating these measures at the national level, there has been no progress on the matter since 2021.

In *M. Srinivasan v. State through Inspector of Police & Anr* (2020),²¹⁸ the Madras High Court declared that transgender women could seek legal redress for sexual harassment in public spaces under Section 4 (penalty for harassment of women) of the *Tamil Nadu Prohibition of Harassment of Women Act, 2002* ('TNPHWA') based on *NALSA* and *Arunkumar*.

In addition to the above decisions, *Annie Nagaraja, Kusum Ingots, Principal Secretary* and Rule 11(4), TPR justify applying Section 354A, IPC/Section 75, BNS to redress sexual harassment against women and LGBTI survivors. As the perpetrator under these provisions is male, a victim-neutral approach to cover LGBTI persons would be a proportionate step. However, with respect to the TNPHWA and other state-level sexual harassment laws, which are coded with respondent neutrality, covering LGBTI survivors must be balanced by providing that male survivors can seek action only against male respondents. This approach would be permissible based on the doctrine of reasonable classification under Article 14.²¹⁹ As sexual harassment is a gendered form of violence against women and LGBTI people, the limitation imposed on male survivors' recourse to law is evidence-based.²²⁰ A narrowly-tailored exception is warranted for averting the risk of male perpetrators retaliating against women survivors with false cases under a gender-neutral regime,²²¹ as abundantly cautioned by *Supriyo Chakraborty* and GR28.

In *Gladin Gilbert v. State of Kerala* (2022),²²² the Kerala High Court quashed a sexual harassment case²²³ filed by a transgender woman, based on a compromise between the parties. The court mechanically observed that as the dispute was personal, quashing it would have no adverse impact on public interest. However, as per settled law on the category of cases which are allowed to be quashed by High Courts on compromise between parties,²²⁴ heinous offences like sexual harassment against transgender persons, especially arising from special statutes like the TPA, do not qualify for quashing as these offences adversely impact the social, economic and political equality of transgender persons. The Kerala government has the authority to appeal the decision and seek prosecution in order for complete justice to be done, an ability which it should exercise.

At the workplace

At the global level, LGBTI people face precarity in employment status, their earnings are lower, prospects for growth are diminished compared to non-LGBTI people and 33% report discrimination due to their SOGIESC status. In India, deep-rooted stigma and prejudice in all spheres (including the private sector)

218 2020 SCC Online Mad 6311

219 *State of West Bengal v. Anwar Ali Sarkar*, AIR (1952) SC 75

220 *Violence that is not gender-neutral* (2016), Centre for Law and Policy Research. Available at: <https://clpr.org.in/blog/violence-that-is-not-gender-neutral/>

221 Datta, S. (2025), *Why gender neutrality won't fix India's broken rape laws*, queerbeat. Available at: <https://www.queerbeat.org/stories/why-gender-neutrality-wont-fix-indias-broken-rape-laws>

222 2022 SCC Online Ker 1980

223 The FIR recorded Section 18(d), TPA read with Section 294[b], Section 506 and Section 34 of the IPC

224 *State of Madhya Pradesh v. Laxmi Narayan*, (2019) 5 SCC 688

drives around 92% of the transgender community to rely on *badhai*, sex work and begging for survival.²²⁵ Although governments and the private sector must commit financial resources for capacity building, reasonable accommodation and equal employment opportunities as remedial measures for transgender persons,²²⁶ the law must intercede to eliminate all forms of gender-based discrimination at workplaces for LGBTI persons. Apart from institutional reforms for inclusion of transgender persons,²²⁷ formal policies are needed at Indian workplaces to prevent policing of gender expression, prohibit trans/homo/bi-phobic speech and redress sexual harassment against LGBTI employees.²²⁸

In *Vishaka & Ors. v. State of Rajasthan* (1997),²²⁹ the Supreme Court issued guidelines, which governed the area of prevention of sexual harassment of women at workplaces (public and private) on the basis of Articles 15, 19 and 21. In *BN Ray v. Ramjas College & Ors.* (2012),²³⁰ the Delhi High Court declared that Vishaka does not prohibit institutional policies that facilitate recourse to legal remedies for male students' complaints against male professors, on the ground that sexual harassment does not affect only some individuals but reinforces gender-based discrimination against everybody.

The Indian Parliament enacted the *Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013* ('SHW Act'), which mandates workplaces to constitute Internal Complaints Committees (ICC) in order to provide internal grievance redress. While the law clarifies that an 'aggrieved woman' can seek redress under the law,²³¹ it also provides that any 'person' can be a respondent.²³² And, while women's rights groups echo *BN Ray* with respect to the SHW Act, i.e., workplace policies and ICCs should be responsive to sexual harassment on grounds of SOGIESC,²³³ the location of LGBTI people under the SHW Act is met with mixed responses by courts.

In *Dr. Malabika Bhattacharjee v. ICC, Vivekananda College & Ors* (2020),²³⁴ the Calcutta High Court examined the validity of making a woman the respondent in sexual harassment cases. The court declared that as the respondent under the statute is defined in a gender-neutral manner, an aggrieved woman could seek legal redress for sexual harassment against another woman under the SHW Act. The court added that such an interpretation was consistent with the nature of the offence under Section 2(n) [sexual harassment] read with Section 3 (prevention of sexual harassment) of the SHW Act and the procedural aspects with respect to the complaint, conciliation and inquiry mechanism.

In a significant divergence from adopting gender-based and intersectional approaches under VAW laws, *Binu Tamta v. High Court of Delhi & Ors.* (2023),²³⁵ a petition seeking gender-neutral application of

225 *Building bridges: LGBTQIA+ collaboration for equality and inclusion* (2023), KPMG

226 Section 9 (non-discrimination in employment) and Section 14 (vocational training and self-employment) of the TPA read with Rule 10 (welfare measures, education, social security and health of transgender persons), Rule 11 and Rule 12 (equal opportunities in employment) of the TPR

227 Nambiar, N. and Shahani, P. (2018), *A manifesto for trans inclusion in the Indian workplace*, Godrej India Culture Lab

228 *Inclusion of gender and sexual minorities in workplace: A manual for employers* (2017), Humsafar Trust

229 *Vishaka & Ors. v. State of Rajasthan*, (1997) 6 SCC 241

230 (2012) 130 DRJ 277 (DB), paras. 6-10

231 Section 2(a) of the SHW Act

232 Section 2(m) of the SHW Act

233 *A handbook for ICC members: FAQs on sexual harassment at the workplace* (2016), Women Power Connect and Populations Services International, page 24

234 WPA No. 9141/2020, order dated 27.11.2020

235 WP (C) No. 162/2013, order dated 07.11.2023

the *Gender Sensitisation and Sexual Harassment of Women at the Supreme Court of India (Prevention, Prohibition and Redressal) Regulations, 2013* ('regulations') was dismissed by the Supreme Court on the reasoning that it did not have the power to direct the Gender Sensitisation and Internal Complaints Committee (GSICC) to amend the regulations. This rationale ignores the origin of the regulations – at the initiative of the Supreme Court itself, which ordered a GSICC sub-committee to prepare them.²³⁶ Apart from this apparent procedural barrier, the court expressed its opinion on the merits of the issue by adding that the regulations are a special measure for women in accordance with Article 15(3) of the Constitution, hence "diluting" them by inclusion of LGBTI survivors was undesirable. As the court's observations make no distinction between gender-neutrality and victim-neutrality, the role of Article 15(3) in the context of VAW laws is examined subsequently.

In *Suo Moto v. Gujarat National Law University (GNLU) & Anr.* (2024), the Gujarat High Court initiated proceedings against the GNLU based on media reports regarding the lack of institutional remedies for sexual assault against women students and homophobic verbal abuse against gay students.²³⁷ It directed the university to provide adequate remedies for women and LGBTI students alike. In the final order, after taking note of the university's action taken report, which revealed the amended policy on sexual harassment as victim-neutral, the court encouraged the university to conduct transgender-inclusive gender sensitisation programmes for all students and staff.²³⁸ In safeguarding women and LGBTI students under the university's ICC through wide consultations with stakeholders, this case reflects a model application of a gender-based and intersectional framework to the SHW Act.²³⁹ The university's amended policy is also remarkably cognisant of protective discrimination, as it provides that the university's safety measures must not result in restricting the freedoms, especially of women, LBT and non-binary students and staff.²⁴⁰

Intersectionality of caste and gender-based discrimination

LGBTI employees in the Indian private sector apprehend a hostile workplace environment, with 66% of surveyed LGBTI employees reporting homophobic verbal abuse in the workplace, 40% facing some form of harassment and 20% facing discrimination from managers.²⁴¹ A 2019 survey of Dalit transgender persons in Tamil Nadu, Karnataka, Kerala and Andhra Pradesh revealed that 78% were denied employment opportunities. When recruited in the private, non-profit, government or informal sectors, the intersecting vulnerabilities of caste and gender manifested in the form of policing food and clothing preferences, frequent reminders to employees of their precarity, unequal pay, social ostracisation, expecting the

236 *Binu Tamta v. High Court of Delhi & Ors*, WP (C) No. 162/2013, order dated 17.07.2013

237 *Gujarat HC takes suo moto cognizance of a news report about a rape case & queer student harassment at GNLU, seeks report*, LiveLaw, 25 Sept. 2023. Available at: <https://www.livelaw.in/high-court/gujarat-high-court/gujarat-high-court-suo-motu-cognizance-news-report-rape-case-queer-student-harassment-national-law-university-238611>; 'Fact-finding panel's report is scary, students' voices suppressed': Gujarat HC castigates university admin, LiveLaw, 28 Feb. 2024. Available at: <https://www.livelaw.in/top-stories/gujarat-high-court-law-students-castigates-gnlu-admin-suppressing-allegations-queerphobia-rape-250732>

238 WP (PIL) No. 110/2023, order dated 01.05.2024

239 *GNLU alumni write to the university to create robust institutional mechanisms to deal with sexual harassment complaints*, LiveLaw, 13 Mar 2024. Available at: <https://www.livelaw.in/news-updates/gnlu-alumni-writes-to-the-university-to-create-robust-institutional-mechanism-to-deal-with-sexual-harassment-complaints-252131>

240 *The Prevention of Sexual Harassment at the Gujarat National Law University, Redressal of Complaints Regulations*. Available at: <https://www.gnlu.ac.in/GNLU/Prevention-of-Sexual-Harassment> (last updated on 23.05.2024)

241 *In & Out: The Indian LGBT Workplace Climate Survey* (2016), A study by Mission for Indian Gay and Lesbian Empowerment

performance of menial tasks, sexual harassment, retaliation and termination.²⁴² As a consequence, the lacuna of a national anti-discrimination law to remedy such structural inequality demands a novel application of existing laws.

In *Malathy SB & Ors. v. State of Karnataka* (2023),²⁴³ in a matter involving a complaint of sexual harassment at the workplace on basis of sexual orientation and caste which resulted in the male victim dying by suicide, the Karnataka High Court refused to quash criminal proceedings on abetment of suicide²⁴⁴ against 2 male co-workers and 1 female co-worker, as it found adequate evidence to proceed with the investigation. In reference to sexual harassment, the male victim registered a complaint with the ICC as well as reported offences under the *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989* ('SC/ST Act')²⁴⁵ against the 3 co-workers.

The facts in *Malathy SB* relate to the persistent harassment of the complainant to disclose his perceived sexual orientation, spreading rumours about his perceived attraction to co-workers of the same sex and constant ridicule of his perceived sexuality by the three co-workers, pursuant to which the complaint of sexual harassment was filed with the ICC. While the SHW Act and *Vishaka* suggest that the law only covers acts of sexual harassment which are of a 'sexual nature', the Supreme Court's analysis in *Nisha Priya Bhatia v. Union of India & Anr.* (2020) is instructive:

“ The scheme of the 2013 Act, Vishaka guidelines and Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) predicates that a non-hostile working environment is the basic limb of a dignified employment. The approach of law as regards the cases of sexual harassment at workplace is not confined to cases of actual commission of acts of harassment, but also covers situations wherein the woman employee is subjected to prejudice, hostility, discriminatory attitude and humiliation in day-to-day functioning at the workplace. Taking any other view would defeat the purpose of the law.”²⁴⁶

The Kerala High Court has disagreed with *Nisha Priya Bhatia's* framing of redressal of gender-based discrimination at the workplace as integral to the SHW Act on the technical ground that while workplaces could arguably remedy such acts formerly under the *Vishaka* guidelines, the SHW Act is limited to acts of sexual harassment of a 'sexual nature' only.²⁴⁷ Although the Kerala High Court's opinion incorrectly suggests that the SHW Act has nullified the *Vishaka* guidelines, the Supreme Court's interpretation of the statute lacks adequate reasoning to arrive at an otherwise favourable opinion. This begs the question whether such an interpretation is consistent with the SHW Act.

Section 2(n) of the SHW Act defines 'sexual harassment' as such:

242 *Intersectionality: A report on discrimination based on caste with the intersections of sex, gender identity and disability in Karnataka, Andhra Pradesh, Tamil Nadu and Kerala* (2019), Centre for Law and Policy Research, pages 29-32, 62-69

243 WP No. 11745/2023, order dated 28.07.2023

244 The FIR records Section 306 (abetment to suicide) read with Section 34 of the IPC

245 Section 3(1)(r) and (s) [intentional insults, intimidation and abuse on basis of caste] of the SC/ST Act

246 2020 SCC Online SC 394, para. 102

247 *Dr. Prasad Pannian v. Central University of Kerala*, 2020 SCC Online Ker 6550, para. 17

- “ (n) “sexual harassment” includes any one or more of the following unwelcome acts or behavior (whether directly or by implication) namely:
- (i) physical contact and advances; or
 - (ii) a demand or request for sexual favours; or
 - (iii) making sexually coloured remarks; or
 - (iv) showing pornography; or
 - (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.”

Thereafter, Section 3 provides as follows (emphasis added):

- “**Prevention of sexual harassment.**—(1) No woman shall be subjected to sexual harassment at any workplace.
- (2) The following circumstances, among other circumstances, if it occurs, or is present in relation to or connected with any act or behavior of sexual harassment may amount to sexual harassment:—
- (i) implied or explicit promise of preferential treatment in her employment; or
 - (ii) implied or explicit threat of detrimental treatment in her employment; or
 - (iii) implied or explicit threat about her present or future employment status; or
 - (iv) interference with her work or creating an intimidating or offensive or hostile work environment for her; or
 - (v) humiliating treatment likely to affect her health or safety.”

Parliamentary debates reveal that lawmakers critiqued and tinkered with the apparent disconnect between earlier versions of Section 2(n) and Section 3(2) in the Bills between 2010 and 2013. However, the survival of the original formulation in substance²⁴⁸ indicates the Parliament’s acceptance to surpass the ‘sexual acts’ framework and cover gender-based discrimination. A textual reading of Section 3(2) lends an interpretation wherein the listed ingredients in clauses (i-v) constitute the offence of sexual harassment “if they occur” *per se* or “they are present in relation to or connected with” an act of sexual harassment. The expression “among other circumstances” in Section 3(2) must be read as referring to Section 2(n) which clearly defines ‘sexual harassment’ in reference to “sexual acts”, in order to save the provision from a charge of vagueness. In this backdrop, a combined reading of the aforesaid two provisions indicates that the SHW Act seeks to prevent, prohibit and redress sexual harassment, which includes non-consensual acts of a sexual nature as well as gender-based discrimination. This reading of the law is warranted because women and LGBTI people are routinely subjected to “prejudice, hostility, discriminatory attitudes and humiliation” on account of their intersecting identities of caste, gender and class at workplaces.²⁴⁹

248 *Compendium on Parliamentary enactments (2015): The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013*, Rajya Sabha Secretariat

249 Mehta, M. (2020), *Nisha Priya Bhatia v. Union of India – Redefining the Scope of Sexual Harassment?* Constitutional Law and Philosophy. Available at: <https://indconlawphil.wordpress.com/2020/05/18/guest-post-nisha-priya-bhatia-vs-union-of-india-redefining-the-scope-of-sexual-harassment/>; Mehta, M. (2020), *The Kerala High Court’s Judgment Reinforces the Need for an Anti-Discrimination Law*, Constitutional Law and Philosophy. Available at: <https://indconlawphil.wordpress.com/2021/01/04/the-kerala-high-courts-judgment-reinforces-the-need-for-an-anti-discrimination-law/>

Article 15(3) of the Constitution and victim-neutrality under VAW laws

Binu Tamta's bar on gender-neutrality in VAW laws based on Article 15(3) merits examination of whether the Constitution forbids a victim-neutral approach. As analysed in the previous chapter, the Supreme Court has consistently declared that the mandate of Article 15(3) is to provide for special measures that improve women's social and economic conditions to remedy historical marginalisation, including reservation in public education and employment, economic security for wives and leniency in the criminal justice system, among others.²⁵⁰ *Dattatraya Motiram More* clarified that a joint reading of the prohibition of discrimination on basis of sex in Article 15(1) with the mandate of Article 15(3) provides that while the government is authorised to legitimately adopt special measures for women, any 'special measures' for men are barred as they would constitute hostile discrimination against women.²⁵¹

This judicial interpretation of Article 15(3) arguably complies with the opinion of members of the Constituent Assembly, who debated the corresponding Article 9(2) of the draft Constitution on 29 November 1948.²⁵² The All India Women's Conference (AIWC), that comprised of members of the Constituent Assembly like Hansa Mehta, Rajkumari Amrit Kaur and Lakshmi Menon, issued a women's charter in 1946 to set out their rights as Indian citizens, which outlined areas of concern such as incentivising poor families with measures like scholarship programmes, hostels etc. to ensure formal education for girls and women, de-linking of voting rights for women from marital status and property ownership, improvement in working conditions like free housing and health insurance etc. to promote women's role in the economy, among others.²⁵³ Although the women's charter does not explicitly identify these issues in reference to Article 9(2) of the draft Constitution per se, it is reasonable to presume that the nature of special provisions for women sought by Article 9(2) at the time of drafting of the Constitution would be qualitatively similar to the demands raised by the AIWC, on account of the role of the draftswomen in both processes which were proximate at the time.

Any discourse on VAW laws as special measures for women under Article 15(3)²⁵⁴ must, therefore, be cognisant of the underlying theme of patriarchal insubordination of women. In this context, as 'gender-neutrality' in VAW laws is agnostic to gender-based vulnerabilities of women, such a proposal would lead to manifestly discriminatory outcomes for women if adopted, as per *Dattatraya Motiram More*, *Supriyo Chakraborty* and GR28. At the same time, as victim-neutrality in VAW laws advances consciousness of gender-based vulnerabilities of both women and LGBTI persons simultaneously, such a proposal would not breach the mandate of Article 15(3). As such, legislative, executive and judicial measures to apply VAW laws for responding to gender-based violence against LGBTI people leave women's interests intact and raise a claim against the state for redressal of relationships of power, domination and insubordination within the family, society and law for women and LGBTI people.

As the UNIE-SOGI has observed, there is no evidence that gender-based and intersectional frameworks lead to under-prioritisation of the challenges, discrimination and violence suffered by women on account

250 *Independent Thought v. Union of India*, (2017) 10 SCC 100, paras. 54-60

251 AIR 1953 Bom 311, pages 847-848

252 *Constituent Assembly Debates*, Volume 7, 29 Nov 1948. Available at: <https://www.constitutionofindia.net/debates/29-nov-1948/>

253 *The Draft Indian Woman's Charter of Rights and Duties* (1946), All India Women's Conference. Available at: <https://www.constitutionofindia.net/historical-constitution/draft-of-indian-womans-charter-of-rights-and-duties-all-india-womens-conference-1946/>

254 *Capt. Ramesh Chander Kaushal v. Veena Kaushal*, (1978) 4 SCC 70; *U.S. Verma v. National Commission for Women*, 2009 SCC Online Del 3200; *Vaishali Abhimanyu Joshi v. Nanasaheb Gopal Joshi*, (2017) 14 SCC 373

of sex in policy and practice. VAW laws can be extended to LGBTI people, wherever appropriate, based on the doctrine that a statute must be treated as “always speaking” to address comparable concerns which were not deliberated at the time of enactment.²⁵⁵ The law and policy concerns of gender-based violence against LGBTI people could not have been deliberated by the Parliament at the time of enacting VAW laws, as the recognition of LGBTI people’s fundamental right to equality, dignity and the freedom from violence arrived later. Therefore, there can be no *a priori* assumption that VAW laws cannot be amended, applied or interpreted to respond to women and LGBTI survivors alike.

As *Binu Tamta*’s rationale to exclude LGBTI survivors from the regulations is contradicted by a historical, jurisprudential and gender-based and intersectional analysis of Article 15(3), it is liable to be set aside as *per incuriam*. As the order ignores material facts and sources of law reviewed above, the court’s *carte blanche* observation that Article 15(3) prohibits the inclusion of LGBTI survivors within VAW laws is legally unsustainable.

Although *Dr. Malabika Bhattacharjee* clarifies that the respondent is gender-neutral under the SHW Act, workplace policies should prudently frame the respondent as male and cover LGBTI ‘aggrieved persons’ based on *Annie Nagaraja*, *Principal Secretary*, *BN Ray*, *GNTU* and Rule 11(4) of the TPR, as this ‘porosity’ can adequately regulate gendered relations of power, domination and insubordination of women and LGBTI employees at workplaces.

Alternatively, if workplace policies are constrained by the law to provide for respondent neutrality, they must provide that covering LGBTI ‘aggrieved persons’ would authorise male ‘aggrieved persons’ to seek action only against male respondents. This approach would be permissible based on the doctrine of reasonable classification under Article 14,²⁵⁶ as the limitation imposed on male ‘aggrieved persons’ is evidence-based,²⁵⁷ given that sexual harassment is a gendered form of violence against women and LGBTI people. A narrowly tailored exception is warranted for averting the risk of male perpetrators retaliating against women survivors with false cases under a gender-neutral regime,²⁵⁸ as abundantly cautioned by *Dattatraya Motiram More*, *Supriyo Chakraborty* and GR28.

255 *Dharani Sugars & Chemicals Ltd. v. Union of India*, (2019) 5 SCC 480, paras. 34-38

256 *State of West Bengal v. Anwar Ali Sarkar*, AIR (1952) SC 75

257 *Violence that is not gender-neutral* (2016), Centre for Law and Policy Research. Available at: <https://clpr.org.in/blog/violence-that-is-not-gender-neutral/>

258 Datta, S. (2025), *Why gender neutrality won’t fix India’s broken rape laws*, queerbeat. Available at: <https://www.queerbeat.org/stories/why-gender-neutrality-wont-fix-indias-broken-rape-laws>

3.4 “Convert, normalise and correct”

The consensus of international human rights norms is that violation of bodily integrity, autonomy and dignity of persons and/or sanctioning patriarchal control through laws, policies, judicial decisions, public authorities or non-state actors has the effect of condoning and/or perpetuating gender-based violence. The violations occur not only from positive actions of state or non-state actors, but also from acts of omission and/or failure to adopt measures to protect rights. This duty of due diligence to take all appropriate measures to prevent, investigate and punish violations by any person, organisation or enterprise ensures accountability of state and non-state actors to prevent individualised as well as structural gender-based violence against women and LGBTI people.²⁵⁹



The due diligence standard applies to the healthcare sector as it attributes its actions to the state, given that healthcare is a public service and impacts the social and economic well-being of the public.²⁶⁰ In particular, the duty of due diligence in the prevention of gender-based violence by the healthcare sector would require it to abolish the pathology-based approach towards LGBTI people and adopt a queer affirmative approach as dictated by Indian and international human rights norms.

In *Navtej Singh Johar*, the court observed that General Comment No. 14 (GC14: Right to the Highest Attainable Standard of Health) to the *International Convention on Economic, Social and Cultural Rights* (ICESCR) informs the duty of governments to respect, protect and fulfil the right to health of LGBTI people under Article 21 of the Constitution.²⁶¹ After noting the evidence of systemic pathologisation of LGBTI people in the Indian healthcare system, in *Supriyo Chakraborty* the court directed Central and State governments to prohibit medical procedures that seek to alter SOGIESC status.²⁶²

As GC14’s prescription of AAAQ standards (‘available, accessible, acceptable, quality’) centre medical ethics in the right to health and healthcare delivery, reviewing legislative, executive and judicial measures to assess the transition from (de) pathologisation to affirmation towards LGBTI people by Indian healthcare systems is apposite.

259 *In-depth study on all forms of violence against women* (2006), Report of the Secretary General, A/61/122/Add.1, paras. 139-141, 254-257; CEDAW General Recommendation No. 19: Violence Against Women (1992), adopted by the Committee on the Elimination of All Forms of Discrimination Against Women, Eleventh Session, paras. 8-9, 24(a)

260 CEDAW General Recommendation No. 24: Women and health (1999), A/54/38/Rev.1, paras. 15, 17; CEDAW General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19 (2017), paras. 24-26

261 *Navtej Singh Johar* (2018), para. 422

262 *Supriyo Chakraborty* (2023), paras. 364(a)(viii), 564(xi)

Conversion therapy

LGBT people (minors and adults) are routinely coerced to undergo conversion therapy by natal families, who resort to medical practitioners, traditional healers and religious leaders that adopt wide-ranging measures which seek to alter their SOGIE status. These measures include talk therapy, cognitive behavioural therapy, aversion therapy, hypnosis, ritualistic practices, anti-depressant/psychotic/anxiety drugs, nausea-inducing drugs, psychoactive drugs, hormone injections, forced institutionalisation, electro-convulsive therapy, withholding treatments for transitioning, physical violence, ‘corrective’ rape and forced pregnancy.²⁶³

The Committee on CEDAW, UNSR-RTH, UNSR-Torture, the UNIE-SOGI and the Committee on Rights of the Child have denounced such practices of ‘conversion therapy’ as a violation of LGBT people’s sexual and reproductive health rights, constituting torture, cruel, inhuman or degrading treatment and a violation of adolescents’ bodily integrity, gender identity and developing autonomy, among other grounds.²⁶⁴

In *S. Sushma and U. Seema Agarval v. Commissioner of Police & Ors.*,²⁶⁵ the Madras High Court noted that the practice of mental healthcare professionals of prescribing anti-depressants (fluoxetine), erectile dysfunction drugs (stimuli capsule), offering cognitive behavioural therapy to gay men for ‘M2M behaviour’ is essentially conversion therapy under the pretext of offering mental healthcare services. Consequently, the court ordered the National Medical Commission (NMC) to take measures to prohibit conversion therapy.²⁶⁶ The apex medical body has amended the *Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002* to frame conversion therapy as professional misconduct, resulting in disciplinary action against registered medical practitioners,²⁶⁷ which will apply at the national level. However, the NMC has not notified the same under the draft version of the *NMC Registered Medical Practitioner (Professional Conduct) Regulations, 2022*,²⁶⁸ which would override the IMC regulations on coming into effect.

In *Queerala v. State of Kerala* (2021),²⁶⁹ in response to the death by suicide of a 21-year-old bisexual woman, an LGBTI organisation sought the prohibition of conversion therapy. The Indian Psychiatric Society (IPS-Kerala) was impleaded as a respondent, which submitted that a small percentage of LGB individuals who ‘choose’ conversion therapy report ‘positive outcomes’. This is critiqued by public health and social sciences experts for ignoring the contribution of stereotypical gender norms perpetuated by

263 Ranade, K. (2009), *Medical response to male same-sex sexuality in western India: An exploration of ‘conversion treatments’ for homosexuality*, Health and Population Innovation Fellowship Programme Working Paper No. 8, Population Council, pages 16-19; *Harmful treatment: The global reach of so-called conversion therapy* (2019), Outright Action International, page 40; Kottai, S. and Ranganathan, S. (2019), *Fractured narratives of psy disciplines and the LGBTQIA+ movement in India: A critical examination*, Indian Journal of Medical Ethics, pages 5-6; Mhatre, P. et al (2023), *A critical medico-socio-legal analysis of conversion therapy in the Indian subcontinent*, Sexuality and Culture, Springer, pages 4-5

264 Viktor Madrigal Borloz, *Practices of so-called “conversion therapy”* (2020), Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/44/53, paras. 59-74

265 WP No. 7284/2021, order dated 31.08.2021

266 *S. Sushma and U. Seema Agarval v. Commissioner of Police & Ors.*, WP No. 7284/2021, order dated 07.06.2021

267 *Conversion Therapy of LGBTQIA+ Community Group as a Professional Misconduct under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002*, notification dated 25.08.2022 of Ethics and Medical Registration Board, National Medical Commission

268 *S. Sushma and U. Seema Agarval v. Commissioner of Police & Ors.*, WP No. 7284/2021, order dated 12.06.2023

269 WP (C) No. 21202/2020, order dated 10.12.2021

natal families, academic institutions, and healthcare systems, among others, that compel LGB individuals to seek such harmful procedures.²⁷⁰ While the court ultimately directed the state government to frame guidelines to prevent “forced” conversion therapy, there are no further reported developments in the *Queerala* case.

The Kerala High Court’s order in *Queerala* ignores the *Mental Healthcare Act, 2017* (‘MHCA’), which provides that mental illness shall be determined in accordance to internationally accepted medical standards, including the latest editions of the International Classification of Diseases (ICD) published by the World Health Organisation (WHO).²⁷¹ As ICD-10 de-classified homosexuality in 1990 and ICD-11 discarded the diagnostic category of ‘egodystonic sexual orientation’ in 2019,²⁷² diverse expressions of sexuality stand completely de-pathologised. In fact, *Navtej Singh Johar* directed mental healthcare practitioners to adopt queer-affirmative counselling practices with respect to LGB persons who report distress associated with their sexual orientation.²⁷³

A ‘diagnosis’ of egodystonic sexual orientation meant that if an individual wished their sexual orientation (whether heterosexual, homosexual or bisexual) were different because of ‘associated psychological and behavioural disorders’, they could lawfully seek ‘treatment’ to change their sexual orientation. Although facially neutral, only lesbian, gay and bisexual persons report distress associated with their sexual orientation on account of stereotypical gender norms of compulsory heterosexuality, marriage and childbirth which promote trans/homo/bi-phobia.²⁷⁴ *Queerala* is per incuriam on this ground and liable to be set aside as ICD-11 amply clarifies that ‘consent’ is not a valid defence for practicing conversion therapy. As *Afeefa CS and Sumayya Sherin v. National Medical Commission & Ors.* (2024)²⁷⁵ – which seeks prohibition, not regulation of conversion therapy – is tagged with *Queerala*, this provides an opportunity to rectify the gender bias underlying the Kerala High Court’s initial approach.

