

**SEXUAL OFFENCES AGAINST WOMEN AND
TRANSGENDERS: A CRITICAL STUDY OF
DISPARITY IN TERMINOLOGY AND
PUNISHMENT IN INDIAN LAWS**

Dissertation to be submitted in partial fulfilment of the Degree of

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Submitted by:

ANURAG SIGOTIYA

Supervised By:

PROF. (DR.) SMITHA NIZAR



**SCHOOL OF LAW GALGOTIAS UNIVERSITY
GREATER NOIDA**

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DECLARATION

I, hereby declare that the dissertation entitled “**SEXUAL OFFENCES AGAINST WOMEN AND TRANSGENDERS: A CRITICAL STUDY OF DISPARITY IN TERMINOLOGY AND PUNISHMENT IN INDIAN LAWS**” is based on original research undertaken by me and it has not been submitted in partially or fully or otherwise in any University for any degree or diploma.

Place: Galgotias University

Anurag Sigotiya

Date:

Admission No. 23GSOL2050013

Enrollment No. 23102050002

CERTIFICATE

This is to certify that the dissertation entitled “**SEXUAL OFFENCES AGAINST WOMEN AND TRANSGENDERS: A CRITICAL STUDY OF DISPARITY IN TERMINOLOGY AND PUNISHMENT IN INDIAN LAWS**” has been prepared by **ANURAG SIGOTIYA**, pursuing LL.M from School of Law, Galgotias University under my supervision and guidance. I recommend it for evaluation.

Place: Galgotias University

Prof. (Dr.) Smitha Nizar

Date:

Associate Dean

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LIST OF ABBREVIATIONS

AIR - All India Reporter

Anr - Another

Assn - Association

BCI - Bar Council of India

HC - High Court

HIV - Human Immunodeficiency Virus

IPC - Indian Penal Code

LGBTQIA+ - Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Asexual

NALSA - National Legal Services Authority

Ors - Others

POCSO - Protection of Children from Sexual Offences

SCC - Supreme Court Cases

SCR - Supreme Court Reports

SC - Supreme Court

UOI - Union of India

UP - Uttar Pradesh

LIST OF CASES

1	Bachan Singh vs. State of Punjab (AIR 1980 SC 898, 1980)
2	Bhupender Singh v. Union Territory of Chandigarh, (2008) 8 SCC 531
3	Independent Thought v. Union of India [2017] 10 SCC 800, AIR 2017 SC 4904
4	Macchi Singh vs. State of Punjab [1980] 2 SCR 864
5	Mohammad Chaman v. State, 2007 Cr.L.J. 725
6	National Legal Services Authority v. Union of India, (2014) 5 SCC 438
7	Naz Foundation v. Government of NCT of Delhi, 160 Delhi Law Times 277 (2009)
8	Queen vs. flattery (1877) 2 Q.B.D. 410
9	R v. Cuerrier, [1998] 2 S.C.R. 371
10	R v. Ewanchuk (1999), [1999] 1 S.C.R. 330
11	R v. Goldfinch (2019), SCC 38
12	R v. JA, 2011[2011] 2 S.C.R. 440
13	R v. Kirkpatrick (2022), SCC 33
14	Raju v. State of Karnataka, AIR 1994 SC 222,
15	Reg vs. R, 3 WLR 767
16	State of Maharashtra vs. Prakash AIR 1992 SC 1275
17	State of Punjab v. Ramdev Singh (2004) 1 SCC 421, 424
18	Sohan Singh vs. State of Rajasthan (1998)..1998 CRI LJ 2618
19	Vishaka v. State of Rajasthan and Ors. (Air 1997 SC 3011)

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CHAPTER I

INTRODUCTION

Sexual offences against women in India have long been a significant societal concern, shedding light on the gaps and flaws within the country's criminal legal system. However, the alarming criminal sexual offence against transgender individuals is often overlooked by the respective laws. For instance, Section 375 of the Indian Penal Code 1860, which defines rape, exclusively protects mentions women alone, but not transgender individuals. Moreover, the Transgender Persons (Protection of Rights) Act 2019, fails to provide specific provisions for addressing rape against transgender individuals, instead its uses a term "sexual abuse."

This disparity in terminology for the same offence underscores a critical gap in the criminal justice system that urgently requires attention and rectification. Regarding the legal status of transgender individuals, despite legislative efforts such as the Transgender Persons (Protection of Rights) Act, their rights and protections remain insufficiently addressed and inadequately safeguarded. This underscores the ongoing need for comprehensive legal reforms to ensure equal protection and recognition of transgender rights within Indian society.

This dissertation examines the different terms used for sexual offences in the Indian Penal Code 1860 and the Transgender Persons (Protection of Rights) Act, 2019. Under Section 375 of the Indian Penal Code 1860 defines any sexual offence committed against a woman term as "rape." At the same time, Section 18 Clause (d) of the Transgender Persons (Protection of Rights) Act, 2019, defines sexual offences against a transgender individual as "sexual abuse." This legal position of terming the same offences into two categories led to mitigating the punishment for sexual offences against transgenders and thus discriminated against transgender individuals.

Section 375¹ of the Indian Penal Code outlines the act of "rape" as any instance where a man penetrating his penis into a woman's vagina, mouth, urethra, or anus, or inserting

¹Under Section 375 of the Indian Penal Code 1860, the offence of "Rape" is defined - A man is said to commit "rape" if he—

any object or body part other than the penis into these body parts. It also includes manipulating any part of a woman's body to cause penetration or using the mouth on her genitals, anus, or urethra. This definition outlines various forms of sexual penetration without consent, constituting the offense of rape under Indian law.

However, Section 375 does not include rape against transgender². The corresponding punishment for the crime is mentioned under Section 376 of the Indian Penal Code 1860, in which it states that whoever commits rape shall be punished with rigorous imprisonment of either description for a term which [shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

At the same time, under Section 18 Clause (d) of the Transgender Persons (Protection of Rights) Act, 2019, sexual offences against transgender individuals are defined as sexual abuse. However, disparities between the term's "rape" for women and "sexual abuse" for transgender individuals within legal statutes raise the question of gender inequality and gender discrimination against transgenders. Such differences in terminology used in the law not only show societal biases but also contributed to mitigating the punishment for sexual abuse against transgender people.

Does it mean rape can only be committed against women and not against transgender. This disparities in defining the rape offence raises critical questions regarding the possibility of discrimination within the legal framework and highlights the need for a thorough examination to decide whether the Act effectively addresses the discriminatory practices and challenges faced by transgender individuals in their daily lives.

Furthermore, under Section 18 Clause (d) of the Transgender Persons (Protection of Rights) Act, 2019, state that whoever harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do

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

²Ibid.

acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.

In the above provision, the definition of rape and its punishment are not defined. Hence, it raises the biggest question whether the law doesn't consider rape against transgender people as an offence? That's why it doesn't include the definition and punishment for rape against transgender individual under the Transgender Persons (Protection of Rights) Act, 2019.

In the case of *National Legal Service Authority v. Union of India*, AIR 2014 SC 1863, it has been recognised transgender as a third gender. However, the law still provides, discrimination in recognition rape offences and their corresponding punishments against transgender and women which is a heinous crime. These differences in punishment for sexual abuse crimes committed against women and transgender individuals uncover the discriminatory pattern that violates Articles 14, 15, and 21 of the Indian Constitution, which guarantee equality before the law, prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth, and protection of life and personal liberty, respectively.

The Disparities in recognising rape offences and its punishment against transgender individuals and women defeats the primary purpose of punishment for criminal offences which is to provide justice to victims. Failing to recognise rape offences and their corresponding punishments against transgender individuals contradicts the purpose of Victim Justice. Punishment is not only about punishing the offender of the crime or making them accountable for their act, but it's also about providing justice to victims and trying to restore the victim to their original position, in which The Transgender Persons (Protection of Rights) Act appears to fall short in effectively addressing this aspect.

This dissertation examines the historical background of punishment for rape offences against transgender individuals as well as try to find out whether transgender people were recognized as "gender" in ancient, medieval, and modern times. Further, it focuses on the amendments made in laws during the 20th and 21st centuries that played a significant role in shaping the status of transgender individuals. Using legal and sociological literature, this dissertation develops a contextual comprehension of the

factors influencing disparities in recognition rape offences against transgender and women.

This study explores how gender and identity play an important role in the legal system in addressing sexual abuse cases. This study includes comparative analysis of The Transgender Persons (Protection of Rights) Act, 2019 with The Canadian Human Rights Act, 1977 to identify similarities and differences between both the Act. Additionally, the research would investigate whether there are differences in Canada regarding recognition of rape offences against transgender individuals compared to women.

This research is a combination of studies and specific case examples to examine any discrimination that exists in the criminal justice system, stressing the importance of a detailed understanding of its effects on transgender in comparison to women. In summary, this dissertation aims to explain the disparities in punishment for sexual offences against women and transgender people and try to explain how its affect the equal rights of transgender individuals. Failing to acknowledge sexual offences as defined as “rape” in the general criminal law ,the Indian penal Code 1860 and their corresponding punishments for sexual offences against transgenders contradict the principle of "victim justice" and may violate Articles 14, 15, and 21 of the Constitution, which affirms right to equality and non-discrimination to all people despite their gender identity.

STATEMENT OF THE PROBLEM

In a general perspective, the laws relating to sexual crimes were created to guarantee fairness and safeguard every person, irrespective of their gender identity. If there is any rape against women, the law provides imprisonment for 10 years to life under Section 376 of the Indian Penal Code 1860. At the same time, if there is any rape against the transgender individual, there are no specific provisions for rape provided in the Transgender Persons (Protection of Rights) Act, 2019. This raises an explicit discriminatory legal position in the criminal justice system. Since there is an exclusive law to protect the rights of Transgender, it is essential that the general law must be in harmony with the same. Hence, there is a requirement to examine whether this law discriminates against Transgender individuals in failing to acknowledge the offence of

rape against transgender individual. This brings up important issues regarding the principles of "fairness and justice" within the legal system. Article 14 of the Constitution gives the guarantee that all individuals are equally protected under the law, irrespective of their gender. It is essential to close the gap to support the rights and respect of transgender individuals and to create a legal system in which every individual lives their life without judging the gender of others.

The disparities in sentencing raise the question of explicit discrimination against the transgender community, which needs to be examined. Failing to acknowledge the offence of rape against transgender seems to show how the legal system often ignores or minimizes the right affirmation of transgender. This research would examine whether the Transgender Law fails to provide protection against the rape of transgender, and if so, is it not a discriminatory legal position?

REVIEW OF LITERATURE

1. **Rhea Sudeesh, "Disparity in punishment for rape offences based on gender identity in india"³**

The author argued that disparities in the punishment for rape offences are based on gender identity. The existing law for rape offences under Section 376 of the IPC 1860 provides a punishment of 10 years to life imprisonment, and on the other side, under Section 18 of the Transgender Person (Protection of Rights) Act, 2019, it provides a punishment of 6 months to 2 years for sexual abuse against transgender, which is comparatively very less as compared to rape against women.

At the end, the author found in this research paper that the existing Transgender Person (Protection of Rights) Act, 2019, somewhere violates Articles 14, 15, and 21. Additionally, the author also established that penalising Section 18 of the TGA with the same severity as Section 376 of the IPC would do justice to the transgender individual.

³Rhea Sudeesh, Disparity in punishment for rape offences based on gender identity in India, volume 11 & Issue 3, Journal of Emerging Technologies and Innovation Research (JETIR)(ISSN-2349-5162) page 4-6, (2014).

2. **Akshara Harish, "Sexual assault against transgender women: shatter the silence stop the violence"⁴**

The author argued that worldwide trans women face an increased risk of sexual harassment, with 19% of trans women suffering domestic or sexual abuse, compared to 6.8% of women. The lack of knowledge and judicial support for trans women in India has become one of the primary causes of this rise in the percentage of cases of sexual harassment against Transgender.

Even when trans women go to file a complaint, the police officer begins to judge their character, body, clothing, etc. This is another reason most of the harassment against trans women is not reported.

At the end, the author tries to convey that it is the responsibility of society to recognize the rights of trans-women and treat them with basic human dignity. Further, the government must ensure that transgender people are treated with basic human dignity like any other human being and have easy access to educational institutions and educational opportunities.

3. **Mansi Singh, "Transgender Persons and Public Spaces: Lack of Protection from the Law"⁵**

The author argued that many transgender people in India are dependent primarily on sex work for their livelihood. Unregulated sex work is filled with difficulties. When it comes to using condoms, sex workers rarely have decision-making authority and have zero control over their working circumstances, prices, hours, or location.

They are therefore extremely susceptible to AIDS and other STDs. The Ministry of Health views transgender people as "at risk" and permanently prohibits them from donating blood due to this vulnerability. Lastly, pimps, goons, and police frequently assault and harass sex workers. Further police officers did not even report their

⁴Akshara Harish, "Sexual assault against transgender women: shatter the silence stop the violence, volume 7 & Issue 11, International Journal of Novel Research and Development (IJNRD) (ISSN: 2456-4184) page 7-8 and 18, (2022).

⁵Mansi Singh, Transgender Persons and Public Spaces: Lack of Protection from the Law, CENTRE FOR LAW AND POLICY RESEARCH, (25 March 2023), <https://clpr.org.in/blog/transgender-persons-and-public-spaces-lack-of-protection-from-the-law> (Last visited on 16 April 2024).

complaints if there was any sexual harassment during this time, due to which the cases of sexual harassment against women rapidly increased.

The author argued that the government should make a policy that will make it easy for transgender to file their complaints against sexual harassment and also make policies that would create employment for transgender individuals.

4. Mr. M.V. Balaji & Mr. S. Prabhu, "Gender inequality in Indian legal system on sexual offences"⁶

The author argued that in India, there is gender inequality in existing written laws on criminal activities like rape, sexual assault, sexual harassment, and offences related to other sexual activities. The sexual offences include modesty, harassment, voyeurism, stalking, sexual touching, abuse, rape, gang rape, adultery, assault, and so on. According to the author, in India there are no gender-neutral sexual offence laws, which leads to violations of Articles 14 and 15 of the Indian Constitution.

5. Akanksha Mishra, "Third gender rights: the battle for equality"⁷

This research paper illuminates the historical growth and current struggles of the transgender community in India, and in *National Legal Services Authority v. Union of India*, AIR 2014 SC 1863, judgement has become the ray of hope for transgender, but still there is a need for continued awareness, legal reform, and a sincere examination of the social and legal position of this marginalised group. The author argued that it is necessary to not only pen down laws but also bring them to action for the upbringing of the transgender community to the basic rostrum of human dignity.

6. Esha Mitra, "India's rape laws don't cover transgender people: they say it's putting them at risk"⁸

⁶Mr. M.V. Balaji & Mr. S. Prabhu, "Gender inequality in Indian legal system on sexual offences", Vol.4 & Issue 4, Law Audience Journal (e-ISSN: 2581-6705), Pages 116 to 122, (2022).

⁷Akanksha Mishra, "Third gender rights: the battle for equality", Christ University Law Journal (ISSN 2278-4322), page 15-16, (2016). <https://core.ac.uk/download/pdf/236436832.pdf>.

⁸Esha Mitra, "India's rape laws don't cover transgender people: they say it's putting them at risk", CNN, (9 December 2020), <https://edition.cnn.com/2020/12/08/india/india-transgender-rape-laws-intl-hnk-dst/index.html> (Last visit on 18 Feb 2024).

The author quotes that, India's first transgender judge, Swati Bidhan Baruah, stated that the huge discrimination in rape laws and punishment for sexual abuse against transgender is another way of showing that our life doesn't matter. Furthermore, the author states that the Justice Verma Committee made recommendations in his report that sexual assault on men, as well as homosexuals and transsexuals, is a reality and the provisions have to be cognizant of the same, but it was not included in the final bill of the Criminal Law (Amendment) Act 2013.

7. Rohan Mehta, "Beyond criminalization: how criminal law marginalizes through Invisibility".⁹

The writer argued that under Section 18 of the Transgender Act 2019, levies a punishment of up to two years for sexual abuse. At the same time, if a woman is raped, the minimum punishment is ten years of rigorous imprisonment. The punishment for rape against a transgender person is clearly unequal treatment as compared to women.

It was argued that disparities in punishment for similar offenses mean that criminal law does not consider rape against transgender as a grave offence, as compared to rape against women.

8. Charvi Devprakash, "Legal safeguards for transgenders from sexual offences: the need of the hour"¹⁰

In this article, the author makes a comprehensive comparison of the rights given in various acts with regard to sexual offences against Transgender such as (a) Position of transgenders under IPC, (b) Position of transgenders under POSH Act, 2013. (c) Position of Transgenders under Immoral Traffic (Prevention) Act, 1956. (D) Position of Transgender under Transgender Persons (Protection of Rights) Act, 2019. To sum it up, the author states that the legislature should make a gender-neutral law for rape as well as other sexual offences because, in this era, sexual harassment cases against women, men, and transgender are rapidly increasing. The Constitution guarantees the right to

⁹Rohan Mehta, "Beyond criminalization: how criminal law marginalizes through Invisibility, Law and other Things, (21 March 2021) (<https://lawandotherthings.com/beyond-criminalization-how-criminal-law-marginalizes-through-invisibility>) (Last visit on 22 Feb 2024).

¹⁰Charvi Devprakash, "Legal safeguards for transgenders from sexual offences: the need of the hour, SCC online, (1 Oct 2021). <https://www.sconline.com/blog/post/2021/10/01/legal-safeguards-for-transgenders-from-sexual-offences/> (Last visit on 17 Feb 2024).

seek protection against sexual assault, and these rights are essential to advancing gender justice and cannot be ignored.

9. Dr. Sushma Singh, "The unspoken struggle: homosexuality in Indian society"¹¹

In this article, the writer states that in India, homosexuality remains a contentious issue due to societal and religious beliefs. While the decriminalisation of Section 377 was a positive step, acceptance of LGBTQ individuals is still a struggle in this era. There is a need for legal recognition, equal rights, and the removal of discrimination against the LGBTQ community, urging awareness and justice from courts and lawmakers.

10. Annapurna Pattnaik, "Protection of transgender rights in India"¹²

In this article, the author states that the Preamble to the Constitution secures to all its citizens Justice, social, economic, and fraternity. Thus, the most significant right that they are deserving of is the right to equality under Article 14. Article 15 speaks about the prohibition of discrimination on the grounds of religion, race, caste, sex, or place of birth. Article 21 ensures the right to privacy and personal dignity for all citizens, and if anyone violates these provisions, they shall be liable for punishment in accordance with the law. But after all, the third community right (transgenders) still continues to be infringed. The author states that India should accept the "live and let live" policy and recognise that every person in the nation has equal rights and privileges.

RESEARCH OBJECTIVES

The main objectives of this dissertation are to completely examine the disparities in recognising rape offence and punishment against transgender individuals and women within India's legal system.