The Kerala High Court’s interventions to order the release of LGBTI people in forced institutionalisation²⁷⁶ attests to the fact that natal families routinely contest psychological health of their LGBTI children (minors or adults) to undermine their autonomy. As the MHCA forbids pathologising gender non-conformity²⁷⁷ and recognises that a formal diagnosis of mental illness *per se* does not diminish the individual’s capacity for independent decision-making,²⁷⁸ stakeholders must be vigilant to natal families’ abuse of LGBTI people’s mental health struggles as pretexts to override their choices relating to self-determination of SOGIESC status, leaving natal family homes and cohabiting with partners/chosen families, among others.²⁷⁹

270 Kottai SR, Ramprakash R. (2023), *Evolving jurisprudence on conversion therapy: Reconsidering ethics in mental health systems*, Indian Journal of Medical Ethics, page 3

271 Section 3(1) [determination of mental illness], MHCA

272 *International Classification of Diseases*, World Health Organisation (Version ICD-11). Available at: <https://icd.who.int/browse/2024-01/mms/en>

273 *Navtej Singh Johar* (2018), para. 449

274 *Human rights violations against sexuality minorities in India* (2001), A PUCL-K fact-finding report about Bangalore, page 20

275 WP(C) No. 11329 of 2024

276 *Shereena Hakkim v. State Police Chief*, 2024 SCC Online Ker 3203; *Adithya Kiron v. State House Officer*, WP (Crl.) No. 704/2024, order dated 01.07.2024

277 Section 3(3) [determination of mental illness], MHCA

278 Section 4 (capacity to make mental healthcare and treatment decisions), MHCA

279 Suchithra KK et al (2022), *A co-traveller’s reflections on crisis intervention*, Raahi, pages 18-19

Witch-hunting

A critical mass of scholarship locates the historical phenomenon of witch-hunts in women's class-struggle against the severe impoverishment of land enclosures and privatisation of 16th century European capitalism, which heralded norms of compulsory heterosexuality, marriage and reproduction that viewed women's sexuality as a 'channel' for organising sexual division of labour.²⁸⁰ This consensus is reflected in Indian academia's examination of the resurgence of witch-hunts with liberalisation of India's economy in 1990, which attests that witch-hunts are orchestrated to punish women's resistance to the multiplying inequalities of class and gender.²⁸¹

A sociological review of local beliefs, customs and practices in rural districts across 17 states in India strongly indicates that women who are economically independent, own land and are single (including separated, divorced or widowed) are typically persecuted as 'witches' as a pretext for usurpation of women's material resources and/or punishment for refusing men's sexual advances. The branding of women as witches invites severe consequences like public humiliation, social and economic boycotts, forced migration, torture, sexual assault and murder.²⁸²

As a consequence, a body of anti-witch-hunting laws²⁸³ has been enacted by several states in India, which recognise witch-hunting as a form of gender-based violence against women. At the same time, few States in India have adopted 'anti-black magic' laws,²⁸⁴ to prevent superstitious practices that cause bodily harm. In addition to these State-level laws, advertisement of drugs and 'magical remedies' for specified purposes²⁸⁵ is prohibited and the practice of non-allopathic systems of medicine (*ayurveda*, *unani*, *siddha*, *sigwa rigpa* and homeopathy)²⁸⁶ is regulated at the central level, which can be invoked by survivors against traditional healers and/or medical practitioners.

The trial records and academic sources on witch-hunts during the Middle Ages reveal that while the vast majority of victims were women, the phenomenon of witch-hunting was gendered. A challenge to gender roles, whether it involved 'unwomanly' women or men who 'violated norms of masculinity' by having intimate relationships with men, led to persecution as witches. In fact, cultural prescription of gender roles and how individuals perform masculinity and femininity are reliable predictors of identifying people at risk of witch-hunting.²⁸⁷ This view is supported by reports of traditional healers using harmful substances for 'medicinal' purposes, performing 'exorcisms', corrective rape and murder

280 Federeci, S. (2018), *Witches, Witch-Hunting and Women*, PM Press, pages 1-34

281 *Targeting of Women as Witches: Trends, Prevalence and the Law in Northern, Western, Eastern and North-eastern Regions of India* (2012), Partners for Law in Development, pages 59, 64-68

282 *Ibid*, *Targeting of Women as Witches* (2012)

283 *Bihar Prevention of Witch (Daain) Practices Act, 1999; Jharkhand Prevention of Witch (Daain) Practices Act, 2001; Odisha Prevention of Witch-Hunting Act, 2013; Rajasthan Prevention of Witch-Hunting Act, 2015; Assam Witch Hunting (Prohibition, Prevention and Protection) Act, 2015*

284 *Chhattisgarh Tonahi Pratadna Nivaran Act, 2005; Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013; Karnataka Prevention and Eradication of Inhuman Evil Practices and Black Magic Act, 2017; The Gujarat Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2024*

285 *Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954*

286 *National Commission for Homeopathy Act, 2020; National Commission for Indian System of Medicine Act, 2020*

287 *Piecing Together Perspectives on Witch Hunting: A Review of Literature* (2013), Partners for Law in Development, pages 13-35, 52-53

of LGBTI people in India.²⁸⁸

In this context, *Govindarajanagar Police Station v. Ganesh* (2024)²⁸⁹ exemplifies the imperative to apply anti-witch-hunting and anti-black magic laws to LGBTI survivors in appropriate cases. Three accused persons, who operated an ‘astrology’ centre, were alleged to have cheated the natal family because the rituals that were sanctioned to ‘convert, normalise or correct’ their gender non-conforming child were unsuccessful. When the natal family demanded a refund of INR. 5,00,000 paid towards such expenses and warned them of approaching the media, the accused persons are alleged to have made threats of a fatal curse and commit wrongful restraint and assault them.²⁹⁰

Although the FIR in *Govindarajanagar* was registered by the natal family, they refused to support the prosecution’s case and insinuated that the police filed a false case, which ultimately led to acquittal of the accused persons. Circumstantially, this suggests collusion at least amongst the natal family and the accused persons to unduly influence the outcome of the trial, since a fair trial would inevitably incriminate the natal family for abetment of the offences. This reasonably explains why the gender non-conforming person’s testimony does not feature as prosecution evidence on record, which would have identified all parties’ roles. Despite the glaring omissions of the police and lawyers, the court’s role merits additional scrutiny.

The failure of the court to exercise powers under Section 216, Section 221 (1-2), Section 464 read with Section 319 (power to proceed against other persons appearing to be guilty of offence), CrPC to frame charges against the natal family for facilitating the commission of offences against the gender non-conforming survivor strikes at the heart of the trial. After the natal family turned hostile, the court’s failure to exercise powers under CrPC’s Section 311 (power to summon material witness, or examine person present) to re-examine them to discover the underlying reason for complainants turning hostile as well as the failure to exercise powers under Section 313 (power to examine the accused) to determine the role of the natal family are significant instances of judicial oversight. The issuance of multiple summons (including proclamation) for production of the gender non-conforming survivor is ostensibly farcical, given that the court did not examine the natal family about the survivor’s whereabouts for the execution of summons.

Govindarajanagar represents a stark violation of the State’s duty of due diligence, as the collective failures of the police, lawyers and the court condone and/or perpetuate individualised and structural violence against the gender non-conforming survivor and appallingly frame the natal family as ‘victims’. As indicated, judges are vested with procedural powers to independently arrive at a just decision, rather than be mute spectators as other stakeholders lead them astray.

288 Patel, R (2016), *Being LGBT in India: Some home truths*, Livemint. Available at: <https://www.livemint.com/Sundayapp/sAYrieZdZKEybKzhP8FDdbP/Being-LGBT-in-India-Some-home-truths.html>; Minj, N. (2022), *The horrors of queer conversion therapy in India*, Scroll. Available at: <https://scroll.in/article/1032115/the-horrors-of-queer-conversion-therapy-in-india>; Rajvanshi, A. (2022), *Doctors in India tried to ‘cure’ her with conversion therapy. Now she’s fighting to ban it*, Time. Available at: <https://time.com/6215994/conversion-therapy-india-lgbtq-rights/>; Sharma, U. (2023), *Tantrik kills lesbian woman after promising to change her sex; victim wanted to marry her partner*, Firstpost. Available at: <https://www.firstpost.com/india/tantrik-kills-lesbian-after-promising-to-change-her-sex-victim-wanted-to-marry-her-partner-12769982.html>

289 CC No. 4439/2023, judgment dated 27.04.2024

290 The FIR recorded charges of Section 323 (punishment for voluntarily causing hurt), Section 341 (punishment for wrongful restraint), Section 420 (cheating and dishonestly inducing delivery of property), Section 506 and Section 34 of the IPC read with Section 3(2) [prevention and eradication of inhuman evil practices and black magic] of Karnataka’s anti-black magic law

The duty to protect the right to gender affirming healthcare from third-party violations

Section 15 (b), (c) and (g) [healthcare facilities], TPA read with Rule 10 and Annexure-II (suggested list of welfare schemes to be considered) mandates State governments to provide gender affirmative care in terms of counselling, hormone therapy, laser therapy and surgery in at least 1 government hospital and insurance to cover such procedures. In addition, Section 15 (d) and (e) also requires the government to publish a health manual related to gender affirming care in accordance with the latest edition of the World Professional Association for Transgender Health (WPATH) and review medical curriculum for enabling healthcare professionals to respond to the needs of transgender persons.

However, transgender persons attest to the unavailability of specialist healthcare professionals, poor quality of healthcare services, breach of medical ethics and discrimination at healthcare facilities.²⁹¹ As per GC14, the duty to protect the right to health includes the responsibility of the government to adopt measures for ensuring that healthcare practitioners adhere to non-discrimination, follow medical ethics and are accountable for committing gender-based violence on vulnerable or marginalised groups of society, including transgender persons.²⁹²

The treatment of transgender persons has advanced from the diagnostic category of ‘gender identity disorder’ (ICD-10)²⁹³ to ‘gender incongruence’ (ICD-11),²⁹⁴ which reflects the scientific consensus that incongruence between sex assigned at birth and self-determined gender is not a disorder *per se*. While gender incongruence is governed by the field of medicine to facilitate access to gender affirming care, ICD-11 clarifies that any hormonal treatment, surgery or other healthcare services to align the body with the experienced gender is solely at the discretion of the individual.

However, the TPA’s compulsion for hormonal treatment, surgery or other healthcare interventions for legal recognition pathologises transgender persons identifying in the binary. Conversely, when transgender persons freely choose gender affirming care, healthcare professionals frequently delay care, support and treatment for several years to ‘screen’ the fitness of the candidate or outrightly refuse.²⁹⁵ Among Indian transgender persons, healthcare professionals allocate more freedom to persons assigned gender male at birth (PAGMB) to undergo gender-affirming care than persons assigned gender female at birth (PAGFB), who are denied the same opportunities due to a perceived loss of the capacity to bear children.²⁹⁶ This gate-keeping of gender affirming care based on stereotypical gender roles is reflective of the structural violence that healthcare professionals exert on marginalised populations.²⁹⁷

The UNIE-SOGI and UNSR-Torture have noted that transgender persons are at particular risk of torture

291 *Queer-Trans* Intimacies and Communities – Envisioning Rights and the Way Forward*, National Queer-Trans* People Meet Report (2022), Sappho for Equality, page 9

292 *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (2000), CESCR, E/C.12/2000/4, para. 35

293 *International Classification of Diseases*, World Health Organisation (Version ICD-10). Available at: <https://icd.who.int/browse10/2019/en>

294 *Id* at 272

295 Semmalar, G. (2014), *Unpacking solidarities of the oppressed: Notes on trans struggles in India*, *Women’s Studies Quarterly*, Vol. 42, No. 3/4

296 Raghuram, H., (2024), *Power, policy and transgender identities: A case study of gatekeeping by mental healthcare professionals in accessing gender affirming surgeries in India*, *Indian Journal of Medical Ethics*

297 Kottai, S. and Ranganathan S. (2019), *Fractured narratives of psy disciplines and the LGBTQIA+ rights movement in India: A critical examination*, *Indian Journal of Medical Ethics*

and ill-treatment within healthcare establishments in the form of denial of medical treatment, verbal abuse, public humiliation and psychiatric evaluations that are medically unnecessary, which can cause severe and life-long physical and mental pain and suffering. If authorisation for gender affirming care is unduly obstructed, the success of treatment outcomes can be compromised. The stipulation of forced gender-affirming care (including undergoing hormone therapy or surgery) or requiring third-party consent for adults as a precondition for legal recognition is abusive since it violates the autonomy, bodily integrity and self-determination of gender.²⁹⁸

The official evidence from three Gender Guidance Clinics in Tamil Nadu, operating under the National Health Mission (NHM), indicates that public provision of gender affirmative care improves health-seeking behaviour, provides financial protection, enhances quality of care and provides mental health support to transgender persons.²⁹⁹ However, one of the study's authors has published an unofficial account that highlights gross misconduct within the clinics.

Despite the clinics stated compliance with WPATH guidelines, transgender users report forced physical examinations and repetitive psychiatric evaluations by healthcare professionals, which has resulted in delays, frustrations and dropouts. The attitudes of healthcare professionals towards trans masculine persons were found to be harsher, imposing inconsistent conditions like obtaining multiple psychiatrists' opinions on gender incongruence and setting an arbitrary regimen of hormonal and surgical treatment. Users reported several cases of outright violation of bodily integrity and sexual harassment by healthcare professionals, including instructing trans masculine persons to undress without providing valid reasons, using transgender women's bodies as exhibits for teaching purposes without consent and subjecting trans masculine persons to 'two-finger tests' to ostensibly determine whether they are 'habituated to sexual intercourse'.³⁰⁰

The WPATH (Version 8, 2022) suggests that while transgender adults represent a diverse array of gender identities and expressions who require individualised assessment for undergoing gender-affirming care (if freely chosen), psychotherapy focused on their gender identity *per se* and genital exams (unless clinically indicated) are not valid requirements for initiating any treatment.³⁰¹ As these standards of care establish a baseline for ensuring accountability in healthcare settings, transgender persons have sought publication of a health manual based on the latest edition of WPATH by the Assam and Tamil Nadu governments, as mandated by Section 15(d), TPA.³⁰² Apart from the practice of 'two-finger tests' being repeatedly held to be harmful, unscientific and illegal,³⁰³ a joint reading of Exception 1 of Section 375 (rape), IPC/Section 63, BNS with Section 164A(7), CrPC/Section 52, BNSS suggests that when genital exams are gratuitously performed, which do not correlate to therapeutic relief and/or forensic analysis,

298 *Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment* (2016), A/HRC/31/57, paras. 48-49, 68; Viktor Madrigal Borloz, *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity* (2018), A/73/152, paras. 28-32, 81 (b)

299 Seshadri, SR. et al (2023), *Meeting the healthcare needs of the transgender community: Gender Guidance Clinics of Tamil Nadu*, Ramalingaswami Centre on Equity and Social Determinants of Health, Public Health Foundation of India, pages 4-5

300 Ramprakash, R. (2023), *Bodies that don't fit: Access barriers to gender affirmative services in Tamil Nadu*, Feminist Perspectives. Available at: <https://www.kcl.ac.uk/barriers-to-gender-affirmative-services-in-tamil-nadu-india>

301 *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8* (2022), World Professional Association for Transgender Health, page 31

302 *Swati Bidhan Baruah v. State of Assam*, PIL No. 74/2018, orders dated 11.11.2021 and 06.09.2024; *Fred Rogers v. Health and Family Welfare Department*, Tamil Nadu, WP No. 35883/2024

303 *State of Jharkhand v Shailendra Kumar Rai* (2022) 14 SCC 299; *Lillu v State of Haryana* (2013) 14 SCC 643

healthcare professionals are liable to prosecution for the offence of rape.

Forced corrective surgeries

Intersex is an umbrella term describing people who are born with sex characteristics (including sex chromosomes, gonads, internal reproductive organs and external genitalia) that do not align with stereotypical definitions of male or female bodies. This understanding of intersex persons is reflected under Section 2(i) of the TPA, which recognises a limited overlap of medico-legal concerns between the transgender and intersex communities.

Both intersex and transgender persons may face discrimination on account of their perceived transgression of sex and/or gender norms. However, a key difference between the two is that while intersex people are often subjected to unwanted medical and surgical treatments to ‘normalise’ their bodies, transgender people face barriers in accessing gender affirming care. Intersex activists across the world are allying with children’s rights, feminist, LGBT and disability rights movements to address shared concerns of bodily integrity, self-determination and de-pathologisation.³⁰⁴

For LGBTI persons, the more ‘embodied’ the non-conformity with stereotypical norms of sex, gender and sexuality is, the more resistance is witnessed from the healthcare sector in reforming pathology-based approaches in offering care, support and treatment.³⁰⁵ The root causes of violations against intersex persons are harmful stereotypes, stigma and pathologisation of bodily diversity,³⁰⁶ often manifesting in intersex genital mutilation or forced ‘corrective’ surgeries, which are performed at infancy or early childhood when intersex variations become apparent. These procedures are typically cosmetic and rarely life-sustaining measures, since intersex individuals usually lead completely healthy lives.³⁰⁷ A brief review of studies concerning these practices in India reveals that parents are influenced by the social and cultural norms of son-preference and frequently instruct the healthcare professional to undertake male gender assignment.³⁰⁸

In *Arunkumar*, the Madras High Court applied *NALSA*’s analysis on self-determination of gender to declare that ‘corrective’ surgeries for intersex children must be deferred until they attain the age of majority and are capable of deciding for themselves, directing the Tamil Nadu government to issue an order to prohibit such procedures.³⁰⁹ In response, the state’s Health and Family Welfare Department has issued a government order to implement the court’s directive.³¹⁰

304 *We are Real: The Growing Movement Advancing the Human Rights of Intersex People* (2016), Astraea Lesbian Foundation for Justice, pages 5,7-8

305 Tenneti, S. (2020), *Curative violence against LGBT+ people in India: Key issues and perspectives*, R. Rajaram GRIT Research Fellowship Paper 1, Prajnya Trust

306 Viktor Madrigal Borloz, *The Law on Inclusion* (2021), Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/47/27, para. 49

307 Kothari, J. et al (2020), *Beyond the Binary: Advocating Legal Recognition for Intersex Persons in India*, Centre for Law and Policy Research and Solidarity Foundation, pages 16-19

308 Chakrapani, V. et al (2023), *A scoping review of lesbian, bisexual, transgender, queer and intersex people’s health in India*, PLOS Glob Public Health, page 22

309 (2019) 4 Mad LJ 503

310 G.O. (Ms.) No. 355 (2019), Health and Family Welfare (M-2) Department. Available at: <https://translaw.clpr.org.in/legislation/tamil-nadu-government-order-banning-surgeries-on-intersex-infants-2019/>

In *X v. Director of Health Services* (2023),³¹¹ where parents of an intersex child approached the Kerala High Court seeking directions to medical practitioners to conduct a ‘corrective’ surgery, the court declared that forced medical procedures violate intersex children’s right to equality under Article 14, freedom of expression of identity under Article 19 and the right to health, dignity and privacy under Article 21. The court relied on GC20 of the Convention on Rights of the Child (CRC) to hold that India is mandated to apply binding international standards that forbid discriminatory medical treatment against intersex children. The court ordered the Kerala government to constitute a State Level Multi-Disciplinary Committee (SLMDC) consisting of a paediatric endocrinologist, surgeon and psychologist, tasked with only facilitating access to life-sustaining healthcare services for intersex children.

In *Srishti Madurai Educational Research Foundation v. Govt. of NCT of Delhi* (2022),³¹² the Delhi High Court directed the government to implement the Delhi Commission for Protection of Child Rights (DCPCR)’s order to prohibit forced ‘corrective’ surgeries on intersex children and facilitate access to medically necessary healthcare services for intersex adults. However, the government was inactive until the petitioner filed a contempt petition, which compelled the State government to constitute an SLMDC for the management of children with differences in sex development.³¹³

In *Gopi Shankar M v. Union of India* (2024),³¹⁴ the Supreme Court has issued notice in a public interest litigation (PIL) on safeguarding the rights of intersex children who are vulnerable to forced ‘corrective’ surgeries. According to General Comment No. 22 (2016: right to sexual and reproductive health) of the ICESCR, the failure to prevent healthcare providers from performing medically unnecessary, irreversible and involuntary surgeries on intersex children violates the duty of governments to ‘protect’ the right to health.³¹⁵ In order to address the root causes of violations against intersex persons, the court can direct Central and State governments to remove harmful stereotypes on gender roles, train healthcare providers on bodily diversity and promote the human rights of intersex persons.³¹⁶ At present, the court is awaiting the Central government’s reply.

In the context of intersex women who are coerced to medically reduce testosterone as a precondition for participation in athletic events, the UNSR-RTH, the UNWGDAGW and the UNSR-Torture have unanimously condemned such athletic regulations.³¹⁷ The policy is impermissible *per se* because it forces the alteration of healthy hormone levels in order to ensure ‘fairness’ in competition, even as the role of testosterone in athletics remains speculative. The directive violates the principle of informed consent because it presents an illusory choice in either compromising intersex women’s health and identity or their careers as professional athletes. The policy is based on gender and racial stereotypes, as African (Annete Negesa, Margaret Wambau, etc.) and South Asian (Santhi Soundarajan, Dutee Chand, etc.) women athletes are disproportionately singled out, which constitutes intersectional discrimination.

311 WP (C) No. 19610/2022, order dated 07.08.2023

312 WP (C) No. 8967/2021, order dated 27.07.2022

313 *Srishti Madurai Educational Research Foundation v. Govt. of NCT of Delhi*, Cont. Case (C) 1252/2023, order dated 16.08.2024

314 WP (C) No. 241/2024, order dated 08.04.2024

315 General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the ICESCR), E/C.12/GC/22, para. 59

316 *Human Rights Violations Against Intersex People: A Background Note*, Office of the High Commissioner of Human Rights, page 53

317 Intervention Application No. 10934/2021 in the case of *Mokgadi Caster Semenya v. Switzerland* before the European Court of Human Rights, by the UNSR on RTH, UNWGDAGW and UNSR on Torture

3.5 Sexual offences under IPC/BNS

In *Shivam Devangan v. State of Chhattisgarh* (2016),³¹⁸ the Chhattisgarh High Court granted bail in a rape case.³¹⁹ The factors that contributed to the court's reasoning included that (1) despite initiating gender-affirming care, the transgender woman's vagina was 'incompletely formed'; (2) forensic evidence indicated no genital injuries, and (3) there was delay in registration of the FIR.

The bail order's reasoning merits scrutiny. Although a survivor's delay in registration of an FIR in sexual offences does not prejudice the case on merits *per se*,³²⁰ it is advisable that survivors approach the police soon after commission of the offence as early reporting strengthens the case. If there is delay, it is recommended that survivors give an adequate explanation to the police.³²¹ As the law prohibits an inference of consent based on lack of injuries,³²² a presumption in favour of survivors on lack of consent,³²³ deems evidence of character or previous sexual experience irrelevant³²⁴ and prohibits impugning the survivors' character to discredit their testimony,³²⁵ the court's reliance on forensic evidence is erroneous.

The court's reliance on the transgender woman's 'incompletely formed' vagina violates *Annie Nagaraja* as it perpetuates stereotypical norms about transgender persons' bodies, gender-affirming care and sexual violence. The Supreme Court's judicial training module on rights of LGBTI people recommends that transgender persons' method of transition should not be assumed, as there is no "wrong" way to transition. Courts should refrain from assuming that transgender persons, if they choose to transition, need to have gone through certain biological changes to identify as a certain gender.³²⁶ Although notable that the charge under Section 376 (punishment for rape), IPC was not a contentious issue in *Shivam Devangan*, the bail order's reliance on flawed premises renders it legally unsustainable.

In *Shilpi Lawrence Elenjikal v. State of Uttarakhand* (2019),³²⁷ the offence of rape against a transgender woman was registered by the police under Section 377, IPC. The transgender woman filed a writ petition to seek prosecution of the offence under Sections 375-376, IPC as a woman survivor. However, the prosecution refused to support her plea. After completion of the investigation, the police filed a chargesheet which recorded the offence under Section 377 based on her DNA report, which revealed the decision of the investigating officer to treat her as a male survivor.

The Uttarakhand High Court observed that the humiliation the transgender woman suffered on account of non-recognition of her gender identity violated her rights to equality and life. The court declared that in light of *NALSA's* declaration of self-determination of gender, the investigating officer had no authority

318 2016 SCC Online Chh 624

319 The FIR recorded charges of Section 376 (punishment for rape), Section 384 (punishment for extortion), Section 323 (punishment for voluntarily causing hurt) and Section 506 read with Section 34 of the IPC

320 *State of Punjab v. Gurmit Singh & Ors.*, (1996) 2 SCC 384; *State of Himachal Pradesh v. Gian Chand*, (2001) 6 SCC 71

321 *Engaging with the criminal justice system: A guide for survivors of sexual violence* (2014), Lawyers Collective Women's Rights Initiative, page 5

322 Section 375, Explanation 2 of the IPC

323 Section 114A (presumption as to absence of consent in certain prosecution for rape), IEA

324 Section 53A (evidence of character or previous sexual experience not relevant in certain cases), IEA

325 Section 146 (questions lawful in cross-examination), IEA

326 *Sensitisation Module for the Judiciary on LGBTQIA+ Community* (2022), Supreme Court of India. Available at: <https://ecommitteesci.gov.in/document/sensitisation-module-for-the-judiciary-on-lgbtqi-a-community/>, page 32

327 WP (Crl.) No. 28/2019, orders dated 29.04.2019 and 31.05.2019

to treat the transgender woman as a male survivor. Ultimately, the court declared that rape cases against transgender women must be prosecuted under Sections 375-376. The court's application of a gender-based and intersectional analysis to the rape law can be followed by other courts based on *Annie Nagaraja*, *Kusum Ingots* and Rule 11(4), TPR.

However, the court's recognition of the survivor as a woman in *Shilpi Lawrence Elenjikal* is comparable to *Sakshi Khatri*, in that its decision is informed by her undergoing gender affirming surgery. Other courts following it as precedent must note that the Uttarakhand High Court's reliance on proof of gender affirming care does not constitute a derogation of *NALSA* on self-determination *per se*; rather, it must be appreciated as the best evidence available to the transgender woman. As advocated previously, courts are duty-bound to affirm the self-determined gender of survivors based on the certificate of identity, official identity documents (Aadhaar, Voter's ID, ration card etc. or an affidavit of self-declaration), in order to do complete justice to transgender litigants' claims.

Amal Fernandes v. State of Kerala (2020)³²⁸ is a bail order in a rape case filed by two transgender persons against five accused men.³²⁹ The Kerala High Court granted bail to one of the accused by doubting whether transgender persons can seek recourse to Section 377, IPC and inferring consent based on the survivors' previous (sexual) experience with the accused.

Despite the well-documented record of persecution and prosecution of transgender persons under Section 377 as evidenced from *Queen Empress v. Khairati* (1884)³³⁰ to *Navtej Singh Johar*, *Amal Fernandes* indicates that trial courts harbour basic misconceptions of law that lead to a miscarriage of justice. As the case was filed by two transgender persons against five accused men, there is no forthcoming explanation why neither the police nor the trial court added the charge of Section 376D (gang rape), IPC. An individual who did not commit the act of rape, but who facilitated its commission, is nonetheless culpable under this provision. The recording of this charge in appropriate cases is vital, as perpetrators would be individually and severally punishable with a term not less than 20 years due to the heinous nature of the offence.

As presumption on lack of consent in favor of survivors is not explicitly provided with respect to offences under Section 377 of the IPC, this disparity in treatment of transgender and male survivors conceivably amounts to gender-based discrimination. In *Dev Jigneshbhai Buddhdev v. State of Gujarat* (2024),³³¹ despite the severity of the sexual offence against a gay/bisexual male survivor,³³² the Gujarat High Court relied upon this gap in standards of evidence to erroneously presume consent between the parties and granted bail to the accused.

The acquittal of two police officers for the offence of raping a minor tribal girl in the 1970s,³³³ in a context of rising sexual offences against women and a high acquittal rate,³³⁴ led to the passage of the *Criminal Law (Amendment) Act, 1983* ('CLA, 1983') in response to demands by feminist groups. The CLA, 1983 brought

328 Bail Appl. No. 1358 of 2020, order dated 13.03.2020

329 The FIR recorded charges of Section 363 (punishment for kidnapping), Section 395 (punishment for dacoity), Section 377 read with Section 34, IPC

330 ILR (1884) 6 All 204

331 Criminal Misc. Application (Bail) No. 18181/2024, order dated 03.10.2024

332 The FIR recorded Section 377, Section 386 (extortion by putting a person in fear of death or grievous hurt) and Section 389, IPC

333 *Tukaram & Anr. v. State of Maharashtra*, (1979) 2 SCC 143

334 *The Criminal Law (Amendment) Bill (1983)*, Rajya Sabha, 06.12.1983

into force Section 114A, IEA which stipulated the presumption in favour of survivors on lack of consent. The systemic exclusion of gay and bisexual male and transgender survivors from the criminal justice system does not grant us the opportunity to authoritatively review prosecution trends. However, their recurring sex stereotyping in orders reviewed are a crucial indicator of the viability of corresponding amendments to the BSA, which can apply the presumption on lack of consent in favour of gay and bisexual male and transgender survivors of sexual offences.

In *Monu Kumar & Anr. v. NCT of Delhi* (2022),³³⁵ two accused men filed a revision petition against the trial court's order to frame charges under Section 376(2)(n) as well as Section 377 against the accused. The accused contended that since the transgender woman underwent gender affirming care, “no sexual assault can be committed against the complainant”. The Delhi High Court rejected the accused's contention and upheld the order of the trial court by relying on the forensic evidence's finding of the victim's capacity for peno-vaginal sexual intercourse.