¹¹Dr. Sushma Singh, "The unspoken struggle: homosexuality in Indian society, Indian Journal of Psychology, (ISSN 0019-5553) PAGE 67-68 (2021). https://www.researchgate.net/publication/377634249_UGC_PAPER.

¹²Annapurna Pattnaik, Protection of transgender rights in India, Volume 9, Issue 2, Pramana Research Journal, (ISSN NO: 2249-2976), page 434-437, (2019). <https://www.pramanaresearch.org/gallery/prj-p493.pdf>.

- The objective of this study is to examine the implications of the different legal terminology of the Indian Penal Code (IPC) and the Transgender Persons (Protection of Rights) Act for the recognition and prosecution of sexual offences or crimes against transgenders
- The purpose of this research is to conduct an analysis of the current legislative provision, of Section 18 clause (d) of The Transgender Persons (Protection of Rights) Act, 2019, with a critical perspective
- Examine the historical recognition of transgender in ancient time to present era and punishment for sexual offences against transgender individuals.
- Review the criminal justice system and evolution of punishment for sexual offences.
- Examine whether failing in recognising rape offence against Transgender contravene the fundamental rights of the Indian Constitution, particularly Articles 14, 15, and 21.

HYPOTHESES

- Whether the different terminology used to describe sexual offences in the IPC as "rape" for sexual offences against women and in the Transgender Persons (Protection of Rights) Act as "sexual abuse" for transgender individuals is discriminatory against Transgender individuals regarding their gender identity.
- Whether the imprisonment for sexual abuse provided under Section 18 Clause (d) of the Transgender Persons (Protection of Rights) Act, 2019, mitigates the gravity of sexual offences and its punishment provided in the Indian Penal Code 1860 under Section 376 of the Indian Penal Code, 1860,
- Whether Section 18 clause (d) of the Transgender Persons (Protection of Rights) Act violates the fundamental rights of Right to Equality and Non-Discrimination and Right to Life affirmed respectively under Articles 14, 15 and 21 of the Constitution.

RESEARCH QUESTIONS

- The general law, the Indian Penal Code, defines any sexual offence against women as "rape" to provide the highest punishment, but the special law for transgender individuals defines any sexual offence against them as "sexual abuse." This legal position of terming the same offences into two categories led to mitigate the punishment for sexual offences against transgenders and thus discriminates Transgender Individuals.
- Does the Transgender Persons (Protection of Rights) Act, 2019 discriminate against transgender and fails to provide justice for Transgender for Sexual offences.
- Whether the Transgender Persons (Protection of Rights) Act, 2019 providing equal rights to transgender in sexual offences.
- Whether the punishments provided for the sexual offences against Women and Transgenders shows any disparities in the criminal legal system?
- Whether there is a conflict between the special law and general law with regard to punishment for sexual offences against transgender.

SCOPE AND LIMITATION OF STUDY

Scope

This dissertation examines the discrimination in punishment for sexual offences against transgender individuals and women in India under Section 376 of the Indian Penal Code 1860, it clearly defines the punishment for rape against women, which is 10 years to life imprisonment, but it does not provide the punishment for rape against transgenders. At the same time, under Section 18 Clause (d) of the Transgender Persons (Protection of Rights) Act, 2019, sexual offences against transgender individuals are defined as sexual abuse. which prima facie shows rape can only be committed against women and not against transgender. This research seeks to explore new aspects of the legal system, cultural influences, and historical factors that are causing the disparities that have been observed.

Limitation

Even though this dissertation thoroughly examines gender-based sentencing disparities in India, it is important to recognize and acknowledge some limitations. The study is limited to India and may not be applicable to other locations. The crucial limitation of

this study is the conflict between specific laws regarding sexual offence against transgender individuals and the general law that regulates these crimes. While specific laws, that is the Transgender Persons (Protection of Rights) Act, 2019, provide some rights and protection that address the Rights Affirmation for Transgender persons, these are often inconsistent with concurrently existing general laws, which is the Indian Penal Code 1860 with respect to sexual offences. These disparities may raise conflict and legal challenges in the application and interpretation of punishment against sexual violence.

RESEARCH METHODOLOGY

This dissertation uses a doctrinal research approach that means a comprehensive examination and analysis of primary sources, including statutes, case law, current legal frameworks, and related legal literature, concerning the disparities in sentencing for sexual offences against women and transgender people in India.

TENTATIVE CHAPTERISATION

CHAPTER 1 INTRODUCTION

Chapter 1 delves into the significant disparities in legal terminology and protections concerning sexual offences against women and transgender individuals in India. The Indian Penal Code (IPC) 1860, specifically Section 375, defines and addresses the crime of rape exclusively against women, outlining various forms of non-consensual sexual penetration. Conversely, the Transgender Persons (Protection of Rights) Act 2019, under Section 18 Clause (d), refers to similar offenses against transgender individuals as "sexual abuse" rather than rape. This differentiation in terminology underscores a critical gap in the legal system, potentially mitigating the severity of punishment for offences against transgender individuals compared to women, and highlights an inherent gender bias within the legal framework.

Furthermore, this chapter explores the broader implications of these legal disparities, emphasising the inadequacy of protections and rights afforded to transgender individuals despite legislative efforts. The Transgender Persons (Protection of Rights) Act 2019, while a step towards recognizing transgender rights, fails to comprehensively

address severe offenses like rape, using a less severe term "sexual abuse" instead. This differentiation not only reflects societal biases but also raises pressing questions about gender inequality and discrimination within the legal system. The chapter argues for the necessity of comprehensive legal reforms to ensure equal protection and recognition for transgender individuals, emphasising the urgent need to address these discriminatory practices and safeguard the rights and dignity of all individuals, irrespective of gender.

CHAPTER 2 HISTORICAL RECOGNITION OF TRANSGENDER IDENTITIES AND RIGHT

Chapter 2 delves into the historical and evolving recognition of transgender individuals, tracing their existence from ancient times to the modern era. It highlights how transgender identities were once punishable by severe penalties, reflecting societal norms that have gradually shifted towards greater acceptance and exploration of gender diversity. The chapter examines significant advancements in the 20th and 21st centuries, where researchers like Magnus Hirschfeld advocated for equal rights, contrasting with earlier views of transgender identity as a mental disorder requiring surgical treatment. This evolving understanding has led to increased legal and policy recognition of transgender individuals, yet challenges remain, particularly in areas such as legal recognition and access to medical care.

Furthermore, this chapter addresses notable disparities in legal terminology for sexual crimes, with "rape" often applied to women and "sexual abuse" to transgender individuals. This distinction underscores societal biases and can result in lesser punishments for crimes against transgender people, highlighting the need for rectifying these disparities to ensure gender equality. The chapter emphasises the importance of non-discrimination on the basis of gender identity, advocating for legal and policy reforms to establish gender-neutral protections and safeguard the rights of all individuals. Despite significant progress, the journey toward full equality for transgender individuals continues, requiring ongoing efforts to address legal and societal shortcomings.

CHAPTER 3 INDIAN CRIMINAL JUSTICE SYSTEM AND PUNISHMENT FOR SEXUAL OFFENCES

Chapter 3 delves into the evolution of the Indian Criminal Justice System, encompassing the police, judiciary, and prisons, and its role in maintaining law and order, justice, and offender rehabilitation. A central focus is on Section 375 of the Indian Penal Code (IPC), which defines rape and underscores the significance of consent in sexual offences. However, the chapter highlights critical disparities in legal terminology, where offences against women are termed "rape" under the IPC, whereas similar offences against transgender individuals are labeled as "sexual abuse" under the Transgender Persons (Protection of Rights) Act. This difference suggests potential discrimination and raises concerns about the adequacy of legal protections for transgender individuals.

Furthermore, this chapter examines the broader implications of these disparities, noting that the IPC includes provisions for offences such as assault, sexual harassment, and stalking, primarily focusing on women. In contrast, the Transgender Persons (Protection of Rights) Act lists physical, sexual, verbal, and emotional abuse as offences against transgender individuals, using broader and potentially less severe terms. This distinction can result in lighter punishments for similar offences against transgender people, highlighting systemic biases and inadequate legal protections. The chapter calls for legislative reforms to standardise terminology and ensure equal treatment under the law for all genders, promoting justice and aligning with principles of equality and human rights in India's criminal justice system.

CHAPTER 4 PUNISHMENT PROSPECT FOR SEXUAL OFFENCES AGAINST WOMEN AND TRANSGENDERS IN NATIONAL AND INTERNATIONAL PERSPECTIVE

Chapter 4 delves into the stark contrasts between India's and Canada's legal frameworks regarding rape punishment and transgender rights. Canada has embraced progressive, gender-neutral laws that ensure robust legal recognition and protection for transgender individuals. This inclusive approach is supported by judiciary interpretations that guarantee consistent support and services for sexual assault victims, irrespective of gender identity. Canada's comprehensive strategy includes accessible reporting mechanisms and educational initiatives focused on sexual assault prevention.

In contrast, India faces significant challenges in implementing its legal reforms despite landmark judgments and legislation such as the Transgender Persons Act of 2019 and the NALSA verdict. The Indian legal system employs disparate terms and frameworks for addressing sexual offenses based on gender identity, exemplified by the specific use of "rape" for women under the Indian Penal Code versus "sexual abuse" under the Transgender Persons Act. These discrepancies perpetuate discrimination against transgender individuals, compounding implementation gaps and societal prejudices that obstruct their access to justice. Thus, the chapter underscores broader disparities in safeguarding transgender rights and achieving equality across different legal contexts.

CHAPTER 5 DISPARITIES IN PUNISHMENT FOR SEXUAL OFFENCES AGAINST TRANSGENDER

Chapter 5 delves into the stark disparities in legal terminology and their profound impact on the lives of transgender individuals in India. The Indian Penal Code (IPC) categorizes sexual offences against women as "rape" with stringent punishments, while the Transgender Persons (Protection of Rights) Act, 2019 uses the term "sexual abuse" for similar offences against transgender individuals, leading to potentially lighter punishments. This distinction exacerbates the vulnerability of transgender people to sexual violence and presents significant hurdles when reporting such crimes, as police often refuse to register complaints and exhibit discriminatory behaviour. The chapter highlights how many transgender individuals are marginalized into precarious occupations like sex work, facing heightened risks of sexual violence and health issues such as HIV/AIDS. The stigma associated with their gender identity further perpetuates discriminatory practices, including a permanent ban on blood donations, severely limiting their access to essential medical services in emergencies. These systemic injustices violate the fundamental rights enshrined in the Indian Constitution, perpetuating a cycle of marginalisation and inequality for transgender individuals.

The research questions in this chapter underscore the legal and societal ramifications of these disparities. The distinction between "rape" and "sexual abuse" in legal frameworks for women versus transgender individuals diminishes the severity of offences and fails to provide equal protection under the law, highlighting systemic discrimination and increased vulnerability for transgender individuals. Furthermore, the conflict between the general provisions of the IPC and the special provisions of the Transgender Persons

Act regarding punishment for sexual offences complicates legal enforcement and undermines justice for transgender victims. The chapter calls for comprehensive legal reforms to harmonise terminology and strengthen protections tailored to the needs of transgender individuals, emphasising the need for clear definitions and stringent penalties within the legal framework. Aligning legislative measures with constitutional guarantees of equality and non-discrimination is essential to fostering a more just and inclusive society where the rights and dignity of transgender individuals are respected and protected.

CHAPTER 6 CONCLUSION & SUGGESTIONS

Chapter 6 delves into the systemic discrimination faced by transgender individuals in India, focusing on the differential terminology used for sexual offences "rape" for women and "sexual abuse" for transgender individuals which reflects deep-seated biases based on gender identity. This disparity not only diminishes the perceived severity of crimes against transgender individuals but also exacerbates their vulnerability and obstructs their pursuit of justice and equality. The chapter underscores the significant legal barriers transgender people face, including discriminatory police practices and inadequate legal recourse, highlighting these issues as violations of Articles 14, 15, and 21 of the Indian Constitution, which ensure equality before the law, prohibit discrimination, and protect life and personal liberty.

CHAPTER- II

HISTORY OF TRANSGENDER IDENTITIES AND RIGHTS AFFIRMATION

INTRODUCTION

In this modern era, significant strides have been made in recognizing transgender rights, especially following landmark judgments like the *NALSA v. Union of India*¹³ in 2014, which acknowledged transgender individuals as Third genders. Despite these advancements, disparities persist, particularly in the legal terminology used for sexual offences against transgenders. The Indian Penal Code categorizes sexual offences against women as "rape," while the Transgender Persons (Protection of Rights) Act refers to similar offences against transgender individuals as "sexual abuse." This chapter delves into the historical context to highlight the evolution of societal attitudes and legal responses, underscoring the need for further reforms to ensure equal protection and affirmation of transgender identities in contemporary India.

The existence and recognition of transgender identity evolve over time; its acceptance and recognition mostly depend on the various cultures and historical periods. Although the identity of the transgender was not recognised in ancient Rome, the attitude towards the transgender individual has varied across different cultures and societies. During 1500 BC–500 BC people were classified into three distinct types in the Vedas, according to one's prakrti, or nature.¹⁴ These are also described as pumsprakrtistri-prakrti (female nature) and tritiya-prakrti (third nature) in the Kama Sutra of 4th century AD and other places. According to a number of sources, third-sex people were well-known in pre-modern India. They were said to include intersexual as well as people with both male and female bodies, and they were frequently identifiable from an early age.¹⁵

¹³NALSA v. Union of India,(2014) 5 SCC 438.

¹⁴M. Michelraj, Historical evolution of transgender community in India, Vol. 4, Asian Review of Social Sciences (ISSN: 2249-6319), page 17- 19 (2015).

¹⁵Ibid.

The ancient Hindu branches of law, astrology, linguistics, and medicine—all addressed a third sex. The primary source of Hindu law, the biological origins of the three sexes are explained by Manu Smriti as follows: "A female child is produced by the prevalence of the female, a male child by a greater quantity of male seed; if both are equal, a third-sex child or boy and girl twins are produced; if either are weak or deficient in quantity, a failure of conception results."¹⁶

In ancient times, some accepted and celebrated gender diversity, and on the flip side of the coin, some imposed hard gender norms and punished people who were diverse from these norms. However, the existence and recognition of transgender identity began in the modern era, especially in the 20th and 21st centuries. Still, there are many countries that are fighting for transgender recognition, like Iran, Saudi Arabia, the United Arab Emirates, etc. Below is a historical development of transgender individuals recognition from ancient times to the present day.¹⁷

This chapter thus explores the existence and experiences of transgender individuals in India from ancient, medieval, and modern periods, focusing on how sexual offences against them have been addressed over time. In ancient India, transgender individuals, particularly the Hijra community, were often revered and held significant societal roles, enjoying certain protections and respect. During the medieval period, their status fluctuated, with some rulers honouring their roles while others marginalised them. The arrival of British colonial rule further exacerbated their marginalisation through repressive laws, leaving them vulnerable to exploitation and abuse without adequate legal protections.

TRANSGENDERS' IDENTITY IN ANCIENT CIVILIZATIONS

1. Ancient Greece:

In ancient Greece, people had a particular ideology about men and women. These ideologies were influenced by religious, cultural, and societal frameworks. However, there were exceptions in Greek mythology. There was a character named Hermaphroditus who described both male and female traits. Apart from this, Greek

¹⁶M. Michelraj, Historical evolution of transgender community in India, Vol. 4, Asian Review of Social Sciences (ISSN: 2249-6319), page 17- 19 (2015).

¹⁷James Montano, Society in transition: A history of the trans movement, EXPERIENCE THE ART, (19Jan2017),<https://americanrepertorytheater.org/media/society-in-transition-a-history-of-the-trans-movement/>(Last visited on 3 Mar 2024).

people are stuck with the idea of male and female gender; they don't recognise or accept transgender people.¹⁸

In ancient Greece, gender was not always evident. In stories, paintings, and plays, there were several examples of characters who did not fit cleanly into the masculine or female categories. For example, the god Dionysos performed and clothed in both masculine and feminine ways.¹⁹ Hermaphroditos have both male and female bodily parts. People such as Kaineus and Teiresias may shift genders due to evil or the gods. Women like Medeia and Klytaimnestra were strong and powerful in public life, which was traditionally viewed as a male world. Even in theatre and festivals, people were seen to dress like the opposite gender. However, types of activity of gender flexibility were perceived as uncommon, and these characters were frequently seen as opposite to the norms of the society.²⁰

2. Romanian Approach of Transgenders:

In ancient Rome, people were very particular about how men and women should behave in society. They expected that men and women should behave in a certain manner, and these expectations were sanctioned by the law. For men, they are meant to be strong and bold and should emerge as leaders for their family and society. Women, on the other hand, are supposed to be obedient and take care of their homes and families.

Apart from this, there were some other people who didn't fit into these categories. In Rome, there were priests called Galli who served the goddess Cybele (the universal mother of not only the gods but also of all humans, animals, and plant life). In ancient Rome, there was a group of people who followed the goddess Cybel. They had a strange ceremony called the Galli rituals. During this ceremony, some priests called the Galli would cut off the private parts to show they were married to the goddess and didn't want earthly desires. After that, they would dress like women and take on female roles. This

¹⁸Morg Daniele, Ancient mesopotamian transgender and non-binary identities, ACADEMUS EDUCATION,(30 June 2021),<https://www.academuseducation.co.uk/post/ancient-mesopotamian-transgender-and-non-binary-identities> (Last visited on 30 June 2021).

¹⁹Rengel Bec, Queering gender in ancient greece, EXPLORE BRISTOL RESEARCH, Page (12- 13), (17Nov2019)https://researchinformation.bris.ac.uk/ws/portalfiles/portal/189624150/Final_Copy_2019_01_23_Rengel_B_MPhil.pdf (Last visited on 4 Mar 2024).

²⁰Ibid.

was a part of religious practices, and these people were somewhere similar to the transgender.²¹

Moreover, in Rome, people are very strict about their gender identity; if someone acts contrary to their gender, it seems like they are doing something wrong, and for that, they could even be punished.

3. Mediaeval European Social Attitude:

In mediaeval Europe, people's behaviour and gender were mostly influenced by the Christian church. The church played a significant role in deciding what is right and wrong. According to the churches, there were particular rules and regulations defined in the Bible for men and women that should be followed by every individual in their capacity.²²

If someone is found to be cross-dressing, that means dressing like the opposite gender. It believes that it is against the will of God, that it was a punishable offence at that time, and that it could be punished by the churches. At that time, same-sex marriage was also a punishable offence; it was believed that it was a sin and went against church teaching.

Overall, during mediaeval times, the churches had full control over people's lives, how they should behave and act, what is wrong and what is right, and their gender identity and sexuality were also influenced by the church's teachings; if anyone didn't follow them, they could face serious consequences.

4. Identity of Transgenders in the Ancient Muslim society:

In the Middle Ages, during the Islamic world, people's ideologies towards gender identity were mostly influenced by religious and cultural practices. In Islamic teaching, it lays down certain rules and regulations for men and women on how they should behave and even cover their bodies. As with other cultures, some people do not fit into these rules and regulations. There are also some exceptions available in Islam, for example, Mukhannathun (an Arabic term used for trans women), who act contrary to

²¹Morg Daniele, Ancient mesopotamian transgender and non-binari ideneities, ACADEMUS EDUCATION,(30 June 2021),<https://www.academuseducation.co.uk/post/ancient-mesopotamian-transgender-and-non-binary-identities> (Last visited on 30 June 2021).

²²Aneilya Barnes, Gender and christianity in medieval europe: New perspectives, Volume 96, Number 1, The Catholic University of America Press, page 2-4 (2010).

their gender. Mukhannathun were in some parts of society, and they faced a certain level of discrimination.

During the Islamic civilization royal courts, Hijras were well-known, especially during the Ottoman and Mughal eras in mediaeval India. They became well-known administrators, political consultants, and guardians of the harems. Due to their reputation for intelligence, reliability, and strength, they gained unrestricted access to all areas of society. Hijras were crucial to the politics of Mughal empire construction. A significant amount of money was given to the Hijras as payment for being so near to kings and queens, and they hold prominent positions in the Islamic religious organisations, particularly in the security of the holy sites of Mecca and Medina.²³

5. Approach Towards Transgenders in the Ancient Hindu Period:

For several centuries, transgender individuals have been a part of Indian society. Historical evidence has been presented regarding the acceptance of "third sexes" and those who do not identify as male or female.²⁴ In the first few historical records of ancient India, the idea of "tritiyaprakriti," also known as "napumsaka," was a central theme in early Vedic, Puranic literatures, and Hindu mythology that meant a lack of the ability to procreate, and it was indicated by the term "napumsaka," which was used to distinguish it from characteristics relating to masculinity and femininity.²⁵

In the ancient Hindu epic Ramayana, Lord Rama leaves his land for a term of 14 years as he is exiled by his father. When he proceeds towards the forest, everyone in the village starts following him, but he requests followers that all "men and women" go back to their homes. Only the Hijras chose to stick with him among his followers because they felt obligated to pursue this path. Impressed by their devotion, Rama granted them permission to bless individuals on auspicious occasions such as childbirth

²³M. Michelraj, Historical evolution of transgender community in India, Vol. 4, Asian Review of Social Sciences (ISSN: 2249-6319), page 17- 19 (2015).
" <https://www.trp.org.in/wp-content/uploads/2015/10/ARSS-Vol.4-No.1-Jan-June-2015-pp.17-19.pdf>.

²⁴Ibid.

²⁵Aneilya Barnes, Gender and christianity in medieval europe: New perspectives, Volume 96, Number 1, The Catholic University of America Press, page 2-4 (2010).

and marriage, as well as at inaugural ceremonies that were meant to prepare people for the badhai custom, which involves hijras singing, dancing, and bestowing blessings.²⁶

GENDER PERSPECTIVE IN THE EARLY MODERN ERA

During the early Modern Era, which was between the 16th and 18th centuries, perspectives regarding gender identity emerged at that time and were mostly influenced by social, cultural, and religious perspectives. However, the existence of transgender identity as understood today did not exist during this period. There were rules and regulations regarding genders that should be followed by the individual, and whoever goes against these rules shall be subject to punishment.²⁷ In the year 1533 the former king of England, Henry VIII, passed the Buggery Act, where sexual intercourse between people of the same gender was punishable with the death penalty. Other offences, like "unnatural intercourse," shall be punished with the punishment of 2 years in jail.²⁸

In the 1800s, people started talking about gender and sexuality in a scientific way in Europe. Some prominent personalities, like Magnus Hirschfeld in Germany and Richard von Krafft-Ebing in Austria, did deep studies on these topics and shared their views with the general public.

Magnus Hirschfeld was one of the first personalities to study the transgender individual in the 19th and 20th centuries. He describes being transgender as a natural and valid part of human diversity. His studies help decriminalise homosexuality and gender-biassed laws. His efforts raised a voice to provide equal rights to transgender individuals.²⁹

Richard von Krafft-Ebing did a deep study of human sexuality and psychology during the 19th century. Richard describes in his famous book "Psychopathia Sexualis" the

²⁶M. Michelraj, Historical evolution of transgender community in India, Vol. 4, Asian Review of Social Sciences (ISSN: 2249-6319), page 17- 19 (2015).
" <https://www.trp.org.in/wp-content/uploads/2015/10/ARSS-Vol.4-No.1-Jan-June-2015-pp.17-19.pdf>.

²⁷James Montano, Society in transition: A history of the trans movement. EXPERIENCE THE ART,(19 Jan 2017).<https://americanrepertorytheater.org/media/society-in-transition-a-history-of-the-trans-movement> (last visit on 4 Mar 2024).

²⁸Timeline of LGBT history in the United Kingdom, In wikipedia (Last visited on 20 May 2024).
https://en.wikipedia.org/wiki/Timeline_of_LGBT_history_in_the_United_Kingdom#References.

²⁹United States Holocaust Memorial Museum. "Introduction to the Holocaust." Holocaust Encyclopedia.
<https://encyclopedia.ushmm.org/content/en/article/magnus-hirschfeld-2>. Accessed on (5 Mar 2024).

various forms of sexual behaviour and identity, including transgender. He describes transgender people as having an illness or some type of mental problem that is not natural and should be treated with medication.³⁰

However, many scholars of this time in the 19th century deliberated about transgender people in a negative light, describing them as non-natural and having some type of mental disorder, which made it harder for people who didn't fit into traditional gender roles. Although the discussion about transgender is negative, it is the beginning of the era where people started researching transgender.

During the British period, Hijra used to accept protections and privileges from several Indian governments by entering the Hijra community at the start of the British era in the Indian subcontinent. Moreover, advantages such as the proper distribution of land, a smaller amount of money from agricultural holdings, and the right to food were provided. However, the British government eventually removed these rights by passing legislation because the land was not inherited by blood relatives.³¹

In the second half of the 19th century, the British colonial government made multiple efforts to criminalise the Hijra population and deny them civil rights. The colonial government classified Hijras as a distinct caste or tribe in various regions of India. All hijra who were involved in abduction, castrating minors, and dressing like women to dance in public were covered by the Criminal Tribes Act of 1871. Such actions were punishable offences up to 2 years in prison, a fine, or both.³² In 1871, during the colonial era, the British described the term "hijra" (used in South Asia for transgender people) as a "criminal tribe" in their "Criminal Tribal Act," which made the lives of transgender people more harassed and also restricted the free movement in society.³³

The acceptance and recognition of the transgender community in western society began to rise in the 20th century. The study of Magnus Hirschfeld in the field of transgender

³⁰Harry Oosterhuis, *Sexual modernity in the works of Richard von Krafft-Ebing and Albert Moll*, Volume 56 / Special Issue 2/ Research gate, page 134-136 (2012).

³¹M. Michelraj, *Historical evolution of transgender community in India*, Vol. 4, *Asian Review of Social Sciences* (ISSN: 2249-6319), page 17- 19 (3 Mar 2024).

³²Ibid.

³³Timeline of LGBT history in the United Kingdom, In wikipedia (Last visited on 20 May 2024). https://en.wikipedia.org/wiki/Timeline_of_LGBT_history_in_the_United_Kingdom#References.

plays a significant role in changing transgender lives. His work was published in 1919 and assisted in the treatment and research of transgender people.³⁴

In 1941 The Oxford English Dictionary reports that the first use of the English phrase transsexuality was printed in 1950. According to the author, the word was already in use at the time and was only rarely used as a synonym for homosexuality.³⁵ In 1900, a doctor named Harry Benjamin was a German American endocrinologist and sexologist famous for assisting the transgender. He wrote a book named "The Transsexual Phenomenon," in which he describes how transgender people feel and how they can be medically treated with surgery.³⁶

In 1969, the famous movement held in New York City called "The Stone Riots" could be a turning point in the freedom struggle of transgender people. It was held that the LGBTQ+ community faced discrimination and was often treated harshly by the police. At that time, there was a bar called "Stonewall Inn," famous for the LGBTQ+ community. One night, police raided the bar and treated the people there very unrespectfully. It was very common there, but this time people fought back, and this led to the clashes and protests, which continued for several days. This movement became a milestone as it showed that transgender people wouldn't accept mistreatment anymore. Since then, transgender people have continued to struggle for their basic rights, demand access to medical care, and want to change their legal documents to match their gender identity.³⁷

MODERN ERA RECOGNITION AND CHALLENGE FACED BY TRANSGENDER

In the 21st century, many countries started to recognise transgender people as a third gender. For that, they also passed the Transgender Act, which provided rights and safety to transgender people and prohibited unequal treatment with these people. By providing

³⁴James Montano, "Society in transition: A history of the trans movement, EXPERIENCE THE ART, (19 Jan 2017) available at, <https://americanrepertorytheater.org/media/society-in-transition-a-history-of-the-trans-movement/>(Last visited on 3 Mar 2024).

³⁵Timeline of LGBT history in the United Kingdom, In wikipedia (Last visited on 20 May 2024). https://en.wikipedia.org/wiki/Timeline_of_LGBT_history_in_the_United_Kingdom#References.

³⁶Ibid.

³⁷Ed Pilkington, The riot that changed America's gay rights movement forever, THE GUARDIAN, (19 June 2019). <https://www.theguardian.com/lifeandstyle/2019/jun/19/stonewall-50th-anniversary-night-that-unleashed-gay-liberation#comments> (Last visited on 6 Mar 2024).

these rights, their lives are now very much visible, and we can see transgender people in many movies, TV shows, and even in politics.

In 2009, transgender activist Rachel Crandall Crocker, who is based in Michigan, founded the International Transgender Day of Visibility in response to the absence of LGBT holidays honouring transgender people. She expressed her frustration that the only well-known holiday focused on transgender issues was the Transgender Day of Remembrance, which expressed disappointment at the deaths of transgender people due to hate crimes but failed to recognise and honour transgender people who are still alive.

In this era, it was scientifically proven that being transgender was not a mental disorder, but now it is a matter of choice. Many transgender people participated in national sports and were also recruited for government posts, such as the first transgender judge, Joyita Mondal, and a social worker recruited as a judge in West Bengal on July 8, 2017. Although providing these rights and facilities is important, transgender people face a lot of challenges in their daily lives. They still face discrimination, harassment, and violence in society. They continuously fight for access to medical care and the legal recognition they need.³⁸

In today's world, people have begun to recognise and accept transgender individuals.³⁹ People are becoming more aware of the fact that gender is not limited to just males or females, and they're learning that other genders, apart from males and females, are also natural, and people have started accepting other genders who identify differently. Although the ideology is improving, there are still a lot of problems that need to be resolved. Transgender people still face a lot of discrimination and violence. They often don't get fair treatment, and they are also discriminated against in getting access to things like healthcare and jobs.

However, the Transgender Persons (Protection of Rights) Act, 2019, which aims to protect and safeguard transgender people, makes a difference. In the IPC, sexual offences against women are termed rape, at the same time, in the Transgender Persons

³⁸Mocarski, R., King, R., Butler, S., Holt, N. R., Huit, T. Z., Hope, D. A., Meyer, H. M., & Woodruff, N. (2019). "The rise of transgender and gender diverse representation in the media: Impacts on the population" *Communication, culture & critique*, 12(3), 416–433. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6824534/>.

³⁹Ed Pilkington, The riot that changed America's gay rights movement forever, *THE GUARDIAN*, (19 June 2019). <https://www.theguardian.com/lifeandstyle/2019/jun/19/stonewall-50th-anniversary-night-that-unleashed-gay-liberation#comments> (Last visited on 6 Mar 2024).

(Protection of Rights) Act, sexual offences against transgender people are defined as sexual abuse. These disparities in terminology mitigate the punishment for sexual offences against transgender people. These disparities in terminology need to be reviewed to ensure equal protection and justice for all individuals.

But apart from these difficulties, there are many people and organisations who fought hard to change these systems who are biased and don't see the other perspective of life.⁴⁰ They fought for new laws and policies that will be in favour of transgender people and provide equal rights to transgender people, and they're pushing for better access to healthcare and support services. Apart from laws and policies, people are also working to change people's attitudes and beliefs about transgender people so that everyone can feel accepted and respected for who they are.⁴¹

In a nutshell, although many things are being corrected in favour of transgender people, there are still many problems that need to be resolved so that every gender in society gets an equal right and is treated equally without any discrimination.

CONCLUSION

Throughout history, transgender people have existed since ancient times; it's not a modern concept; the recognition and acceptance of transgender individuals have evolved over time with the changing of social, cultural, and political attitudes towards gender diversity. From ancient civilisations to the modern era, transgender people have existed in various forms and religious beliefs. In ancient times, dressing like the opposite gender and being transgender were punishable offences (the death penalty). Although the concept of transgender people in this modern era could not exist in ancient times, it has evolved with the changing of societal norms.

In the modern era, people started exploring transgender and sexuality. Some of the researchers state that it's some kind of mental disorder that is not natural and also prescribe surgical treatment, but on the other side, some of the researchers, like Magnus Hirschfeld, raised a voice to provide equal rights to transgender individuals. In the 20th

⁴⁰Timeline of LGBT history in the United Kingdom, In wikipedia (Last visited on 20 May 2024). https://en.wikipedia.org/wiki/Timeline_of_LGBT_history_in_the_United_Kingdom#References.

⁴¹Ibid.

and 21st centuries, people started recognising and accepting transgender as a third gender, and many significant advances in the field of laws and policies took place. Transgender individuals are increasingly recognised and affirmed in diverse societies worldwide, with growing awareness and acceptance of gender diversity. However, transgender people are still facing many problems, but with the changing of society, they are fighting for new problems such as legal recognition and medical access.

However, disparities between the terms "rape" for women and "sexual abuse" for transgender individuals within legal statutes raise the question of gender equality. Such differences in terminology not only show societal biases but also mitigate the punishment for sexual abuse against transgender people. In this modern era, this type of disparity needs to be addressed so no one discriminates on the basis of gender identity.

At the end, the history of transgender people is a story of resistance and progress in social, economic, and political fields. Although significant changes have been made, the journey towards full equality for the transgender individual is far from reality. However, there is a need to ensure no one discriminates on the basis of gender identity by rectifying the current status and making policies which are gender neutral.

CHAPTER- III

INDIAN CRIMINAL JUSTICE SYSTEM AND PUNISHMENTS FOR SEXUAL OFFENCES

INTRODUCTION

Moving beyond mere historical context, this chapter also delves into the legal definitions of rape and sexual abuse, seeking to distinguish between these two terms.

Through an exploration of statutory definitions and legal precedents, it endeavours to know the nuances in elements, intent, and circumstances inherent in each offence.. Understanding these legal standards and judicial considerations is pivotal in comprehending the gravity of sexual offences and the subsequent punishment meted out by the criminal justice system. Moreover, it scrutinizes the nuanced dimensions of rape and sexual abuse, shedding light on the complexities inherent in prosecuting such crimes and the challenges faced by victims seeking justice.

This chapter delves into a comprehensive examination whether the punishments provided for the sexual offences against Women and Transgenders shows any disparities in the criminal legal system. Beginning with an exploration of the foundational principles and objectives of the Indian Criminal Justice System, it seeks to unravel the historical trajectory that has shaped the contemporary framework. As societies progress, so do their systems of justice, and this chapter aims to trace the evolution of punitive measures for sexual offences within the Indian legal landscape.

Moreover, this chapter scrutinizes the sentencing guidelines and judicial precedents set forth by Indian courts in cases of rape offences. By analysing the judicial approach to punishment, it seeks to elucidate the factors influencing sentencing decisions and the principles guiding judicial discretion. Furthermore, it critically assesses the implementation of punitive measures and the myriad challenges encountered therein, paving the way for a comprehensive understanding of the efficacy and limitations of punishment within the Indian Criminal Justice System.

EVOLUTION OF CRIMINAL JUSTICE SYSTEMS

Hobbes believed that man was inherently greedy and that he could go to great lengths for pleasure.⁴² According to Bentham, a person demands to pursue pleasure and avoid suffering.⁴³ Typically, he follows his instincts, and in the past, there were no boundaries or rules to govern his behaviour. As towns and the people grew, his interests clashed

⁴²By Richard Gunderman, The beef with greed: Leo tolstoy and adam smith, ECONLIB, (3 Jan 2022), <https://www.econlib.org/library/columns/y2022/gundermangreed.html> (Last visited on 12 April 2024).

⁴³Jerome Warren, Bentham's two sovereign masters - Examining bentham's influence on the social sciences, EXPLORING ECONOMICS, (2020). <https://exploring-economics.org/en/discover/benthams-two-masters/> (Last visited on 10 April 2024).

with others', creating a conflicting environment. Therefore, a system that could keep an eye on a man's behaviour was required to control his behaviour. The evolution of the criminal justice system parallels that of human growth.

The first phase was when he acted in accordance with his needs and desires and had no control over his behaviour. He could harm anyone and grant his wishes if necessary. The second stage then began, during which the state notion evolved and the territory grew. At this point, the kingdom was ruled by a ruler, while other people carried out his orders. The monarch, however, meted out severe punishments according to the eye-for-an-eye and body-for-a-body principle because this stage was unable to handle the conflict of interests. This was a hateful, vengeful stage. A suitable system was thought to be necessary when the king was still unable to control human behaviour and there was anarchy in the community. The criminal justice system came into being as a result of society's progress over time, which saw the monarchy give way to the aristocracy and then democracy. Additionally, it was believed that the government had a mechanism in place to regulate the amount of crime in each state.⁴⁴

Ancient Criminal Justice System

The ancient Indian legal system was run through the concept of 'Dharma' and provided several norms of ethical conduct. The laws and rules can be traced in different manuals that describe the Vedic scriptures, such as 'Puranas' and 'Smritis'. The King lacked independent authority and received his powers from 'Dharma', which he was expected to respect.⁴⁵ The difference between a civil wrong and a criminal offence was obvious. Civil wrongs were mostly about money conflicts, although crime was characterised by the concept of pātaka (sin). The Mauryas had a strict punitive system that dictated mutilation as well as the death penalty for even minor offences.

Manu's Dharmasastra includes offences related to the human body, such as assault and other bodily injuries, as well as property offences like theft and robbery. During the Gupta era, the judiciary was made up of the guild, the folk assembly or council, and the

⁴⁴Dr. Rahul Tripathi, Evolution of criminal justice system in ancient India, Volume 5; Issue 1, International Journal of Multidisciplinary Research and Development, Page 153-157 (2018).

⁴⁵Criminal Justice system in india, In byjus.com. Available at [https://byjus.com/free-ias-prep/criminal-justice-system-in-india/#:~:text=An%20Indian%20Penal%20Code%20\(IPC,be%20followed%20in%20all%20states,Last%20visited%20on%205%20April%202024\)](https://byjus.com/free-ias-prep/criminal-justice-system-in-india/#:~:text=An%20Indian%20Penal%20Code%20(IPC,be%20followed%20in%20all%20states,Last%20visited%20on%205%20April%202024) (Last visited on 5 April 2024).

monarch. Judicial decisions were mostly based on legal texts, societal usage, and the king's proclamation, which barred him from breaking the decisions.⁴⁶

Criminal Justice System During Medieval Times

India was subjected to a series of wars that began in the eighth century A.D. and ended in the fifteenth century, until ending under Mughal rule.