While Section 377 penalises non-consensual penetrative oral and/or anal acts, the CLA, 2013 broadened the scope of Sections 375-376 to cover all forms of non-consensual penetrative and non-penetrative acts as rape. The prosecution of the accused under Sections 375-376 as well as Section 377, IPC for non-consensual oral and/or anal acts against transgender women is uncontroversial, as child sexual abuse is routinely prosecuted under the *Protection of Children from Sexual Offences Act, 2012* (POCSO Act) as well as Sections 375-377, IPC.³³⁶ **Thus, courts should not only be authorised to prevent gratuitous examination of forensic evidence and/or voyeuristic legal submissions by defence advocates to this effect, they should also base their decisions on a sound interpretation of the law.**

Bhupesh Thakur v. State of Himachal Pradesh (2024),³³⁷ an interim bail order in a 'promise of marriage' rape case filed by a transgender woman, highlights the cruel dichotomy of social recognition of transgender women as women by matrimonial families followed by a contestation over legal gender recognition after allegations of gender-based violence, as previously observed in *Somnath Bhakat, Ankit Kumar @ Hitesh and Vishwanathan Krishna Murthy*.

In this case, the transgender woman registered an FIR at the local mahila police station under Section 69 (sexual intercourse by employing deceitful means), BNS which is punishable up to 10 years' imprisonment and Section 18(d), TPA. She reported that the accused was aware of her gender and her choice to not transition, when he promised to marry her. She alleged that when he pressured her to transition to align her sex assigned at birth with her experienced gender at the behest of his family, she chose gender-affirming care. However, after transitioning, the accused refused to marry her and his family started arranging his marriage to another woman.

The defence brazenly submitted that no offence was made out under Section 69, BNS, and instead Section 18(d), TPA would be applicable on account of significantly lesser punishment. In addition to ignoring Rule 11(4) of the TPR, this reveals that the prescription of 6 months to 2 years for a wide range of offences under Section 18, TPA is exploited by the accused to diminish their culpability under VAW laws, in order to escape severe punishment.

335 Crl. Rev. Petition No. 622/2022, order dated 20.09.2022

336 *Issues under the POCSO Act: A Compilation of Legal Cases and Facts* (2023), Second Edition, HAQ Centre for Child Rights

337 Cr.MP(M) No. 1798/2024, order dated 30.08.2024

The defence relied on harmful stereotypes and audaciously submitted that as sexual relations between the parties occurred prior to the survivor's transition, neither Section 69, BNS nor Section 18, TPA were applicable. As these provisions do not cover 'cis gender male' survivors, these submissions not only undermine the survivor's self-determined gender, but they also imply an unqualified immunity as sexual offences against men are not criminalised under BNS.

The government pleader and the survivor's legal aid advocate supported her case by submitting that as her Aadhaar card records the female gender, this furnishes adequate proof of her self-determined gender and supported the charge of Section 69 of the BNS, notwithstanding the lack of forensic evidence of the survivor's physiology as contended by the defence.

The court granted bail on the grounds that the accused was cooperating with the investigation and evidence had been gathered, while imposing conditions that he must not tamper with the evidence or threaten witnesses. Thereafter, the court noted that as Section 2(10), BNS defines 'gender' as including male, female or transgender persons and Section 2(35), BNS defines 'woman' to mean a female human of any age, the Parliament intended to differentiate transgender persons from women. This analysis led the court to observe that the accused is conceivably liable for prosecution only under Section 18, TPA and not under Section 69, BNS.

This interpretation of VAW provisions under the BNS can lead to the miscarriage of justice for transgender or intersex survivors. The explanation to Section 2(10), BNS clearly states that Section 2(k), TPA governs the meaning of 'transgender person', which is as follows:

“...a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone sex reassignment surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.”

A combined reading of Section 2(k), TPA with Section 2(35), BNS abundantly clarifies that 'woman' includes transgender women, whether or not they have undergone any gender-affirming care. As a consequence, not only did the court go beyond the scope of adjudication at the stage of bail, it also caused grave prejudice to the survivor's case on merits by casting doubt on the applicability of Section 69, BNS. The misreading of law violates *Annie Nagaraja* by perpetuating stereotypes about transgender women, their bodies and gender-affirming care.

A review of the above cases indicates that police officers, defence advocates and judges alike partake in voyeuristic discussion on forensic evidence and legal submissions with respect to the sex assigned at birth and/or extent of gender-affirming care (if any), which are based on trans-misogynistic stereotypes and used to humiliate transgender women survivors. The experience of women survivors with the criminal justice system suggests that a perverse discourse on ejaculation, body language of survivors and physical or genital injuries is routinely weaponised in order to deter survivors from seeking recourse to the law.³³⁸ The law, thus, has a critical role in regulating extraneous evidence at the pre-trial and trial stages to facilitate the pursuit of justice by LGBTI survivors.

338 Baxi, P. (2014), *Public Secrets of Law – Rape Trials in India*, Oxford University Press

Witness protection and reparation

The concerns of witness protection and reparations for rape survivors were agitated by the survivor in *Shilpi Lawrence Elenjikal*.

In this case, the Uttarakhand High Court transferred the criminal proceedings to another jurisdiction,³³⁹ whereas the Supreme Court granted police protection to the complainant on all dates of appearance before the trial court and prohibited the accused from making contact with the complainant.³⁴⁰ These measures crucially affirm survivors' faith in the criminal justice system, as securing convictions in rape cases is an arduous struggle due to constant surveillance, intimidation and harassment by the accused to withdraw the case. As such, the Supreme Court recognises witness protection as integral to the survivor's right to a fair trial under Article 21 and recommends adoption of legislative measures to this effect.³⁴¹ The MHA's *Witness Protection Scheme, 2018* is binding on all State governments and UTs,³⁴² which are obliged to notify the same according to Section 398 (witness protection scheme), BNSS.

In *Shilpi Lawrence Elenjikal* the survivor contested the denial of reparation under the *NALSA Compensation Scheme for Women Victims/Survivors of Sexual Assault/Other Crimes* (2018) by the DLSA in 2019. The case has not proceeded on merits since 2022 and reported orders do not clarify the underlying basis for the rejection.³⁴³ However, based on the transgender woman's struggle in framing the appropriate charges for the criminal proceedings, it is reasonable to presume (until future orders clarify to the contrary) that the DLSA has rejected reparation by deeming her as ineligible on account of the sex assigned at birth. **As the Uttarakhand High Court has ordered the prosecution of the sexual offence to be conducted on the charge of Sections 375-376 of the IPC, the logical corollary is that transgender women are entitled to reparation under the NALSA scheme, which is a statutory right of rape survivors.**³⁴⁴

The UNSR-VAW (2010)³⁴⁵ notes that governments have a duty to mitigate the impact of violence against women by providing reparation for acts of the perpetrator and for their own failure in preventing gender-based violence. The reparation policy must take into account the impact on mental health, abortion and allied health services, loss of educational or employment opportunities, ostracism by the natal family and/or the community, abandonment by husbands/male partners and raising children resulting from rape, among other criteria. These criteria are reflected in NALSA's scheme and are equally applicable in an assessment of the impact of gender-based violence on LGBTI survivors.

The victim reparations scheme was framed under directions of the Supreme Court in *Nipun Saxena v.*

339 *Shilpi Lawrence Elenjikal v. State of Uttarakhand*, Transfer Application No. 8/2020, order dated 28.05.2021

340 *Shilpi Lawrence Elenjikal v. State of Uttarakhand & Ors.*, Special Leave for Appeal (Crl.) 6146/2019, orders dated 07.09.2020 and 23.09.2020

341 *National Human Rights Commission v. State of Gujarat*, 2003 (9) SCALE 329; *People's Union for Civil Liberties v. Union of India*, 2003 (10) SCALE 967; *Sakshi v. Union of India*, 2004 (6) SCALE 15; *Zahira v. State of Gujarat*, 2004 (4) SCC 158

342 *Mahender Chawla & Ors. v. Union of India*, (2019) 14 SCC 615

343 *Shilpi Lawrence Elenjikal v. State of Uttarakhand*, WPMS No. 1584/2021, order dated 12.08.2021

344 Section 357 (order to pay compensation), Section 357A (victim compensation scheme) and Section 357B (compensation to be in addition to fine under Section 326A or Section 376D, IPC) of the CrPC/Sections 395 and 396, BNSS

345 Rashida Manjoo (2010), *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, A/HRC/14/22

Union of India (2018),³⁴⁶ which seeks reforms to the criminal justice system for effective prosecution of VAW offences. As the litigation is pending, LGBTI groups can intervene to propose gender-based and intersectional measures to improve the responsiveness of the criminal system.

The survivor as an active rights-holder in the criminal justice system

As criminal offences are treated as a violation against the state, the state assumes the role of prosecuting the accused; the survivor's role is typically limited as a witness during the proceedings. However, recognising the need to balance the accused's right to a fair trial with the survivor's recourse to the law, it is imperative to note the framework of procedural law which authorises the survivor as an active rights-holder in the criminal justice system.

A combined reading of Sections 24(8) (public prosecutors), 301 (appearance by public prosecutors) and 302 (permission to conduct prosecution), CrPC/Sections 18, 338 and 339 BNSS authorises the survivor to appoint private advocates to represent their case during prosecution before criminal courts. These advocates are permitted to conduct the prosecution and submit written arguments under instructions of public prosecutors, after receiving the court's permission,³⁴⁷ as evidenced by the survivor's choice in *Bhupesh Thakur*. In that vein, in cases like *Shilpi Lawrence Elenjikal*, *Amal Fernandes* and *Vishwanath Krishna Murthy* survivors can engage private advocates to assist public prosecutors in making written/oral submissions on procedural and substantive questions of law.

The criminal justice system operates on the premise that 'bail is the rule' based on cardinal principles of presumption of innocence of the accused until proven guilty, protecting personal liberty and avoiding the undue hardship of pre-trial incarceration. However, the Supreme Court has declared that exceptional circumstances of flight-risk of the accused, safety of the witnesses and/or community, prevention of tampering of evidence, further investigation for recovery of evidence and severity of the crime merit jail in exceptional circumstances.³⁴⁸ This raises the issue of the survivor's role in contesting grant of bail to the accused.

Earlier, High Courts held that survivors could not independently oppose bail except under instructions of public prosecutors as per Sections 301-302, CrPC.³⁴⁹ However, the Supreme Court has held that if bail is granted in heinous crimes in ignorance of facts and evidence, if the accused interferes with administration of justice or evades the process of law or violates bail conditions, such orders can be contested by survivors independently of the state as per Section 439(2) (special powers of High Court or court of session regarding bail), CrPC.³⁵⁰

The gender bias writ large in *Maharaja*, *Shivam Devangan* and *Amal Fernandes* translated into lack of rigorous bail conditions on tampering with evidence and threatening witnesses, thereby indicating the

346 WP (C) No. 565/2012, orders dated 24.04.2018, 10.05.2018 and 11.05.2018

347 *Shiv Kumar v. Hukum Chand & Anr.*, (1999) 7 SCC 467

348 *State of Rajasthan v. Balchand*, (1977) 4 SCC 308; *State of Uttar Pradesh v. Amarmani Tripathi*, (2005) 8 SCC 21; *Sanjay Chandra v. Central Bureau of Investigation*, (2012) 1 SCC 40; *Arnab Manoranjan Goswami v. State of Maharashtra*, (2021) 2 SCC 427; *Satinder Kuman Antil v. Central Bureau of Investigation*, (2022) SCC Online SC 825

349 *All India Democratic Women's Association v. State & Ors.*, 1998 Cri LJ 2629 (Mad); *Dr. Sunil Puri v. State of Chhattisgarh*, 2006 Cri LJ 2866 (Ch'garh)

350 *Puran v. Rambilas*, AIR 2001 SC 2023

bail orders in these cases being unsustainable in law. Ultimately, the survivor's right to appeal against acquittal or conviction for a lesser offence or grant of inadequate reparation is recognised under Section 372 (no appeal to lie unless otherwise provided), CrPC/Section 413, BNSS.

Non-recognition of marital rape

Exception 2 of Section 375, IPC/Section 63, BNS states that sexual intercourse or sexual acts by a man with his own wife, the wife not being under 18 years of age, is not rape.³⁵¹ Section 376B (sexual intercourse by husband upon his wife during separation), IPC/Section 67, BNS on the other hand states that when the husband and wife are *de facto* separated, sex without consent is punishable with a sentence ranging from 2-7 years. In addition, Section 198B (cognizance of offence), CrPC/Section 210, BNSS provides that no court shall take cognizance of the offence under Section 376B, IPC unless *prima facie* satisfied of the facts which constitute the offence.

The Delhi High Court's split verdict in *RIT Foundation v. Union of India*, (2022)³⁵² focused on the validity of the aforesaid provisions. While the division bench engaged with the proportionality of punishing marital rape by husbands on par with cases of 'stranger' rape, neither judge engaged with the proportionality of non-recognition of marital rape *per se*. In *Justice K.S. Puttaswamy*, the Supreme Court laid down a 3-part test to determine the constitutional validity of state action on the anvil of Article 21:

“...An invasion of life or personal liberty must meet the threefold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.”³⁵³

If protection of the social institution of marriage/family is the legitimate state aim that ostensibly justifies Exception 2 to the rape law, the exception would still be liable to be struck down for breaching the standard of proportionality. The survival of the marriage/family cannot be countenanced by adopting a disproportionate measure of granting unqualified immunity to the husband for the offence of marital rape. In contrast, the POCSO Act's response to child sexual abuse serves an instructive analogy, in that the law makes no distinction on the substantive, procedural and evidentiary standards in prosecuting a wide range of sexual offences by 'strangers' or the family.

Although the Central government has not formally invoked Article 15(3) in support of the impugned provisions, the submission that protection of the social institution of marriage/family necessitates the exception is reminiscent of the theory of protective discrimination under Article 15(3), which historically sanctioned a restriction of women's rights under the pretext of marital obligations. *Anuj Garg's* contest to protective discrimination indicates that rather than undermining wives' recourse to the law, the state must affirm their autonomy by removing the exception and transform stereotypical gender roles to eradicate spousal violence.

The National Family and Health Survey (NFHS-5, 2019-21) reports that although 82% married women

351 *Independent Thought v. Union of India & Anr.*, (2017) 10 SCC 800

352 2022 SCC Online Del 1404

353 (2017) 10 SCC 1, para. 325

identify current husbands and 14% married women identify former husbands as perpetrators of sexual violence, only 26% of survivors of physical and sexual violence seek help from natal families (61%), matrimonial families (29%), friends (17%), police (6%), women's groups (3%) or doctors and lawyers (2%). When these figures are contrasted with asset ownership which reveals that only 42% women own a home and 32% women own land (singly or jointly),³⁵⁴ the social and economic conditions that impede marital rape survivors to invoke Section 376B, IPC/Section 67, BNS become apparent.

In the interim, wives can resort to the DV Act for legal redress of 'sexual abuse', which includes any conduct of sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of women.³⁵⁵ The magistrate is authorised to prohibit the respondent from committing domestic violence, including sexual abuse.³⁵⁶ Although the DV Act operates as a civil law by prioritising social and economic well-being of survivors, the respondent's breach of protection orders is treated as a cognizable and non-bailable offence which is punishable with imprisonment up to 1 year and/or fine.³⁵⁷

Non-recognition of sexual offences

After *Navtej Singh Johar*, Section 377 of the IPC only penalised sexual offences against men and transgender persons with a sentence ranging from 10 years to life. However, after coming into force of the BNS, which repealed the IPC and contains no corresponding provision to Section 377, adult gay/bisexual male survivors are divested of an adequate remedy in law.

A PIL seeking to rectify this manifest legislative error before the Delhi High Court has been converted into a representation to the Central government to take urgent action.³⁵⁸ The government submitted that despite the passage of the new criminal laws, it is in the process of receiving inputs from various stakeholders to propose suitable amendments to the statutes. However, the absence of a corresponding provision to Section 377 in the BNS is not attributable to a mere legislative oversight, as the parliamentary standing committee took cognisance of this significant gap and unequivocally recommended introducing a comparable provision in the new statute.³⁵⁹

The lack of an adequate remedy for sexual offences against married women and gay/bisexual men violates Articles 14, 15, 19 and 21 of the Constitution³⁶⁰ as well as the duty of due diligence to prevent, prosecute and remedy gender-based violence as per international human rights norms.³⁶¹ The UNIE-SOGI recommends the introduction of new legislation or amendments to existing VAW laws to provide victim

354 *National Family Health Survey (NFHS-5), India Report (2019-21)*, International Institute of Population Sciences, Ministry of Health and Family Welfare, Government of India, pages 579-589, 639-648

355 Explanation I of Section 3, DV Act

356 Section 18, DV Act

357 Section 31 (penalty for breach of protection order by respondent), DV Act

358 *Gantavya Gulati v. Union of India*, 2024 SCC Online Del 5990

359 *Department-Related Parliamentary Standing Committee on Home Affairs (2023)*, Report No. 246 on the Bharatiya Nyays Sanhita, 2023, paras. 1.14-1.17

360 The opinion of Rajiv Shakhder, J. in *RIT Foundation* (2022)

361 *In-depth study on all forms of violence against women* (2006), Report of the Secretary General, A/61/122/Add.1, paras. 139-141, 254-257; General Recommendation No. 19: Violence Against Women (1992), adopted by the Committee on the Elimination of All Forms of Discrimination Against Women, Eleventh Session, paras. 8-9, 24(a); General Recommendation No. 24: *Women and Health* (1999), para. 18; General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19 (2017), paras. 24-29

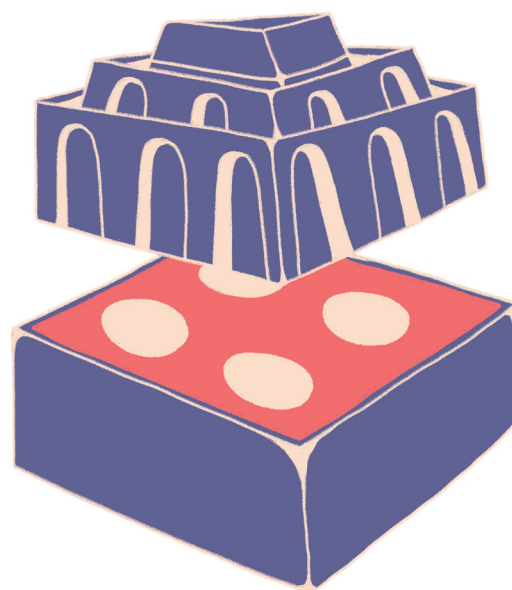
neutrality.³⁶² An amendment to the rape law to provide for victim-neutrality would be appropriate, given the law's framing of perpetrators as male averts the risk of gender-neutrality. This would be consistent with recommendations of the Expert Committee on the Issues Relating to Transgender Persons (2013),³⁶³ the Justice Verma Committee (2013),³⁶⁴ the UNSR-VAW (2014),³⁶⁵ feminist and LGBTI advocacy groups.³⁶⁶

The aforesaid analysis reliably affirms the view that gender-based and intersectional reforms to locate LGBTI survivors within the criminal justice system do not de-prioritise the inequality of women. Conversely, the fight against trans/homo/bi-phobia benefits the fight against misogyny and other forms of gender-based inequalities, because structural reforms in favour of LGBTI survivors necessitate a rights-based commitment to implementing the substantive, procedural and evidentiary standards which simultaneously bolster the duty to prevent, prosecute and remedy violence against women.

3.6 Custodial violence

Preventive, punitive and remedial measures on custodial violence

A systemic pattern of police bias, discrimination and atrocities against transgender persons, sex workers, gay and bisexual men is well-documented by civil society organisations and government bodies, including illegal detention, aggravated sexual offences and custodial torture.³⁶⁷ A disproportionate representation of transgender persons as victims of custodial violence is attributable to the structural violence of criminalisation, formerly under colonial laws, which identified 'criminal tribes' and 'eunuchs' for targeted policing. This legacy is perpetuated by current state-level police laws, which treat



362 Viktor Madrigal Borloz, *The Law on Inclusion* (2021), Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/47/27, paras. 77, 81, 82

363 *Report of the Expert Committee on Issues Relating to Transgender Persons* (2013), Ministry of Social Justice and Empowerment, Government of India, page 49, 92

364 Justice Verma, JS. et al, *Report of the Committee on Amendments to Criminal Law* (2013), Government of India, page 416

365 Rashida Manjoo (2014), Mission to India, Report of the Special Rapporteur on violence against women, its causes and consequences, A/HRC/26/38/Add.1, para. 78(c)

366 Submissions to Justice Verma Committee by Lawyers Collective, Alternative Law Forum, Saheli Women's Resource Centre, All India Democratic Women's Association, Forum Against Oppression of Women, Aawaaz-e-Niswan, Lesbians and Bisexuals in Action and Partners for Law in Development (2013). Available at: <https://pldindia.org/feminist-law-archives/>

367 *Gender Violence in India* (2022), Prajnya, page 12; Sharma M. et al (2021) SOGIESC Rights in India, An Unfinished Agenda, International Lesbian, Gay, Bisexual, Trans and Intersex Association-Asia, pages 15-16, 21; *Study on Human Rights of Transgender as a Third Gender* (2017), National Human Rights Commission, page 48; *Human rights violations against sexuality minorities in India* (2001), pages 12-18; "Unnatural Offences": Obstacles to Justice in India based on Sexual Orientation and Gender Identity (2016), International Commission of Jurists, pages 33-42; *Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India* (2002), Human Rights Watch; *Human rights violations against the transgender community: A study of kothi and hijra sex workers in Bangalore* (2003), People's Union for Civil Liberties Karnataka (PUCL-K); *Violence in intimate and family relationships of men who have sex with men, transgender women and hijras and its impact on HIV vulnerability in India* (2015), India HIV/AIDS Alliance

them as suspected and/or habitual offenders, as reflected by the parallel of police brutality against denotified tribal communities.³⁶⁸

The settled position of law is that a person need not be formally arrested to be under ‘custody’ of the police. Even prior to registration of an FIR, if a police officer establishes contact with any person deemed to be accused of an offence, their personal liberty is effectively curtailed. Thus, any kind of restriction, restraint or surveillance by a police officer with respect to accused persons amounts to *de facto* custody.³⁶⁹

In *Thangjam Santa Singh @ Santa Khurai v. State of Manipur* (2024), the Supreme Court ordered a stay on the summons issued under Section 160[1] (police officer’s power to require attendance of witness), CrPC to a transgender woman, in order to mitigate the risk of custodial violence.³⁷⁰ In addition, the court restrained her arrest and directed the Manipur government to appoint a woman Deputy Superintendent of Police, thereby balancing the transgender woman’s well-being with the police’s objective to investigate the offence.³⁷¹ As Section 160(1), CrPC provides that no woman shall be required to attend any place other than her residence for police interrogation, this demonstrates an implicit application of a gender-based and intersectional analysis to procedural law.

A logical corollary of *Thangjam Santa Singh @ Santa Khurai* is that references to particular grounds (‘gender’) in procedural law must not be read as delineating a group with fixed boundaries (‘women’). Rather, they must be understood as seeking to regulate relationships of power, domination and insubordination within the criminal justice system. As a consequence, women-centric measures, including to require a woman police officer to effect the arrest, to record the statement of the victim of rape preferably at their residence and extension of beneficial provisions on bail in cases of non-bailable offences³⁷² must apply in favour of women and LGBTI people alike to mitigate their risk of custodial violence.

In *DK Basu (I) v. State of West Bengal* (1997),³⁷³ the Supreme Court directed that all persons have a right to inform relatives, friends or other persons if they are detained or arrested, be medically examined for any injuries at the time of detention or arrest and to consult a lawyer during interrogation, among other measures, to prevent custodial violence. Non-compliance of *DK Basu* violates detained/arrested persons’ rights under Article 21 and renders defaulting police officers liable for departmental action, contempt of court and/or criminal proceedings.³⁷⁴

368 Narrain, S. (2009), Crystallising Queer Politics: The Naz Foundation Case and its Implications for India’s Transgender Communities, 2 NUJS Law Review, pages 458-459; Bhukya, B. et al (2021), *Unveiling the World of the Nomadic Tribes and Denotified Tribes: An Introduction*, Economic and Political Weekly, Vol. 56, Issue No. 36. Available at: <https://www.epw.in/engage/article/unveiling-world-nomadic-tribes-and-denotified>

369 *Perumal Raja v. State*, 2024 SCC Online SC 12, paras. 25-29

370 Kumar, S. (2023), *Supreme Court stays Manipur Police’s arrest of transgender rights activist in case over social media posts*, LiveLaw. Available at: <https://www.livelaw.in/top-stories/supreme-court-stays-arrest-of-transgender-rights-activist-by-manipur-police-over-social-media-posts-240507>

371 *Thangjam Santa Singh @ Santa Khurai v. State of Manipur*, WP (Crl.) No. 498/2023, orders dated 18.10.2023 and 26.02.2024

372 Section 46 (arrest how made), Section 157 (procedure for investigation) and Section 437 (when bail may be taken in case of non-bailable offence) of the CrPC/Sections 43, 176 and 480, BNSS

373 (1997) 1 SCC 416, para. 35

374 Section 220 (commitment for trial or confinement by person having authority who knows that he is acting contrary to law), Section 330 (voluntarily causing hurt to extort confession or to compel restoration of property) and Section 331 (voluntarily causing grievous hurt to extort confession or to compel restoration of property), IPC

Section 376(2)(a), IPC/Section 64(2)(a), BNS penalises rape by police officers with 10 years to a life sentence, whereas Section 376C (sexual intercourse by a person in authority), IPC/Section 68, BNS penalises any person in a position of authority or a public servant, who abuses such authority to induce any woman in his custody or under his charge to have sexual intercourse with him with 5-10 years rigorous imprisonment. This proportionality of sentencing that is commensurate to the gravity of offences is glaringly omitted in Section 18 of the TPA, despite the well-documented history of custodial violence against transgender persons;³⁷⁵ including coercing transgender persons to have sexual intercourse as a pre-condition to register FIRs.³⁷⁶ The coverage of LGBTI survivors for aggravated sexual offences under IPC/BNS is necessary and justifiable based on *Annie Nagaraja, Principal Secretary* and Rule 11(4), TPR.

Section 197[1] (prosecution of judges and public servants), CrPC/Section 218(1), BNSS states that no court shall take cognisance of complaints with respect to police officers accused of offences in discharge of official duties, except with previous sanction of Central/State government. This has been frequently misused to obstruct police accountability in several cases, by erroneously claiming that since the alleged unlawful detention, custodial violence or firing at protestors occurred “*in discharge of official duties*”, no court can take cognisance until the appropriate government has granted sanction. However, the Supreme Court has declared that since acts of torture, disproportionate use of force against unarmed persons and wrongful confinement in police lock-up are patently illegal, accused police officers are liable for prosecution without prior sanction.³⁷⁷

The CLA, 2013 added an explanation to Section 197(1), CrPC (which is reflected in BNS) which amply clarifies that prior sanction is not required to prosecute a police officer if he is accused of offences of gender-based violence described in Section 166A (public servant disobeying direction under law), IPC as well as the offence of non-registration of FIR. This amendment acknowledges the feminist movement’s demand for removal of procedural barriers in the prosecution of state actors for gender-based violence.³⁷⁸

As prosecutions of custodial violence notoriously result in acquittals due to lack of evidence, the LCI proposed amending the IEA to provide a rebuttable presumption in favour of survivors/victims.³⁷⁹ The LCI recommended that if the duration of custody, the statement of survivor/victim and forensic evidence establish that bodily injuries originated in custody, courts should presume that police/prison authorities have committed custodial violence. The burden of proof must rest on the accused police/prison authorities, which can promote proactive compliance with *DK Basu*.

Apart from punitive and/or disciplinary measures against the accused police/prison authorities, the survivor/legal heir is entitled to seek reparation.³⁸⁰ In *Jayalakshmi v. State of Tamil Nadu & Ors.* (2007),³⁸¹ where a transgender woman died in police custody after rape and torture, the Madras High Court directed

375 *Human rights violations against the transgender community: A study of kothi and hijra sex workers in Bangalore* (2003), People’s Union for Civil Liberties Karnataka (PUCL-K)

376 Mishra, J. (2022), *Raped, Mocked by Police for Seeking Justice: India’s Rape Laws Do Not Cover Transwomen*, Article 14. Available at: <https://article-14.com/post/raped-mocked-by-police-for-seeking-justice-india-s-rape-laws-do-not-cover-transwomen-62c65919a04a3>

377 *PP Unnikrishnan v. Puttiyottil Alikutty*, AIR 2000 SC 2952; *SS Khandwala (IPS) Addl. DGP & Ors. v. State of Gujarat*, (2003) 1 GLR 802; *Uttarakhand Sangharsh Samiti v. State of Uttar Pradesh*, (1996) 1 UPLBEC 461

378 Jaising, I. (2015), *Status of Law Relating to Violence Against Women and Due Diligence Obligation: Duty to Prevent, Protect and Respect*, Amicus Brief in *Nipun Saxena v. Union of India*, WP (C) No. 565/2012, page 160

379 113th Report on *Injuries in Police Custody* (1985), Law Commission of India

380 *Re-Inhuman Conditions in 1382 Prisons*, (2017) 10 SCC 658

381 2007 4 LW 404

payment of reparation to her family and initiated disciplinary action against the police officials.

Policing and prison reforms

In *Re-Inhuman Conditions in 1382 Prisons*, the Supreme Court identified custodial violence, overcrowding and inadequately trained staff as significant challenges in the protection of prisoners' rights and issued a series of orders seeking prison reforms.

Under instructions of the court, the Central government issued an advisory to State governments and UTs to constitute Under Trial Review Committees (UTRC) in every district. The UTRC comprises of district judges, superintendents of police and DLSAs, who must meet every 3 months to verify compliance of Section 436 (in what cases bail to be taken) and Section 436A (maximum period for which an undertrial prisoner can be detained), CrPC.³⁸² The objective is to ensure that undertrial prisoners are not denied bail if they are unable to furnish sureties and their detention must not exceed half of the sentence for the triable offence.

Although the cardinal principle of 'bail is rule, jail is exception' has been affirmed with respect to LGBTI undertrials' vulnerability to custodial violence,³⁸³ courts must tailor bail conditions in order to secure their liberty. In *Sathish v. State* (2023),³⁸⁴ a transgender woman languished in jail because she could not comply with the bail condition of furnishing 2 sureties by blood relatives due to conflict with the natal family. The Madras High Court granted bail by modifying the condition to provide that any 2 people can furnish sureties on her behalf, in exercise of its powers under Section 439, CrPC. In fact, the Ministry of Home Affairs (MHA) has issued advisories to State governments and UTs which recognise the role of the chosen family, friends and legal advisers for preparation of appeal, arranging bail or management of property and family affairs on behalf of LGBTI inmates.³⁸⁵ These advisories clearly oblige courts to follow *Sathish* in granting bail to LGBTI inmates who are unable to furnish sureties by blood relatives

In *Re-Inhuman Conditions in 1382 Prisons*, the Supreme Court directed High Courts to initiate *suo moto* proceedings to identify victims of custodial violence and grant reparation to their legal heirs. The court further directed State governments and UTs to secure the right to health of prisoners, including by providing mental healthcare services. Ultimately, the court directed implementation of an independent oversight mechanism under the *Prisons Act, 1894* to ensure protection of prisoners' right³⁸⁶. In this context, the court has specifically demanded action by State governments and UTs on the status of women and transgender prisoners.³⁸⁷

The aforesaid law on prisons provides that State governments frame rules to constitute a Board of Visitors (BOV), comprising of official persons (judges, magistrates, medical officers, welfare officers, etc.) as well as non-official visitors (public-spirited individuals), which must include LGBTI people's organisations to

382 *Re-Inhuman Conditions in 1382 Prisons*, WP (C) No. 406/2013, order dated 05.02.2016

383 *XXX v. State of Maharashtra*, 2024 SCC Online Bom 1984; *Divya Kailash Singh & Anr. v. State of Maharashtra*, Bail Application No. 3272/2024, order dated 19.11.2024

384 2023 SCC Online Mad 4973

385 *Treatment and care of transgender persons in prisons* (2022), Ministry of Home Affairs, Government of India; *Prison Visitation Rights of LGBTQ+ Community* (2024), Ministry of Home Affairs, Government of India

386 *Re-Inhuman Conditions in 1382 Prisons*, (2017) 10 SCC 658, paras. 33-34, 58

387 *Re-Inhuman Conditions in 1382 Prisons*, WP (C) No. 406/2013, order dated 29.08.2023

monitor their prison conditions as per international human rights norms.³⁸⁸ In *DK Basu (II) v. State of West Bengal* (2015),³⁸⁹ the Supreme Court directed State governments and UTs to implement this beneficial provision as well as install CCTV cameras for maintaining oversight on prisons and police stations. These cameras must be installed at all entry and exit points, be equipped with night vision and audio and be capable of storing the recordings for at least 12-18 months.³⁹⁰

In *Re-Inhuman Conditions in 1382 Prisons*, the Supreme Court strongly recommended that the reduction of arbitrary arrests could significantly lower overcrowding and custodial violence in prisons. In this context, the court's reiteration of the police officers' duty to follow Section 41 (when police may arrest without warrant) and Section 41A (notice of appearance before police officer), CrPC/Section 35, BNSS to prevent unlawful arrest in offences punishable up to 7 years is crucial.³⁹¹ However, **the reformative intent of reducing arbitrary arrests can be extrapolated to also review laws which de facto criminalise LGBTI people due to poverty and/or status. As per evolving consensus of international human rights norms, the criminalisation of homelessness, abortion, sex work, SOGIESC-status, begging and drug use is incompatible with the basic principle of criminal law to proscribe harmful conduct that poses risk to public safety, order or health.**³⁹²

In particular, Indian courts have advanced the framework on decriminalisation of conduct associated with poverty and/or status, which offers opportunities to reduce arbitrary arrests in order to eradicate custodial violence against transgender prisoners. In *Harsh Mander & Anr. v. Union of India* (2018)³⁹³ and *Suhail Rashid Bhat v. State of Jammu and Kashmir* (2019),³⁹⁴ High Courts struck down local anti-begging laws for violating Articles 14, 19 and 21. As begging is linked to caste-based marginalisation, lack of employment opportunities and unfair distribution of wealth, courts recommend that governments adopt wide-ranging economic policies to prevent conditions of poverty rather than use penal laws to invisibilise its failure to do so. At present, 23 State governments and UTs apply anti-begging and/or anti-vagrancy statutes³⁹⁵ and Section 18(a), TPA criminalises enticement of transgender persons in 'forced or bonded labour'. These laws merit a substantive review by legislative, judicial and administrative branches of government to decriminalise begging. Rajasthan is the only state which discards penal measures and adopts a socio-economic response towards persons in destitution.³⁹⁶

388 Principle 9 (the right to treatment with humanity while in detention), *Yogyakarta Principles: Application of international human rights law in relation to sexual orientation and gender identity* (2007)

389 (2015) 8 SCC 744, para. 38.5-38.7

390 *Paramvir Singh Saini v. Baljit Singh & Ors.*, (2021) 1 SCC 184

391 *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273; *Social Action Forum for Manav Adhikar v. Union of India*, (2018) 10 SCC 443; *Mohammed Zubair v. State of NCT of Delhi*, 2022 SCC Online SC 897

392 *A human rights-based approach to criminal law, including the decriminalisation of conduct associated with poverty and status* (2024), International Commission of Jurists

393 2018 SCC Online Del 10427

394 2019 SCC Online J&K 869

395 *West Bengal Vagrancy Act, 1943; Madras Prevention of Beggary Act, 1945; Police (Puducherry Amendment) Act, 1966; Bhopal Prevention of Begging Act, 1947; Madhya Pradesh Bikshavirty Nivaran Adhiniyam, 1973; Bihar Prevention of Begging Act, 1951; Andhra Pradesh Prevention of Beggary Act, 1977; Goa, Daman and Diu Prevention of Begging Act, 1972; Haryana Prevention of Begging Act, 1971; Himachal Pradesh Prevention of Begging Act, 1979; Karnataka Prevention of Begging Act, 1975; Punjab Prevention of Begging Act, 1971; Uttar Pradesh Prevention of Begging Act, 1972; Assam Prevention of Begging Act, 1964; Sikkim Prohibition of Beggary Act, 2004.* Kerala applies the Cochin Vagrancy Act, 1945, Travancore Prohibition of Begging Act, 1945 and the Madras law across different districts of the state. Gujarat, Chhattisgarh, Jharkhand, Uttarakhand, Telangana and Chandigarh have adopted laws of their neighbouring states

396 *Rajasthan Rehabilitation of Beggars or Indigents Act, 2012*

In *Karnataka Sexual Minorities Forum v. State of Karnataka* (2017)³⁹⁷ and *Vyjayanti Vasanta Mogli v. State of Telangana* (2023),³⁹⁸ High Courts struck down local police laws and regulations which mandated surveillance of transgender persons ‘suspected’ of kidnapping, emasculating or committing child sexual abuse of minor boys, prohibited transgender persons from adopting children and criminalised them for wearing female clothing, singing, dancing or participating in public entertainment as violating Articles 14 and 21 for perpetuating stereotypes associated with transgender persons as ‘habitual offenders’. State governments and UTs must adopt measures akin to the *Tamil Nadu Subordinate Police Conduct Rules, 1964*, as amended in 2022, to authorise disciplinary action against police officers for harassment of LGBTI people, which has contributed towards periodic capacity-building of the police on LGBTI issues.³⁹⁹

In *Budhadev Karmaskar v. State of West Bengal & Ors.* (2022),⁴⁰⁰ the Supreme Court issued directions to Central and State governments restraining the arrest of adult sex workers who are engaging in sex work with consent, releasing sex workers detained against their will in correctional homes and training district, state and national legal services authorities to provide legal aid to sex workers, among others. Sex workers collectives have critiqued a proposed anti-trafficking Bill for the prevalent penal approach and recommended social and economic policies to alleviate poverty,⁴⁰¹ to guide Central and State governments with respect to implementation of policies, programmes and/or law reform⁴⁰² governing sex workers and victims of trafficking. The Bill’s conflation of sex workers with victims of human trafficking violates *Anuj Garg*, as ignoring consent and age constitutes protective discrimination.

The failure of State governments and UTs’ to adhere to *Prakash Singh v. Union of India* (2006)⁴⁰³ poses significant barriers to usher in criminal justice reforms. In this case, the court was seised of the issue of police accountability in the context of non-implementation of several commissions’ recommendations by Central/State governments and UTs. The range of issues particularly concerned ensuring accountability with respect to the police’s role in investigation and prosecution of offences, police misconduct (inaction or discriminatory application of law, harassment, unlawful detention, custodial violence, fabrication of evidence, malicious prosecution etc.), and their responsiveness towards ‘weaker sections’ of society.

A principal direction in *Prakash Singh* required the constitution of district and state-level Police Complaints Authorities (PCA), comprising retired judges, civil servants, police officers and civil society representatives. The state-level PCA is authorised to examine complaints of death, grievous hurt, or rape in police custody against officers of the rank Superintendent of Police and above, whereas, the district-

397 WP No. 1397/2015, order dated 06.02.2017

398 2023 SCC Online TS 1688

399 *S. Sushma and U. Seema Agarwal v. Commissioner of Police & Ors.*, WP No. 7284/2021, order dated 18.02.2022

400 Criminal Appeal No. 135/2010, order dated 19.05.2022

401 *Comments on Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill* (2018), Coalition for an Inclusive Approach on the Trafficking Bill

402 Section 370 (trafficking of person), Section 370A (exploitation of a trafficked person), Section 371 (habitual dealing in slaves), Section 372 (selling minor for purposes of prostitution etc.) and Section 373 (buying minor for purposes of prostitution etc.) of the IPC; ITPA criminalises activities related to prostitution and provides rescue, rehabilitation and correction of sex workers; the *Juvenile Justice (Care and Rehabilitation) Act, 2015* provides a framework for protection of children who are missing or at risk of trafficking; a series of laws that deal with forced labour and child labour through regulation and welfare-oriented measures like the *Bonded Labour System (Abolition) Act, 1976*; *Contract Labour (Regulation and Abolition) Act, 1970*; *Inter-state Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979*; *Children (Pledging of Labour) Act, 1933* and *Child Labour (Regulation and Prohibition) Act, 1986*

403 (2006) 8 SCC 1, paras. 2, 4-7, 10, 12, 25-26, 29-31

level PCA is authorised to examine complaints of extortion, unauthorised usurpation of land/property and any incident of grave abuse of authority (including custodial violence) against police officers up to the rank of the Deputy Superintendent of Police. The PCAs' recommendations for departmental or criminal action are binding on the appropriate authorities.

The Central government proposed the *Model Police Bill, 2006* which statutorises *Prakash Singh*. However, compliance by State governments and UTs varies. As of 2020, only Assam, Haryana, Mizoram and Uttarakhand report partial compliance, whereas Andhra Pradesh reported full compliance with respect to PCAs,⁴⁰⁴ which have been the focus of litigation due to non-adherence to directions on composition, mandate and powers.⁴⁰⁵ In the absence of political will from State governments and UTs, the Allahabad, Madras and Andhra Pradesh High Courts have ensured compliance.⁴⁰⁶ The Justice Verma Committee recommends that when State governments and UTs adopt the model law, they must not only investigate sexual offences by the police but also condonation and/or abetment of sexual offences by the police.⁴⁰⁷

Finally, although it is desirable for India to ratify the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT, 1984) to promote accountability under international oversight mechanisms, Central and State governments and UTs are nevertheless mandated to act urgently to promote criminal justice reforms as torture and other cruel, inhuman or degrading treatment or punishment is barred by Article 21.⁴⁰⁸

Cooperative federalism and the criminal justice system

In order to transform heteronormative and trans-exclusionary gender norms in society for effectively combating gender-based violence against women and LGBTI survivors, the sensitisation of the legislative, judicial and administrative branches of government is imperative. However, many legislative and administrative issues are either entrusted to State governments or jointly distributed among Central and State governments as per Article 246 (subject matter of laws made by parliament and by the legislatures of states) read with Schedule VII of the Constitution. As public order, police and prisons are entrusted under List II (State List) of Schedule VII and criminal law, procedure and evidence are entrusted under List III (Concurrent List), this ostensibly leads to a gridlock between the Central and State governments. This manifests in variance in the investigation and prosecution of gender-based violence across the country, as evidenced by the divergence in the criminal justice system's approach in adjudicating domestic violence, dowry-related cruelty, sexual harassment and rape cases of LGBTI survivors reviewed here.

However, courts have noted that there is no precise bifurcation in implementing Central and State laws in India, as state officials and central bureaucratic appointees in states administer state laws as well as central laws. This context has influenced the adoption of the doctrine of cooperative federalism, whereby courts have declared that Central and State governments must jointly negotiate, coordinate

404 Raman, S. and Paliath, S. (2020), *14 years on, no State/UT has fully implemented SC-mandated police reforms*, Indian Spend. Available at: <https://www.indiaspend.com/14-years-on-no-state-ut-has-implemented-sc-mandated-police-reforms>

405 *Legal Accountability of the Police in India* (2015), Centre for Law and Policy Research, pages 13-15

406 *Seven Steps to Police Reform* (2010), Commonwealth Human Rights Initiative, pages 9-11

407 Justice Verma, JS. et al, *Report of the Committee on Amendments to Criminal Law* (2013), Government of India, pages 318-319, 328-330

408 *Shatrugan Chauhan & Anr. v. Union of India*, (2014) 3 SCC 1, paras. 46, 61

and perform their duties.⁴⁰⁹ The legislative and administrative classification, in practice, only mandates State governments to make infrastructure available at the regional level (in this case, build and operate prisons, recruit and train staff, etc.), whereas the Central Government is implicated in governance aspects of planning, financial allocation and providing technical stewardship for State Governments and UTs in administration of the criminal justice system.⁴¹⁰

In *Re: Inhuman Conditions in 1382 Prisons*, the court resolved the purported gridlock to usher criminal justice reforms due to separate and joint allocation of powers between Central and State governments and UTs by directing the Central government to provide active support and monitor implementation by the latter in preventing overcrowding, custodial violence and training prison staff.⁴¹¹ This practice of cooperative federalism must translate into uniform standard operating procedures, which are applicable across States and UTs for the investigation and prosecution of gender-based violence against women and LGBTI survivors.⁴¹²

At the time of entry into prisons, undergoing search procedures for restricting entry of prohibited substances, medical examination and allocation of wards exposes transgender persons to a high risk of gender-based violence, as these procedures routinely involve being forcefully stripped and subjected to unwarranted sex determination inspections typically by male officials.⁴¹³ As a matter of routine practice, transgender women are detained in men's prison wards, with reports of a case where 5 transgender women were placed inside the men's prison ward at the Nagpur Central Prison with 2,000 male inmates, which led to sexual harassment and violence.⁴¹⁴

In this context, the MHA advisories on LGBTI prisoners⁴¹⁵ provide technical stewardship to State governments and UTs in a spirit of cooperative federalism, on preventing gender-based discrimination and violence in correctional facilities. In addition, the Central government has proposed the *Model Prisons and Correctional Services Act, 2023* for adoption by States and UTs, which reflects a gender-based and intersectional approach towards the needs of transgender inmates. The advisory on transgender inmates and the model law recommends that:

- Admission procedures, medical examination, search, lodging, clothing, requisitioning of police escorts and treatment inside prisons must be consistent with the self-determined gender;
- Search procedure for transgender inmates must be conducted by a person of their preferred gender identity or by medical professionals/paramedics. The person conducting the search must ensure the safety, privacy and dignity of the person being searched. At the stage where the search procedure requires stripping, it must be done in a private room or partition. The search procedure

409 *Bir Singh v Delhi Jal Board* (2018) 10 SCC 312, paras 119-128

410 Sanap, S. (2023) et al, *The Judiciary-Executive Interface in Areas of Health*, RTH-UHC Working Paper 2, Centre for Health Equity, Law and Policy, pages 35-47

411 *Re-Inhuman Conditions in 1382 Prisons*, (2017) 10 SCC 658

412 Jaising, I. (2015), *Status of Law Relating to Violence Against Women and Due Diligence Obligation: Duty to Prevent, Protect and Respect*, page 10

413 *Lost Identity: Transgender persons inside Indian prisons* (2020), Commonwealth Human Rights Initiative, pages 40-45

414 Shantha, S. (2021), *Misgendering, sexual violence, harassment: What it is to be a transgender person in an Indian prison*, The Wire. Available at: <https://thewire.in/lgbtqia/transgender-prisoners-india>

415 *Treatment and care of transgender persons in prisons* (2022), Ministry of Home Affairs, Government of India; *Prison Visitation Rights of LGBTQ+ Community* (2024), Ministry of Home Affairs, Government of India

must strictly be confined to compliance with security protocols and restriction of prohibited substances and should not be aimed at determining the person's gender;

- If court or prison records mention incorrect gender of transgender inmates, the superintendent must take assistance of the DLSA to assist transgender inmates in obtaining a certificate of identity;
- Transgender inmates shall be allowed to meet or communicate with their natal or chosen family, friends or legal advisers for preparation of appeal, arranging bail or management of property and family affairs;
- The training of prison officials must be jointly undertaken by government stakeholders in consultation with CBOs.

Despite harm-reductionist measures of private rooms or partitions, strip-searches violate transgender inmates' privacy, dignity and safety in the context of limited autonomy of prisoners, systemic gender bias and the high-risk of custodial violence. In *Ahmed Kamal Shaikh v. State of Maharashtra* (2023),⁴¹⁶ a trial court directed the superintendent and prison officials to prohibit strip-searches as they violate prisoners' privacy. **In order to ensure security protocols and restriction of prohibited substances, prison officials were directed to use scanners or electronic devices.** Notably, Rule 276 (search of prisoners on admission) of *Delhi Prison Rules, 2018* provides that prisoners must be searched with body scanners. The MHA advisory clearly merits a review by the Central government to comply with its duty of due diligence to avert condoning and/or perpetrating gender-based violence against LGBTI prisoners.

In *Law Foundation v. State of Bihar* (2022),⁴¹⁷ the petitioner sought the MHA advisory's enforcement of gender-congruent placement of transgender inmates to prevent custodial violence. The Patna High Court examined the responses of the Department of Home Affairs and the Inspector General of Prisons and Reforms Services and observed that the Bihar government had substantially complied with the MHA advisory. In *S. Sushma and U. Seema Agarwal v. Commissioner of Police & Ors.* (2022),⁴¹⁸ the Director General of Prisons and Correctional Services collaborated with CBOs to train prison officials on providing separate wards for transgender prisoners, under orders of the Madras High Court.

In *Sunpreet Singh v. Union of India & Ors.* (2024),⁴¹⁹ the Punjab and Haryana High Court is reviewing the availability of separate wards and toilets for transgender prisoners as per Rule 10 (5,9) of the TPR in prisons and police stations. The existing public sanitation facilities typically present a risk of violence, dysphoria and/or adverse health consequences for transgender and intersex persons. In addition, transgender persons need to use washrooms to meet other needs besides sanitation, for instance, to adjust their binders or deal with menstruation.⁴²⁰ The MHA advisory is resourceful in ensuring separate wards/enclosures, toilets, shower facilities etc. for transgender men and women.

416 2023 SCC Online Dis Crt (Bom) 4

417 2022 SCC Online Pat 2371

418 WP No. 7284/2021, order dated 06.12.2022

419 CWP-PIL-116/2023, orders dated 18.01.2024, 29.07.2024, 10.12.2024 and 20.03.2025

420 Das, S. and Noronha, N. (2024), *How India continues to deny its gender queer citizens access to toilets*, queerbeat. Available at: <https://www.queerbeat.org/stories/how-india-continues-to-deny-its-genderqueer-citizens-access-to-toilets/>

3.7 LGBTI adolescents in need of care and protection

At academic institutions

Although bullying in schools on account of SOGIESC is less documented, a 2019 Tamil Nadu-based study provides some insights on the nature and scale of this phenomenon and school authorities' response. Participants reported high incidence of verbal and sexual harassment during primary school and many incidents of verbal and physical harassment during middle-to-higher secondary school. Of the total documented cases, only 18% reported acts of bullying to school authorities. In the reported cases, the response of school authorities ranged from taking disciplinary action against the offending male students and teachers, instructing victims to change their perceived feminine behaviour to avoid bullying and re-traumatising students by ridiculing them. The participants reported that bullying played a key role in facing isolation, developing anxiety and depression, lower academic performance, missing classes and discontinuing school. The 82% who did not take action against bullying were inhibited by unsupportive family members.⁴²¹

SOGIESC-related bullying in schools interrupts development in formative years and contributes to poorer social and economic outcomes for LGBTI people in later stages. As a consequence of diminished prospects in formal employment, a large proportion of the respondents in the aforesaid study turned to begging or sex work for survival. Such a finding necessitates a gender-based and intersectional application of laws and policies governing academic institutions.

Section 2(d) of the *Right of Children to Free and Compulsory Education Act, 2009* ('RTE Act') defines a 'child belonging to disadvantaged group' to mean one with a disability, child belonging to the SC/ST community, socially and educationally backward class or such other group having disadvantage owing to social, cultural, economic, geographic, linguistic, gender or other factor, as notified by the appropriate government. A gender-based and intersectional reading of Section 2(d), RTE mandates that grounds therein ('gender' or 'other factor') must not be read as delineating a group with fixed boundaries ('girls'), rather, they must be understood as seeking to regulate relationships of power, domination and insubordination within academic institutions, which necessitates notification of LGBTI minors as children belonging to disadvantaged groups. In *Naz Foundation (India) Trust v. Union of India & Ors.*, (2017),⁴²² the Supreme Court's direction to State governments and UTs to notify children living with HIV as covered under Section 2(d), RTE to secure their right to education affirms the liberal application of law.

The notification of LGBTI minors as children belonging to disadvantaged groups implicates the government to ensure that they are not discriminated against and prevented from completing elementary education on any grounds,⁴²³ they must constitute at least 25% of class strength in private schools⁴²⁴ and their parents shall be proportionately represented on School Management Committees (SMC).⁴²⁵ These guarantees are crucial as the appropriate bodies are tasked with preventing mental and

421 *Be a Buddy, Not a Bully: Experiences of sexual and gender minority youth in Tamil Nadu schools* (2019), Sahodaran and United Nations Educational, Scientific and Cultural Organisation (UNESCO)

422 WP (C) No. 147/2014, order dated 31.03.2017, 05.05.2017

423 Section 8 (c) [duties of appropriate government] read with Section 9 (c) [duties of local authority], RTE Act

424 Section 12 (c) [extent of school's responsibility for free and compulsory education], RTE Act

425 Section 21 (school management committee), RTE

physical harassment of children,⁴²⁶ preventing discrimination in classrooms, during mid-day meals, in playgrounds, using common drinking water and sanitation facilities⁴²⁷ and in the provision of textbooks, uniforms, library and information, communication technology facilities.⁴²⁸

At the university level, the *Regulations on Curbing the Menace of Ragging in Higher Education Institutions, 2009* were amended by the University Grants Commission (UGC) in 2016 to explicitly define ragging as including:

“ Any act of physical or mental abuse (including bullying and exclusion) targeted at another student (fresher or otherwise) on the ground of colour, race, religion, caste, ethnicity, gender (including transgender), sexual orientation, appearance, nationality, regional origins, linguistic identity, place of birth, place of residence or economic background”⁴²⁹

As a consequence, public and private higher education institutions (HEIs) are mandated to constitute anti-ragging committees, anti-ragging squads and monitoring cells to prevent and remedy ragging of LGBTI students⁴³⁰ and recommend administrative and/or criminal action against offenders.⁴³¹

The *UGC (Prevention, prohibition and redressal of sexual harassment of women employees and students in HEIs) Regulations, 2015* provides that public and private universities must act decisively against all forms of gender-based violence, especially against women and LGBTI students and employees who are vulnerable to sexual harassment, humiliation and exploitation.⁴³² **In order to transform universities, rights-based approaches must apply GNU, thereby ensuring that safety measures do not undermine the autonomy of women and LGBTI students and employees.** Notably, the University of Delhi’s policy on sexual harassment is remarkable as it goes beyond remedying unwelcome ‘sexual acts’ and regulates gender-based discrimination. The policy stipulates that ‘sexual harassment’ includes but is not limited to:

“ When deprecatory comments, conduct or any such behaviour is based on the gender identity/sexual orientation of the person and/or when the classroom or other public forum of the University is used to denigrate/discriminate against a person or create a hostile environment on the basis of a person’s gender identity/sexual orientation”⁴³³

426 Rule 3((6)(f) [composition and function of the school management committee] of the *Right of Children to Free and Compulsory Education Rules, 2010* (‘RTE Rules’)

427 Rule 9(4) [responsibilities of appropriate government and local authority], RTE Rules

428 Rule 11 (1) [admission of children belonging to weaker section and disadvantaged group], RTE Rules

429 *Regulations on Curbing the Menace of Ragging in Higher Education Institutions, 2009*, University Grants Commission. Available at: <https://nludelhi.ac.in/wp-content/uploads/2024/04/Ragging-UGC-27-June-2019.pdf>

430 Regulation 6 (measures for prevention of ragging at the institutional level)

431 Regulation 7 (action to be taken by the head of the institution) read with Regulation 9 (administrative action in the event of ragging)

432 Regulation 3 (responsibilities of higher educational institutions)

433 *Prohibition of and punishment for sexual harassment* (2004), University of Delhi

In order to facilitate the right to education for LGBTI minors in a queer affirming environment, appropriate governments are obligated to sensitise teachers and faculty in schools and colleges by fostering respect for gender and sexual diversity.⁴³⁴

As examined previously, despite *Dr. Malabika Bhattacharjee*'s clarification that the respondent is gender-neutral under the SHW Act, university policies should prudently frame the respondent as male and cover LGBTI 'aggrieved persons' based on *Annie Nagaraja*, *Principal Secretary*, *BN Ray*, *GNLU* and Rule 11(4) of the TPR, as this 'porosity' can adequately regulate gendered relations of power, domination and insubordination of women and LGBTI students and faculty at universities. **Alternatively, if university policies are constrained by the law to provide for respondent neutrality, they must provide that covering LGBTI 'aggrieved persons' would authorise male 'aggrieved persons' to seek action only against male respondents, which complies with the doctrine of reasonable classification under Article 14.**⁴³⁵ **As there is no evidence to support the view that university policies must authorise men to seek action against women for sexual harassment,**⁴³⁶ **the caution issued by *Dattatraya Motiram More*, *Supriyo Chakraborty* and GR28 on the risk of men retaliating against women under gender-neutral laws must be heeded.**

In the criminal justice system

In *Surya & Ors. v. State* (2024),⁴³⁷ the Madras High Court dismissed the accused's application to recall the gender non-conforming child survivor of sexual abuse for cross-examination to contradict the prosecution's case. The court relied on Section 33[5] (procedure and powers of special court), POCSO Act which authorises courts to ensure that child survivors are not called repeatedly to testify, in order to safeguard children from reliving the trauma of repetitively recounting the sexual abuse.

The preamble of the POCSO Act states the law seeks India's compliance with the CRC, by protecting children from sexual offences. The statute is gender-neutral, evidenced by the victim-neutrality in Section 2(d) which states that a child means any person below the age of 18 years read with perpetrator-neutrality in framing of offences under Section 7 (sexual assault), Section 9 (aggravated sexual assault), Section 11 (sexual harassment), Section 3 (penetrative sexual assault), Section 5 (aggravated penetrative sexual assault) and Section 13 (use of child for pornographic purposes). As a consequence, LGBTI child survivors can seek remedies for sexual offences under the POCSO Act against any perpetrator.

Victim-neutrality under the POCSO Act does not foreclose the law's cognisance of the gendered impact of child sexual abuse. Section 5(j)(ii) [aggravated penetrative sexual assault] recognises pregnancy as a consequence of the sexual offence, which is a determinant for quantum of reparation as per Rule 7(3) (vii) [compensation] of the *POCSO Rules, 2012*. Section 27[2] (medical examination of a child) provides that in case the victim is a girl child, the medical examination shall be conducted by a woman doctor. A gender-based and intersectional enforcement mandates that grounds in the POCSO Act ('pregnancy' or 'gender') must not be read as delineating a group with fixed boundaries ('girl children'), rather, they must be understood as seeking to regulate relationships of power, domination and insubordination. This

434 Section 13 (obligation of educational institutions to provide include education to transgender persons), TP Act read with Rule 10(7)(a), TP Rules

435 *State of West Bengal v. Anwar Ali Sarkar*, AIR (1952) SC 75

436 *Violence that is not gender-neutral* (2016), Centre for Law and Policy Research. Available at: <https://clpr.org.in/blog/violence-that-is-not-gender-neutral/>

437 Criminal Original Petition No. 6703/2024, order dated 20.03.2024

demands a focus on girl children as well as gender non-conforming minors' sexual and reproductive healthcare needs in the aftermath of sexual offences, as per the aforesaid provisions.

In this context, Section 39 (guidelines for child to take assistance of experts, etc.), POCSO Act provides that State governments shall frame guidelines to collaborate with non-governmental organisations (NGOs), professionals and experts in areas of psychology, social work, health and child development to offer assistance to child survivors at all stages of the trial. The model guidelines of the Ministry of Women and Child Development (2013) prescribe that child survivors' SOGIESC-status must not pose any barriers in the criminal justice system or in the ecosystem of support services.⁴³⁸

Indian courts have applied the *UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* (2005) to promote age-sensitive measures for child litigants in the criminal justice system,⁴³⁹ including appointment of a guardian *ad litem*⁴⁴⁰. These guidelines also encourage governments to adopt SOGIESC-responsive measures. **In order to secure the best interests of LGBTI child survivors, a gender-based and intersectional enforcement of the POCSO Act mandates that the presence of natal families who abuse LGBTI children must be barred during recording statements,⁴⁴¹ magistrates or police officers can record statements at the premises of LGBTI-affirming support services⁴⁴² and aggressive questioning or character assassination on SOGIESC grounds shall be prohibited by presiding judges.⁴⁴³** These measures comply with India's obligations under General Comment No. 24 (children's rights in the child justice system) to the CRC.⁴⁴⁴

In *State of Maharashtra v. Preeti Pravin Lad* (2020),⁴⁴⁵ a minor girl's mother filed an FIR under IPC and the POCSO Act against a gender non-conforming young adult for 'enticing' her daughter.⁴⁴⁶ The court subsequently added more charges under these statutes.⁴⁴⁷ The FIR stated that the accused 'enticed' the minor girl by promising to give her a job and marry her. Although the minor girl's police statement was falsified, she deposed before the court that she voluntarily travelled with the accused who is a person assigned gender female at birth (PAGFB) and whose gender expression is masculine. She denied developing intimate relations with the accused, refused to undergo a medico-legal examination (which would ostensibly elicit forensic evidence of sexual activity) and blamed the false case on her mother's 'misunderstanding'. Ultimately, the trial court acquitted the accused of all charges.