They followed a criminal code that classified all offences based on the penalty they deserved, including retaliation (blood for blood), specified penalties for theft and robbery, and discretionary penalties.⁴⁷

The Contemporary Criminal Legal System

India's criminal justice system follows the legal procedures established by the British prior to independence. The first Law Commission of India drafted an Indian Penal Code (IPC) in 1860, which defined crime and prescribed suitable punishments. It was developed in accordance with English criminal law. The Code of Criminal Procedure was enacted in 1861, outlining the standards that must be observed at all stages. This was updated in 1973. The NN Vohra Committee, established in 1993, saw an increase in political criminalization and discussed the forbidden nexus. It was an attempt to urge reforms in the criminal justice system. In 2000, the Indian government appointed Justice V.S. Malimath, the former Chief Justice of Kerala and Karnataka, led a team that proposed reforms to the country's century-old criminal justice system. In 2003, the Justice Malimath Committee issued a report with 158 recommendations. According to the Committee, the current system "weighed in favour of the accused and did not adequately focus on justice for the victims of crime."⁴⁸

The whole existence of an ethical society is dependent on the proper and effective operation of the criminal justice system. The law of the country must be in accordance with the demands of changing times and the nature of complications in wrongdoing. There should be a greater debate among all stakeholders to develop effective provisions

⁴⁶Ibid.

⁴⁷Dr. Rahul Tripathi, Evolution of criminal justice system in ancient India, Volume 5; Issue 1, International Journal of Multidisciplinary Research and Development, Page 153-157 (2018).

⁴⁸Criminal Justice system in india, In byjus.com. Available at [https://byjus.com/free-ias-prep/criminal-justice-system-in-india/#:~:text=An%20Indian%20Penal%20Code%20\(IPC,be%20followed%20in%20all%](https://byjus.com/free-ias-prep/criminal-justice-system-in-india/#:~:text=An%20Indian%20Penal%20Code%20(IPC,be%20followed%20in%20all%20) (Last visited on 5 April 2024).

that ensure the interests of justice are served and served correctly, with no innocents suffering.

COMPONENTS OF THE CRIMINAL JUSTICE SYSTEM AND THEIR OBJECTIVES

The criminal justice system in India consists of all the necessary elements that assist in maintaining social order, deterring criminal behaviour, and administering justice within a society. Criminal justice mainly consists of three agencies: police, judiciary, and prisons. These three— State agencies assist in providing justice to society and establishing a rule of law.

Police department is a state agency to prevent crime within the criminal justice system, the police play a crucial role in preventing crime. Their main responsibility is to register the crime, investigate the crime, arrest the offender, and much more. Their main aim is to create a fearless society where every individual enjoys their rights without infringing on the rights of others. The police are also tasked with maintaining public order and ensuring the safety of communities through proactive patrols and emergency response. By fostering trust and cooperation with the public, they contribute to building a secure and harmonious environment for all citizens.⁴⁹

Additionally the judiciary is a significant part of the criminal justice system. The judiciary plays a crucial role in interpreting and upholding laws to maintain consistency and fairness in legal outcomes, thereby promoting public trust in the justice system. It serves as a pillar of democracy by safeguarding individual rights and liberties through impartial adjudication. Its main functions are to resolve legal disputes, conduct trials, and administer justice. Furthermore, it also interprets the law whenever any question of law arises and ensures everyone gets a fair trial, so justice is delivered.⁵⁰

The last agency of the criminal justice system is prisons. It assists in convicting the offender of a crime. providing punishment and rehabilitation. Moreover, house inmate prisons also offer programmes and services that will help in the education, vocational

⁴⁹Criminal Justice System in India - History, objectives, components, constitutional provisions & more, In testbook, available at <https://testbook.com/ias-preparation/criminal-justice-system-in-india>,(Last visited on 17 Jan 2024).

⁵⁰"Criminal justice" In wikipedia, https://en.wikipedia.org/wiki/Criminal_justice (Last visited on 17 May 2024).

training, and counselling of offenders. Furthermore, prisons aim to facilitate the rehabilitation and reintegration of inmates into society upon their release, promoting long-term societal safety and reducing recidivism rates. By addressing the root causes of criminal behaviour through targeted interventions, they strive to foster positive behavioural change and support individuals in making constructive contributions to their communities.⁵¹

These three agencies, police, judiciary, and prisons always work together to safeguard society and ensure justice is delivered.

Objectives of the Criminal Justice System in India:

The criminal justice system plays a significant role in administering the behaviour of human beings; without law and order, no one safeguards the rights of an individual. A well defined Criminal justice system in any society functions with the objectives of safeguarding the society, maintaining law and order, rehabilitation of criminals, to provide justice to the victims and to compensate the victim of a crime.⁵²

In addition to these core objectives, the criminal justice system in India also focuses on the principles of fairness and impartiality. Ensuring that justice is delivered without discrimination based on caste, creed, religion, or economic status is fundamental to the integrity of the system. This involves upholding the constitutional rights of all individuals, providing legal aid to those who cannot afford it, and ensuring a fair trial. Furthermore, the system aims to deter criminal behaviour through the certainty and proportionality of punishment, thereby fostering a sense of security and trust among the citizens. By addressing the root causes of crime through socio-economic reforms and community policing, the criminal justice system works towards creating a more just and equitable society.

⁵¹Criminal Justice System in India - History, objectives, components, constitutional provisions & more, In testbook, available at <https://testbook.com/ias-preparation/criminal-justice-system-in-india>, (Last visited on 17 Jan 2024).

⁵²Ibid.

LEGAL DEFINITION OF RAPE AND THE CONCEPT OF CONSENT

Rape is a heinous crime that affects not only the physical, mental, and emotional aspects but also the whole life of the victim. It is a more grievous offence as compared to theft and dacoity, as it left a mental trauma in the mind of the victim for the rest of their lives. It is a violation of the fundamental right of the victim under Article 21 of the Indian Constitution. In India, rape is defined in Section 375⁵³ of the Indian Penal Code 1860. In India, it is presumed that rape is not gender-neutral, which means rape is only done by men. In rape, the major concern is about consent. In many cases, the consent is used as a precedent to define the real meaning of the consent.⁵⁴

According to Section 375 (1) of the Indian penal Code if a man has sexual intercourse with a woman against her will, it is a rape. If it does not fall under the exception provided under this section.⁵⁵In the case of *Himachal Pradesh v. Mango Ram*⁵⁶ the victim in this instance was Jagia Ram's eldest daughter. The victim was accompanied by the 17-year-old accused. When the accused caught her from behind, she was made to lie on the cowshed and engage in sexual conduct. The girl attempted to resist the accused's advances, but the accused overcame her, and the act was carried out against the victim's will. As a result, the accused was found guilty of the rape charge, according to the Supreme Court.

According to Section 375(2), if a man has sexual intercourse with a woman without consent, it is a rape. if it does not fall under the exception provided under this section. In the case of *Queen vs. Flattery*,⁵⁷ the girl visited the accused's clinic due to health concerns, and she accepted the recommendation to have a surgical procedure. During

⁵³ Under Section 375 of the Indian Penal Code 1860, the offence of "Rape" is defined - A man is said to commit "rape" if he-

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus

of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.

⁵⁴Nikunj Kulshreshtha, A critical analysis of the standard of consent in rape law in India, Volume 13, Issue 4, Onati Socio-Legal Series, page 1425–1428 (2023).

⁵⁵Ibid.

⁵⁶Himachal Pradesh v. Mango Ram (2000)7 SCC 224.

⁵⁷The Queen v. Flattery (1877) 2 Q.B.D. 410.

the procedure, the accused engaged in sexual activity with the girl. The court determined that the consent was obtained by deception and was therefore invalid, thereby holding it accountable for the rape offence.

In the case of *Sohan Singh vs. State of Rajasthan*⁵⁸, if a woman states that she did not consent to sexual intercourse, the court will presume that she did not consent.

According to the Section 375(3), if a woman gives consent for sexual intercourse by putting her or anybody in fear of death or harm, this is called rape.⁵⁹In the case of *Reg vs. R*⁶⁰, due to matrimonial disputes, the wife left the home of the husband and started living with her parents. She also conveyed her intention that she would fill out the divorce suit, but her husband still forcefully tried to have sexual intercourse with her, which caused bodily injury to the woman. The court found him guilty of the attempted rape.

In this case of *State of Maharashtra vs. Prakash*⁶¹ the victim's husband was placed on remand by a police officer and a businessman after that victim gave her permission to engage in sexual activity. The court ruled that where a person's interest is placed at risk of harm or death, the permission she gave is invalid. They were accountable for the offence as a result. A person incapable of giving consent: It would be a crime of rape for a male to engage in sexual activity with a woman who is incapable of giving consent.

According to Section 375(4), if a man has sexual intercourse with a woman, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

In the case of *Bhupender Singh v. Union Territory of Chandigarh*⁶² the accused in this case had sex with the prosecutrix, which resulted in her getting pregnant and having an abortion. They engaged in sexual activity once more. She got pregnant again after the accused assured her that he would marry her. She later discovered the accused had previously been married, had kids, and had broken his word during the confrontation. She lodged a suit against the defendants. The accused was found liable

⁵⁸*Sohan Singh vs. State of Rajasthan* (1998).5 SCC 611 (1998).

⁵⁹Indian Penal Code, 1860 (Act NO. 45 of 1860) Section 375.

⁶⁰*Reg v R*, [1991] 3 WLR 767.

⁶¹*State of Maharashtra vs. Prakash* AIR 1992 SC 1275.

⁶²*Bhupender Singh v. Union Territory of Chandigarh* (2008) 6 SCC 579 (2008).

under Section 375 of the law after the court determined that the accused had engaged in fraudulent sexual relations with the victim, rendering the victim's consent invalid.

According to Section 375(5), if a man has sexual intercourse with a woman when she is unconscious, unsound, or intoxicated, it will amount to rape. Even though the victim gave consent to intoxication and did not know the consequences of the act, it will amount to rape.⁶³

Section 375(6) of the IPC provides that, if a man has sexual intercourse with a girl under 18 years old with or without consent, it will amount to rape. It was presumed that a girl under 18 years old would be under the guardianship of her parents and would not give consent on her own. Similarly, Section 375(7) of the IPC defines sexual intercourse with a woman who is unable to give consent or is not in a position to give consent amounts to rape.

After examining Section 375 of the Indian Penal Code and the accompanying case law reveals the complexities and nuances in defining and prosecuting rape. These legal provisions and judicial interpretations have evolved to address various situations where consent is compromised, such as through force, deceit, fear, or incapacity. However, these laws predominantly address the experiences of women, often leaving transgender individuals without explicit protection. As societal understanding of gender evolves, it is essential that rape laws reflect this inclusivity to ensure that transgender individuals are also safeguarded against sexual violence.

The current legal framework under Section 375 does not explicitly address the experiences of transgender individuals, who may face unique forms of sexual violence and exploitation. The absence of specific provisions for transgender individuals can result in gaps in legal protection and justice. Incorporating protections for transgender individuals within rape laws would recognize their right to bodily autonomy and integrity, ensuring that they receive the same legal protections as cisgender individuals. This change is crucial for promoting equality and preventing discrimination in the criminal justice system.

⁶³Indian Penal Code, 1860 (Act NO. 45 of 1860) Section 375.

Developing rape laws to include transgender individuals would also enhance the overall effectiveness and fairness of the criminal justice system. It would ensure that all survivors of sexual violence, regardless of gender identity, are treated with dignity and respect. This inclusive approach would encourage more transgender individuals to report incidents of sexual violence, knowing that the law acknowledges their experiences and offers protection. By addressing these gaps, the legal system can move towards a more comprehensive and just framework that upholds the rights and dignity of all individuals, thereby fostering a safer and more equitable society.

Moreover Section 376 of the Indian Penal Code stipulates stringent penalties for rape, reflecting the seriousness of the crime and aiming to deter sexual offenses. It includes severe punishments for aggravated forms of rape, such as custodial rape, gang rape, and rape of minors. However, these provisions predominantly address crimes against women and do not explicitly include protections for transgender individuals. This creates a disparity in the legal protection and justice available to transgender individuals who may face unique forms of sexual violence and exploitation. The absence of specific provisions for transgender individuals in Section 376 results in gaps in legal protection, potentially leading to unequal treatment and justice in the criminal justice system.

Legal Capacity and Consent

Consent, an action carried out by a person in a free state of mind, is defined by Merriam-Webster as expressing approval and assent. According to Section 375, consent is a clear and voluntary agreement expressed by a woman through verbal or nonverbal communication indicating her willingness to perform a certain act. It emphasises that consent is about choice, not will. To interpret consent, it must be demonstrated that the subject is capable of giving consent and that the subject freely chose to accept the conduct. A person is considered capable of giving valid consent when they have a sound mind, meaning they understand the consequences of their actions, and have reached the age of maturity. For instance, if a woman under 18 years of age gives consent for sexual intercourse, it is not considered valid as she is presumed to be under the guardianship of her parents.

Consent can be invalid if given under pressure, fear, or misconception. Essentially, there are two types of consent: implied and express. Implied consent is expressed through behaviour, using signs or other nonverbal communication. The legal dictionary defines

implied consent as permission assumed based on facts, gestures, or silence. For example, if a restaurant owner, A, sees B indicating hunger as he enters the restaurant, B's actions imply consent to be served food. Express consent, on the other hand, is given verbally or in writing and is simpler to prove in court. For instance, if B explicitly replies "yes" when A asks him to buy a piece of property, that is express consent.

Despite these definitions and types of consent, the legal framework largely overlooks the specific needs and experiences of transgender individuals, who may face unique forms of sexual violence and exploitation. The absence of explicit provisions for transgender individuals in consent laws results in gaps in legal protection. To ensure inclusivity and fairness, it is essential to develop legal provisions that recognize and protect the rights of transgender individuals, thereby fostering a safer and more equitable society for all.

LANDMARK CASE LAWS AND DEFINITION OF SEXUAL OFFENCES

In the case of *Vishaka v. State of Rajasthan and Ors*⁶⁴ five men were accused of gang-raping Bhanwari Devi, a social worker who tried to stop child marriage in the village. Bhanwari Devi was raped in front of her husband, and despite a complaint being filed, no inquiry was made. This incident, occurring during her employment, was deemed a violation of Articles 14, 15, and 21 of the Constitution. The Supreme Court issued what are known as the Vishaka guidelines in this particular instance. This case is historic as it influenced the creation of policies against sexual harassment at the workplace. Some of the legal changes include the formation of a sexual harassment committee, which should be headed by a woman employee of the NGO, and the committee should guide the victim for further action.

Following this case, there have been significant changes in the betterment of women's safety and the implementation of laws to protect women at the workplace. The Vishaka guidelines led to the enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, which provides a robust framework for addressing and preventing sexual harassment in the workplace. This legislation

⁶⁴*Vishaka v. State of Rajasthan*, (1997) 6 SCC 24.

marks a considerable advancement in ensuring a safer and more equitable working environment for women.

However, despite the progressive ruling in the *Navtej Singh Johar v. Union of India* case⁶⁵, which decriminalised consensual same-sex relations and was a landmark for LGBTQ+ rights in India, transgender individuals continue to face significant challenges. The legal system still lacks comprehensive measures to address the unique forms of sexual violence and discrimination that transgender individuals encounter. While there have been strides in protecting women's rights and safety, the transgender community remains vulnerable and often excluded from these protections, highlighting the need for further legal reforms to ensure equality and justice for all.

Other Major Offences Against Women:

Apart from the rape offence, there are many other offences against women; some of them are as follows:⁶⁶

Section 354. Assault by criminal force on a woman with the intent to outrage her modesty.

Section 354A: Sexual harassment and punishment for sexual harassment.

Section 354B: Assault or use of criminal force against a woman with intent to disrobe.

Section 354C: Voyeurism.

Section 354D: Stalking.

Section 326A: Voluntarily causing grievous hurt by use of acid, etc.

Section 498A: Husband or relative of husband of a woman subjecting her to cruelty.

Section 509. Word, gesture, or act intended to insult the modesty of a woman".

It appears, prima facie, that with the evolution of the criminal justice system, sexual offences against women are categorised into different forms. But on the other hand, sexual offences against transgender people are limited to physical abuse, sexual abuse,

⁶⁵Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

⁶⁶Indian Penal Code, 1860 (Act NO. 45 of 1860), Section 375.

verbal abuse, and emotional abuse, as mentioned under the Transgender Persons (Protection of Rights) Act, 2019. These disparities in terminology need to be addressed to ensure equal protection and justice for all individuals.

LEGAL STANDARDS AND JUDICIAL CONSIDERATION FOR RAPE OFFENCES PUNISHMENT

Statutory guidelines for sentencing are based on various factors, such as the circumstances of the incident, the previous history of the offender, the seriousness of the offence, the age of the victim, and the motive behind the offence. The court will review all these necessary elements and guidelines provided by the superior court and, on the basis of them, pass the sentence for rape. Courts take into account a variety of factors when deciding on the proper punishment for rape offences in order to make sure that the sentence is both equitable and consistent with the seriousness of the crime. Among the crucial elements that courts take into account are:

Gravity of the Offence: In deciding the sentence for the rape offences, the court takes into consideration various elements, including the victim's degree of harm and if any violence, compulsion, or threats were used during the rape. Additionally, sentencing guidelines and legal precedents play a crucial role in determining the severity of the punishment. Ultimately, the goal is to ensure justice for the victim while aiming to prevent future crimes and uphold societal norms of safety and respect.⁶⁷

Effect on the Victim: In determining the sentence for rape against women, the court takes into account the victim's physical, psychological, and emotional condition and then decides the sentence. Sometimes women are not even in a condition to give a statement about the incident, and the court also takes into consideration the type of victim condition in determining the penalty for the offence.

Offender's Criminal History: In deciding the sentence for a rape offence, the court takes into consideration the previous criminal behaviour of the accused. If the accused was previously convicted for the offence related to the women, the court took into consideration these factors and provided a harsh punishment for the repeated offence.

⁶⁷J. Lakshmi Charan, Rape sentencing in India: Need for uniform sentencing guidelines, Volume 6, Issue 6, International journal of law management and humanities [ISSN 2581-5369] page 1945 -1947(2023).

Preventing Circumstances: In deciding the sentence for the rape offence, the court also takes into account the preventing circumstances that will help reduce the guilt of the offender. If there are things available and accessible that will prevent the person from becoming the victim of the crime, the court also takes that into consideration. Things taken into consideration by the court, such as regret, assistance to the police, or proof of recovery,⁶⁸

In the case of *Raju v. State of Karnataka*,⁶⁹ A lady boards a bus to attend her brother's marriage ceremony. On the bus, two unknown males introduced themselves and promised her that they would safely transport her to her destination because they were going there together. The lady believed them and decided to accompany them. The two guys recommended to her that, because it was already late, they might spend the night in the hotel and start their adventure the next morning. During that night, the lady shared a room with the two guys, and the two accused raped her viciously. The Court ruled that the victim's past conduct was voluntary and that she consented to sharing the same room, which resulted in the commission of the crime. As a result, the court sentenced the accused to three years in prison. The punishment handed to the accused was less than the punishment prescribed under the statute.