A study of POCSO Act cases from Maharashtra, West Bengal and Assam between 2016-20 found that 24.3% of all cases constituted 'romantic cases', wherein 80.2% of such cases are filed by parents and

438 *Model Guidelines for the Use of Professionals and Experts under Section 39 of POCSO* (2013), Ministry of Women and Child Development (MWCD), Government of India, page 9

439 *State v. Sujeet Kumar*, (2014) 213 DLT 635 (DB), paras. 47-48

440 *Arsheeran Bahmichee v. Govt. of NCT of Delhi*, WP (CrI.) No. 1820/2015, order dated 07.10.2015, paras. 10-12; *Lavanya Anirudh Verma v. State of NCT of Delhi*, CrI. M.C. No. 301/2017, order dated 08.02.2017

441 Section 24 (recording of statement of a child), POCSO

442 Section 26 (additional provisions regarding statement to be recorded), POCSO

443 Section 33(6), POCSO

444 General Comment No. 24 on *Children's Rights in the Child Justice System* (2019), Committee on the Rights of the Child, para. 40

445 Special POCSO Case No. 11/2019, order dated 09/12/2020

446 The FIR records Section 363, Section 354 (assault of criminal force to women with intent to outrage her modesty) and Section 420 of the IPC read with Sections 7-8 of POCSO

447 Section 354A and Section 354D (stalking), IPC along with Section 11 of POCSO

relatives of girls who voluntarily enter romantic relationships.⁴⁴⁸ The criminalisation of adolescent sexuality under the POCSO Act has been critiqued by courts,⁴⁴⁹ since the law is agnostic to consent. In order to remedy this conflict, in 2023 the LCI proposed judicial discretion in providing a lesser sentence than minimum punishment for ‘sexual assault’ and ‘penetrative sexual assault’ under the POCSO Act read with corresponding amendments to the *Juvenile Justice (Care and Protection of Children) Act, 2015* (‘JJ Act’), in cases where the ‘victim’ (>16 years of age) “tacitly approved” of the intimate relationship.⁴⁵⁰

However, the LCI’s stipulation of parental approval as a mitigating circumstance in the determination of a lesser sentence will prove to be limiting. This factor will inadvertently bar application of this beneficial measure to adolescent relationships which transgress norms of caste, SOGIESC, religion and class as such relationships are disproportionately objected to by families due to subversion of social norms, as witnessed in *Preeti Pravin Lad*. GC20 (CRC) mandates India to promote an environment that affirms evolving capacities of adolescents to help them in exploring their identities, beliefs and sexualities, by ensuring that age of consent must balance protection and autonomy.⁴⁵¹ The legitimacy and proportionality of criminalisation of adolescent sexuality, therefore, merits scrutiny as per *Anuj Garg*, since the reliance on Article 15(3) in the POCSO Act’s preamble suggests that the legislative intent has blurred the boundaries of positive discrimination vis-à-vis protective discrimination.

In *Kajal v. State of Punjab & Haryana*,⁴⁵² the Punjab & Haryana High Court directed the Central Bureau of Investigation to monitor the elopement of an LGBTI couple, comprising of a young adult and a minor.⁴⁵³ During her appearance before the court, the minor stated that she voluntarily eloped due to natal family violence and threats of forced marriage. However, the court ignored the gravity of these allegations and directed her to be placed in a child care institution (CCI).⁴⁵⁴ To dissuade her association with the petitioner, the court directed the local Child Welfare Committee (CWC) to offer ‘psychological counselling’ to the minor,⁴⁵⁵ who was only released from the CCI on agreeing to rejoin the natal family.⁴⁵⁶ *Kajal* manifestly evidences that criminalisation of adolescent sexuality condones and/or perpetrates structural violence against LGBTI adolescents and young adults.

448 ‘Romantic’ cases under the POCSO Act: Analysis of judgments of Special Courts in Assam, Maharashtra and West Bengal (2022), Enfold Proactive Health Trust

449 *In re: Right to Privacy of Adolescents*, Suo Moto Writ Petition No. 3/2023 with Criminal Appeal No. 1451/2024, 2025 INSC 778; *State of Karnataka v. Basavraj*, (2023) 1 AIR Kant R 23; *Veekesh Kalawat v. State of Madhya Pradesh* [Misc. Criminal Case No. 4521 of 2023]; *Ashik Ramji Ansari v. State of Maharashtra*, 2023 SCC Online Bom 1390; *X v. Govt. of NCT of Delhi & Anr.*, 2022 LiveLaw (Del) 1077; *Silvester Khonglah & Anr. v. State of Meghalaya*, CrI. Petn. No. 45/2022, order dated 27.10.2022; *Ephina Khonglah v. State of Meghalaya*, BA No. 14/2021, order dated 22.11.2021; *Teiborlang Kurkalang & Anr. v. State of Meghalaya*, CrI. Petn. No. 62/2021; *Olius Mawiong & Anr. v. State of Meghalaya*, CrI. Petn. No. 22/2022, order dated 19.07.2022; *Vijayalakshmi v. State*, CrI. O.P. No. 232/2021 and CrI. M.P. No. 109/2021; *Ranjit Rajbanshi v. State of West Bengal*, 2021 SCC Online Cal 2470; *Dharmender Singh v. Govt. of NCT*, Bail Appl. No. 1559/2020; *Sabari v. Inspector of Police & Ors.*, (2019) 3 RCR (Cri); *Ashik Ranjan Ansari v. State of Maharashtra & Anr.*, Criminal Appeal No. 1184/2019

450 *Age of consent under POCSO, 2012: Report No. 283* (2023), Law Commission of India, Government of India, pages 116-124

451 CRC/C/GC/20 (2016), paras. 16, 40

452 CRWP No. 12562/2023, orders dated 04.01.2024, 15.01.2024, 23.01.2024

453 CRWP No. 12562/2023, order dated 07.03.2024

454 CRWP No. 12562/2023, order dated 13.03.2024

455 CRWP No. 12562/2023, orders dated 14.04.2024, 05.04.2024, 19.04.2024

456 CRWP No. 12562/2023, orders dated 09.05.2024, 28.05.2024

The *Devu G.Nair* guidelines stipulate that the minority age of a detenu or ‘missing person’ must not serve as a pretext to dismiss habeas corpus petitions against illegal detention by natal families. As LGBTI adolescents and young adults in romantic relationships find themselves in conflict with the POCSO Act due to misuse of law by parents and police,⁴⁵⁷ courts must use the tool of age determination to authenticate consent, grant leniency in bail and quash frivolous cases. Section 94 (presumption and determination of age) of the JJ Act provides that age determination must be based on a birth certificate, matriculation or equivalent certificate from academic institutions or ossification test, in this order of preference.

In cases of LGBTI minors in need of care and protection, a gender-based and intersectional application of the JJ Act mandates that CWCs must offer queer affirmative counselling services, seek assistance of LGBTI-led organisations to conduct social investigation, restore children to their natural/adoptive/foster parent or guardian with supervision or place them in LGBTI-responsive CCIs and seek prosecution of natal family violence.⁴⁵⁸ In appropriate cases, CWCs or LGBTI people’s organisations can be appointed as guardians *ad litem* with respect to LGBTI adolescent survivors, as natural guardians or next friends are authorised to represent minors in judicial proceedings.⁴⁵⁹

Apart from social and penal sanctions against adolescent sexuality, gender non-conforming minors face the added barrier to affirm their self-determined gender. As the TPA authorises parents/guardians of a child to apply for a certificate of identity, parental transphobia can undermine their developing autonomy. However, a combined reading of the JJ Act and the TPA amply clarifies that CWCs are authorised to facilitate legal gender recognition for gender non-conforming minors who are abused, neglected and/or subjected to any violation of child rights by parents/guardians.⁴⁶⁰

457 Das, S. (2024), *How a law created to protect minors neglects queer realities in India*, queerbeat. Available at: <https://www.queerbeat.org/stories/how-a-law-created-to-protect-minors-neglects-queer-realities-in-india>

458 Section 2(14) [child in need of care and protection] read with Section 30 (functions and responsibilities of committee), Section 37 (orders passed regarding a child in need of care and protection) and Section 75 (punishment for cruelty to child), JJ Act

459 *Srikant Ray v. State of West Bengal & Anr.*, 2022 SCC Online Cal 3400

460 Section 2(14) [child in need of care and protection] and Section 30 (functions and responsibilities of committee) of JJ Act read with Section 5 (application for certificate of identity) of TPA and Rule 3 (application for issue of certificate of identity) of TPR

3.8 Engendering an intersectional perspective across the criminal justice system

A systematic invalidation of survivors' experiences in the course of adjudicating gender-based violence cases attest to the lack of neutrality, objectivity and gender-based and intersectional perspectives in criminal justice systems across the world.⁴⁶¹ The misapplication of substantive, procedural and evidentiary standards in cases of acid attack, abduction,⁴⁶² and murder⁴⁶³ against transgender women, sex workers and gay and bisexual men in India evidences this critique. The problem in acid attack, abduction and murder cases is compounded by gender-neutral coding of offences, which obscures the gendered dynamics of power, domination and insubordination underlying the facts and circumstances in cases.



In *Abdul Fareed v. State of Karnataka* (2024),⁴⁶⁴ the trial court convicted a man under Section 302 (punishment for murder), IPC and sentenced him to life imprisonment for killing a transgender woman who refused to have sex with him. The Karnataka High Court, on appeal, reduced his conviction to Section 304 (punishment for culpable homicide not amounting to murder), IPC and the sentence to the period already served in detention (12 years) on the ground that the man resorted to violence under influence of alcohol in response to the 'grave and sudden provocation' by the transgender woman, who humiliated his physical appearance. *Abdul Fareed* is consistent with the international trend of a latent gender bias in the prosecution of gender-based violence, where male perpetrators are routinely handed lighter sentences on account of the mitigating circumstance of 'grave and sudden provocation' by women, which normalises violent masculinity in law and society.⁴⁶⁵

In *Shoukatali Idrimiya Raeen v. State of Maharashtra* (2018),⁴⁶⁶ the appellant was convicted under Section 302 for killing a man and under Section 309 (attempt to commit suicide), IPC by the trial court. At the Bombay High Court, the appellant contended that the deceased forced him to engage in "unnatural lust" and attacked him with a knife on refusal; thereafter snatching the knife, he killed the deceased in the heat of the moment. However, the assistant public prosecutor argued that forensic evidence suggested self-

461 Renner, K.E. et al (1997), *The Standard of Social Justice as a Research Process*, 38 Can. Psychology 91, page 100

462 *Amal Deth v. State of Kerala*, Bail Appl. No. 8802 of 2022, order dated 16.02.2022

463 *Abhilash Kumar v. State of Kerala*, Bail Appl. No. 8291 of 2017, order dated 06.12.2017; *Imran v. State of Karnataka*, Criminal Petition No. 9334 of 2016, order dated 20.01.2017; *Raju Khan v. State*, AIR Online 2018 Del 1857; *Prathamesh Swarup Tandale v. State of Maharashtra*, Criminal Bail Application No. 892/2020, order dated 26.04.2021; *Anil Jamadar v. State of Karnataka*, Criminal Petition No. 201531/2021, order dated 08.11.2021; *Godampally Sidarth & Anr. v. State of Telangana*, Criminal Petition No. 4851/2023, order dated 13.06.2023;

464 Criminal Appeal No. 1971/2021, order dated 08.02.2024

465 Ramanathan, U. (1999), *Reasonable Man, Reasonable Woman and Reasonable Expectation*, Engendering Law – Essays in Honour of Lotika Sarkar; Cote, A. et al (2000), Position Paper on the Defence of Provocation, National Association of Women and the Law; Ramsey, C. (2010), *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, Journal of Criminal Law & Criminology

466 2018 SCC Online Bom 2635

inflicted injuries, which were projected as caused by the deceased to exploit the ‘mitigating circumstance’ for leniency. In addition, the deceased’s wife’s testimony alluded to ambiguity in the nature of the relationship between the accused and deceased as an underlying source of conflict.

The Bombay High Court accepted the appellant’s testimony without rigorously testing it against the prosecution evidence, granted him the benefit of doubt and altered his conviction to Section 304, IPC on grounds of resorting to violence under ‘grave and sudden provocation’ and directed his release by writing off his sentence against the period already served in detention (6 years, 9 months). *Shoukatali Idrimiya Raeen* risks condoning and/or perpetuating the ‘LGBTI panic defence’ codified in Section 100 (when the right of private defence of the body extends to causing death), IPC/Section 38, BNS that stipulates ‘assault with the intention of gratifying unnatural lust’ as a legitimate exception, since ‘assault’ denotes an attempt to perform an action, which is a lower threshold than the use of ‘criminal force’ under law. ‘LGBTI panic defences’ are notoriously pleaded across jurisdictions to partially or completely diminish culpability in cases of non-violent sexual advances by weaponising trans/homo/bi-phobia as a rationale for the accused’s violence against LGBTI victim/survivors.⁴⁶⁷

In *Prabhu @ Bharat Kumar v. Inspector of Police* (2017),⁴⁶⁸ the Madras High Court allowed the male accused’s petition to transfer the case under Section 326A (voluntarily causing grievous hurt by use of acid), IPC from a mahila court to a sessions court, which was filed by his transgender woman partner. As evidenced in *Thangjam Santa Singh @ Santa Khurai*, the criminal justice system seeks higher participation of women as police officers, judges or other officials, to foster gender-sensitivity and facilitate the survivor’s recourse to the law. The contrast in the aforesaid cases inexorably indicates that *Prabhu @ Bharat Kumar* undermines the transgender woman’s recourse to law in a gender-sensitive manner. **Although the transfer per se does not defeat the survivor’s case, it signals to stakeholders in the criminal justice system that prosecuting gender-based violence against transgender women does not meet the priority of prosecuting violence against women in terms of timeframes, sentencing, reparation etc.**

In the context of gender-based violence, the law mandates that cases be tried as far as practicable by a court presided by a woman,⁴⁶⁹ the FIR must be registered by a woman police officer or any woman officer,⁴⁷⁰ a woman police officer or any woman officer orally examine and record statements of survivors⁴⁷¹ and cases be tried *in camera* by a court presided by a woman.⁴⁷² A gender-based and intersectional approach towards such procedural guarantees implies that references to particular grounds (‘gender’) must not be read as delineating a group with fixed boundaries (‘women’), rather, they must be understood as seeking to regulate relationships of power, domination and insubordination within the criminal justice system by ensuring application of beneficial provisions for LGBTI survivors as well as promoting the role of LGBTI persons as police officers, judges, lawyers and other stakeholders.

467 S. Sesker, T. (2022), *Who are you protecting? A feminist analysis of gay and trans panic defense bans, how they are defined and who they protect*, Hollins University

468 Criminal Original Petition No. 7647/2017, order dated 21.04.2017

469 Section 26 (courts by which offences are triable), CrPC/Section 21, BNSS

470 Section 154[1] (information in cognizable cases), CrPC/Section 173, BNSS

471 Section 161[3] (examination of witness by police), CrPC/Section 180, BNSS

472 Section 327[2] (court to be open), CrPC/Section 366, BNSS

Postscript

A review of LGBTI survivors' interface with the criminal justice system indicates that stakeholders (including but not limited to the police, protection officers, lawyers, public prosecutors, judges, prison officials, CWCs, DLSAs, etc.) must be periodically trained on gender-based and intersectional perspectives in the application of substantive, procedural and evidentiary standards to effectively combat gender-based violence against women and LGBTI survivors. Central/State governments and UTs bear a positive obligation to adopt preventive, punitive and remedial measures as per the due diligence standard.

Although respondent-neutrality in the law on domestic violence necessitates a separate legal framework to govern gay and bisexual survivors, the vast majority of laws (including laws governing TF-GBV, sexual harassment, rape, acid attacks, witch hunting etc.) clearly permit coverage of LGBTI victims/survivors based on interpretation of statutes in a manner that regulates the gendered dynamics of power, domination and insubordination in society. The issue of respondent-neutrality under the sexual harassment law merits reasonable classification in applying policies by ICCs, given the evidence of SOGIESC-based inequalities at the workplace. Victim-neutrality must be coupled with the condition that male complaints can seek recourse against male perpetrators only, as there is no evidence to support framing women as perpetrators under the law. Article 15(3) strictly prohibits gender-neutrality in laws governing women but does not impede victim-neutrality under VAW laws to facilitate recourse of law to LGBTI survivors, wherever appropriate.

Central/State governments and UTs must undertake criminal justice reforms in policing and prisons in a spirit of cooperative federalism. As the available grievance redressal mechanisms at the school and university level are capable of responding to the needs of LGBTI adolescents in need of care and protection, stakeholders in academic institutions must be periodically trained in gender-based and intersectional perspectives.



STRENGTHENING THE HEALTHCARE SYSTEM'S RESPONSE TO GENDER-BASED VIOLENCE AGAINST LGBTI SURVIVORS

While the criminal justice system demonstrates the government's commitment to deter violation of law by punishing acts of gender-based violence, the healthcare system can contribute to preventing violence by influencing behavioural change, mitigating the impact of violence and facilitating a survivor-centric approach to the law. Gender-based violence is a social determinant of health, as it presents substantial public health challenges in terms of its impact on survivors' physical, mental, sexual, and reproductive well-being. As survivors are more likely to approach healthcare facilities over law enforcement in order to address the real and imminent impact of violence, healthcare providers assume a critical role in providing care, support and treatment to survivors, early detection of violence, advising survivors on their medico-legal needs, linking them to support services and averting the recurrence of violence.⁴⁷³

The World Health Organisation's (WHO, 2013) research on the impact of intimate partner violence against women reveals the prevalence, nature and severity of adverse health outcomes on survivors in terms of depression, harmful alcohol use, sexually transmitted infections (STIs), unwanted pregnancies, neonatal health complications, cardiovascular disease, non-fatal and fatal injuries and suicide.⁴⁷⁴ This evidence has informed development of clinical and policy guidelines for responding to healthcare needs of women survivors⁴⁷⁵. The WHO clarifies that these guidelines are equally applicable in cases of intimate partner violence and natal family violence against persons of all genders, wherever appropriate.

In reference to Indian gay and bisexual men, transgender women and hijra persons, intimate partner violence (including by commercial sexual partners) and natal family violence is linked to poor outcomes in mental health, prevalence of substance use, risk of STIs and suicide ideation.⁴⁷⁶ LGBTI survivors of conversion therapy – which is often accompanied with emotional, verbal, physical and sexual violence - report long-term consequences of anxiety, depression, social isolation, self-hatred, physical injuries, sexual dysfunction, suicidal ideation and symptoms of post-traumatic stress disorder. Survivors can also develop chronic stress as a consequence of violence, which can result in other negative health consequences such as stomach ulcers, gastrointestinal disorders, skin diseases, sexual and eating disorders and migraines.⁴⁷⁷ However, healthcare providers' gaps in knowledge, attitude and practice towards LGBTI survivors in general and transgender survivors in particular translates to nearly 60% survivors in India refusing to seek healthcare services to mitigate the impact of gender-based violence.⁴⁷⁸

A lack of formal training and prevalence of harmful stereotypes on gender, sexuality and bodily diversity among public and private healthcare providers alike deters LGBTI people's healthcare-seeking

473 Garcia-Moreno, C. et al (2015), *Violence against women and girls: The health-systems response to violence against women*, The Lancet, Vol. 385, pages 1567–79

474 *Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence* (2013), WHO, London School of Hygiene and Tropical Medicine & South African Medical Research Council

475 *Responding to Intimate Partner Violence and Sexual Violence: Clinical and Policy Guidelines* (2013), WHO, page 11

476 Pal, S. (2024), *Men at risk: correlates of verbal, physical and sexual violence against men who have sex with men across selected cities in India*, BMC Public Health; *Violence in intimate and family relationships of men who have sex with men, transgender women and hijras and its impact on HIV vulnerability in India* (2015), India HIV/AIDS Alliance; Thompson, LH et al (2019), *Violence and mental health among gender diverse individuals enrolled in a HIV program in Karnataka*, Transgender Health

477 Viktor Madrigal Borloz, *Practices of so-called "conversion therapy"* (2020), Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/44/53, paras. 19, 55-58

478 *National medical symposium on sexual and gender-based violence: Provision of person-centric medical care to survivors of sexual and gender-based violence, review of evidence to influence policy and practice* (2023), Vydehi, Medicines Sans Frontieres and Kasturbha Medical College, page 7

behaviour, which in turn has an adverse impact on their health. Although lesbian and bisexual women, trans-masculine and intersex persons are significantly under-represented in Indian healthcare research, the disparity in quality of care due to SOGIESC generally translates into a higher burden of depression, anxiety, alcohol and drug use, tuberculosis, suicidal ideation, Hepatitis B and C, STIs (syphilis, chlamydia, gonorrhoea, HIV/AIDS), diabetes, stroke and cardiovascular diseases among LGBTI Indians as compared to the general public. This is attributable to structural blind spots in health systems and apathy of individual healthcare practitioners.

Table 1.1: The qualitative nature of professional misconduct by health providers⁴⁷⁹

Transgender persons	People living with HIV (PLHIV)
Denial of treatment	Delay in anti-retro viral treatment (ART) initiation for gay and bisexual men and transgender persons living with HIV due to negative experiences with healthcare providers
Inability or unwillingness to accommodate in gendered hospital spaces (wards, out-patient departments, waiting rooms, washrooms, etc.)	Displaying red markers on beds
Ignoring social determinants (stigma, discrimination and violence) that result in adverse healthcare outcomes	Double-gloving for and/or sterilising instruments after consulting with gay and bisexual male and transgender patients
Gratuitous queries on anatomy, physiology and sexual practices of transgender patients that are not correlated to the provision of care	
Sexual harassment	
‘Untouchability’	
Denial of post-exposure prophylaxis (PEP) to survivors for reducing risk of STIs	
Displaying transgender patients as museumised beings in teaching hospitals	

479 Raghuram, H. et al (2024), *Experiences of transgender persons in accessing routine healthcare services in India: Findings from a participatory qualitative study*, PLOS Glob Public Health 4(2); Yatirajula, SK. et al (2024), *Stigma faced by transgender women in their daily lives: Implications for research and policy*, Wellcome Open Research; Goitiandia, SF et al (2024), *Beyond the bench: LGBTQ+ health equity after India’s ‘no same sex marriage’ verdict*, Lancet Regional Health (Southeast Asia); White paper on comprehensive health-related services for transgender persons (2023), National AIDS Control Organisation, Ministry of Health and Family Welfare; Chakrapani, V. et al (2023), *A scoping review of LGBTQI+ people’s health in India*, PLOS Glob Public Health 3(4); HIV and AIDS estimates, India Factsheet (2023), United Nations Programme on HIV/AIDS; Arora, L. et al, (2021), *Understanding discrimination against LGBTQIA+ patients in Indian hospitals using a human rights perspective*, Sexual and Reproductive Health Matters, 29(2), 38-54; Achuthan, A. and Singh, A. (2019), *Questions on gender-sexuality and discrimination: perspectives from and on biomedicine and healthcare: An exploratory study of discrimination based on non-normative genders and sexualities*, Advanced Centre for Women’s Studies, Tata Institute of Social Sciences; Chandran, V. and Nair, AP (2019), *Healthcare discrimination experienced by non-normative genders and sexualities in Southern India: : An exploratory study of discrimination based on non-normative genders and sexualities*, Advanced Centre for Women’s Studies, Tata Institute of Social Sciences

Denial of gender affirming care to trans masculine persons for perceived loss of 'motherhood'	
Pathologising identity/behaviour	

The gender perspective in healthcare systems is typically limited to heterosexual married women's reproductive healthcare needs. The imperative of prevention and control of HIV/AIDS in the 1990s introduced non-normative gender and sexual minorities to health systems. However, the National AIDS Control Organisation's (NACO) targeted interventions focus on high-risk groups of gay and bisexual men, transgender women and sex workers. As a consequence, healthcare needs of lesbian and bisexual women, trans-masculine persons and intersex persons are under-prioritised in areas of STIs, gynaecology and psychiatry.⁴⁸⁰ Unsurprisingly, a lack of attention towards LGBTI survivors in the health system's response to gender-based violence is symptomatic of their systemic exclusion from access to healthcare goods, services and facilities.⁴⁸¹

A diverse range of responses to violence against women arose in India in the 1990s, that continue to offer legal and healthcare services for survivors today. In terms of legal services, crisis intervention centres by the Delhi Commission of Women that offer medico-legal support, court-based crisis centres by the Delhi Legal Services Authority that guide survivors from police investigation to completion of trial, police station-based Special Cells for Women and Children (SCWC) in Maharashtra and other regions that offer counselling and legal services are operationalised by the government. In terms of healthcare services, feminist groups in partnership with State governments such as those in Karnataka, Haryana and Gujarat train frontline healthcare workers like ASHAs and Auxiliary Nurse Midwives (ANMs) to link survivors to maternity hospitals for prevention of adverse health consequences of violence, building capacity of district hospitals to provide psycho-social support, referral to support services for survivors, providing specialised healthcare services like treatment for burn victims and linkages with legal aid at the tertiary-level healthcare establishments.⁴⁸²

However, international evidence from Bangladesh, the United Kingdom, South Africa and other countries has shown that providing an integrated ecosystem of support is successful in facilitating survivors' access to psycho-social support, healthcare services, shelter and legal services.⁴⁸³ The earliest model to comprehensively address violence against women as a public health concern in India was piloted by the Centre for Enquiry into Health and Allied Themes (CEHAT) in collaboration with the Municipal Corporation of Greater Mumbai (MCGM) in 2000. The crisis centres (Dilaasa) are located within public hospitals, which train counsellors, nurses and doctors to identify women at risk of violence and those who showed signs or symptoms as survivors, including chronic anaemia, repeated abortions, depression, repeated pregnancies, constant head/body aches, sudden weight loss, high blood pressure, tuberculosis, fainting spells, breathlessness, white discharge, infertility, fractures, 'accidental' falls, consumption of poison,

480 Gangadharan, B. (2024), *The harrowing queer struggle of accessing STI care in India*, queerbeat. Available at: <https://www.queerbeat.org/stories/the-harrowing-queer-struggle-of-accessing-sti-care-in-india>; *Country assessment on human rights in context of sexual and reproductive health rights: A study undertaken for the National Human Rights Commission* (2018), Sama Resource Group for Women and Health & Partners for Law in Development, pages 17-54

481 *Queer-Trans intimacies and communities: envisioning rights and the way forward*, National Queer-Trans People Meeting (2022), Sappho for Equality, page 9

482 Bhate-Deosthali, P. et al (2018), *Role of the health sector in addressing intimate partner violence in India: A synthesis report*, International Centre for Research on Women (New Delhi), pages 18-22

483 *Training Package on VAW for functionaries of One Stop Crisis Centres* (2015), Lawyers Collective and United Nations Development Programme

burns and attempts of suicide.⁴⁸⁴ Healthcare providers are accordingly trained to document the history of abuse, provide therapeutic care, conduct forensic examination in cases of sexual violence in a gender-sensitive manner and link survivors with support services related to counselling, shelter and legal aid.⁴⁸⁵

As crisis intervention by the Society for Nutrition, Education and Health Action (SNEHA) in Mumbai attests, addressing gender-based violence as a public health issue is invaluable in fostering autonomy of women survivors, preventing recurrence of violence and facilitating their medico-legal needs.⁴⁸⁶ As a corollary, this chapter reviews ecosystems of support for violence against women and proposes structural adjustments for improving their responsiveness to LGBTI survivors' access to psycho-social support, healthcare services, shelter and legal services, wherever appropriate. If available systems are unable to integrate LGBTI survivors' needs due to the allocation of business rules of concerned departments/ministries, the Central/State governments and UTs' duty of due diligence as per Indian constitutional and international human rights norms in adopting supplementary measures to prevent and remedy gender-based violence against LGBTI survivors are outlined below.

4.1 Sakhi One Stop Centre Scheme

The Sakhi One-Stop Centre (OSC) scheme by the Indian government builds on the experience of feminist groups and provides an integrated ecosystem of support to women survivors. The architecture of OSC centres was officially established in 2015 on the recommendation of Justice Usha Mehra (retd.) Commission (2013), constituted to suggest multi-sectoral measures to improve women's safety in the aftermath of the Jyoti Pandey gangrape case in 2012.⁴⁸⁷ OSCs are mandated to appoint front-line personnel to provide integrated support to women survivors in terms of emergency and general services, including medical, legal, counselling, shelter (maximum 5 days) and video-conferencing facilities to record statement of survivors for the police and court.⁴⁸⁸

OSCs must operate on a 24-hour basis and be open to all women and girls under 18 years. In case of minors, the centres are linked to CWCs. The centres must be established within a hospital or in any government institution/women's shelter/working women's hostel within a 2 km radius of a hospital to facilitate emergency services for survivors. However, the discretion to establish centres beyond hospital premises has contributed to under-reporting of violence and under-utilisation of services by survivors. The NFHS-5's finding that of the 26% of survivors of physical and sexual violence who seek any form of assistance, only 2-6% seek recourse to the law is partly attributable to barriers in approaching centres

484 Jain, M. (2023), *How hospitals are helping combat violence against women*, Scroll. Available at: <https://scroll.in/article/1053624/how-hospitals-are-helping-combat-violence-against-women>; Yadavar, S. (2023), *Karnataka's Muktha centres show how government hospitals can support domestic violence survivors*, IndiaSpend. Available at: <https://www.indiaspend.com/health/karnatakas-muktha-centres-show-how-govt-hospitals-can-support-domestic-violence-survivors-859444>

485 Dilaasa, *Crisis Intervention Department for Women: A report on the joint initiative of CEHAT, KB Bhabha Municipal Hospital and Public Health Department* (2010), Centre for Enquiry into Health and Allied Themes

486 Daruwalla, N. et al (2024), *Support needs of survivors of violence against women in urban India: a prospective analysis of client records*, National Institute for Health and Care Research

487 *Report of Justice Usha Mehra [retd.]* (2013), Ministry of Home Affairs, Government of India, pages 73-78. Available at: https://www.mha.gov.in/sites/default/files/UshaMehraReport_170913.pdf

488 *One Stop Centre Scheme: Implementation Guidelines for States Governments and UT Administrations* (2017), Ministry of Women and Child Development, Government of India

beyond hospital premises, as women's mobility is severely restricted by the family.⁴⁸⁹

At the centre, adult and minor survivors are provided with DLSA or private lawyers⁴⁹⁰ and CWC-appointed support-persons⁴⁹¹ respectively. In addition, a case worker guides survivors through every stage of the medico-legal procedures. In *Delhi Domestic Working Women's Forum* (1995), the Supreme Court outlined the rights of survivors with respect to adequate legal representation as follows:

- Police officers shall be duty-bound to inform survivors of their right to legal representation during registration of the complaint;
- In case a survivor does not have legal representation, a list of lawyers who are available to offer their services must be readily available at every police station;
- The lawyer is authorised to assist the survivor at the police station before the court's permission, to ensure the survivor receives representation at the earliest;
- The appointed lawyer must assist the survivor from the stage of registering the complaint, familiarise the survivor with the stages of the legal proceedings, prepare her to effectively participate in the case and provide adequate representation in court;
- In addition to familiarising the survivor with the legal proceedings, the lawyer must facilitate access to emergency healthcare services and counselling.⁴⁹²

In this context, the CEDAW Committee's recommendations to the Canadian Government for a more effective legal aid system is noteworthy, which includes directions to recruit and train aboriginal women to provide legal aid on issues of gender-based violence to other women from that community.⁴⁹³ In India, as para-legal volunteers trained by national/state/district legal services authorities undertake legal awareness programmes, assist survivors on securing compensation and monitor violations in custodial settings,⁴⁹⁴ the Delhi DLSA's training of survivors as para-legal volunteers⁴⁹⁵ sets a novel precedent. Although Telangana, New Delhi, Odisha, Maharashtra and Karnataka recruit and train transgender persons as para-legal volunteers,⁴⁹⁶ the inclusion of LGBTI survivors would be an effective measure to facilitate their recourse to law.

489 Jain, M. and Raman, S. (2023), *India lacks a national policy to strengthen the health response to gender-based violence*, Pulitzer Centre. Available at: <https://pulitzercenter.org/stories/india-lacks-national-policy-strengthen-health-response-gender-based-violence>

490 Section 24(8) of the CrPC/Section 18 of the BNSS

491 Rule 4(7) of POCSO

492 *Delhi Domestic Working Women's Forum v. Union of India*, (1995) 1 SCC 14, para. 15; *Dilip v. State of Madhya Pradesh*, (2013) 14 SCC 331

493 *Cecilia Kell v. Canada* (2012), Committee on the Elimination of Discrimination against Women in Communication No. 19/2008

494 *Scheme for para-legal volunteers (revised): Module for the orientation- induction – refresher courses for PLV training*, National Legal Services Authority

495 *SV v. State*, CRL.A. 728/2024 & CRL.M. (Bail) 1343/2024, order dated 10.12.2024

496 *Para-legal volunteers*, National Legal Services Authority. Available at: <https://nalsa.gov.in/para-legal-volunteers/#>

The Supreme Court has recommended that all State governments and UTs consider setting-up at least one OSC in every district.⁴⁹⁷ As of 2024, 752 centres provide these essential services to women survivors across India.⁴⁹⁸ However, the evaluation of service delivery at the centres reveals significant gaps. Court-based centres in New Delhi lack counsellors, video-conferencing facilities and DLSA lawyers, which reduces the centres to offering only mediation services.⁴⁹⁹ Hospital-based centres in Uttar Pradesh, Bihar, Jharkhand and West Bengal do not employ adequately trained healthcare workers to offer care, support and treatment to survivors with disabilities and lack accessible infrastructure. The staff are found to routinely counsel adolescent women to return to abusive natal homes.⁵⁰⁰

OSCs are evidently flailing due to less-than-half of funds allocated between 2015-2022 by State governments and UTs being utilised, lack of coordination between hospital and court-based OSCs and poor working conditions of personnel at the centres.⁵⁰¹ The under-utilisation of funds for combating gender-based violence in one financial year leads to reduction of the budget for the next financial year, as lesser utilisation is ordinarily correlated with lower allocation needs rather than inability to effectively utilise resources.⁵⁰²

A 2022 review of OSCs in New Delhi, Madhya Pradesh, Punjab and Rajasthan suggests that implementation challenges and persistence of conservative attitudes among service providers is a significant indicator of overall budgetary priorities. The majority of projects supported by the Nirbhaya Fund (set up by the Central government in 2013 to fund safety, security and empowerment programmes for women) spend a disproportionate number of resources on surveillance-based measures like CCTVs and GPS tracking in public transport.⁵⁰³

Instead, rethinking the budget to optimally invest in recruiting adequately trained and paid human resources and periodic capacity-building of service providers (helplines, OSCs, shelter homes, counsellors, mahila thanas, hospitals, DLSA) can effectively facilitate women and LGBTI survivors' recourse to services.⁵⁰⁴ A 2011 study of disabled, lesbian and sex working survivors who accessed services in India, Nepal and Bangladesh echoes this view - budgetary allocation for gender-based and intersectional capacity building of service providers is vital to ensure appropriate care, support and

497 *Nipun Saxena v. Union of India*, (2019) 2 SCC 703, paras. 49, 50.9, 51

498 Shaikh, N. and Ankita, K. (2024), *Empowering survivors of gender-based violence: Insights from NGO-led one stop centres*, Observer Research Foundation. Available at: <https://www.orfonline.org/expert-speak/empowering-survivors-of-gender-based-violence-insights-from-ngo-led-one-stop-centres>

499 Sharma, K. and Verma, M. (2023), *How Delhi's One Stop Centres in courts, meant to assist women with medical and legal help, are failing or flailing*, Article 14. Available at: <https://article-14.com/post/how-delhi-s-one-stop-centres-in-courts-meant-to-assist-women-with-medical-legal-help-are-failing-or-flailing-656fed8b991e6>

500 Sengupta, S. (2024), *Crisis in crisis intervention centres for women*, Varta. Available at: <https://vartagensex.org/2024/12/16/crisis-in-crisis-intervention-centres-for-women/>

501 Suresh, N. (2023), *One Stop, Many Challenges: Sakhi centres struggle to support women survivors of violence*, IndiaSpend. Available at: <https://www.indiaspend.com/governance/one-stop-many-challenges-sakhi-centres-struggle-to-support-women-survivors-of-violence-861666>; Tapasya (2024), *A cold shoulder: The collapse of government help centres meant to protect women*, Reporters Collective. Available at: <https://www.reporters-collective.in/womens-safety/a-cold-shoulder-the-collapse-of-government-help-centres-meant-to-protect-women>

502 *Towards violence free lives for women: Tracking of Union budgets (2018-21) for violence services* (2021), Oxfam India

503 Ambast, S. et al (2022), *Strengthening planning and budgeting interventions to address sexual and gender-based violence: Scoping studies in New Delhi, Madhya Pradesh, Punjab and Rajasthan*, Centre for Budget and Governance Accountability, Jagori and Budget Analysis and Research Centre Trust, pgs. 16-21

504 *Ibid.*

treatment to survivors.⁵⁰⁵

4.2 Ecosystem of support for LGBTI survivors

At least since 2016, feminist and LGBTI collectives of *Lam-lynti Chittara Neralu* (LCN),⁵⁰⁶ who lead crisis interventions in Assam, Karnataka, New Delhi, Tamil Nadu and Meghalaya, have concertedly advocated a gender-based and intersectional approach towards inclusion of LGBTI survivors in state-funded and operated ecosystems of support for women.⁵⁰⁷ The systemic barriers and service providers' unwillingness to accommodate LGBTI survivors has informed LCN's activism to periodically offer capacity building to counsellors, OSCs and shelter homes to improve their responsiveness towards LGBTI survivors. Stakeholders are trained to respond to LGBTI survivors' unique challenges, including violence within natal families, house arrest, coercion for marriage, cessation of education and/or employment opportunities, intimate partner violence and seeking gender affirming care, among others factors which drive their migration and search for shelter homes.



During the COVID-19 pandemic, ecosystems of support for women survivors increasingly assisted LGBTI survivors of domestic violence in New Delhi, Nagaland, Jharkhand, Assam, Karnataka, Meghalaya and Karnataka, who sought assistance from helplines, NGOs, DLSAs, protection officers, OSCs, special police cells, medical officers and other authorities.⁵⁰⁸ The natal family was reported as the primary perpetrator of emotional, verbal, physical and sexual violence against LGBTI persons, which occurred regularly and had greater and longer lasting impact than violence perpetrated by non-family members. However, the vast majority of shelter homes were unable to provide safe space for transgender survivors, often due to lack of gender-congruent public identification documents. LGBTI persons reported that all helplines struggled

505 *Count me in! Violence against disabled, lesbian and sex working women in Bangladesh, India and Nepal*, CREA

506 The Lam-lynti Chittara Neralu (LCN) network comprises of Jagori, Association for Advocacy and Legal Initiatives [AALI], Nazariya Queer Feminist Resource Group, Action Aid, SWATI, Visthar, Sangma, North East Network [NEN], Ekta Resource Centre for Women and Vimochana

507 *Voices from the fringes: Experiences of female survivors of violence in shelter homes, Assam action-research study* (2018), North East Network; *A refuge of hope: Women's experiences of shelter homes, South-Karnataka action-research study* (2019), Vimochana; *re-visioning shelter homes, Meghalaya action-research study* (2019), North East Network; *Towards re-visioning shelter homes, An action-research study of shelter homes for survivors of violence in North Karnataka* (2019), Visthar and Sangma; *Survivor speak: Call for action* (2019), Jagori; *In search of a dignity-restoring safe space: An action-research study on experiences of women survivors of violence in shelter homes of Tamil Nadu* (2019), Ekta Resource Centre for Women; *Beyond the roof: An action-research study on women survivors of violence in shelter homes in Delhi* (2019), Action India, Jagori and Nazariya Queer Feminist Resource Group; *Time for overhauls: Report of national consultation on services in and around state-run and funded shelter homes for girls, women and other vulnerable populations* (2019), Jagori

508 *At Home, At Risk: A rapid survey series across 7 states on the domestic violence redressal ecosystem during Covid-19 outbreak* (2020), Lam-lynti Chittara Neralu; *Civil society's response to domestic violence during Covid-19: Building better support for survivors* (2021), One Future Collective

to offer assistance due to lack of training in responding to their needs. Although Madhya Pradesh has a formal policy to facilitate transgender survivors’ recourse to OSCs,⁵⁰⁹ the general exclusion of LGBTI survivors is consistent with the reality in many Asian countries such as Sri Lanka, Pakistan, Malaysia, the Philippines and Japan.⁵¹⁰

A review of budgetary allocations for transgender persons’ welfare by the Central government and the Karnataka, Kerala, Tamil Nadu and West Bengal governments between 2019-23 suggests that a gender-based and intersectional perspective to policymaking and budgetary allocations beyond nodal departments/ministries concerned with transgender welfare can overcome the extremely limited interventions.⁵¹¹ As the predominant social and cultural justification for natal family violence against LGBTI survivors in Asia is embedded in the same patriarchal norm of ‘family honour’, which fuels opposition against inter-caste and inter-faith couples and promotes forced ‘heterosexual’ marriages of LGBTI persons,⁵¹² an integrated ecosystem of support for responding to women and LGBTI survivors appears judicious. However, while addressing LGBTI survivors’ concerns within ecosystems of support for women survivors is crucial to facilitate their recourse to medico-legal services in an integrated manner,⁵¹³ the ad hoc nature of such a response merits examining the viability of distinct grievance redress mechanisms for LGBTI survivors.

Table 1.2 LGBTI-specific ecosystems of support

Governing Body	Beneficiary
Eleven State governments and UTs ⁵¹⁴ have constituted Transgender Protection Cells to ensure timely registration, investigation and prosecution of offences against transgender persons. ⁵¹⁵ Telangana organises community-led trainings for the police on transgender persons, sex workers and homeless persons. ⁵¹⁶	Transgender persons and sex workers (the latter only with respect to Telangana).

509 Madhya Pradesh State Transgender Policy (2020), pages 14-15

510 *Violence: Through the Lens of Lesbian, Bisexual Women and Trans People in Asia* (2014), The International Gay and Lesbian Human Rights Commission

511 Samy, P. and Ambast, S. (2023), *Assessing allocation for transgender persons*, Centre for Budget and Governance Accountability

512 Viktor Madrigal Borloz, Report of the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity: Practices of so-called ‘conversion therapy’ (2020), A/HRC/44/53

513 Borah, R. and Tanmay, *Sexuality and gender-based violence: Acknowledging the elephant in the room*, Nirantar: Centre for Gender and Education

514 Welfare of transgender persons (2024). Available at: <https://www.pib.gov.in/PressReleaseDetailm.aspx?PRID=2042571®=3&lang=1>. Tamil Nadu has filed an undertaking before court to express its commitment to establish a TPC, as borne out in *S. Sushma and U. Seema Agarwal v. Commissioner of Police & Ors.*, WP No. 7284/2021, order dated 18.02.2022

515 Rule 11(5), TP Rules

516 *Vyjayanti Vasanta Mogli v. State of Telangana*, 2023 SCC Online TS 1688, para. 48

Twenty State governments and UTs have constituted Transgender Welfare Boards ⁵¹⁷ to facilitate access to education (school and university level), adequate housing (affordable housing, safe shelters, old age homes) and welfare (food security, livelihoods, financial services). ⁵¹⁸	Transgender persons.
Apart from the Ministry of Social Justice and Empowerment (MOSJE) supporting 18 Garima Greh centres in 15 States and UTs for transgender persons, ⁵¹⁹ the Madras High Court's intervention is leading to expansion of Support for Marginalised Individuals for Livelihood and Enterprise (SMILE) to include LGBTI beneficiaries ⁵²⁰ in social security schemes, including shelters homes, employment opportunities, healthcare services and other measures.	At inception, only transgender persons. The Madras High Court's intervention merits monitoring to review extension of SMILE to LGBTI persons.
The MWCD's Mission Vatsalya grants discretion to State governments and UTs to establish childcare institutions (CCI) in partnership with NGOs by taking into account special needs on the basis of gender identity of the child. ⁵²¹	Gender non-conforming minors under the age of 18 years.
The National AIDS Control Organisation (NACO) has established approximately 74 OSCs in 25 States/UTs for prevention of HIV/AIDS among high-risk groups (including gay and bisexual men, transgender persons, sex workers, people who use drugs, migrants and truckers), ⁵²² which enlists CBOs/NGOs for crisis response. ⁵²³	Gay and bisexual men, transgender persons and sex workers.
In <i>Supriyo Chakraborty</i> , Central/State governments were directed to adopt preventive, remedial and punitive measures (including establishing shelter homes) as per Shakti Vahini to protect LGBTI persons in conflict with state and non-state actors. ⁵²⁴	LGBTI persons.

The availability of reliable data on demographic estimates of LGBTI people can support evidence-based decision-making by state and non-state actors to study the prevalence, nature and severity of gender-based violence, adopt integrated ecosystems of support for survivors and address gaps in preventive, punitive

517 *A place to call home: Access to housing for trans persons in India* (2024), Housing and Land Rights Network, page 29

518 Rule 10(1) read with Annexure-II of TP Rules, 2020

519 The details of all Garima Greh centres are available at: <https://transgender.dosje.gov.in/Applicant/Registration/ListofNGO>

520 *S. Sushma & Anr. v. Commissioner of Police & Ors.*, WP No. 7284/2021, orders dated 23.12.2021, 08.04.2022, 08.07.2022, 22.08.2022, 09.12.2022, 23.01.2023, 29.01.2024, 10.06.2024 and 18.09.2024

521 *Mission Vatsalya: Implementation guidelines*, Ministry of Women and Child Development, Government of India, page 21

522 *National consultation on One Stop Centre and Orientation on new strategies under NACP-V* (2022), National AIDS Control Organisation, Ministry of Health and Family Welfare, Government of India; *Prevention Progress* (2023-24), National AIDS Control Organisation, Ministry of Health and Family Welfare, Government of India

523 *Operational guidelines for implementing HIV targeted interventions among men who have sex with men in India: Guidelines for CBOs/NGOs, SACS and TSUs* (2016), National AIDS Control Organisation, Ministry of Health and Family Welfare, Government of India; *Operational guidelines for implementing targeted interventions among hijras and transgender people in India: Guidelines for CBOs/NGOs and SACS/TSUs* (2015), National AIDS Control Organisation, Ministry of Health and Family Welfare, Government of India

524 *Supriyo Chakraborty*, para. 564

and remedial measures.⁵²⁵ In a broader context, monitoring SOGIESC data can authorise budgetary allocation for healthcare needs, development of clinical interventions and effective preventive services to reduce violence and health inequities, including improved screening for cervical, breast and prostate cancer and gynaecological services for LGBTI persons⁵²⁶. As collection of personal data for censuses is performed in pursuance of a law for the legitimate purpose of promoting social and economic inclusion of vulnerable groups and such data is only shared amongst concerned public authorities,⁵²⁷ Central or State governments must consider collection and proper management of data that is disaggregated on SOGIESC characteristics by enlisting LGBTI people's CBOs/NGOs.

The only official data on the number of transgender persons in India is the Social Economic and Caste Census (SECC) of 2011, which recorded a figure of 4,87,803 individuals identifying as the 'other' gender. However, transgender activists have noted that this is a gross underestimation for several reasons, including that transgender persons identifying in the binary of male or female might not have chosen 'other', parents of gender non-confirming minors might have suppressed their identities, the fear of social and economic consequences of publicly identifying as transgender adults and the failure to enlist transgender enumerators who can acquire a more authentic representation of the population.⁵²⁸

In the context of gender-based violence, as the National Crime Records Bureau (NCRB-MHA) and NFHS (MOHFW and MWCD) collect disaggregated data based on sex, age, caste, tribe and disability, a gender-based and intersectional perspective to inform policymaking must focus on the role of SOGIESC as a driver of violence and healthcare outcomes.⁵²⁹ As the due diligence standard mandates that failure to implement laws, policies and programmes to respond to LGBTI survivors condones and/or perpetuates gender-based violence by state and non-state actors,⁵³⁰ this leaves no margin for inaction by the Central and State governments and UTs on adopting legislative, executive and financial measures towards constituting an integrated ecosystem of support for LGBTI survivors.

525 Madrigal-Borloz, V. (2019), *Data collection and management as a means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity*, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/41/45, paras. 27-34

526 *Right to the highest attainable standard of health and access to healthcare for LGBTI people in Europe* (2024), Third thematic review of implementation of the Council of Europe Committee of Ministers Recommendation (2010) to member states on measures to combat discrimination based on sexual orientation and gender identity, Council of Europe, pages 29, 61-62

527 *Youth for Equality & Ors. v. State of Bihar*, 2023 SCC Online Pat 2393

528 Brindaalakshmi, K. (2020), *Gendering of development data in India: Legal rights and enumeration process*, Centre for Internet and Society. Available at: <https://cis-india.org/raw/brindaalakshmi-k-gendering-development-data-india>

529 Dutta, S. et al (2023), *Why India's nationally representative surveys need to look beyond gender normativity*, BMJ Global Health

530 *In-depth study on all forms of violence against women* (2006), Report of the Secretary General, A/61/122/Add.1, paras. 139-141, 254-257; General Recommendation No. 19: Violence Against Women (1992), adopted by the Committee on the Elimination of All Forms of Discrimination Against Women, Eleventh Session, paras. 8-9, 24(a); General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19 (2017), paras. 24-26

4.3 Care, support and treatment for LGBTI survivors

A gender-based perspective in healthcare programmes is aimed at dismantling systemic discrimination to remedy women's social and economic inequalities.⁵³¹ However, a gender-based and intersectional perspective must translate into regulating relationships of power, domination and insubordination by healthcare systems vis-à-vis women and LGBTI persons. As the right to the highest attainable standard of physical and mental health is guaranteed under the Indian Constitution,⁵³² Central and State governments' duty to train healthcare providers to address transgender persons' health concerns,⁵³³ mental healthcare practitioners to adopt queer-affirmative counselling practices⁵³⁴ and develop suicide-prevention programmes for LGBTI people⁵³⁵ must include the indivisible right to care, support and treatment for mitigating the impact of violence against LGBTI survivors.

The *Guidelines & Protocols: Medico-legal Care for Survivors/Victims of Sexual Violence* (MOHFW, 2014) acknowledge that while women and girls bear the disproportionate burden of gender-based violence, LGBTI persons and boys are victims/survivors too and entitled to care, support and treatment. In particular, the guidelines provide:⁵³⁶

- In case of survivors with disabilities or those who are minors, it is crucial that the caretaker or person accompanying the survivor is not dictating the history-taking and that such narrative is taken directly from the survivor. History-taking for minors can be facilitated by use of illustrative books, dolls and/or body charts. The healthcare facility must make available interpreters, translators or special educators in case the survivor has a speech, hearing or cognitive disability;
- Healthcare providers shall document the survivor's account of the violence as part of history-taking, which can disclose information with respect to the role their caste, religion, SOGIESC and/or disability played in the violence, if and when survivors freely choose to pursue legal proceedings;
- Healthcare providers shall neither offer "cures" to change identity/behaviour of LGBTI survivors nor express personal opinions about the survivor's caste, religion, SOGIESC and/or disability, which can deter healthcare seeking behaviour of survivors. The examination proforma must reflect the bodily diversity and gender identity of transgender and intersex survivors;
- Healthcare providers shall not perpetuate misconceptions that sex workers provoke violence because of their work or that they are dependent on alcohol/drugs and/or living with HIV, which can

531 *Devika Biswas v. Union of India*, (2016) 10 SCC 733

532 *Bandhua Mukti Morcha v. Union of India* (1984) 2 SCR 67; *Vincent Panikurlangara v. Union of India* (1987) 2 SCC 165; *Parmanand Katara v. Union of India* (1989) 4 SCC 286; *Consumer Education and Research Centre v. Union of India* (1995) 3 SCC 42; *Paschim Banga Khet Mazdoor Samiti v. State of West Bengal* (1996) 4 SCC 37; *State of Punjab v. Mohinder Singh Chawla & Ors.* (1997) 2 SCC 83; *State of Punjab v. Ram Lubhaya Bagga* (1998) 4 SCC 117; *Navtej Johar & Ors. v. Union of India & Anr.* (2018) 10 SCC 1

533 Section 15 (healthcare facilities), TPA read with Rule 10 (welfare measures, education, social security and health of transgender persons by appropriate government) and Rule 11 (provisions for non-discrimination) of TP Rules; NALSA, paras. 135.5-135.6

534 *Navtej Singh Johar* (2018), para. 449

535 *Supriyo Chakraborty*, paras. 364-366

536 *Guidelines & Protocols: Medico-legal Care for Survivors/Victims of Sexual Violence* (2014), Ministry of Health and Family Welfare, Government of India, pages 11-17, 37-40

deter healthcare seeking behaviour of survivors. Sex workers are entitled to equal protection of law in the event of sexual violence, including treatment for physical injuries, emergency contraception, abortion and allied services, prophylaxis for STIs and psycho-social support;⁵³⁷

- In circumstances of communal conflict, healthcare providers should sensitively enquire about and look for signs or symptoms of violence among all women and girls who access healthcare facilities, even when they do not proactively disclose a history of violence;
- In order to safeguard the agency of adult and minor survivors, healthcare providers shall ensure that survivors make informed decisions to consent or refuse any stage of the medical examination. This shall be facilitated by:
 - providing necessary information with respect to what the procedure involves, the reason for doing the procedure, the potential risk and discomfort in a simple manner;
 - granting adequate time to arrive at a decision to consent or refuse; and
 - providing assistance of a friend/colleague/caregiver in making the decision and
 - communicating it to the healthcare provider;
- As courts recommend a gender-based and intersectional approach towards delivery of sexual and reproductive health services,⁵³⁸ healthcare providers shall provide abortion and allied services to trans-masculine and intersex women survivors who are at risk of unwanted pregnancy;
- Psycho-social care and support services that are responsive to needs of LGBTI survivors shall be made available, including mental health services, assessment for suicide ideation, developing a safety plan to prevent recurrence of violence, including friends and/or family to assist in the healing process and linking with legal aid. LGBTI survivors must be counselled that their identities / behaviours are not responsible for the violence they suffered, and the onus lies on the perpetrator. As courts recommend a gender-based and intersectional approach towards delivery of mental health services, suicide-prevention programmes must centre needs of LGBTI people.⁵³⁹ As nearly half (44%) of surveyed Indian trans masculine persons reported suicide ideation and one-third (36%) attempted suicide in the previous year,⁵⁴⁰ the imperative of targeted mental health services cannot be overstated.

Although prescription of these standards is laudable, the MOHFW (2014) guidelines are rarely applied in letter and spirit to provide care, support and treatment to survivors.⁵⁴¹ A 2021 study of medico-legal care for survivors in 61 public healthcare facilities of Maharashtra and Telangana revealed that the majority of facilities lacked sexual assault forensic evidence (SAFE) kits, all facilities lacked diagnostics and medicines for STIs and unwanted pregnancies and resorted to outsourcing these services, police

537 *Buddhadev Karmaskar v. State of West Bengal*, WP(Crl.) No 135/2010, order dated 19.05.2022

538 *X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi*, 2022 SCC Online SC 1321

539 *Supriyo Chakraborty* (2023), paras. 303-304, 364 (b)

540 *Our health matters: Indian trans men and trans masculine health study* (2023), Transgender Welfare Equity & Empowerment Trust

541 *Country assessment on human rights in context of sexual and reproductive health rights: A study undertaken for the National Human Rights Commission* (2018), Sama Resource Group for Women and Health & Partners for Law in Development, pages 127-128

requisition forms for medico-legal records persistently sought 'two-finger test' results and survivors were occasionally refused services due to unavailability of gynaecologists, among other lacunae. This suggests that periodic capacity building of health systems on the MOHFW (2014) guidelines is imperative.⁵⁴² In this context, it is worth noting that the UNSR-Torture observes that denial of access to abortion services to women due to administrative or bureaucratic hurdles, refusal by healthcare workers to adhere to medico-legal protocols, negative attitudes, official incompetence or disinterest amounts to torture or ill-treatment.⁵⁴³

In order to ensure that the MOHFW (2014) guidelines are applied in letter and spirit to LGBTI survivors, healthcare systems must transition from pathologisation to affirmation of LGBTI people. In this context, the due diligence standard for prevention of violence by public authorities and non-state actors⁵⁴⁴ is germane with respect to the NMC's revised edition of the competency-based medical education curriculum (August 2024),⁵⁴⁵ which set forth a pathology-based view of LGBTI people and recommended performance of the 'two-finger' test on survivors. A practice of medicine founded on such a retrograde view spurs violation of the bodily integrity, dignity and health of women and LGBTI people as it allows medical practitioners to perform illegal, unscientific and harmful procedures with impunity. Indeed, it amounts to contempt of court as it flagrantly violates orders directing reforms in medical education to improve responsiveness towards healthcare needs of LGBTI people⁵⁴⁶ and prohibition of the 'two-finger test'.⁵⁴⁷ As a corollary to the doctrine of progressive realisation of rights, the doctrine of non-retrogression of rights postulates that governments are prohibited from adopting measures which deliberately lead to regression of rights.⁵⁴⁸

After withdrawal, the NMC introduced a new edition (September 2024)⁵⁴⁹ which discarded a pathology-based view and the recommendation on 'two-finger tests'. However, the latest edition does not reflect a queer-affirmative approach, particularly ignoring healthcare priorities of intersex persons and sanctioning a retrograde diagnostic category for transgender persons ('gender identity disorder'), which condones and/or perpetrates violence by healthcare systems, allowing "corrective" procedures to be performed with impunity. **As pathologisation of LGBTI people is rooted in social, economic and/or political norms rather than individual culpability,⁵⁵⁰ accountability towards LGBTI persons must be guaranteed at both**

542 Lingam, L. et al (2021), *Enhancing the quality of response of the healthcare system to sexual assault*, Tata Institute of Social Sciences and Forum for Medical Ethics Society

543 Juan Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment* (2016), A/HRC/31/57, paras. 43-44

544 *In-depth study on all forms of violence against women* (2006), Report of the Secretary General, A/61/122/Add.1, paras. 139-141, 254-257; General Recommendation No. 19: Violence Against Women (1992), adopted by the Committee on the Elimination of All Forms of Discrimination Against Women, Eleventh Session, paras. 8-9, 24(a); General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19 (2017), paras. 24-26

545 *Competency Based Medical Education Curriculum (CBME) Guidelines*, 31.08.2024

546 *S. Sushma v Commissioner of Police*, 2021 SCC OnLine Mad 2096; *Queerythm v National Medical Commission*, 2021 SCC OnLine Ker 8590

547 *State of Jharkhand v Shailendra Kumar Rai* (2022) 14 SCC 299; *Lillu v State of Haryana* (2013) 14 SCC 643

548 *Navtej Singh Johar*, paras. 201-202, 268.9

549 *Competency Based Medical Education Curriculum (CBME) Guidelines*, 12.09.2024

550 Sylvia Walby et al (2017), *Conceptualising Violence and Gender: The Concept and Measurement of Violence*, Bristol University Press; Perello, LS (2022), *The recognition of institutional violence: a new tool to demand women's rights; Gender-based violence and public policies: building up feminist and intersectional responses*, IDEAS, Ministry of Equality and Feminism & Centre for Study of Contemporary Issues

the facility-level and the systemic-level. The notification of a charter of patients' rights⁵⁵¹ under the *Clinical Establishments Act, 2010* can ensure grievance redressal for LGBTI persons by respecting the right to know the truth about their medical histories (including full access to medical records).⁵⁵² However, apart from the negative duty to eradicate pathologisation, remedying structural violence necessitates healthcare systems to bear the positive duty to adopt LGBTI-affirming practices.⁵⁵³