Degree of Planning or Preparation: When the court decides the sentence for the rape offence, it takes into consideration the planning for committing the offence. If the offence is committed by the person who planned to commit it, they shall be subject to harsh punishment.

Effect on Community or Society: Judges may take into account how the rape offence has affected the community or society as a whole. For instance, the court may impose a more severe sentence to deter similar behaviour and safeguard public safety if the crime has resulted in fear or a loss of trust in the community.

In the case of *Mohammad Chaman v. State*, the accused was found guilty of raping a one-and-a-half-year-old child and also guilty of murdering the same child. The trial court found this case to be one of the 'rarest of the rare' cases, awarding the death

⁶⁸Ibid.

⁶⁹*Raju v. State of Karnataka* 1994 AIR 222.

penalty. The Delhi High Court concurred with the lower court's decision and upheld the death sentence. The appellants petitioned the Supreme Court of India, which lowered the death sentence to life imprisonment after analysing the mitigating and aggravating factors. The court concluded that this case cannot be deemed the rarest of rare cases and that the accused is not a threat to society. Hence, the Supreme Court reversed the punishment issued.⁷⁰

Use of Technology and Social Media: Courts may consider the sophistication of the perpetrator's techniques as well as the possibility of greater injury or victim exploitation in circumstances where technology or social media platforms were utilised to enable the rape. This element may have an impact on how harsh the penalty.

Restitution and Victim Compensation: In order to make up for any financial damages suffered by the victim as a result of the rape, such as medical bills or counselling fees, courts may compel the perpetrator to pay restitution or compensation. The sentence decision may be influenced by the offender's capacity to adhere to restitution orders.

Opportunities for Rehabilitation and Alternative Sentencing:In the case of *Polepaka Praveen @ Pawan v. The State of Telangana*⁷¹, represented by its Public Prosecutor, the facts of the case are that on June 18, 2019, the accused entered a house to conduct theft and kidnapped a nine-month-old girl infant from the house in Hanumakonda, Warangal District. He then raped and murdered the infant girl, and the police reported the incident under the Prevention of Children from Sexual Offences (POCSO) Act and IPC Act. The trial imposed the death penalty based on the case's rarest of the rare case.

The accused, who was dissatisfied with the judgement, filed an appeal with the Telangana High Court via Criminal Appeal, and the Hon'ble Division Bench of the High Court ruled that the current case does not fall under the rarest of rare cases, and that the appellant/accused is from a schedule caste, is illiterate, young, poor, and has never committed a grievous crime. One of the reasons is that the prosecution failed to present evidence demonstrating that the appellant is beyond reformation. As a result, the High

⁷⁰Mohammad Chaman v. State, (2007) 4 SCC 619.

⁷¹Polepaka Praveen @ Pawan v. State of Telangana, 2019 SCC OnLine TS 3056.

Court modified the death sentence to life in prison until his death because the rape and murder were not premeditated.

The Telangana Government, dissatisfied with the High Court's judgement, filed an appeal with the Supreme Court. Then Supreme Court's Division Bench heard the case and rejected to impose a death sentence retrospectively under the POCSO (Amendment) Act, 2019, because the act is prospective. The Supreme Court stated that it will impose the highest sentences for horrific crimes against women and children while also reforming the convict.

The Courts considered a variety of other factors such as the offender's illness, age, and socioeconomic status (i.e., sole provider of the family). Due to a lack of appropriate legal rules, the Indian courts examined a variety of mitigating factors. The Indian courts have competent judges who issue punishments without bias, yet their observations vary due to a lack of well structured sentencing criteria in these types of offences.

LEGAL PARAMETERS AGAINST SEXUAL ABUSES

In India, when someone is forced or pushed to have a sexual activity against their will, it is known as sexual violence, and it's a punishable offence, but cases are still increasing. Two significant concepts, rape and sexual abuse, are frequently misinterpreted as both being the same. It is very important to understand that both sexual abuse and rape are different. Despite their similarity in sound, they have different meanings: punishment and extension. Sexual abuse occurs when someone is forced to engage in sexual activity with another individual without that person's consent. It generally involves stalking, touching private parts, uncovering intimate areas, or pressuring someone to be involved in sexual activity against their will. At the same time, the offence of rape is an extremely dangerous form of sexual assault. It occurs when an individual forces someone to have sex against their will. Rape and sexual abuse both cause severe physical and psychological harm to victims.⁷²

Sexual Abuse

Sexual abuse refers to the forceful sexual activity of women and transgender people against their will or consent. Sexual abuse generally involves inadequate touching and

⁷²Sexual abuse, In wikipedia, https://en.wikipedia.org/w/index.php?title=Sexual_abuse&action=history (Last visit on 18 May 2024).

forcing someone to engage in sexual activity. It is a less grave offence as compared to rape. but in both cases, the victim suffers mentally and physically. Sexual abuse may manifest in various forms, which are as follow:⁷³

Physical Sexual Abuse: This sexual abuse involves physical contact of a sexual nature without consent. It might include anything from forced sexual relations or rape to unwanted touching or groping. The victim of physical sexual assault does not easily get rid of these mental traumas in this type of situation. Physiological factors play an important role in rehabilitation.⁷⁴

Verbal Sexual Abuse: In this kind of sexual abuse, the accused used sexually abusive language and tried to humiliate the women. Verbal sexual abuse generally involves comments, threats, jokes, or innuendos that will create an uncomfortable environment for the woman, due to which she will feel shame, guilt, and worthlessness.

Emotional Sexual Abuse: In this type of sexual abuse, the accused try to manipulate the victim by making fraudulent promises of marriage and try to blackmail the victim. So that the accused can be involved in sexual activity with a woman through manipulation. Such types of abuse have a very bad impact on women, such as low self-esteem, anxiety, and depression.

Non-Consensual Sexual Activity: In this kind of activity, women are not in a position to give free consent for the sexual activity. It occurs due to intoxication and coercion, in which women are not in a position to give free consent, which leads to physical and mental harm.

The Offence Of Rape And Its Legal Status In India

The Latin word "rape" means "to seize." Rape is a criminal offence that includes sexual assault, usually involving sexual contact that can be initiated by one or more people against the will of another person. Section 375 of the Indian Penal Code defines rape as "unlawful sexual intercourse by a man with a woman without her consent" in India. The

⁷³Bonnie sharma, "Sexual violence against women: A serious human rights violation" Volume 4, Issue 2, Page 2913 -292, International Journal of Law Management and Humanities, (2021).

⁷⁴Ibid.

definition of rape has been criticised by many scholars as not including certain types of sexual assaults.

Apart from physical suffering, rape victims have other impacts on their mind, body, and reputation. Rape has been divided into many categories according to a wide spectrum of situations. These include spousal rape, acquaintance rape, stranger rape, gang rape, and statutory rape.

An association or connection of some kind exists between the victim and the attacker in acquaintance rape. A stranger rape is one in which the accused is unknown to the victim of the rape. In the category of rape, the most severe attack is gang rape, which not only hampers women physically but also shakes their confidence in society. At the end, statutory rape is the one in which the victim is under the age of 18, and it is assumed that she is under the guardianship of their parents. Forcing a spouse to engage in sexual activity is known as spousal rape.⁷⁵

Differences Between Rape And Sexual Abuse

Penetration is one of the major factors that distinguishes between rape and sexual abuse. Under the definition of rape, provided under Section 375 of the of the Indian Penal Code 1860, it is described that penetration is one of the essential elements required for rape. However, penetration is not involved in sexual abuse, although it can cause emotional and psychological pain. Elements that are included in sexual abuse are touching, fondling, coercion, or exploitation, occurring without the victim's consent.

On the other hand, rape is a grave offence as compared to sexual abuse; it has an effect has an effect not only physically but also emotionally and mentally. It involves the penetration of the victim's body, whether vaginal, anal, or oral, against their will or consent. It may happen through physical force, threats, manipulation, or incapacitation. The emphasis on penetration distinguishes rape as a distinct and severe sexual offence as compared to sexual abuse. However, both offences affect the person mentally,

⁷⁵Radha R Sharma, The problem of rape in india: A multi-dimensional analysis, INTERNATIONAL JOURNAL OF MANAGING PROJECTS IN BUSINESS, (12 April 2014). Available at https://www.researchgate.net/publication/261637776_The_Problem_of_Rape_in_India_A_Multi-dimensional_Analysis (last visited on 9 March 2024).

physically, and emotionally and leave a horrific memory in the lives of women and transgender people.⁷⁶

SENTENCING GUIDELINES AND JUDICIAL PRECEDENTS

Sentencing Guidelines and Judicial Precedents play a crucial role in deciding the imprisonment of an offender. Sentencing guidelines are rules and regulations in the criminal justice system that offer suggestions in sentence ranges to judges according to the seriousness of the offence and the criminal background of the offender. These principles assist in maintaining the balance between judicial discretion and fairness and consistency in sentencing.

Judicial precedent is basically a superior court decision that would be followed by all the lower courts, and it will help in maintaining the basic standard for all similar cases. By providing judges with guidance on how to interpret the law and apply it to comparable circumstances, they guarantee uniformity and predictability in the decisions made by the courts.⁷⁷

Malimath Committee Report 2003.

The Criminal Justice System (CJS) reforms in India are the subject of the Malimath Committee report. It came into being in 2000. The committee was led by Justice V.S. Malimath⁷⁸, a former Chief Justice of the High Courts of Kerala and Karnataka. The assessment of India's criminal justice system was presented to L.K. Advani, the deputy prime minister and head of the Home Department, in 2003. In its 2003 report, the Malimath Committee made 158 recommendations. None of them, though, were really executed. They came to the conclusion that the current legal system was biased in favour of offenders and did not adequately assist victims of crime. There are several reasons to restructure India's criminal justice system.

⁷⁶Nicola Henry, Rape, sexual assault and sexual harassment: what's the difference?, THE CONVERSATION (27 Mar 2018), <https://theconversation.com/rape-sexual-assault-and-sexual-harassment-whats-the-difference-93411>(Last visited on 11 March 2024).

⁷⁷Parth singh, Determination of sentences in India: Policy and practices, CAMBRIDGE UNIVERSITY PRESS, (9 August 2023) Available at, <https://www.cambridge.org/core/journals/international-annals-of-criminology/article/abs/determination-of-sentences-in-india-policy-and-practice/88CBC2E2CFC66AE82AB8DFF75AD482F4> (last visited on 12 March 2024).

⁷⁸Malimath Committee, Report on Reforms of the Criminal Justice System (March, 2003).

The Indian government established a body in 2003 known as the Malimath Committee. The major objectives of the committee are to examine the current criminal justice system and provide reformative suggestions. This committee is headed by Justice V.S. Malimath aims to provide a report that will improve the efficiency of the current legal system. These recommendations sought to strengthen India's criminal justice system as a whole, protect human rights, and speed trials.

Recommendations

The committee's 158 recommendations, which have been established after investigating numerous aspects of national criminal law systems, particularly those in continental Europe, essentially require a change from an adversarial criminal justice system where the prosecution and defence present their respective versions of the facts before an impartial judge to an inquisitorial system, where the judicial officer oversees the investigation of crimes and the goal is to "quest for truth."

Many of the accused person's pre-trial protections against violence in police custody have been suggested to be weakened by the report. For example, it aims to increase by double the amount of time (90 days) allotted to file a charge sheet, after which an accused individual may be granted bail.

The Malimath Committee recommended that involving the victim in each process of the legal proceedings would improve the efficiency of getting justice. Moreover, it is necessary to create a programme for witness protection so that victims can defend themselves. It is also recommended to create a State Security Commission so that police officers can do their work without the hindrance of political pressure.

It is recommended to extend the definition of rape to include other kinds of forced penetration, but this is overshadowed by the lack of concern for the majority of the issues raised by women's movements. The penal malimath committee opposes the death sentence applied to rapists. According to the report, the death penalty should be replaced by life imprisonment without commutation.

Malimath Committee Recommendations Summarised:

The inquisitorial system: elements of the inquisitorial method of inquiry, which is used in nations like France and Germany, are proposed to be borrowed. Under this method, the investigation is overseen by a judicial magistrate.

Right to silence: The panel suggested amending Article 20(3) of the Constitution, which guards against forcing the accused to testify against themselves.

Rights of the accused: The accused should be made aware of his or her rights, how to enforce them, and who to contact in the event that those rights are denied by having the Schedule to the Code made available in all regional languages.

Assumption of innocence: In criminal trials, the standard employed by the courts to find an accused person guilty is "proof beyond a reasonable doubt." The committee felt a "very unreasonable burden" on the prosecution.

Justice for victims of crime: The victim needs to receive fair compensation in addition to being permitted to take part in cases involving serious offences. In cases of grave offences, the legal representative may represent themselves as a party even if the victim has passed away. When paying for it, the state needs to assign the victim's preferred advocate to represent him or her in court. In cases of grave offences, the state is required to provide victim compensation. The Victim Compensation Act allows for the creation of a Victim Compensation Fund, which may include assets seized from organised crime.

Police investigation: The Committee recommended a separate investigative branch from the existing police system. It is recommended to form a state security commission and a national security commission to make the investigation free from political pressure. To handle postings, transfers, and other matters, it is required to establish a police establishment board. creating specialised squads to combat organised crime; and assembling a group of officers to investigate interstate or transnational crimes. The Committee recommended extending police custody to thirty days and allowing an extra ninety days to file charge sheets in cases of major crimes.

Considering the child's future, pregnant women and women with children under the age of seven may choose to be placed under home arrest rather than be imprisoned where society's interests do not hamper, so the law commission should give preference to

settlement without a trial. It is required to update the new and emerging crimes in the Indian Penal Code 1860 and increase, decrease, or apply other forms of punishment.

The National Judicial Commission needs to establish exact rules about the education, background, and personal characteristics of an ideal judge. There must be a distinct criminal section in the higher courts, made up of judges with criminal law expertise. recommended that a record of the timestamps be kept by each court.

In the end the finding of the Malimath Committee Report 2003 triggered a significant debate all over India. It seeks to reform the criminal justice system in India. It describes the many gaps in the criminal justice system that need to be filled. While the recommendation of the committee is not implemented, it provides a significant roadmap that will help the policymaker form the policy.

The Malimath Committee Report of 2003, aimed at reforming India's criminal justice system, does not address transgender individuals' specific experiences with sexual offences. It focuses on legal procedures, victim protection, and investigative enhancements, overlooking the unique vulnerabilities of transgender victims. This omission highlights disparities in legal protections and systemic barriers faced by transgender individuals within the justice system. The report's oversight underscores the need for inclusive reforms to ensure the rights and safety of all individuals, including transgender persons, are recognized and protected in cases of sexual violence.

Justice Verma Committee 2013

The Justice Verma Committee⁷⁹ was formed after the horrific gang rape that occurred in Delhi, which shakes the hearts of every individual in India. This committee is especially formed to give suggestions that will help change the current criminal law. It focuses especially on providing recommendations regarding speedier trials and harsher penalties for those who commit sexual assault against women. The committee, which was led by Justice J.S. Verma and comprising Gopal Subramaniam and Justice Leila Seth, turned in its findings on January 23, 2013. The committee's principal recommendations were as follows:

The Committee believed that sexual assault and rape are acts of power as well as crimes of passion. Rape ought to be recognised as a distinct crime and not restricted to

⁷⁹Justice Verma Committee, Report on Amendments to Criminal Law (January, 2013).

penetration of the mouth, anus, or vagina. Any non-consensual sexual intercourse needs to be covered by the concept of rape. The IPC distinguishes between rape that occurs outside a marriage and rape that occurs within a marriage. Sexual relations without consent are forbidden by the IPC. On the other hand, unconsented sexual relations between a husband and wife are not considered a crime of rape. The committee suggested eliminating the exclusion for marital rape. It is incorrect to view marriage as an unchangeable agreement about sexual behaviour. Hence, in determining the offence of rape, the relationship between the accused and victim is immaterial.

Currently, the punishment for "assault or use of criminal force against a woman with the intent to outrage her modesty" is given under Section 354 of the IPC, which is two years of imprisonment. The IPC contains no definition for the phrase "outraging a woman's modesty." Accordingly, in cases where penetration cannot be demonstrated, the offence is classified as specified in Section 354 of the IPC. The Committee made the recommendation to classify non-penetrative types of sexual contact as sexual assault. It is important to define sexual assault as any non-consensual, non-penetrative touching that has a sexual component. An act's sexual nature should be assessed given the specific circumstances. The act's intent for sexual pleasure shouldn't be necessary to establish the offence. The crime should be punishable by 5 years of imprisonment, a fine, or both.

Verbal Sexual Assault and Its Punishment, Currently, the punishment is 1 year of imprisonment, a fine, or both for using words or gestures to "insult a woman's modesty," which is provided under Section 509 of the IPC. It is necessary to repeal this section. The Committee has proposed that sexual assault be defined as the use of acts, words, or gestures that constitute an unwanted threat of a sexual nature and be punished by up to a year in jail, a fine, or both.

Sexual Harassment: The following are some of the main suggestions put out by the Committee on the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Bill, 2012, which is currently awaiting passage in Parliament: The bill needs to encompass domestic employees as well. The report recommended that first try to resolve the dispute between the complainant and the respondent by conciliation. However, this recommendation contradicts the ruling in *Vishakha v. State of Rajasthan*, which demands a safe workplace. The female employee

who experienced sexual harassment should receive compensation from her employer. According to the bill, employers must set up an internal complaints body where grievances must be submitted.

Acid Attack: According to the Committee, the offence shouldn't be included in the IPC's provisions for grievous hurt, which carries a seven-year jail sentence. It was mentioned that the Criminal Laws Amendment Bill, 2012, which is presently being debated in Parliament, addressed the offence. The bill states that the penalty could be 10 years of life imprisonment. It was suggested that a corpus be established by the central and state governments to provide compensation to victims of crimes against women.

Trafficking: The Committee, by reviewing the Immoral Trafficking Prevention Act of 1956, found that this act only made trafficking for prostitution illegal; it did not provide any complete definition of trafficking. It suggested amending the IPC's slavery laws to make human trafficking committed under duress, coercion, or threat illegal. It also suggested making hiring someone who had been trafficked illegal. High Courts should have legal guardianship over the juvenile and women's protection homes, and measures to reintegrate the victims into society should be implemented.

In summary, the Justice Verma Committee report made a revolutionary reform in the field of women's safety and promoted significant changes to the penal code to address sexual violence against women. On the basis of the Justice Verma Committee report, the Criminal Law (Amendment) Act, 2013 was passed, which made huge changes in the criminal law.