As part of the healthcare systems' capacity to prevent gender-based violence, comprehensive gender and sexuality education programmes provide a strategic intervention. The feeling of being different and exposure to higher rates of violence, bullying and harassment for LGBTI adolescents can lead to mental health problems, including anger, depression and stress.⁵⁵⁴ However, despite a statutory mandate to provide age-appropriate, gender-sensitive and non-discriminatory information, education and communication (IEC) programmes for prevention of HIV/AIDS,⁵⁵⁵ healthcare providers assigned to adolescent sexual and reproductive healthcare services are unable to respond to LGBTI adolescents' needs.⁵⁵⁶

Although inter-departmentally coordinated school health programmes focus on promoting favourable attitudes among adolescents to prevent gender-based violence, challenge gender stereotypes and raise awareness on appropriate laws,⁵⁵⁷ they conspicuously lack a gender-based and intersectional perspective to respond to needs of LGBTI adolescents. This is evidenced by the Delhi High Court's adjudication of school teachers' preparedness to respond to needs of LGBTI adolescents, at the behest of a parent whose minor son died by suicide due to SOGIESC-related bullying in school.⁵⁵⁸

Under orders of the Madras High Court, the National Council of Educational Research and Training (NCERT) published a manual in 2021 on teacher training for inclusion of gender non-conforming adolescents in schools. The manual was summarily withdrawn, ostensibly as inclusion of gender non-conforming children, promoting gender-neutral facilities (toilets, changing rooms, hostels etc.) and

551 *Charter of Patients' Rights and Responsibilities* (as approved by the National Council for Clinical Establishments). Available at: <https://clinicalestablishments.mohfw.gov.in/sites/default/files/2023-06/3181.pdf>

552 Principle 37 (The right to truth), *The Yogyakarta Principles plus 10: Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics* (2017)

553 *Lt. Col. Nitisha*, 2021 SCC Online SC 261, paras. 56, 85, 90, 95

554 *International technical guidance on sexuality education: An evidence-informed approach* (2018), UNESCO, UNFPA, UNAIDS, UNICEF, UNWOMEN and WHO, pg. 24

555 Section 17 (promotion of HIV and AIDS related information, education and communication programmes) of the *HIV/AIDS (Prevention and Control) Act, 2017*

556 *Country assessment on human rights in context of sexual and reproductive health rights: A study undertaken for the National Human Rights Commission* (2018), Sama Resource Group for Women and Health & Partners for Law in Development, pages 31-32

557 *Strategic Approach to Reproductive, Maternal, Newborn, Child and Adolescent Health (RMNCA+) in India* (2013), Ministry of Health & Family Welfare, Government of India; *Rashtriya Kishor Swasthya Karyakram: Strategy Handbook* (2014), Ministry of Health & Family Welfare, Government of India; *Operational Guidelines on School Health Programme under Ayushman Bharat* (2018), Ministry of Health & Family Welfare and Ministry of Human Resource & Development, Government of India; *Ayushman Bharat: Comprehensive Primary Health Care through Health and Wellness Centres*, National Health Systems Resource Centre, Government of India

558 Tadeipalli, S. (2024), *Supporting queer teachers to be the teachers they needed*, queerbeat. Available at: <https://www.queerbeat.org/stories/supporting-queer-teachers-to-be-the-teachers-they-needed>

initiating a dialogue on puberty blockers was deemed to violate child rights.⁵⁵⁹ While the second edition of the NCERT manual has been under review since 2023,⁵⁶⁰ the Supreme Court has issued notice on a fresh plea in a similar matter in 2025.⁵⁶¹

The failure of existing school health programmes to respond to needs of LGBTI adolescents indicates that **comprehensive gender and sexuality education should be a compulsory part of school health programmes and reach out-of-school adolescents, with a focus on gender equality and sexual diversity, early detection of child sexual abuse, address toxic masculinity by reforming gender roles, non-violent conflict resolution, sexual and reproductive health rights, responsible parenthood and prevention of pregnancy and STIs, which can avert gender-based discrimination and violence.**⁵⁶²

The court-appointed National Task Force's (NTF) mandate to address mental health (including suicide-prevention) in universities is informed by gender-based and intersectional perspectives. The NTF is mandated to issue recommendations to strengthen law and policy measures, by taking into account multiple and intersecting vulnerabilities of SC/ST status, gender, religion, economic status, sexual orientation, disability and political beliefs amongst students in public and private universities.⁵⁶³

Cooperative federalism in implementation of the MOHFW (2014) guidelines & protocols

The Supreme Court has directed all State governments and UTs to adopt the MOHFW (2014) guidelines to provide care, support and treatment to survivors at OSCs.⁵⁶⁴ However, apart from the issuance of the guidelines, the Central government has not taken adequate measures to ensure implementation by State governments and UTs. This has led to instances where healthcare providers continue to use outdated protocols for performing medical examinations with impunity in Rajasthan, Haryana, Madhya Pradesh and other regions, including conducting 'two-finger tests', recording past sexual activities and opining on the inconclusiveness of 'rape' due to the absence of forensic evidence.⁵⁶⁵

The MOHFW (2014) guidelines are not uniformly adopted by State governments and UTs ostensibly because 'public health' is a subject matter of the State List.⁵⁶⁶ However, as medico-legal examination

559 'Complaints against members of drafting committee of the teacher training manual and conspiring to traumatise school students in name of gender sensitisation', MH-217265/2021-22/Misc/226278, National Commission for Protection of Child Rights

560 *S. Sushma & Anr. v. Commissioner of Police & Ors.*, WP No. 7284/2021, orders dated 06.12.2021, 23.12.2021, 18.02.2022, 08.04.2022, 08.07.2022, 25.07.2022, 02.09.2022, 09.12.2022, 23.01.2023, 10.06.2024, 18.09.2024, 03.02.2025, 17.02.2025, 09.06.2025, 04.08.2025

561 *Kaavya Mukherjee Saha v. Union of India*, WP (C) No. 809/2025, order dated 01.09.2025

562 General Comment No. 20: *Implementation of rights of the child during adolescence to the Convention on Rights of the Child*, CRC/C/GC/20 (2016), para. 61; *A compendium on comprehensive sexuality education* (2023), Dr. Tlaleng Mofokeng: Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, Victor Madrigal-Borloz: Independent Expert on sexual orientation and gender identity, Farida Shaheed: Special Rapporteur on the right to education, Dorothy Estrada-Tanck et al: Working Group on discrimination against women and girls; *Preventing violence against women through formal and informal education: Article 14 of the Istanbul Convention* (2022), Council of Europe

563 *Amit Kumar & Ors. v. Union of India*, 2025 SCC Online SC 631, paras 49-84

564 *Nipun Saxena v. Union of India*, WP (C) No. 565/2012, order dated 31.07.2019

565 *Everyone blames me: Barriers to justice and support services for sexual assault survivors in India* (2017), Human Rights Watch, pages 48-57

566 Entry 6 of List II, Schedule VII of the Constitution

of gender-based violence is covered by Section 164A, CrPC/Section 184, BNSS and ‘criminal law and procedure’ are governed by the Concurrent List,⁵⁶⁷ the implementation of the MOHFW (2014) guidelines evidently necessitates a collaborative effort between the Central and State governments and UTs.⁵⁶⁸

As per the doctrine of cooperative federalism, the classification of administrative and legislative powers, in practice, only mandates that State governments and UTs make available the resources (in this case, trained healthcare providers, examination rooms, drugs, apparatus etc.) at the regional level. The Central government is inextricably implicated in inter-sectoral coordination between health, criminal justice and other allied departments with respect to planning, making financial allocation, providing technical stewardship and support to build capacities of State governments and UTs and thereafter monitoring implementation.⁵⁶⁹

In a 2019 case instituted *suo moto* by the Supreme Court to assess the performance of criminal justice and healthcare systems response to violence against women, the court issued notice to all State governments and UTs to provide data on appointment of women police officers, availability of video-conferencing facilities for recording the survivors’ statements for the police and courts, compliance of public and private healthcare establishments with the MOHFW (2014) guidelines and framing of victim/witness protection policies, among several other measures.⁵⁷⁰ However, there are no further substantive orders that reveal the status of these measures at the regional level.

4.4 Availability of gender-responsive healthcare providers

As the recruitment of female healthcare providers is often viewed by stakeholders as ensuring gender sensitivity in meeting healthcare needs of survivors, the appropriate measures to fulfil healthcare systems’ duty of gender-sensitivity towards survivors’ merits examination: whether via gendered recruitment policies or gender-based and intersectional training of all healthcare providers?



As per official statistics on the availability of trained healthcare providers in Indian healthcare systems (2022-23), there are major gaps in the availability of nursing staff, ANMs, obstetricians and gynaecologists at rural, tribal and urban healthcare facilities.⁵⁷¹ The global estimates of 2024 indicate that the gender disparity in wages for Indian women across sectors is averaged at 39.8%, which is correlated with their

567 Entries 1-2 of List III, Schedule VII of the Constitution

568 Jaising, I. (2015), *Status of Law Relating to Violence Against Women and Due Diligence Obligation: Duty to Prevent, Protect and Respect*, Amicus Brief in *Nipun Saxena v. Union of India*, WP (C) No. 565/2012, page 83

569 Sanap, S. (2023) et al, *The Judiciary-Executive Interface in Areas of Health*, RTH-UHC Working Paper 2, Centre for Health Equity, Law and Policy, pages 16-30, 35-47

570 *In re: Assessment of Criminal Justice System in Response to Sexual Offences v Union of India*, Suo Moto WP (Crl.) No. 4/2019, order dated 18.12.2019

571 *Health dynamics of India: Infrastructure and human resources (2022-23)*, Government of India, Ministry of Health and Family Welfare (Statistics Division), pages 85-86, 131, 133, 136, 139, 147-148, 168, 170, 178-179, 198-199, 203, 213-214

labour force participation at 41.7%.⁵⁷² While stereotypical norms of caregiving are routinely attributed to women's roles in the Indian healthcare sector,⁵⁷³ the gendered division of labour is a product of a mix of social and economic factors that contributes towards the undervaluation of women's labour and corresponding labour shortfalls. In this context, a mixed response by policymakers on compulsorily requiring female healthcare providers to respond to survivors leads to paralysis in decision-making.⁵⁷⁴

While Section 164A(1), CrPC//Section 184(1), BNSS provides that any registered medical practitioner (RMP) can examine a survivor, Section 27(2) (medical examination of a child), POCSO Act provides that the medical examination of a survivor who is a girl child must be conducted by a woman doctor. The MOHFW (2014) guidelines amply clarify that in case of women and LGBTI survivors of any age, while a woman doctor is preferable, the unavailability of such personnel shall not lead to denial or delay in providing care, support and treatment to survivors. Instead, the guidelines suggest that male doctors must examine survivors in the presence of female attendants.⁵⁷⁵ However, the Kerala government has provided that in cases of vaginal penetrative sexual assault, a gynaecologist or a woman doctor shall examine the survivor,⁵⁷⁶ despite technical experts' caution that regional variations do not guarantee the availability of women doctors.⁵⁷⁷ While Kerala-based gynaecologists contested this protocol on the ground that working conditions of under-staffed and over-burdened specialists might render the model unworkable, the Kerala High Court validated the state's guideline by noting that the government had carved out a narrowly-tailored category in the best interests of survivors and directed the specialists and the government to arrive at an amicable solution.⁵⁷⁸

Although there is no formal bar on men in nursing under Indian law, the historical under-valuation of women's caregiving roles within the family explains the reservation policies by State governments in New Delhi, Maharashtra, Chhattisgarh and others with a preference for women in nursing.⁵⁷⁹ A gendered labour force with lower bargaining power serves as the pretext for poor working conditions in terms of inadequate pay, barriers to unionisation and exploitation, exemplifying how gender, caste and class mutually reinforce each other in creating conditions where opportunities to recruit healthcare providers are diminished across the board.⁵⁸⁰ In recognition of this interplay between social and economic forces that drives employment-seeking behaviour, parties before the Delhi High Court who have asserted that the shortage of nurses in the Indian healthcare system necessitates the removal of gender-based

572 *Global Gender Gap* (2024), World Economic Forum. Available at: <https://www.weforum.org/publications/global-gender-gap-report-2024/>

573 *Sachin Atram & Anr. v. Director of Health Services (Pune)*, Maharashtra Administrative Tribunal, Original Appn. No. 651/2021, order dated 20.08.2021

574 *Country assessment on human rights in context of sexual and reproductive health rights: A study undertaken for the National Human Rights Commission* (2018), Sama Resource Group for Women and Health & Partners for Law in Development, page 129

575 *Guidelines & Protocols: Medico-legal Care for Survivors/Victims of Sexual Violence* (2014), Ministry of Health and Family Welfare, Government of India, page 20

576 *Kerala Medico-Legal Protocol for Examination of Survivors of Sexual Offences* (2019), Government of Kerala, page 14

577 *Minutes of national consultation on MOHFW's Guidelines and Protocols on Medico-Legal Care for Survivors/Victims of Sexual Violence* (2017), National Health Systems Resource Centre

578 *Dr. Laxmy Rajmohan & Ors. v. State of Kerala*, WP (C) No. 39109/2023, order dated 18.03.2024

579 Johari, A. (2022), *The one profession where men are demanding equality*, Scroll. Available at: <https://scroll.in/article/1014198/the-one-profession-where-men-are-demanding-equality>

580 Ray, P (2016), 'Is this even work?': Nursing care and stigmatised labour, *Economic and Political Weekly*, Vol. 51, No. 47, pages 60-69

restrictions to nursing⁵⁸¹ are closely monitoring Supreme Court proceedings that aim to ensure gender justice for (women) nurses by securing economic parity.⁵⁸²

A gendered recruitment policy which recognises only married/ widowed/ divorced/ separated women as eligible for the role of ASHAs⁵⁸³ is a crucial determinant of the exploitation of community healthcare workers, who are treated as ‘voluntary’, underpaid and over-burdened with multiple responsibilities.⁵⁸⁴ The rationale for marital status is predicated on the perceived qualification in facilitating access to maternal and child healthcare services as well as prevention of loss of an unmarried woman’s labour when she relocates after marriage.⁵⁸⁵ In relation to appointment of Anganwadi Workers (AWW), the Rajasthan High Court has struck down similar eligibility conditions as unconstitutional as far as the link between marital status and delivery of maternal and child healthcare services is found to be an arbitrary stereotype as per Article 14 and violates the right to public employment under Article 16 (equality of opportunity in matters of public employment).⁵⁸⁶ However, in a matter concerning the rejection of a transgender applicant for the role of an ASHA on grounds of marital status and gender identity, the Calcutta High Court failed to rigorously test the rationale of eligibility conditions with the functional fitness to perform the job.⁵⁸⁷ In addition, the Madras High Court’s direction to the MWCD and MOHFW to train ASHAs, AWWs and other healthcare providers to respond to needs of transgender persons⁵⁸⁸ renders a gendered recruitment policy unsustainable.

A brief review of the aforesaid gendered recruitment policies indicates that the perceived benefits to service users are outweighed by adverse conditions of the labour force. A combined approach of anti-discrimination policies to eradicate sex stereotyping of women as caregivers and greater investment in developing an adequately remunerated labour force that is aligned to public health goals offers a comprehensive opportunity to ensure availability of healthcare providers trained in gender-based and intersectional perspectives. The policies for horizontal reservation for transgender candidates in medicine⁵⁸⁹ will contribute to their inclusion as healthcare providers and improve responsiveness to transgender patient’s healthcare needs. This is based on the settled view that reservation in medical/ diploma courses,⁵⁹⁰ compulsory public service bonds⁵⁹¹ and regularisation of service⁵⁹² promote the availability of essential and specialist healthcare providers for underserved areas, populations and

581 *Indian Professional Nurses Association v. Union of India*, WP (C) No. 15250/2023, orders dated 08.12.2020 and 28.11.2023

582 *Union of India v. Maj. Gen. Usha Sikdar*, Civil Appeal No. 7417/2010, order dated 29.03.2017

583 *ASHA Guidelines* (2006), National Rural Health Mission, Ministry of Health and Family Welfare, Government of India

584 Roy, B. (2019), *ASHAs in India: Gender, voluntarism and performance-based payments*, 4th International Conference on Public Policy, Montreal

585 *Working conditions of ASHAs*, Committee on Empowerment of Women (2009-10), Lok Sabha, para. 29

586 *Madhu v. State of Rajasthan*, WP (C) No. 11280/2019, order dated 04.09.2023

587 *Sumita Kumari v. State of West Bengal*, WP No. 8911/2015, order dated 01.07.2015

588 *S. Sushma & Anr. v. Commissioner of Police & Ors.*, WP No. 7284/2021, order dated 07.06.2021

589 Mandhani, A. (2025), *Transgender doctors are taking the battle for quota in PG courses to courts, one petition at a time*, The Print. Available at: <https://theprint.in/judiciary/transgender-doctors-are-taking-battle-for-quota-in-pg-courses-to-courts-one-petition-at-a-time/2589206/>

590 *Ankit Abhishek v. Dr. Ravi Ranjan Kumar*, 2020 SCC Online Pat 669

591 *Association of Medical Superspecialty Aspirants and Residents v. Union of India*, (2019) 8 SCC 607; *Tamil Nadu Medical Officers Association v. Union of India*, (2021) 6 SCC 568

592 *Gade Basaveswara Rao & Ors. v. Govt. of Andhra Pradesh*, (2017) 6 ALD 447

health concerns.⁵⁹³

A body of international evidence on healthcare providers' attitudes suggests that in the absence of formal training or guidelines, healthcare providers exercise wide discretion in basing their service delivery on their own value judgments, which is a major underlying cause of gender insensitivity. This is especially true in cases where the patient or the health issue is perceived as controversial or morally charged, such as in the case of sexual and reproductive healthcare needs of women and LGBTI people.⁵⁹⁴

An improvement in healthcare delivery towards gay/bisexual men and transgender persons, support for anti-discrimination policies at healthcare facilities and recording appropriate SOGIE-related clinical history as a result of capacity-building amongst Indian healthcare providers⁵⁹⁵ exemplifies the efficacy of continuous professional development courses⁵⁹⁶ to foster LGBTI-affirmative healthcare systems. As the *National Health Policy* (2017) mandates gender-responsive care, support and treatment for survivors,⁵⁹⁷ the training modules developed by feminist organisations with gender-based and intersectional perspective building for nurses,⁵⁹⁸ medical officers⁵⁹⁹ and ASHAs⁶⁰⁰ are indispensable in improving the responsiveness of health systems towards LGBTI survivors. The recommendation to healthcare providers to *listen* with empathy, *inquire* in a sensitive manner about their needs/concerns, *validate* their identities/experiences/choices, discussion of *safety plans* to prevent recurrence of violence and providing *support* as per the WHO's LIVES framework is invaluable to mitigate the impact of violence.⁶⁰¹

593 *Dr. Rajendra Sadanand Burma & Ors. v. State of Maharashtra*, PIL No. 133/2007, order dated 17.07.2015

594 Muller, A (2016), *Health for all? Sexual orientation, gender identity and the implementation of right to access healthcare in South Africa*, Health and Human Rights Journal

595 Chakrapani, V., et al (2023), *Efficacy of a multi-level pilot intervention ("Harmony") to reduce discrimination faced by men who have sex with men and transgender women in public hospitals in India: findings from a pre-and post-test quasi-experimental trial among healthcare workers*, Venereology, 2(3), 86-107

596 *Colours in your care: A guide for medical educators to be LGBTQIA+ affirmative* (2023), Initiative for health equity, advocacy and research, Sangath; Ranade, K. et al (2023), *Trans affirmative mental healthcare guidelines: Results of a mixed-method enquiry in three cities of India*, Tata Institute of Social Sciences; Pemde et al (2023), *Adolescent health academy statement on the care of transgender children, adolescents and youth*; *Trans-affirmative medical education in India: Need for reform and core competencies* (2022), Initiative for health equity, advocacy and research, Sangath and United Nations Development Programme; Ranade, K et al (2022), *Queer affirmative counseling practice: A resource book for mental health practitioners in India*, Mariwala Health Initiative; *Indian standards of care for persons with gender incongruence and people with differences in sex development/orientation* (2021), Association for Transgender Health in India; Pai et al (2021), *Manual on mental healthcare of transgender persons in India*, National Institute of Mental Health and Neurosciences; Majumder et al (2020), *Idea group consensus statement on medical management of adult gender incongruent individuals seeking gender reaffirmation as female*; *A good practice guide to gender-affirmative care* (2017), Sappho for Equality

597 *National Health Policy* (2017), Ministry of Health and Family Welfare, Government of India, page 14

598 *Towards addressing gender inequity and gender-based violence: Building capacities of nurses* (2024), Sama – Resource Group for Women and Health. Available at: <https://samawomenshealth.in/towards-addressing-gender-inequity-and-gender-based-violence-nurses/>

599 *Towards addressing gender inequity and gender-based violence: Building capacities of medical officers* (2023), Sama – Resource Group for Women and Health. Available at: <https://samawomenshealth.in/training-modules-on-addressing-gbv-for-healthcare-providers/>

600 *Towards addressing gender inequity and gender-based violence: Building capacities of ASHAs* (2024), Sama – Resource Group for Women and Health. Available at: <https://samawomenshealth.in/towards-addressing-gender-inequity-and-gender-based-violence-ashas/>

601 *Caring for women subjected to violence: A WHO training curriculum for healthcare providers* (2021), World Health Organisation

4.5 The right of the survivor to receive therapeutic care, support and treatment vis-à-vis the duty of mandatory reporting of the offence

The current practice among health providers is to over-emphasise forensic examination and evidence collection, at the expense of providing first aid, psychological support, treating injuries, administering prophylaxis to prevent STIs and unwanted pregnancy and providing tetanus toxoid. There is a need to accentuate therapeutic responsibility in the healthcare response to survivors, which must take precedence over forensic responsibility.⁶⁰²

The feminist movement's efforts have institutionalised gender-based violence as a public health concern under Indian law and policy frameworks⁶⁰³. The DV Act provides women survivors of domestic violence the right to receive healthcare services,⁶⁰⁴ support services⁶⁰⁵ and compensation.⁶⁰⁶ The law prohibits denial of healthcare goods, services and facilities to survivors for not having lodged a domestic incident report (DIR).⁶⁰⁷ While the CrPC provides women survivors of sexual offences the right to free medical treatment at public or private hospitals,⁶⁰⁸ the law simultaneously requires mandatory reporting of the offence.⁶⁰⁹ As per the POCSO Act, healthcare providers are mandated to treat injuries, provide prophylaxis for STIs, emergency contraceptives for unwanted pregnancy, a referral or consultation for mental or psychological health or other counselling free of cost for minor survivors.⁶¹⁰ While healthcare personnel are prohibited from refusing emergency medical care for lack of reporting of the offence, the law ultimately requires mandatory reporting of offences by hospitals.⁶¹¹

A healthcare provider's denial of treatment to survivors is punishable by law.⁶¹² The CrPC/BNSS mandates the police to facilitate medical examination, treatment and evidence collection of adult women and child survivors within 24 hours of registration of the FIR.⁶¹³ While CrPC/BNSS provides that any medical examination can be lawfully performed only with the consent of the adult woman survivor,⁶¹⁴ the POCSO Act provides that any medical procedure undertaken with the consent of the minor survivor's parent/

602 Country assessment on human rights in context of sexual and reproductive health rights: A study undertaken for the National Human Rights Commission (2018), Sama Resource Group for Women and Health & Partners for Law in Development, page 127

603 Bhate-Deosthali, P. and Duggal, R. (2013), *Rethinking gender-based violence and public health policies in India: Insights from Dilaasa, Mumbai*, Routledge Studies in Public Health

604 Section 7 (Duties of medical facilities) of the Act

605 Section 10 (Service Providers) of the Act

606 Section 20 (Monetary reliefs) of the Act

607 Rule 17 (medical facility to the aggrieved person) of the *Protection of Women from Domestic Violence Rules, 2006*

608 The scope of free healthcare services is detailed in the *Guidelines & Protocols: Medico-legal Care for Survivors/Victims of Sexual Violence* (2014), Ministry of Health and Family Welfare, Government of India, pages 21, 34

609 Section 357C (treatment of victims), CrPC/Section 397, BNSS guarantees free-of-cost emergency healthcare services at private and public hospitals, including OPD/in-patient registration, lab and radiology investigations, urine pregnancy tests, medicines and a copy of all medical records

610 Section 27 (medical examination of a child) read with Rule 5 (emergency medical care) of POCSO

611 Section 19 (reporting of offences), Section 20 (obligation of media etc. to report offences) and Section 21 (punishment for failure to report), POCSO; Section 166B (punishment for non-treatment of victim), IPC

612 Section 166B (punishment for non-treatment of victim), IPC/Section 200, BNS

613 Section 164A (medical examination of the victim of rape), CrPC/Section 184, BNSS

614 Section 164A(7), CrPC/Section 184(7), BNSS

guardian is legally permissible.⁶¹⁵

Adult and minor survivors may not wish to report the offence to the police for various reasons – their financial dependence on the abuser who is a family member, the need for additional time to make an informed decision to report, a desire to only access healthcare services, fear of social and economic consequences of disclosure, police harassment due to caste, SOGIESC, religion etc., among other reasons.⁶¹⁶ The scheme of the law on access to healthcare services for survivors examined above indicates that adult women survivors and parents/guardians of minor survivors can refuse to consent to medical procedures for evidence collection, as healthcare providers are explicitly forbidden from undertaking any medical procedure without the consent of the parties.

The thrust of the MOHFW (2014) guidelines is to safeguard the agency of the survivor. Hence, they provide that filing a police complaint and/or medico-legal examination is not compulsory to receive therapeutic care, support and treatment.⁶¹⁷ The proforma offers a clear direction of documenting “*informed refusal*” in cases where adult or child survivors do not wish to participate in criminal proceedings but only intend to access healthcare services to mitigate the impact of violence. If the survivor persists in refusing consent despite the healthcare provider’s explanation on the importance of forensic evidence collection, the decision must be accepted.⁶¹⁸ In particular:

“ If a person has come directly to the hospital without the police requisition, the hospital is bound to provide treatment and conduct a medical examination with consent of the survivor or parent/guardian (depending on age). A police requisition is not required for this.

If a person has come on his/her own without FIR, s/he may or may not want to lodge a complaint but requires a medical examination and treatment. Even in such cases the doctor is bound to inform the police as per law. However, neither court nor police can force the survivor to undergo medical examination. It has to be with the informed consent of the survivor/ parent/ guardian (depending on the age). In case the survivor does not want to pursue a police case, an MLC must be made and she must be informed that she has the right to refuse to file FIR. An informed refusal must be documented in such cases.

In case there is informed refusal for police intimation, then that should be documented. At the time of MLC intimation being sent to the police, a clear note stating ‘informed refusal for police intimation’ should be made.”⁶¹⁹

Similarly, to facilitate access to abortion and allied services for minors, RMPs are instructed not to disclose personally identifiable information of the minor to comply with mandatory reporting under the POCSO

615 Section 41 (provisions of Sections 3-13 not to apply in certain cases), POCSO

616 *Understanding dynamics of sexual violence: A study of case records* (2018), Centre for Enquiry into Health and Allied Themes (CEHAT) and Municipal Corporation of Greater Mumbai (MCGM), pages 44-49

617 *Guidelines & Protocols: Medico-legal Care for Survivors/Victims of Sexual Violence* (2014), Ministry of Health and Family Welfare, Government of India, page 20

618 *Ibid*

619 *Guidelines & Protocols: Medico-legal Care for Survivors/Victims of Sexual Violence* (2014), Ministry of Health and Family Welfare, Government of India, pages 24-25

Act, if requested by minors and their parent/guardian.⁶²⁰ These practices adequately ensure compliance with the duty of mandatory reporting by healthcare providers and simultaneously facilitate access to essential healthcare services for survivors by affirming their autonomy, privacy and health.⁶²¹

As demonstrated in *Preeti Pravin Lad*, the minor's informed refusal to undergo medico-legal examination averted the risk of penalising consenting LGBTI adolescents under the POCSO Act. However, there may be exceptional circumstances in which stakeholders are unable to respect the survivor's informed refusal. For instance, in cases of homicidal or other life-threatening injuries, the duty to report and take action against the perpetrator overrides the survivor's right to privacy. In such extraordinary cases, the state's duty to protect the life of an individual takes precedence over the survivor's informed refusal, as per Section 92 (act done in good faith for benefit of person without consent), IPC/Section 30, BNS.⁶²²

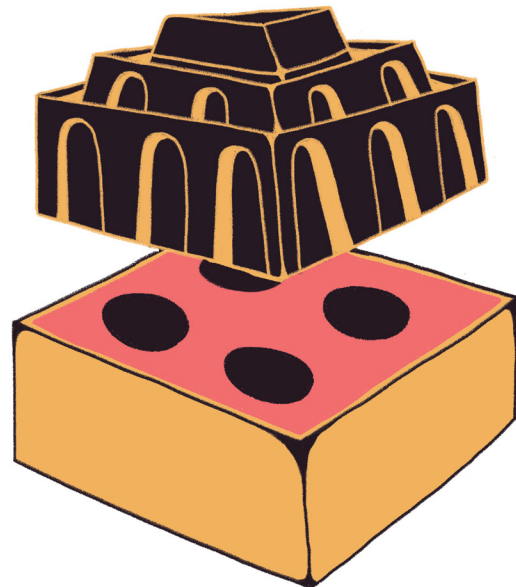
The healthcare provider's disclosure to the police in such life-threatening cases would be compliant with the narrowly-tailored exception to the general rule of maintaining doctor-patient confidentiality, which provides that every communication (personal or related to health/treatment) between the RMP and the patient shall be confidential, unless required by law or if non-disclosure can be detrimental to the health of the patient or another human being.⁶²³

4.6 Over-reliance on forensic evidence in sexual offences

The range of medico-legal evidence comprises of:

- Trace evidence in the form of semen, spermatozoa, blood, hair, cells, dust, lubricant, faecal matter, body fluids, saliva
- Injuries on the body, including the genitals
- Unwanted pregnancies and/or STIs (HIV, Hepatitis, Gonorrhoea).

The CrPC/BNSS provides for DNA profiling of the survivor.⁶²⁴ The training of healthcare providers on evidence collection as per the MOHFW (2014) guidelines provides that DNA from a foetus can be relied upon as evidence in cases of sexual violence, in the event sexual



620 *X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi*, 2022 SCC Online SC 1321, paras. 80-84

621 Jaising, I. (2015), *Status of Law Relating to Violence Against Women and Due Diligence Obligation: Duty to Prevent, Protect and Respect*, Amicus Brief in *Nipun Saxena v. Union of India*, WP (C) No. 565/2012, pages 82-83

622 *Guidelines & Protocols: Medico-legal Care for Survivors/Victims of Sexual Violence* (2014), Ministry of Health and Family Welfare, Government of India, page 25; *Engaging with the criminal justice system: A guide for survivors of sexual violence* (2014), Lawyers Collective Women's Rights Initiative, pages 18-19

623 Regulation 24: Confidentiality, *National Medical Commission Registered Medical Practitioner (Professional Conduct) Regulations*, 2023

624 Section 164A(2)(iii), CrPC/Section 184(2)(iii), BNSS

violence has resulted in pregnancy. DNA can also be extracted from seminal stains, swabs and/or vaginal smears.⁶²⁵ As existing protocols limit the usage of DNA evidence to the aforesaid extent, the reliance on genetic sex markers by the police to discredit transgender survivor in *Shilpi Lawrence Elenjikal* is unsustainable as per the medico-legal guidelines.

The MOHFW (2014) guidelines caution healthcare professionals against making reference to immaterial aspects related to the survivor's physiological attributes as they are not correlated to medico-legal issues in sexual offences for the following reasons:

- Comments on the height and weight of the survivor are immaterial to medico-legal examination, as they are only intended to indicate whether or not the survivor is capable of resisting the assault;
- Any comments such as “old tears of the hymen” are irrelevant and are intended to comment on the past sexual history of the survivor and to discredit sex workers. An intact hymen does not rule out sexual violence and a ruptured hymen does not indicate sexual activity;
- The per vaginum examination (PV exam), commonly referred to as the ‘two-finger test’, is a forensic test performed to assess elasticity of the vagina to characterise the survivor as habituated to sex. This is not evidence-based as women are even congenitally born with variations in size of the vagina. As a consequence, the two-finger test is inadmissible as evidence;⁶²⁶
- Old injuries or that gay or bisexual male or transgender survivors are ‘habituated to anal sex’ should not be recorded. The settled medical consensus dictates that forced anal examinations are not only unethical and abusive, but also without any evidentiary value to arrive at findings of intercourse.⁶²⁷

The PV exam can only be permissible for survivors when medically indicated, in which case it is followed up with a treatment plan. The survivor may require such an examination depending upon the nature of sexual violence and whether they are experiencing bleeding, vaginal pain or discharge, after which treatment would be offered for these conditions.⁶²⁸

The MoHFW (2014) guidelines instruct healthcare providers to examine survivors beyond genital injuries and seek recording of possible sites on the entire body, including nail abrasion, laceration, tenderness, bleeding, oedema, pain in urination/defecation etc., related to sexual assault. However, healthcare providers are cautioned that the presence of injuries is only observed in one-third of cases and absence of injuries does not mean the survivor consented to sexual activity. The absence of injuries can be due to various reasons, including the inability of the survivor to resist the perpetrator due to threats or intoxication, reporting for examination after 96 hours, activities undertaken by the survivor (bathing, urinating, gargling, defecating etc.) which may lead to loss of evidence, use of condom or in case the perpetrator has a disease of the vas deferens which explains the lack of semen. These factors must be

625 Dr. Narayanreddy, J. (2017), *Answers to FAQs by medical professionals during medical examination of survivor/victims of sexual violence: Strengthening health sector response to violence*, National Health Mission, Maharashtra, page 12

626 *Guidelines & Protocols: Medico-legal Care for Survivors/Victims of Sexual Violence* (2014), Ministry of Health and Family Welfare, Government of India, pages 13-14, 60

627 *Dignity debased: Forced anal examinations in homosexuality prosecutions* (2016), Human Rights Watch, pages 64-73

628 *Guidelines & Protocols: Medico-legal Care for Survivors/Victims of Sexual Violence* (2014), Ministry of Health and Family Welfare, Government of India, pages 13-14, 60

recorded by healthcare providers to contextualise their findings of forensic evidence.⁶²⁹

This nuanced understanding on the limitations of forensic evidence is reflected in law, which provides that a woman who does not physically resist the act of penetration shall not for that reason alone be regarded as consenting to the sexual activity.⁶³⁰ This clarifies that injuries either to the body or to the genitals need not be present in order to prove sexual violence. The MOHFW (2014) guidelines emphatically instruct healthcare providers to avoid these outdated medical practices since the law provides a presumption in favour of the survivor that she did not consent,⁶³¹ the character of the survivor or their previous sexual experience is immaterial to the issue of consent or the quality of consent in offences of gender-based violence⁶³² and impugning the character of the survivor to discredit her testimony is strictly prohibited.⁶³³

As such practices do not meet the threshold of objectivity and this information is routinely misused by defence advocates for arriving at erroneous conclusions on the issue of consent, the law has effectively declared such medico-legal practices redundant. In any event, the settled position of law on rape or other sexual offences states that a conviction can be based solely on the uncorroborated testimony of survivors in absence of forensic evidence, unless compelling reasons exist to seek corroboration.⁶³⁴

Collectively, the aforesaid medico-legal standards govern the remit of a healthcare provider's evidence in cases of gender-based violence.⁶³⁵ The healthcare provider must infer commission of forceful sexual intercourse by correlating the history and clinical findings in a provisional opinion immediately after examining the survivor. A final opinion is issued only after the forensic analysis is complete.⁶³⁶ However, healthcare providers are not competent to respond to queries by the police or judges about whether 'rape' occurred or whether the survivor is capable of sexual intercourse. This prioritises the survivor's testimony by preventing essentialising forensic evidence in order to conclusively determine the occurrence of sexual violence.⁶³⁷

629 *Guidelines & Protocols: Medico-legal Care for Survivors/Victims of Sexual Violence* (2014), Ministry of Health and Family Welfare, Government of India, pages 26, 31

630 Section 375, Explanation 2 of the IPC/Section 63, Explanation 2 of the BNS

631 Section 114A (presumption as to absence of consent in certain prosecution for rape), IEA/ Section 120, BSA

632 Section 53A (evidence of character or previous sexual experience not relevant in certain cases), IEA/Section 48, BSA

633 Section 146 (questions lawful in cross-examination), IEA/Section 149, BSA

634 *Kamalanantha & Ors. v. State of Tamil Nadu* (2005) 5 SCC 194, para 34; *Sudhansu Sekhar Sahoo v. State of Orissa*, (2002) 10 SCC 743, para 11; *Vijay @ Chinee v. State of Madhya Pradesh*, (2010) 8 SCC 191, paras. 9-14

635 Section 164A read with Section 291 (deposition of medical witness), CrPC and Section 45 (opinion of experts), IEA/ Section 184 read with Section 326 of BNSS and Section 39, BSA

636 *Guidelines & Protocols: Medico-legal Care for Survivors/Victims of Sexual Violence* (2014), Ministry of Health and Family Welfare, Government of India, pages 31-36

637 *Guidelines & Protocols: Medico-legal Care for Survivors/Victims of Sexual Violence* (2014), Ministry of Health and Family Welfare, Government of India, pages 41-42

Postscript

The medico-legal framework set forth herein leads to the firm conclusion that Centra/State governments and UTs bear a non-derogable duty to institutionalise a public health response to LGBTI survivors by adopting suitable legislative, executive, judicial and financial measures in a spirit of cooperative federalism. The range of interventions include ensuring the right to care, support and treatment for LGBTI survivors in accordance with the MOHFW (2014) guidelines, adopting LGBTI-affirmative healthcare practices, capacity building of stakeholders (including healthcare providers and service providers) in gender-based and intersectional perspectives and promoting comprehensive gender and sexuality education programmes. The collection and management of SOGIESC-disaggregated data on gender-based violence by the NCRB and NFHS will facilitate evidence-based decision-making with respect to the aforesaid interventions.

Although grievance redress mechanisms exist under disparate frameworks for some sexual and gender minorities, the Madras High Court's liberal application of the MOSJE's allocation of business rules to expand SMILE from transgender beneficiaries in particular to LGBTI beneficiaries in general sets a precedent for policymakers to design and implement integrated ecosystems of support for gender-based violence (for instance, the OSC scheme), wherever appropriate. This would authorise State governments and UTs to designate LGBTI collectives as service providers for facilitating recourse of LGBTI survivors of domestic violence to medico-legal services.⁶³⁸

As Indian and global evidence overwhelmingly suggests, survivors refuse to seek sexual and reproductive healthcare services if mandatory reporting is enforced indiscriminately, especially those belonging to disadvantaged groups who fear secondary victimisation due to institutional bias from stakeholders of the criminal justice system. Therefore, periodic capacity-building of healthcare providers must emphasise that survivors' right to therapeutic care, support and treatment takes precedence over the duty of mandatory reporting.⁶³⁹

The critique of over-reliance on forensic evidence, viewed through the lens of sexual offences against transgender survivors in *Shivam Devangan*, *Shilpi Lawrence Elenjikal*, *Monu Kumar* and *Bhupesh Thakur* in the discussion on locating transgender survivors in the criminal justice system, raise concerns with respect to essentialising evidence of injuries, sex assigned at birth and/or status of gender affirming care. Although these cases arise at the stage of bail or revision, these extraneous factors are likely be considered on merits during the stage of appreciation of evidence, which will ultimately impact the determination of guilt of the accused and relief to the survivor. This underscores the duty of stakeholders (including healthcare providers) to strictly conform to the medico-legal standards prescribed under the MOHFW (2014) guidelines, which can facilitate LGBTI survivors' recourse to the law, when freely chosen.

In re: Assessment of Criminal Justice System in Response to Sexual Offences provides an appropriate avenue to seek gender-based and intersectional perspectives in healthcare systems for responsiveness towards LGBTI survivors. Central/State governments and UT's inability to fulfil the right to care, support and treatment for LGBTI survivors due to resource constraints must be differentiated from their unwillingness to utilise maximum available resources towards this goal. In case of inability, the appropriate government bears the onus to justify that it has made optimal budgetary allocations to fulfil the obligation. While

638 Section 10 (service providers) of the DV Act

639 agadeesh, N. et al (2017), *Ethical concerns related to mandatory reporting of sexual violence*, Indian Journal of Medical Ethics, Vol. II

in the case of unwillingness, the appropriate government's refusal to allocate budgets violates India's obligations under the ICESCR, and which can be brought to account before courts.⁶⁴⁰ As the Sustainable Development Goals are directly implicated in responding to LGBTI survivors in terms of universal access to health for all (Goal 3), gender equality, including universal access to sexual and reproductive health and rights (Goal 5) and eliminating discrimination, reducing inequality and promoting inclusion (Goals 10 and 16),⁶⁴¹ Central/State governments and UTs are obligated to drive political action to fulfil the right to care, support and treatment for LGBTI survivors.

640 Committee on Economic, Social and Cultural Rights (2000), General Comment 14, UN Doc. E/C/2000/4. Available at: <https://www.refworld.org/legal/general/cescr/2000/en/36991>

641 Madrigal-Borloz, V. (2022), *The right of enjoyment of the highest attainable standard of physical and mental health of persons, communities and populations affected by discrimination and violence based on sexual orientation and gender identity in relation to the Sustainable Development Goals*, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/50/27, paras. 6, 35-37



CONCLUSION & RECOMMENDATIONS

The leading theme of this policy brief is that cross-movement solidarity for gender justice amongst feminist and LGBTI groups is not only possible, but eminently desirable, as combating gender-based violence in a united way will have a cascading effect to concertedly strengthen demands for legislative, executive, judicial and budgetary measures for all survivors. Apart from offering guidance to concerned stakeholders in their practice of law, medicine and service delivery, we hope this policy brief provokes more opportunities for collaboration amongst feminist and LGBTI movements to intervene in law and policy reform initiatives.

As the Supreme Court and India's due diligence obligations under international human rights norms impose a positive obligation on Central and State governments and UTs to adopt preventive, punitive and remedial measures to combat gender-based violence, the following recommendations are proposed for stakeholders for an inter-sectoral response towards LGBTI survivors. Apart from the key issues deliberated in this policy brief, these recommendations arise from collective experiences of individuals from feminist and LGBTI movements who have interacted closely with the criminal justice system, ecosystems of support and the healthcare system to promote equality, dignity and autonomy of survivors.

Parliament:

1. While Article 15(3) forbids gender-neutrality in law and policy frameworks governing gender-based violence, it must not be misconstrued to deny a victim-neutral application to cover women and LGBTI survivors, wherever appropriate. In particular, feminist and LGBTI people's organisations must be consulted for legislative drafting/amendments in terms of:
 - i. Applying gender-based and intersectional perspectives in laws, including but not limited to TF-GBV, domestic violence (including dowry-related offences), sexual harassment, rape, custodial violence, witch-hunting, anti-black magic laws, child sexual abuse and acid attacks to cover LGBTI survivors, wherever appropriate;
 - ii. Covering LGBTI 'aggrieved persons' under Section 498A, IPC/ Section 85, BNS and the DV Act to adequately regulate the gendered dynamics of power, domination and insubordination in family and society;
 - iii. Amend the SHW Act to:
 - codify the respondent as male and provide for victim-neutrality, in recognition of the overwhelming evidence that sexual harassment is a gendered form of violence that disproportionately affects women and LGBTI people;
 - expand the scope of 'sexual harassment' to include gender-based discrimination and harassment at workplaces;
2. Amend Section 18, TPA to granularly define the scope of gender-based violence against transgender persons based on the gravity of offences and ensure proportionality in sentencing for these offences on par with VAW laws, in consultation with transgender people;
3. Amend the BNS in consultation with feminist and LGBTI people's organisations to:
 - i. provide for victim-neutrality in Sections 63-64, BNS for the offence of rape;

- ii. stipulate ‘corrective rape’⁶⁴² as an aggravated sexual offence against LGBTI people under Section 64;
 - iii. delete Exception 2 of Section 63 to criminalise marital rape;
 - iv. eradicate ‘LGBTI panic defences’ under Section 38, as legal exceptions for accused persons who commit lethal violence against LGBTI victim/survivors in cases of non-violent sexual advances;
 - v. provide for victim-neutrality under Section 75 for the offence of sexual harassment;
 - vi. criminalise sexual offences and the commission of extortion against gay and bisexual men under the fear of disclosure of their sexual orientation;
4. Amend the BNS and BSA in consultation with feminist and LGBTI people’s organisations, to ensure applicability of evidentiary standards to LGBTI survivors in terms of:
 - i. Adopting recommendations of the Law Commission of India’s 113th Report on *Injuries in Police Custody* (1985) to stipulate that if the duration of custody, statement of the victim/survivor and forensic evidence establish that bodily injuries originated in custody, courts shall presume that police/prison authorities have committed custodial violence;
 - ii. Prohibiting inference of consent based on lack of injuries;⁶⁴³
 - iii. Presumption in favour of survivors on lack of consent;⁶⁴⁴
 - iv. Deem evidence of character or previous sexual experience as irrelevant;⁶⁴⁵
 - v. Prohibit impugning the survivors’ character to discredit their testimony in relation to LGBTI survivors of sexual offences;⁶⁴⁶
 5. Amend the BNS and BNSS to ensure accountability of public and private healthcare establishments in providing healthcare services to LGBTI survivors;⁶⁴⁷
 6. Review laws which *de facto* criminalise vulnerable groups due to poverty and/or status, including but not limited to homelessness, abortion, sex work, begging and drug use.

Judiciary:

In *Aparna Bhat v. State of Madhya Pradesh* (2021),⁶⁴⁸ the Supreme Court issued guidelines for trial courts and High Courts to govern language, standards of evidence and bail conditions to avert gender bias in the adjudication of gender-based violence against women. The court particularly noted that defence lawyering that engages in extraneous discourse to diminish the accused’s culpability and judicial observations that reinforce stereotypical gender norms must be regulated, otherwise, this would undermine neutrality, objectivity and gender-sensitivity within the criminal justice system. The court

642 *S. Sushma and U. Seema Agarwal v. Commissioner of Police & Ors.*, WP No. 7284/2021, order dated 07.06.2021, para. 8

643 Section 63, Explanation 2 of the BNS

644 Section 120 (presumption as to absence of consent in certain prosecution for rape), BSA

645 Section 48 (evidence of character or previous sexual experience not relevant in certain cases), BSA

646 Section 149 (questions lawful in cross-examination), BSA

647 Section 200 (punishment for non-treatment of victims), BNS read with Section 397 (treatment of victims), BNSS

648 2021 SCC Online SC 230

relied on the *Bangalore Principles of Judicial Conduct* (2006)⁶⁴⁹ and the UNSR on VAW Report on Mission to India (2013), to conclude that judges should not permit expression of any bias or prejudice towards women survivors based on sex, religion, caste, religion, SOGIESC, disability or other grounds

India's compliance with the duty of due diligence must ensure that the criminal justice system does not condone and/or perpetuate gender-based bias, stereotypes, discrimination and structural violence against women and LGBTI survivors alike. Apart from imparting gender-based and intersectional perspectives in judicial trainings on the interpretation of statutes concerned with gender-based violence, the Supreme Court can issue guidelines that are modelled on *Aparna Bhat* in exercise of its powers under Article 142 (enforcement of decrees and orders of the Supreme Court):

As India bears a duty of due diligence to prevent, prosecute and remedy gender-based violence against LGBTI survivors, courts must:

1. Desist from recommending 'compromise' between the accused and survivors of sexual offences;
2. Desist from directing the accused and their transgender or intersex wife to mediate in cases of acute domestic violence (including dowry-related offences);
3. Desist from quashing FIRs on 'settlement' between the accused and survivor;
4. Desist from issuing protectionist measures that undermine survivors' autonomy, dignity and equality before law, and instead adjudicate through rights-based frameworks that affirm these principles;
5. Desist from granting applications for sex or gender determination of wives and impose costs on applicants;
6. Ensure that after the legal gender of transgender or intersex survivors is ascertained as per law (certificate of identity; Aadhaar, Voter's ID, ration card etc.; affidavit of self-declaration), the accused is barred from raising a dispute on this issue in order to partially or completely diminish his culpability under VAW laws;
7. Strictly scrutinise the mitigating plea of 'grave and sudden provocation' to prevent partially or completely diminishing the culpability of perpetrators and condoning and/or perpetuating gender-based violence against victim/survivors;

While 'bail is the rule, jail is the exception' is a cardinal principle, judges shall:

1. Exercise judicial discretion in the grant of bail based on neutral and objective criteria as per the CrPC/ BNSS;
2. Desist from decision-making based on sex stereotyping survivors in terms of their SOGIESC, dress, behaviour, past conduct, survivor's character, role in society;

⁶⁴⁹ *The Bangalore Principles of Judicial Conduct*, UN Economic and Social Council Resolution 2006/23. Available at: <https://www.unodc.org/documents/ji/training/bangaloreprinciples.pdf>

3. Impose conditions that the accused neither tampers with evidence nor establishes contact with survivors/witnesses to prevent harassment or intimidation;
4. Notify survivors with copies of bail orders 2 days;

With respect to the prevention of gender-based bias, stereotypes, discrimination and structural violence against LGBTI survivors, all stakeholders in the criminal justice system must:

1. Use preferred pronouns of survivors to signify to other state and non-state actors to respect self-determined gender in letter and spirit;
2. Desist from asking unwarranted and/or voyeuristic queries about survivors' SOGIESC, including sexual activity and physiology;
3. Desist from expressing trans/homo/bi-phobic views or display sympathy with the accused members of natal or matrimonial family;
4. Desist from condoning and/or perpetuating historic stigma associated with demonisation, pathologisation and/or criminalisation of LGBTI people;
5. Repudiate notions of a "right" way of transitioning for legal gender recognition;
6. Abjure unwarranted and/or voyeuristic reliance on forensic evidence related to transgender or intersex survivors' sex assigned at birth and/or injuries in sexual offences;
7. Desist from condoning and/or perpetuating violent masculinity based on stereotypes that being alone at night, wearing certain clothes or consumption of alcohol/smoking justifies unwelcome advances from men; refusal of men's sexual advances justifiably provokes violence against transgender or intersex women; transgender or intersex women and sex workers should be submissive or obedient to men.

Central and State governments and UTs:

1. Issue advisories to the concerned stakeholders of the criminal justice system to enforce Rule 11(4), TPR for promoting transgender and intersex survivors' recourse to remedies under VAW laws, wherever appropriate;
2. Issue advisories for District Magistrates to issue certificates of identity to transgender persons only based on affidavits of self-declaration and proof of counselling as per Rule 6, TPR in accordance with *Supriyo Chakraborty* (2023);
3. Issue advisories to concerned stakeholders of the criminal justice system to clarify that a combined reading of Section 2(k), TPA with Section 2(10) and Section 2(35), BNS mandates that the categories of 'man' and 'woman' under BNS are inclusive of transgender and intersex persons who identify as male or female, (whether or not they have undergone any gender affirming care), whose recourse to remedies for gender-based violence under BNS must be facilitated;

4. Issue advisories to ensure that police officers are trained to register cases of acute domestic violence under Section 498A, IPC/Section 85, BNS appropriately and provide for disciplinary action against police officers who refuse to register FIRs for such offences without ingredients of dowry-related offences;
5. Issue advisories to concerned stakeholders of the criminal justice system to apply Section 153A, IPC/ Section 196, BNS and the IT Rules, 2021 in cases of hate speech against LGBTI people;
6. Until the SHW Act is suitably amended, issue advisories to ensure that workplace policies provide for victim-neutrality and the respondent is male;
7. Extend the *NALSA Compensation Scheme for Women Victims/Survivors of Sexual Assault/Other Crimes* (2018) to LGBTI survivors;
8. Ensure adoption of the *Witness Protection Scheme, 2018* by State governments and UTs in accordance with Section 398, BNSS;
9. Ensure the High-Powered Committee constituted as per *Supriyo Chakraborty* (2023) recommends pathways for healthcare systems (including the National Medical Commission) to transition from de-pathologisation to adopting queer affirmative approaches;
10. Constitute Under-Trial Review Committees to ensure that undertrial prisoners are not denied bail if they are unable to furnish sureties and their detention must not exceed half of the sentence for the triable offence, in accordance with Sections 436-436A, CrPC/ Sections 478-479, BNSS;
11. Monitor installation of CCTV cameras for maintaining oversight of prisons and police stations at all entry and exit points – main gate, lock-up, corridors, lobby/reception area, verandahs, inspectors/ sub-inspectors rooms, station hall, compound, outside washrooms, duty officer's room etc. The CCTV cameras must be equipped with night vision and audio and be capable of storing the recordings for at least 12-18 months;
12. Ensure the Board of Visitors (BOV) for prison oversight must include LGBTI people's organisations as non-official members;
13. Ensure compliance with *Prakash Singh* (2006) with respect to the constitution of district and state-level Police Complaints Authorities (PCA), which can examine complaints of death, grievous hurt, or rape in police custody, extortion and any incident of grave abuse of authority (including custodial violence) against police officers;
14. Ratify the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984*;
15. Ensure cooperation with respect to implementation of the MOHFW (2014) guidelines and protocols for survivors of sexual assault and the MHA (2022-2024) advisories on ensuring dignity of LGBTI prisoners;
16. Notify LGBTI minors as children belonging to disadvantaged groups under Section 2(d), RTE Act, which implicates the appropriate government to ensure they are not discriminated against and

prevented from completing elementary education on any grounds, they must be counted in the 25% quota of class strength in private schools, and their parents shall be proportionately represented on school management committees;

17. Instruct NCRB and NFHS to collect and manage disaggregated data on SOGIESC to devise evidence-based policy interventions to reduce health inequalities and combat gender-based violence with respect to LGBTI people;
18. Ensure gender-based and intersectional perspectives in policymaking and budgetary allocation in relation to combating gender-based violence in consultation with feminist and LGBTI people's organisations. This includes ensuring that allocation of business rules of concerned departments/ministries promote inclusion of LGBTI beneficiaries in ecosystems of support (for instance, OSCs, SMILE etc.), wherever appropriate.
19. School health programmes must include comprehensive gender and sexuality education;

Child Welfare Committees:

1. Ensure availability of queer-affirmative counselling services for LGBTI adolescents in need of care and protection;
2. Enlist LGBTI-led organisations to conduct social investigation regarding LGBTI adolescents in need of care and protection in order to arrive at a determination on restoring them to natural/adoptive/foster parents or guardians with supervision or placing them in CCIs;
3. Ensure prosecution of natal family violence against LGBTI minors⁶⁵⁰;
4. Facilitate legal gender recognition for gender non-conforming minors who are abused or neglected by natural or legal guardians;⁶⁵¹
5. Act as guardian *ad litem* with respect to LGBTI minors, as next friends are authorised to represent minors in judicial proceedings.⁶⁵²

Health systems:

1. Healthcare providers must be trained in particular to address LGBTI persons' health concerns, adopt queer affirmative counselling practices and develop suicide-prevention programmes for LGBTI people;

650 Section 2(14) [child in need of care and protection] read with Section 30 (functions and responsibilities of committee), Section 37 (orders passed regarding a child in need of care and protection) and Section 75 (punishment for cruelty to child), JJ Act

651 Section 2(14) [child in need of care and protection] and Section 30 (functions and responsibilities of committee) of JJ Act read with Section 5 (application for certificate of identity) of TPA and Rule 3 (application for issue of certificate of identity) of TPR

652 *Srikant Ray v. State of West Bengal & Anr.*, 2022 SCC Online Cal 3400

2. Adopt preventive, punitive and remedial measures with respect to conversion therapy against LGBTI people, forced corrective surgeries on intersex minors, violations in transgender persons' access to gender affirming healthcare services and performing two-finger tests to determine virginity and/or previous sexual activity;
3. Registered medical practitioners must refrain from determining genetic sex of transgender or intersex survivors while performing DNA profiling under Section 164A(2)(iii), CrPC/ Section 184(2)(iii), BNSS;
4. Abolish gendered recruitment policies for nurses, doctors and community healthcare workers like ASHAs and AWWs and ensure greater investment in developing an adequately remunerated labour force to ensure availability of healthcare providers trained in gender-based and intersectional perspectives;
5. Ensure all survivors (including minors) have the right to exercise 'informed refusal' of medico-legal examination in non-lethal cases;

Legal Services Authorities, feminist and LGBTI people's organisations:

1. Survivors must be informed of their right to appoint private advocates, if needed, to adequately represent their case before criminal courts;⁶⁵³
2. LGBTI people's organisations can act as guardian *ad litem* with respect to LGBTI adolescent survivors, as next friends are authorised to represent minors in judicial proceedings;⁶⁵⁴
3. DLSAs must enlist LGBTI para-legal volunteers to promote LGBTI survivors' recourse to law;
4. The gender-sensitive measures under CrPC/BNSS⁶⁵⁵ must apply to LGBTI litigants in terms of
 - i. FIR registration;
 - ii. Execution of arrest;
 - iii. Recording victim's statement at their residence;
 - iv. Conducting police interrogation at their residence;
 - v. Applying beneficial bail provisions in non-bailable cases;
 - vi. In-camera proceedings.
5. Section 24, Section 26 and Section 33(6) of the POCSO Act must apply to bar the presence of natal families accused of abuse during recording of the child's statements, the magistrate or police can record the child survivor's statement at the premises of LGBTI-affirming support services and aggressive questioning or character assassination on SOGIESC-grounds shall be prohibited by presiding judges, for ensuring child survivors' ease of navigating the criminal justice system;

653 Section 24(8) and Sections 301-302, CrPC/ Section 18(8) and Sections 338-339, BNSS

654 *Srikant Ray v. State of West Bengal & Anr.*, 2022 SCC Online Cal 3400

655 Section 26, Section 46, Section 154(1), Section 157, Section 160(1), Section 161(3), Section 327(2) and Section 437(1), CrPC/ Section 21, Section 43, Section 173(1), Section 176, Section 179(1), Section 180(3), Section 366(2) and Section 480(1), BNSS

6. LGBTI under-trials must be required to furnish sureties by 'any person' as part of bail conditions;
7. Strip-searches must be completely barred and only electronic scanners/devices must be utilized for complying with security protocols;
8. In extortion cases reported by gay or bisexual male survivors up to June 2024, courts must take cognisance of the gender-based and intersectional perspective underlying Sections 388-389, IPC in adequately determining conviction/sentencing of the accused.

Annexure 1

List of participants in virtual meetings to develop research on criminal justice and healthcare concerns of LGBTI survivors, July 2023

- | | |
|----------------------------|---------------------------|
| 1. Aarthi Pai | 18. Mihir Samson |
| 2. Abhay Jain | 19. Mridul D |
| 3. Adsa Fatima | 20. Padma Bhate Deosthali |
| 4. Amritananda Chakraborty | 21. Pawan Dhall |
| 5. Aqsa Sheikh | 22. Pramada Menon |
| 6. Arjun Kapoor | 23. Rachana Mudraboyina |
| 7. Asha Achuthan | 24. Raj Kanaujiya |
| 8. Chayanika Shah | 25. Rituparna Borah |
| 9. Divya Taneja | 26. Rumi Harish |
| 10. Jaya Sharma | 27. Shals Mahajan |
| 11. Koyel Ghosh | 28. Shomona Khanna |
| 12. KP @ Ketaki Ranade | 29. Shruta Neytra |
| 13. Kranti LC | 30. Tashi Choedup |
| 14. L. Ramakrishnan | 31. Varsha Verma |
| 15. Manak Matiyani | 32. Veena Gowda |
| 16. Maya Awasthi | 33. Vijay Hiremath |
| 17. Meena Seshu | 34. Vrinda Grover |