In the case of *Bachan Singh vs. State of Punjab*, A legal concept in India known as the "rarest of rare" doctrine assists courts in deciding whether to impose the death penalty in certain cases. The Supreme Court created this doctrine in 1980 in the *Bachan Singh v. State of Punjab* case.

The Honourable Supreme Court declared that the death penalty is lawful, overturning the Rajendra Prasad case's ruling. In this instance, the appellant was found guilty of killing three people in accordance with Section 302 IPC. The High Court denied his appeal, and his sentence was confirmed. The appellant appeared before the court with special leave to appeal. He challenged his death sentence, arguing that the death penalty was justified, which was given to him. In a majority decision, the Supreme Court

reversed the ruling in the Rajendra Prasad case and declared that imposing a death sentence under Section 302 of the IPC does not violate Article 21.

The alternative punishment included in this section is the death penalty, which the judiciary may apply if it deems it appropriate. Judges have the discretion to impose a death sentence, but discretion does not mean wish; here, discretion means justifiability. Article 21 does not prohibit the death penalty because, under the constitution, a person can be deprived by the procedure established by the law.⁸⁰

The Justice Verma Committee was formed in response to the Delhi gang rape to initiate sweeping reforms aimed at improving the safety and rights of women in India. However, there remains a crucial gap in addressing sexual offences against transgender individuals, who face heightened vulnerability and discrimination. Despite their increased risk of harassment and violence, no similar committee has been convened specifically to address the unique challenges and legal protections needed for transgender persons. This oversight underscores the urgent need for dedicated reforms and legal provisions that recognize and protect the rights of transgender individuals within the criminal justice system, ensuring they are afforded equal dignity and safety under the law.

IMPLEMENTATION AND CHALLENGES OF PUNISHMENT IN THE CONTEXT OF INDIA

There are many challenges in India that will occur in the execution of the punishment; some of them are as follows:

Legal Backlog: The Indian judiciary faces a huge burden of backlog cases, due to which it fails to provide justice on time and also shakes the confidence of the general public. Moreover, there is a famous phrase that "justice delayed is justice denied," which means that if justice is not served timely, it is not served.⁸¹

Socioeconomic Disparities: Socioeconomic disparities in India are also a major reason behind the disparity in sentencing outcomes. There are many communities and groups

⁸⁰Bachan Singh vs. State of Punjab (AIR 1980 SC 898, 1980).

⁸¹"Reforming Country's Criminal Justice System" In Drishti IAS, (17 Aug 2023), Available at <https://www.drishtias.com/daily-updates/daily-news-editorials/reforming-country-s-criminal-justice-system> (Last visit on 16 Mar 2024).

that will face problems with proper access to justice, such as transgender people, Dalits, tribal populations, and religious minorities.⁸²

Reform of Correctional Facilities: Even when the accused found guilty and orders imprisonment and rehabilitation, the many rehabilitation centres are overcrowded, understaffed, and do not have enough resources to assist the accused in proper rehabilitation. Hence the major purpose of the punishment, which is to reform the accused as a prudent man, will fail. These challenges need to be addressed so the purpose of justice can be served.⁸³

Police and Judicial Corruption: Corrupt police and judiciary play a crucial role in the formation of challenges in access to justice, due to which many people do not even file a complaint of crime because they know the behaviour of the police and judiciary. Without providing a bribe, they will not get justice. Bribery, extortion, and undue influence are the major factors in miscarriages of justice, with offenders escaping punishment or receiving lenient sentences.⁸⁴

Inadequate Legal Aid and Access to Justice: Many people in India, especially those who are coming from marginalised communities and rural areas, lack access to the legal system and assistance. Having no awareness and limited resources in the legal justice system makes it difficult to get justice. High legal fees and procedural complexities hinder access to justice. There is a need to improve legal aid services and promote legal literacy so that every individual gets justice.⁸⁵

Implementation of the Death Penalty: The death penalty is always a debatable issue in India. There are no specific guidelines for the death penalty, but there are many judgements that assist in deciding the death penalty, but these all change according to the circumstances and discretion of the court. The execution of the death penalty is

⁸²Reforming Country's Criminal Justice System, In Drishti IAS, (17 Aug 2023) Available at <https://www.drishtiiias.com/daily-updates/daily-news-editorials/reforming-country-s-criminal-justice-system> (Last visit on 16 Mar 2024).

⁸³Community sentencing in India remedies and reforms, In ipleader (4 Mar 2021) <https://blog.ipleaders.in/community-sentencing-india-remedies-reforms/> (Last visit on 18 Mar 2024).

⁸⁴Ibid.

⁸⁵Reforming Country's Criminal Justice System, In Drishti IAS, (17 Aug 2023) Available at <https://www.drishtiiias.com/daily-updates/daily-news-editorials/reforming-country-s-criminal-justice-system>(Last visit on 16 Mar 2024).

subject to procedural flaws, delays, and inconsistencies, raising questions about its fairness and reliability in the criminal justice system.⁸⁶

CONCLUSION

The Indian Criminal Justice System has evolved through centuries, from ancient and medieval times to the present, reflecting society's changing needs and complexities. Today, the system encompasses three main pillars: the police, judiciary, and prisons, all working together to maintain law and order, ensure justice, and rehabilitate offenders. These elements are essential in safeguarding society and upholding the principles of justice.

In terms of rape offences, the legal framework is primarily guided by Section 375 of the Indian Penal Code (IPC), which defines rape and outlines various clauses to address different circumstances of the crime. The law explicitly details what constitutes rape and emphasizes the critical role of consent. Consent must be clear, voluntary, and informed, with specific provisions stating that consent obtained through fraud, coercion, or incapacity is invalid.

However, a significant issue arises from the different terminologies used to describe sexual offences in the IPC and the Transgender Persons (Protection of Rights) Act. While the IPC uses the term "rape" for offences against women, the Transgender Persons (Protection of Rights) Act uses "sexual abuse" to describe similar offences against transgender individuals. This distinction raises concerns about potential discrimination and the adequacy of protections afforded to transgender individuals.

In addition to rape, other major offences against women are mentioned in IPC, such as assault with intent to outrage modesty (Section 354), sexual harassment (Section 354A), and stalking (Section 354D), highlighting the comprehensive nature of the legal framework aimed at protecting women only. But on the other hand, sexual offences against transgender people are limited to physical abuse, sexual abuse, verbal abuse, and emotional abuse, as mentioned under the Transgender Persons (Protection of Rights)

⁸⁶Capital punishment in India, In ipleader (5 Dec 2022) Available at <https://blog.ipleaders.in/capital-punishment-in-india-2/> (Last visit on 19 Mar 2024).

Act, 2019. These terminologies somewhat mitigate the punishment against transgender which need to be addressed to ensure equal protection and justice for all individuals.

In conclusion, the disparities in legal terminology within the Indian Criminal Justice System concerning sexual offences highlight the need for a more inclusive approach. Addressing these inequities is essential to ensure that transgender individuals receive the same legal protections and respect as other citizens. By fostering societal acceptance and making necessary legal reforms, India can work towards a more just and equitable society for all its citizens, regardless of gender identity.

CHAPTER IV

PUNISHMENT PROSPECT FOR SEXUAL OFFENCES AGAINST WOMEN AND TRANSGENDERS IN NATIONAL AND INTERNATIONAL PERSPECTIVE

INTRODUCTION

Across the study of two chapters, the evolution of transgender identities and rights reveals historical oppression alongside modern advancements. From ancient times, transgender individuals faced severe penalties for their gender nonconformity, contrasting with contemporary movements that increasingly recognize diverse gender identities. However, persistent challenges remain evident in the differential legal treatment. In the Indian Criminal Justice System, Section 375 of the IPC uses "rape" for women, whereas the Transgender Persons (Protection of Rights) Act employs "sexual abuse" for transgender individuals. This disparity underscores societal biases and the need for more inclusive legal frameworks.

This chapter aims to identify the disparities between Canada and India's approaches to handling rape cases when the victim is a woman and transgender. This comparative research will offer a comprehensive view of the implementation of rape laws and their punishment in both countries and try to find out which one is best and most effective in dealing with rape offences. The Canadian judicial system is famous for being accessible and progressive in regard to the protection and safeguarding of the rights of transgender people. In Canada, there is an explicit prohibition of discrimination on the basis of gender identity and expression, which has led to increased protections and equitable treatment for transgender people. The Canadian Criminal Code does not make a difference between male, female, and transgender rape victims. This implies that for rape victims, whether they are women, men, or transgender, the punishment for the accused is the same. This equality of treatment demonstrates Canada's dedication to safeguarding everyone from sexual assault and making sure justice is administered

impartially. Canada uses gender-neutral laws to remove discrimination on the basis of gender identity.⁸⁷

Many government policies and judicial decisions are reinforced to boost the legal protections provided to transgender people. For example, the Canadian Human Rights Act's recognition of gender identity and expression as protected grounds guarantees transgender people's right to pursue legal action in the event of discrimination, enhancing their protection against crimes such as rape. Additionally, the training of law enforcement and judicial staff on matters connected to gender diversity assists in the effective handling of cases and enhances the process of the judiciary.

On the other side, India's judicial system has a difficult and complex structure as compared to Canada. With the landmark judgement "*NALSA v. Union of INDIA*"⁸⁸ which upheld transgender people's right to be recognised as a third gender, Further, the Transgender Persons (Protection of Rights) Act of 2019 aims to protect and safeguard the rights of victims, but it is flawed because it omits to mention the definition and punishment for rape offences. Although India has made great progress in recognising the rights of transgender people, there is still a huge requirement for changes in the law so that transgender people can get justice easily without hindrance.⁸⁹

Indian rape laws have always been based on a binary conception of gender and are mainly targeted at women. As a result, transgender people have historically lacked legal recognition and protection. There are still huge differences in how transgender rape victims are treated and acknowledged as compared to women. Although there are many changes made in law that safeguard transgender people, there is still need to change the ideology of the Indian citizen, which is still orthodox. When Indian citizens started treating transgenders equally to women, only then could transgender rights be protected.

⁸⁷Debra M Haak, Shifts in how sex and gender identity are defined may alter human rights protections: Canadians deserve to know how and why, *THE CONVERSATION* (10 Apr 2024). <https://theconversation.com/shifts-in-how-sex-and-gender-identity-are-defined-may-alter-human-rights-protections-canadians-deserve-to-know-how-and-why-226432> (Last visited on 20 April 2024).

⁸⁸National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

⁸⁹Esha Mitra, India's rape laws don't cover transgender people. They say it's putting them at risk. *CNN* (9 December 2020), <https://edition.cnn.com/2020/12/08/india/india-transgender-rape-laws-intl-hnk-dst/index.html> (Last visited on 18 February 2024).

This chapter examines the legal systems in Canada and India regarding punishment for sexual offences against women transgenders. This chapter examines whether there are variations in the punishments when the victims are women or transgenders?

LEGAL ASPECTS OF RAPE PUNISHMENT IN CANADA AND JUDICIAL DECISIONS

Sexual assault is a serious crime that affects victims' physical, mental, and emotional conditions. In Canada, there is no separate law dealing with rape offences against transgender people. The Canadian government provides a gender-neutral law to deal with rape offences so that no one can be discriminated against on the basis of gender identity.

The Criminal Code of Canada 1985 deals with rape offences in Canada. This act is designed to address the complexities of the crime, ensuring justice for victims while upholding principles of fairness and due process. In the Criminal Code of Canada, the word "sexual assault" is used to describe rape offences in Canada. The Criminal Code of Canada is the primary source of law in Canada. As a result, modern conceptions of consent are mostly influenced by the legal interpretations of sexual assault. The Criminal Code of Canada differentiates sexual assault under a broad classification that includes basic sexual assault, sexual assault with a weapon or causing bodily harm, and aggravated sexual assault. Each category carries distinct legal definitions, punishments, and interpretations according to the changing circumstances.

Historical Development Of Laws Related Sexual Offences In Canada

The development regarding the laws related to punishment for rape offences in Canada depicts that the country's understanding of sexual violence is emerging, ensuring gender equality and justice. Across the years, significant legal reforms have been made to provide better safety and security for the victims and ensure that the criminal is held punishable. This extensive summary reviews the key milestones in the development of rape laws in Canada, emphasising the major reforms and their impact on the legal platform.

In the early 20th century, Canada's legal structure on rape was confined and only slightly discussed. The Criminal Code of Canada, established in 1892, explained rape as a crime perpetrated by a man reluctantly on a woman who was not his partner. This

explanation was rooted in the fact that rape is an offence against women, primarily unmarried women, where women are often barely noticed as property of their husbands or fathers. Rape is defined as a man who is doing any sexual activity with a woman against her will and doing any harassment where women's consent is not obtained. Rape is not only limited to the unmarried women's but also to the women's who are married and do not want to indulge in all kinds of men's sexually pleasure activities.⁹⁰

The reform that was being considered in the 1980s It is a significant swirling point in Canadian rape laws, explained by the developing recognition of the need for a more inclusive and detailed approach towards sexual violence. This period shows the major legal reforms that expanded the scope of sexual assault laws and introduced security and safety protections for victims.

The Criminal Law Amendment Act, 1983⁹¹

The Criminal Law Amendment Act of 1983 was a milestone achievement as the piece of legislation that fundamentally reexplained sexual violence in Canada. Some major features that have been introduced for rape victims are as follows:

Eliminating "Rape" with "Sexual Assault" The Act abolished the term "Rape" and displaced it with three levels of "sexual assault," widening the development, which includes any activity that is not tolerated by humans in terms of non-consensual activity with respect to any gender, and it is developed in three categories, which are as follows:

Category 1: Any sexual assault or activity that contains any form of unwanted sexual contact or touch without the consent of the person.

Category 2: Sexual assault with any harmful weapon like a rod that harms the person or a third party includes causing body harm, which depicts severe offences and involves additional elements of violence or intimidation.

⁹⁰Bruce A. MacFarlane, Historical development of the offence of rape, CANADIAN BAR ASSOCIATION, <https://www.kruselaw.ca/blog/sexual-assault/the-sexual-offences-in-canadas-criminal-code/TZqeXirT0d> (Last visited on 8 April 2024).

⁹¹Kwong-Leung Tang, Rape Law Reform in Canada: The Success and Limits of Legislation, INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY, <https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://typeset.io/pdf/rape-law-reform-in-canada-the-success-and-limits-of-mpu0scpcxv.pdf&ved=2ahUKEwjxrtzJ0LyGAXUN9zgGHTNpE9YQFnoECBIQAQ&usg=AOvVaw0ycHGkztaoffMshV8IWIYDs> (Last visited on 12 April 2024).

Category 3: Exasperated sexual assault, which includes harmful weapons like knives or sharp edge equipment, generates wounds, maiming, disfiguring, and threatens the life of the victim. This category covers the most severe cases of sexual violence.

Eliminating Marital Protection: The 1983 reforms also eliminated the marital exemption, considering that sexual assault can also lead within marriage, where the partner can file a case against the opposite gender. This change was a crucial step in recognising the rights of married individuals and ensuring that no matter whether you are engaged or not, sexual assault cases will be punishable.

Rape Shield Law: The rape shield law is defined as the victim's past history not being revealed in court and only the case being discussed. The victim should be treated with all the respect and dignity and not with any questions about their character. This law is made to protect the victim's identity in society.⁹²

REFORMS AND MODERNIZATION

The reform of the 1980s was to work on the ground reality and make reforms for the victims. Upgrade the societal attributes to make them more inclusive and safer. Several bills have been developed and upgraded at regular intervals for the safety of society.

Bill C-46 (1997), Privacy and Protection for Victims

Bill C-46 introduced that whoever registered the complaints in the department, their identity should not be revealed, and this should be kept private so that the victims should not hesitate to file the case and come forward to take action regarding the mishap occurring with them. This bill primarily focuses on the victim's personal identity and consent.⁹³

Bill C-51 (2018), Enhancing Consent Laws and Victim Protection

Bill C-51 explained the consent laws, which define consent as being explicit and can be withdrawn at any time. This bill also reinforced the inadmissibility of evidence regarding a complainant's sexual history, except under specific and limited

⁹²Rape shield laws, In Australia Law Reform Commission (17 Aug 2010) <https://www.alrc.gov.au/publication/uniform-evidence-law-alrc-report-102/20-matters-outside-the-uniform-evidence-acts/rape-shield-laws/> (Last visited on 10 April 2024).

⁹³Bruce A. MacFarlane, Historical development of the offence of rape, CANADIAN BAR ASSOCIATION, <https://www.kruselaw.ca/blog/sexual-assault/the-sexual-offences-in-canadas-criminal-code/TZqeXirT0d> (Last visited on 8 April 2024).

circumstances. This bill revealed that the major focus of the bill is to take action against the person who committed the crime rather than knowing the victim's past history.⁹⁴

Bill C-5 (2022), Addressing Legal Gaps and Protecting Sexual Assault Survivors

Bill C-5 addressed gaps in the legal system regarding consent and the definition of bestiality, among other issues. It further refined the rules around the admissibility of evidence to protect the rights and dignity of sexual assault survivors. This bill also introduced mandatory training for judges on issues related to sexual assault law and trauma-informed practices, ensuring that the judiciary is better equipped to handle these sensitive cases.⁹⁵

Bill C-16 (2017), Protecting Gender Identity and Expression

In recent years, Canada has addressed the rights of all transgender and non-binary individuals, and several bills have been developed. Bill C-16 added "gender identity or expression" to the Canadian Human Rights Act and the Criminal Code, providing explicit protection against all genders, including transgenders. The bill is formed so the victim can get higher justice, and their safety should not be compromised. In addition to this, the bill also includes a legislative change for handling sexual assault cases that will ensure safety and protection, and it also acknowledges the unique vulnerability and experiences of all the humans who face such problems.⁹⁶

Public Awareness and Support Systems

The action has been taken to let the individuals understand the support system and create a public awareness programme where the cases related to sexual activity should be revealed and their actions regarding such activity should be discussed. Advocacy by LGBTQ+ public education campaign and welfare programme to develop awareness and foster the laws to make people take action regarding such criminals, and support should be provided to the victims.⁹⁷

⁹⁴Ibid.

⁹⁵Kwong-Leung Tang, Rape Law Reform in Canada: The Success and Limits of Legislation, INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY, <https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://typeset.io/pdf/rape-law-reform-in-canada-the-success-and-limits-of-mpu0scpcxv.pdf&ved=2ahUKEwjxrtzJ0LyGAXUN9zgGHTNpE9YQFnoECBIQAQ&usg=AOvVaw0ycHGkztaoffMshV8lWYDs> (Last visited on 12 April 2024).

⁹⁶Ibid.

⁹⁷Bruce A. MacFarlane, Historical development of the offence of rape, CANADIAN BAR ASSOCIATION, <https://www.kruselaw.ca/blog/sexual-assault/the-sexual-offences-in-canadas-criminal-code/TZqeXirT0d> (Last visited on 8 April 2024).

At the end the Canada rape laws signify that any human of any gender who is facing sexually abused or sexual harassment issues can file a case, and strict action shall be taken regarding the person who commit such a crime. It's not biased towards only one gender; it also includes transgender people, and legal action should be taken in such incidents. Canada legal reform is the ongoing efforts from the government to make the city safer and more liveable for all the residents by following reforms to create and build an inclusive society, highlighting the importance of adapting to societal changes and developing an understanding of gender and sexual violence. The Canda continues to build a safer environment for all individuals, despite their gender identity, to protect them from sexual assault and harassment.

THE CANADIAN LEGAL FRAMEWORK

In Canada, rape is described as a "sexual assault," which covers a different range of non-consensual sexual activities. The primary legislation governing sexual assault is the Criminal Code of Canada. The Criminal Code of Canada provides different forms of sexual offences and their corresponding punishments, which are as follows:

Sections 271, 272, and 273 of the Criminal Code of Canada address varying degrees of sexual assault. Section 271 criminalizes non-consensual sexual acts that violate the sexual integrity of the victim. Section 272 addresses sexual assault involving a weapon, threats to a third party, or causing bodily harm, recognizing the increased threat to the victim. Section 273 deals with aggravated sexual assault, involving severe physical injury, disfigurement, or endangerment of the victim's life, with the most severe penalties. Consent, defined in Section 273.1, must be a voluntary, ongoing agreement to engage in sexual activity, free from threats, force, or manipulation, and can be withdrawn at any time.

Under Section 271⁹⁸ of the Criminal Code of Canada, outlines penalties for sexual assault, emphasizing graduated penalties based on the age of the victim and whether the offense is tried as an indictable or summary conviction offense. This structured

⁹⁸Under Section 271 of the Criminal Code of Canada, anyone who commits a sexual assault is subject to the following penalties: (a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or (b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

sentencing framework aims to reflect the severity of the offense and provide deterrence against sexual violence.

In comparison, the Indian Penal Code (IPC) addresses sexual offenses under various sections, including Section 376 which deals with rape and its aggravated forms. While the IPC imposes severe penalties for rape, including life imprisonment and in certain cases, the death penalty, it does not provide the same clear distinction between indictable and summary offenses as seen in Canadian law. The IPC focuses on the gravity of the offence itself rather than specific sentencing guidelines based on the victim's age or the method of prosecution indictable and summary. This difference in approach reflects varying legal philosophies between Canada and India regarding the classification and sentencing of sexual offenses, with Canada placing emphasis on structured penalties tailored to different circumstances of sexual assault.

In summary while Canada's structured approach to sentencing sexual assault offers clear benefits in terms of transparency, consistency, and tailored justice, India's emphasis on severe punishments reflects a strong deterrent against sexual offenses. Both approaches serve to address and combat sexual violence within their respective legal frameworks, albeit with differing emphases on sentencing structure and severity.

Under Section 272⁹⁹ of the Criminal Code of Canada, explicitly addresses the use of weapons, threats to third parties, and specific actions like choking in the context of sexual assault, imposing stringent penalties for such aggravating factors. This ensures that any involvement of a weapon, whether real or imitation, during the commission of a sexual assault, automatically escalates the severity of the crime and results in harsher penalties. Additionally, the Canadian law specifically includes provisions for threats

⁹⁹Under Section 272 of the Criminal Code of Canada, Sexual Assault with a Weapon, Threats to a Third Party, or Causing Bodily Harm is defined.

(1) Every person commits an offence who, in committing a sexual assault, (a) carries, uses or threatens to use a weapon or an imitation of a weapon; (b) threatens to cause bodily harm to a person other than the complainant; (c) causes bodily harm to the complainant; (c.1) chokes, suffocates or strangles the complainant; or (d) is a party to the offence with any other person.

(2) Every person punished who commits an offence under subsection (1) is guilty of an indictable offence and liable

(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organisation, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of (i) in the case of a first offence, five years, and (ii) in the case of a second or subsequent offence, seven years;

made to third parties, causing bodily harm, and actions like choking, suffocating, or strangling the victim, ensuring these factors are clearly defined and accounted for during sentencing. In contrast, the Indian Penal Code (IPC) under Section 376(2) covers causing grievous bodily harm or endangering life during sexual assault but does not explicitly mention weapon use. While causing serious injury is recognized as an aggravating factor in Indian law, the lack of specific mention of weapons means that weapon involvement is implicitly covered under the broader category of grievous harm or endangerment without the same explicit emphasis seen in Canadian law. Moreover, the IPC does not specifically mention choking or suffocation but generally addresses physical harm under grievous injury or endangerment.

When it comes to multiple perpetrators, Canadian law explicitly criminalises being a party to the offence with another person. This means that if the sexual assault is committed with one or more accomplices, it is treated as an aggravated offence, leading to more severe penalties. On the other hand, India addresses this through its gang rape provisions under Section 376D, which ensures that rape involving multiple perpetrators is treated as a particularly heinous crime, deserving of severe punishment. The Canadian legal framework provides a detailed punishment scheme for sexual assault with aggravating circumstances. For instance, if a restricted or prohibited firearm is used, or if any firearm is used in association with a criminal organisation, the punishment can be up to 14 years of imprisonment, with a minimum of 5 years for the first offence and 7 years for subsequent offences. If the victim is under 16 years old, the punishment can extend to life imprisonment with a minimum of 5 years. This detailed breakdown ensures that specific aggravating circumstances lead to mandatory minimum sentences, reflecting the crime's severity.

In comparison, Indian law under Section 376(2) IPC and related provisions imposes severe penalties for aggravated rape, including life imprisonment and the death penalty for certain aggravated cases. For example, general aggravated rape carries a minimum sentence of 10 years to life imprisonment, while gang rape under Section 376D carries a minimum sentence of 20 years to life imprisonment. Additionally, causing death or resulting in a vegetative state under Section 376A can lead to a minimum of 20 years to life imprisonment, or even the death penalty. However, the IPC lacks the detailed breakdown of punishments for different aggravating factors that is present in Canadian law. Furthermore, Canada's approach includes detailed provisions for handling

subsequent offences, focusing on the sequence of convictions. Prior convictions for similar offences must be considered during sentencing, ensuring that repeat offenders face harsher penalties. This structured approach ensures a clear and consistent method for escalating punishments based on an offender's criminal history. In contrast, Indian law does not have a comparable detailed provision for treating prior offenses in the context of sexual assault. The IPC generally imposes harsher sentences for repeat offenders, but it lacks the detailed structure and specific mention found in Canadian law. This difference in detail and structure reflects varying approaches to legislative precision and enforcement in dealing with sexual crimes.

The more granular approach taken by Canada allows for a nuanced consideration of the various elements that can exacerbate the severity of a sexual assault. By explicitly detailing factors such as weapon use, threats, and specific physical actions like choking, Canadian law ensures that these elements are directly addressed in the judicial process. This specificity not only provides clear guidelines for sentencing but also serves to underscore the seriousness of these additional factors, potentially acting as a deterrent. In contrast, the broader provisions under the Indian Penal Code, while stringent in their punishments, do not provide the same level of specificity, which can lead to a more generalised application of justice in cases involving such aggravating factors.

Additionally, the Canadian Criminal Code's detailed provisions for subsequent offences highlight a robust system for dealing with repeat offenders. By explicitly considering the sequence of convictions and imposing mandatory minimum sentences for second or subsequent offences, Canada's legal framework aims to impose progressively severe consequences for repeat offenders, thereby enhancing the deterrent effect and promoting public safety. The Indian Penal Code, while severe in its treatment of sexual offences, does not incorporate a similarly detailed mechanism for escalating penalties based on prior convictions. This distinction illustrates the differing legal philosophies and approaches to criminal justice in the two countries, with Canada's approach focusing on detailed legislative guidance and India's approach emphasising severe penalties within a broader framework.

Under Section 273¹⁰⁰ of the Criminal Code of Canada, defines Aggravated Sexual Assault, which covers situations where a sexual assault results in serious harm to the victim, such as wounds, maiming, disfigurement, or endangerment of life. This section acknowledges the heightened severity of such assaults, aiming to ensure serious consequences for perpetrators. In Canada, aggravated sexual assault is treated as a very serious crime and is categorized as an indictable offense, which means it can lead to substantial prison sentences.

Under Canadian law, if a perpetrator uses a restricted or prohibited firearm during the assault or if the crime is linked to a criminal organisation, they can face life imprisonment. For a first offence, there's a mandatory minimum sentence of five years, which increases to seven years for subsequent offences. Even if a firearm isn't used, the minimum prison term is four years in cases of aggravated sexual assault. The law also takes into account previous convictions for similar offences involving firearms, which can lead to harsher penalties for repeat offenders. Comparatively, the Indian Penal Code (IPC) also addresses serious sexual offenses with severe punishments, including life imprisonment and, in certain extreme cases, the death penalty for aggravated rape. However, unlike Canada, the IPC doesn't specifically outline different punishments based on factors like the use of firearms or previous convictions for similar offences involving weapons. This reflects a difference in how each country's legal system approaches sentencing and the consideration of aggravating circumstances in cases of aggravated sexual assault.

In summary, Canada's Section 273 provides a detailed and structured approach to dealing with aggravated sexual assault, focusing on the severity of harm inflicted and

¹⁰⁰Under Section 273 of the Criminal Code of Canada, Aggravated Sexual Assault is defined.

(1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

(2) Every person who commits an aggravated sexual assault is guilty of an indictable offence and liable (a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organisation, to imprisonment for life and to a minimum punishment of imprisonment for a term of (i) in the case of a first offence, five years, and (ii) in the case of a second or subsequent offence, seven years; (a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and (a.2) if the complainant is under the age of 16 years, to imprisonment for life and to a minimum punishment of imprisonment for a term of five years; and (b) in any other case, to imprisonment for life.

imposing graduated penalties based on specific aggravating factors. In contrast, while the IPC addresses serious sexual offences with severe penalties, it lacks the same level of specificity and structured consideration of aggravating circumstances seen in Canadian law.

Under Section 273.1¹⁰¹ of the Criminal Code of Canada explains what consent means in cases of sexual activity. Consent must be freely given by the person involved at the time of the activity. The law specifies that consent is not present if the person is unconscious, unable to give consent due to factors like intoxication, or if they express disagreement or withdraw consent during the activity. It's also clear that an accused person cannot claim they believed the other person consented if they were reckless or didn't take reasonable steps to ensure consent.

In contrast, while the Indian Penal Code also recognizes the importance of consent in sexual offences, it doesn't have the same detailed rules about when consent is absent or the limitations on claiming a mistaken belief in consent as a defence. This shows how Canada's legal system defines and protects consent in cases of sexual assault more specifically than Indian law does.

JUDICIAL DELIBERATION IN CANADA TO DEFINE THE TERM "RAPE"

It is worthwhile to examine about the five important decisions in Canadian sexual assault law that have significantly shaped the legal landscape.

The first one is *R v. Ewanchuk*¹⁰², the Supreme Court rejected the concept of "implied consent" in sexual assault cases, emphasizing that consent must be explicit, affirmative, and continuous throughout the sexual activity. The court ruled that consent cannot be inferred from silence or non-resistance; instead, it must be clearly communicated by the complainant. This decision established a clear legal standard where any belief in consent must be reasonable and based on the complainant's expressed words or conduct.

¹⁰¹Under Section 273.1 of the Criminal Code of Canada "Meaning of consent" is defined.

(1) Subject to subsection (2) and subsection 265(3), consent means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question. Consent (1.1) Consent must be present at the time the sexual activity in question takes place. Question of law. (1.2) The question of whether no consent is obtained under subsection 265(3) or subsection (2) or (3) is a question of law.

¹⁰²*R v. Ewanchuk* (1999), [1999] 1 S.C.R. 330.

In contrast, Indian law under Section 375 of the Indian Penal Code (IPC) defines consent more broadly but does not explicitly require it to be continuously explicit throughout sexual activity. While Indian courts recognize the importance of consent, the legal framework does not explicitly address the issue of implied consent or emphasise the need for continuous, affirmative communication of consent as rigorously as Canadian law does in cases like *R v. Ewanchuk*. The divergence highlights a stricter interpretation and legal standard for consent in Canadian law, focusing on clear and ongoing communication to ensure mutual understanding and respect in sexual interactions. In comparison, Indian law provides broader guidelines on consent without mandating the same level of explicit communication throughout sexual encounters. This difference underscores varying legal approaches to defining and protecting consent in sexual assault cases between Canada and India.

In another case, *R v. JA*,¹⁰³ The Supreme Court of Canada addressed the issue of consent in situations where an individual is unconscious. The accused, JA, engaged in sexual activity with his partner while she was asleep. The woman had previously agreed that she could be choked unconscious as part of consensual sexual activity. However, since the act occurred when she was unable to provide consent due to her unconscious state, JA was charged with sexual assault. The highest court in Canada ruled that prior consent for sex during unconsciousness is void. The court stated that consent must be continuous at each stage of sexual activity; there cannot be advance consent to sexual acts occurring during sleep or otherwise unconscious incapacity. This determination confirmed that legal capacity is central to consent; one must remain conscious throughout and capable of giving consent during sexual intercourse. The ruling in *R v. JA*¹⁰⁴ by the Supreme Court of Canada underscores a crucial principle in sexual assault law: consent must be continuous and active, and any prior consent for sexual activity during unconsciousness is invalid. This decision emphasises that consent must be explicit and ongoing throughout the entirety of the sexual act.

In contrast, Indian judgments under Section 375 of the Indian Penal Code (IPC) do not explicitly mandate the concept of continuous consent. While Indian courts recognize the importance of consent, the legal framework does not explicitly state that consent

¹⁰³*R v. JA*, 2011[2011] 2 S.C.R. 440.

¹⁰⁴*Ibid.*

must be ongoing and cannot be pre-given for periods when an individual is unconscious. This difference highlights a more stringent interpretation of consent in Canadian law, emphasising the necessity of an individual's continuous capability to consent during sexual activity. Indian law, while addressing consent, does not incorporate the same explicit requirement for continuous consent, potentially allowing for different legal interpretations and outcomes in similar cases.

In the case of *R v. Cuerrier*¹⁰⁵ The Canadian Supreme Court addressed the issue of consent in the context of HIV disclosure. Cuerrier, who was HIV positive, did not disclose his status to his sexual partners. The complainants argued that had they known his HIV status, they would not have consented to sexual intercourse. Cuerrier was charged with aggravated assault.

The Canadian Supreme Court ruled that non-disclosure of HIV status in cases where there is a significant risk of transmission nullifies consent. The court reasoned that consent obtained through fraud, such as withholding information about a significant risk of serious bodily harm (like HIV transmission), cannot be considered valid consent. The court emphasised that proper disclosure is essential for consent to be genuine and valid. Therefore, omitting or withholding crucial information like HIV status undermines the voluntary nature of consent. This decision expanded the concept of informed consent by asserting that certain risks, particularly those involving serious harm, necessitate disclosure for consent to be legally effective.

In India, the issue of non-disclosure of HIV status and its impact on consent is approached differently. Indian law does not have specific statutes or judicial precedents that directly address HIV disclosure in the context of sexual consent with the same level of clarity and specificity as Canadian law, as exemplified in *R v. Cuerrier*¹⁰⁶. However, under general principles of consent in Indian law, there is recognition that consent must be voluntary and informed. Courts have acknowledged the importance of disclosure in some contexts, such as medical treatment or marriage, where withholding material information can affect the validity of consent. Yet, the application and extent of such principles in cases of HIV disclosure may vary. The contrast highlights a more stringent legal standard in Canada regarding the disclosure of HIV status and its impact on

¹⁰⁵R v. Cuerrier, [1998] 2 S.C.R. 371.

¹⁰⁶R v. Cuerrier, [1998] 2 S.C.R. 371.

consent, explicitly stating that failure to disclose such information can invalidate consent. In India, while similar principles of informed consent apply broadly, the specific application to cases involving HIV disclosure may not be as explicitly defined or uniformly applied in legal practice. This disparity underscores different legal approaches and protections concerning consent and disclosure in sexual contexts between Canada and India.

In the case of *R v. Kirkpatrick*¹⁰⁷, the Canadian Supreme Court addressed the issue of conditional consent in sexual relations. Kirkpatrick engaged in sexual intercourse with the complainant under the condition that he would use a condom. However, during the act itself, Kirkpatrick removed the condom without informing the complainant. The court ruled that such actions constituted sexual assault because they violated the conditions under which the complainant had agreed to engage in sexual activity.

The Canadian Supreme Court emphasised that consent to sexual intercourse can be conditional, and any deviation from those conditions without the partner's knowledge or agreement can invalidate consent. In this case, removing the condom without informing the complainant amounted to deceitful behaviour that destroyed the validity of consent. The ruling underscored the principle that sexual consent must be voluntary and based on accurate information. Deception or fraudulent actions, such as removing a condom without permission, undermine the integrity of consent and constitute sexual assault.

In India, the issue of conditional consent and its impact on sexual assault law is recognized, but specific cases addressing the removal of a condom without consent are less commonly litigated. Indian law generally requires consent to be free, voluntary, and informed, similar to Canadian principles. However, the explicit recognition of deceit or fraudulent actions like removing a condom without permission as constituting sexual assault may not be as uniformly established in Indian legal precedents.

In the case of *R v. Goldfinch*¹⁰⁸, the Supreme Court of Canada dealt with the admissibility of evidence regarding a complainant's prior sexual history. Goldfinch and the complainant were in a "friends with benefits" relationship. During the trial,

¹⁰⁷R v. Kirkpatrick (2022), SCC 33.

¹⁰⁸R v. Goldfinch, [1995] 4 S.C.R. 353.

Goldfinch sought to introduce evidence of their past sexual history to suggest that the complainant was more likely to have given consent for the intercourse in question. However, the Supreme Court ruled that evidence of prior sexual history is generally inadmissible to suggest consent or to undermine the complainant's credibility unless it meets strict criteria set out in the criminal code. The court emphasized the importance of Rape Shield Provisions in protecting complainants.

Rape Shield Provisions are legal measures designed to protect complainants in sexual assault cases from having their sexual history used against them in court. These provisions prevent the introduction of evidence regarding a complainant's previous sexual conduct, ensuring that such information cannot be used to infer consent or attack their credibility. The aim is to encourage reporting of sexual offences, protect the dignity and privacy of complainants, and prevent the re-victimization of individuals during trials.

The ruling in *R v. Goldfinch*¹⁰⁹ by the Supreme Court of Canada highlights a stringent approach to the admissibility of a complainant's prior sexual history in sexual assault cases. In Canada, such evidence is generally inadmissible unless it meets specific criteria, reinforcing the protection of complainants under Rape Shield Provisions.

In contrast, Indian law under Section 146 of the Indian Evidence Act allows for the cross-examination of a complainant about their past sexual conduct, which can be used to challenge their credibility. Although the Indian judiciary has made strides to protect the rights of sexual assault survivors, such as in the case of *State of Punjab v. Gurmit Singh*¹¹⁰, where the Supreme Court condemned the use of a complainant's past sexual history to discredit them, the legal framework does not offer the same robust protection as Canada's Rape Shield Provisions. This difference underscores a more protective stance in Canadian law regarding the privacy and dignity of sexual assault complainants during trials.

After observing these case laws it can be stated that Canadian and Indian court rulings highlight significant differences in the legal recognition and protection of transgender rights. Canadian courts have progressively expanded their judgments to

¹⁰⁹Ibid.

¹¹⁰State of Punjab v. Gurmit Singh, AIR 1996 SC 1393.

encompass the rights of both transgender individuals and females, reflecting a broader and more inclusive approach to gender equality. This inclusive legal framework ensures that transgender individuals are granted protections and rights parallel to those afforded to females, fostering a more equitable society. Conversely, in India, judicial rulings have predominantly focused on addressing female rights, with limited attention given to the specific disparities faced by the transgender community. Despite some landmark judgments aimed at improving the legal status and rights of transgender persons, there remains a notable gap in comprehensive legal protections and targeted measures to address the unique challenges they face.

This disparity underscores the need for Indian legal frameworks to evolve towards a more inclusive approach that explicitly recognizes and protects the rights of transgender individuals. Such progression is essential to ensure that all gender identities receive equal consideration and protection under the law, thereby promoting a more just and equitable society for all.

COMPARATIVE ANALYSIS OF PUNISHMENTS FOR SEXUAL OFFENCES IN INDIA AND CANADA

Rape and sexual assault are grave violations of human rights and dignity, requiring stringent legal frameworks for effective deterrence and justice. This comparative analysis of rape punishment in India and Canada examines various aspects, including legal definitions, gender inclusivity, recognition and protection of transgender individuals, consent, age of consent, punishments, marital rape, evidentiary standards, judicial sensitivity, support services, reporting mechanisms, and awareness and education.

In India, rape is defined under Section 375 of the Indian Penal Code (IPC), traditionally emphasizing penile-vaginal penetration and recognizing only women as victims and men as perpetrators. Recent legal reforms aim to broaden this scope, yet it remains largely gender-specific.¹¹¹ In contrast, Canada defines sexual assault as a gender-neutral offense under Sections 271-273 of the Criminal Code, encompassing a wide range of

¹¹¹Indian Penal Code, 1860 (Act NO. 45 of 1860) Section 375.

non-consensual sexual activities beyond penile-vaginal penetration. This inclusive definition reflects a broader understanding of sexual violence.¹¹²

The Criminal Law (Amendment) Act, 2013, in India introduced provisions for transgender individuals, but rape laws predominantly focus on women as victims. Canadian law, however, offers equal protection to all individuals under sexual assault laws, ensuring comprehensive legal coverage for everyone, including transgender individuals. India's recognition of transgender victims has improved following the NALSA judgement (2014), but specific protections remain limited. Canada explicitly recognizes transgender persons under anti-discrimination statutes, which influence the handling of cases involving transgender victims and ensure their rights are upheld.¹¹³

The Transgender Persons (Protection of Rights) Act, 2019, in India provides some legal protections for transgender individuals, but enforcement and recognition are inconsistent. In contrast, Canada's legal framework offers robust protection under the Canadian Human Rights Act and Criminal Code. This ensures comprehensive legal recourse and protection for transgender individuals, reflecting a strong commitment to their rights.

In terms of consent, Indian law requires it to be unequivocal and voluntary, with the burden of proof often on the accused to demonstrate that consent was obtained. Canadian law requires consent to be affirmative, ongoing, and withdrawable at any time, with the onus on the accused to prove that reasonable steps were taken to ascertain consent. This progressive approach ensures a clearer and more victim-centred understanding of consent. The age of consent for sexual relationships in India is 18 years, while in Canada, it is 16 years with close-in-age exceptions for peers, reflecting different cultural and legal attitudes towards the autonomy and protection of young individuals.¹¹⁴

Punishments for rape in India range from 10 years to life imprisonment, with the death penalty applicable in cases involving the rape of minors or repeat offenders.¹¹⁵ In Canada, punishments for sexual assault can extend to a maximum of 10 years, or up to

¹¹²Criminal Code of Canada, RSC 1985, c C-46, Section 271-273.

¹¹³Ibid.

¹¹⁴Indian Penal Code, 1860 (Act NO. 45 of 1860) Section 375. Criminal Code of Canada, RSC 1985, c C-46, Section 150.1.

¹¹⁵Indian Penal Code, 1860 (Act NO. 45 of 1860) Section 376.

14 years if the complainant is under the age of 16. The severity of punishments in India reflects a stringent stance, whereas Canada's approach emphasises proportionality and rehabilitation.¹¹⁶

Marital rape is not recognized as a crime in India if the wife is above 18 years old, except under the Protection of Women from Domestic Violence Act, which provides civil remedies. Conversely, Canada recognizes marital rape as an offense, requiring consent regardless of marital status, highlighting a significant difference in legal acknowledgment and protection against marital rape.¹¹⁷

Evidentiary standards also differ significantly. In India, the victim's testimony is crucial but often requires corroboration, and the victim's character and past sexual conduct can influence the case, despite reforms aiming to reduce this bias. In Canada, the victim's past sexual conduct is generally inadmissible due to rape shield laws, and the victim's testimony can suffice for conviction without corroboration. This approach protects victims from character attacks and focuses on the facts of the case.¹¹⁸

Judicial sensitivity towards gender issues is growing in India, but bias and insensitivity, particularly towards transgender individuals, persist. Canada has implemented judicial education programs emphasising gender and sexuality matters, promoting fair treatment of transgender people within the legal system and fostering a more informed and empathetic judiciary.

Support services for rape victims in India, including transgender individuals, are limited and often inadequate, with NGOs playing a significant role. In Canada, well-established support services, including specialized services for transgender victims of sexual assault, ensure that victims receive the necessary care and assistance. Reporting mechanisms in India can be daunting and intimidating, often deterring victims, especially transgender individuals, from reporting offences. Canada offers victim-

¹¹⁶Criminal Code of Canada, RSC 1985, c C-46, Section 271.

¹¹⁷Criminal Code of Canada, RSC 1985, C-46, Section 271-273.

¹¹⁸Rape shield laws, In Australia Law Reform Commission (17 Aug 2010) <https://www.alrc.gov.au/publication/uniform-evidence-law-alrc-report-102/20-matters-outside-the-uniform-evidence-acts/rape-shield-laws/> (Last visited on 10 April 2024).

centred reporting mechanisms that respect the survivor's need for anonymity and dignity, encouraging more victims to come forward and report sexual assaults.¹¹⁹

Awareness and education programs also differ. In India, although there has been an increase in awareness programs, widespread education on sexual assault and transgender rights remains insufficient. Canada has public education programs covering both sexual violence prevention and the rights of transgender people, playing a crucial role in preventing sexual violence and promoting understanding of transgender rights.

DISPARITY IN PUNISHMENT FOR SEXUAL OFFENCES

The impact of Canadian law on the transgender community is profound, thanks to its inclusive perspective on sexual assault laws and specific provisions for protecting gender identity. Several key aspects highlight how these punishments for rape offenses have influenced the lives of transgender individuals in Canada. The inclusion of gender identity and expression in the Canadian Human Rights Act and the Criminal Code has assured that transgender individuals are acknowledged by law and have their rights secured. This has led to more reporting of sexual assaults by transgender individuals, who now feel confident that the law explicitly protects them and respects their gender identity in legal proceedings. Furthermore, court rulings affirming transgender rights have created significant legal precedents, legitimising and reinforcing their protections under the law. Judicial education concerning gender identity and expression has contributed to increased judicial mindfulness and impartiality. Judges and legal practitioners have gained knowledge on handling cases involving transgender persons with care, reducing incidences of bias. This ensures that transgender victims can receive fair trials, with their gender respected and without irrelevant or prejudicial information influencing the case.¹²⁰

Access to victim support services has also improved, with a range of support services available for anyone who experiences sexual violence, including those tailored specifically for transgender victims. This holistic support provides medical, psychological, and legal assistance customised to their needs, ensuring comprehensive

¹¹⁹Evaluation of the Justice Canada Federal Victims Strategy, In government of Canada, available at <https://www.justice.gc.ca/eng/tp-pr/cp-pm/eval/rep-rap/2021/victims-victimes/findings-constatations.html> (Last visit on 15 April 2024).

¹²⁰Brittany Pompilii, Reporting Sexual Assault in Canada, MISSINFORMED (19 February 2021), <https://www.missinformed.ca/post/reporting-sexual-assault-in-canada> (Last visited on 20 April 2024).

care and recovery. The availability of specialised support services fosters trust in the legal system and healthcare among the transgender community, encouraging them to seek help more often. Public education programs on sexual assault and transgender rights have increased awareness and decreased stigma. A more informed society understands that transgender individuals face higher rates of sexual violence, fostering a supportive environment. Educating the public reduces stigmatisation towards transgender people, creating a safer space for all individuals. Preventative measures and deterrence have been strengthened through severe punishments for sexual assault and legal acknowledgment of gender identity rights. Potential offenders are discouraged from committing sexual assaults against transgender persons, knowing there are serious repercussions such as life imprisonment. Clear legal consequences for perpetrators who victimise transgender individuals ensure justice and underscore the seriousness of the crime.¹²¹

An inclusive legal system empowers transgender individuals and their advocacy groups. Legal protections provide a solid foundation for advocacy groups to push for further reforms and support transgender rights. Transgender individuals feel more empowered to claim their rights and seek redress without fear of prejudice or discrimination based on their gender. Canada's approach to addressing intersectional challenges faced by transgender people, including those belonging to other disadvantaged groups, has been vital. Inclusive policies recognize the unique challenges faced by transgender persons who belong to racial, ethnic, or socio-economic minorities, helping achieve comprehensive protection and support. Intersectional support services address an individual's identity from multiple perspectives, offering more effective and nuanced assistance.

Additionally, the societal impact of these legal frameworks extends beyond the courtroom and into everyday interactions, fostering a climate of acceptance and respect for transgender individuals. As public awareness and education continue to grow, societal attitudes towards transgender people are becoming more positive, reducing instances of discrimination and violence. This cultural shift is crucial for the well-being

¹²¹Evaluation of the Justice Canada Federal Victims Strategy, In government of canada, available at [https://www.justice.gc.ca/eng/tp-pr/cp/Brittany_Pompili, Reporting Sexual Assault in Canada, MISSINFORMED \(19 February 2021\), https://www.missinformed.ca/post/reporting-sexual-assault-in-canada \(Last visited on 20 April 2024\).](https://www.justice.gc.ca/eng/tp-pr/cp/Brittany_Pompili, Reporting Sexual Assault in Canada, MISSINFORMED (19 February 2021), https://www.missinformed.ca/post/reporting-sexual-assault-in-canada (Last visited on 20 April 2024).-pm/eval/rep-rap/2021/victims-victims/findings-constatations.html)-pm/eval/rep-rap/2021/victims-victims/findings-constatations.html(Last visit on 15 April 2024).

of transgender individuals, who can now navigate their lives with greater confidence and security. The presence of strong legal protections and supportive services not only aids in immediate recovery but also contributes to long-term mental health and societal integration, ultimately leading to a more inclusive and just society.¹²²

Moreover, the proactive stance of Canadian law serves as a model for other countries aiming to enhance protections for transgender individuals. By embedding comprehensive legal safeguards and support mechanisms within the national framework, Canada exemplifies how laws can evolve to meet the needs of marginalised communities effectively. This model encourages ongoing dialogue and reform in jurisdictions worldwide, promoting a global movement towards greater inclusivity and human rights. The successes and challenges faced by Canada in this journey provide valuable lessons for policymakers and activists, highlighting the importance of legal recognition, societal support, and continuous advocacy in the fight for transgender rights.

CONCLUSION

In this chapter, it is apparent that there are huge disparities between India's legal framework on rape punishment when compared to Canada's legal system as far as the treatment of transgendered persons is concerned. Gender-neutral laws have been implemented in Canada, which offer strong legal recognition and protection for transgender rights underpinning inclusive judicial pronouncements.

Many other things that Canada is implementing to make things better for victims of sexual offences, such as easy reporting mechanisms, victim support services, educational programmes on sexual assault, and punishment for rape offences, are similar irrespective of gender identity. This kind of approach looks after the welfare of transsexuals who have been sexually abused.

On the other hand, although India has made some progress in its legal framework with landmark decisions like the NALSA judgement or the Transgender Persons (Protection of Rights) Act 2019, among others, it still faces implementation challenges. These

¹²²Ibid.

challenges result in gaps in legal enforcement and persistent societal stigma, which impede transgender individuals' access to justice.

In India, two legislations that apply on the basis of gender identity provide different perspectives of sexual offences and its punishment. While the Transgender Law aims to safeguard the transgenders and the other protects women, but still, there are disparities in punishment for the rape offence. The two different terms used to describe the sexual offence are "sexual abuse" for transgender individuals under the Transgender Persons (Protection of Rights) Act and "rape" for women under Section 375 of the Indian Penal Code. This gap clearly shows the explicit discrimination against Transgenders, who are recognized as the Third gender.

CHAPTER V

DISPARITIES IN PUNISHMENT FOR SEXUAL OFFENCES AGAINST TRANSGENDER

INTRODUCTION

Across the study of three chapters, the evolution of transgender identities and rights from historical to modern times, noting both progress and ongoing struggles for recognition and acceptance. The Indian Criminal Justice System's handling of rape offences, highlighting the discriminatory distinction between "rape" for women and "sexual abuse" for transgender individuals. Additionally, as compared the legal frameworks of India and Canada concerning the legal approach of sexual offences against transgenders, reveal significant disparities. Canada's gender-neutral laws offer more inclusive protection, while India's legal framework, despite notable progress, still reflects societal biases and requires comprehensive reforms for true equality and justice.

Women are individuals who identify themselves as female by birth and whose gender identity corresponds to their sex. At the same time, transgender people identify their gender differently from the sex assigned to them. India is world-famous for accepting diversity in culture, creed, race, caste, and religion. However, transgender people still suffered for not having equal rights in India. Transgender people are still not accepted as human beings in our society, and the major reason for that is the Indian ideology of Indians. "The major factor in changing the ideology began in British times when the Criminal Tribes Act of 1871 was passed, which criminalised hijras who were involved in abduction, castrating minors, and dressing like women to dance in public places. Even in the Vedic period, hijras are accepted as a gender called Napunsaka, and there is no punishment imposed on being transgender, but the twist comes up in the story when Britishers pass the Criminal Tribes Act of 1871. This act made the lives of transgender people miserable and prohibited their access to public places, and this is still continuing in this era.¹²³

¹²³M. Michelraj, Historical evolution of transgender community in India, Vol. 4, Asian Review of Social Sciences (ISSN: 2249-6319), page 17- 19 (2015).

The *National Legal Services Authority v. Union of India* case,¹²⁴ judgement is a ray of hope in the lives of transgender people because it recognises transgender as a third gender. However, the Transgender Persons (Protection of Rights) Act 2019, which aims to protect and safeguard transgender rights in society, discriminates against transgenders. Under Section 375 of the Indian Penal Code 1960, sexual offences against transgender people are termed "rape." At the same time, Section 18 Clause (d) of the Transgender Persons (Protection of Rights) Act defines sexual offences against a transgender individual as "sexual abuse. This terminology led to mitigation of the punishment for sexual offences against transgenders.

Under Section 375 of the Indian Penal Code 1860, the definition of "Rape" includes the rape against women only. However, the punishment for the rape offence is mentioned under Section 376 of the Indian Penal Code 1860, in which it states that the person who commits the offence of rape shall be punished with rigorous imprisonment for a term not less than 10 years, which may extend to imprisonment for life, a fine, or both.¹²⁵ On the flip side of the coin, under section 18 clause (d) of the Transgender Persons (Protection of Rights) Act, 2019, the punishment for sexual offences against transgender shall not be less than 6 months but which may extend to 2 years and with fine.

This difference in terminology puts transgender women in danger. Transgender women have been raped, but perpetrators have not been punished due to the lack of legal recognition as victims of rape. "For instance, in 2018, a transgender female named Chandni was raped and killed in Hyderabad. The police first declined to register a rape case, claiming that transgender women cannot be raped. Only after public pressure did the police register a case of rape and murder".¹²⁶

This chapter delves into the pervasive disparities in both terminology and punishment concerning sexual offences against transgender individuals. By scrutinising constitutional safeguards and judicial precedents, it aims to illuminate the systemic inequalities ingrained within the legal framework. A comparative analysis of rape

¹²⁴National Legal Services Authority v. Union of India case, 2014 SC 1863

¹²⁵Indian Penal Code, 1860 (Act NO. 45 of 1860) Section 375 and 376.

¹²⁶Rhea Sudeesh, Disparity in punishment for Rape offences biased on gender identity in India, volume 11 & Issue 3, Journal of Emerging Technologies and Innovation Research (JETIR)(ISSN-2349-5162) page 2 (2014).

punishments further highlights the stark contrasts in how justice is meted out. This chapter also explores how these disparities in terminology often serve to mitigate the severity of punishment for sexual offences committed against transgender individuals, perpetuating a cycle of injustice and marginalisation.

"A 2015 analysis, the most recent available data, indicated that one-fifth of transwomen polled had experienced sexual violence during the previous year.

According to the National Integrated Biological and Behavioural Surveillance (IBBS) conducted in 2014–15 by the National AIDS Control Organisation (NACO) under the Union Ministry of Health and Family Welfare (MOHFW), 31.5% of trans women were forced into sex during their first sexual encounter with a male partner". "More than a quarter, or 26%, were 14 or younger when they had their first sexual contact with a male partner, while 30.2% were between the ages of 15 and 17. Only 23.6% of respondents were over the age of 18.¹²⁷

The Indian Census does not gather statistics on transgender people; however, the 2011 Census did, for the first time, include 'other' as a third gender option. This stated that there were around 487,803 transgender people in India, with Uttar Pradesh having the highest number at 137,465. According to the IBBS 2014–15, one-fifth (20%) of all transgender people surveyed had suffered sexual violence within the previous year. The Census of India does not collect data on transgenders, but the 2011 Census, for the first time, included 'other' as a third gender. This indicated an estimated 487,803 transgender people in India, with the largest number in Uttar Pradesh at 137,465. The IBBS of 2014–15 found that one fifth (20%) of all hijras and transgender people surveyed had experienced sexual violence in the 12 months preceding the interview."¹²⁸

"The author suggested that many transgender people in India depend primarily on the sex industry for a living. Unregulated sex work is fraught with difficulties. When it comes to condom use, sex workers have little decision-making power and no control over their working conditions, rates, hours, or location. As a result, they are very

¹²⁷Jigyasa Mishra, Raped, Mocked By Police For Seeking Justice: India's Rape Laws Do Not Cover Transwomen, ARTICLE 14 (7 July 2022), <https://article-14.com/post/raped-mocked-by-police-for-seeking-justice-india-s-rape-laws-do-not-cover-transwomen--62c65919a04a3> (Last visited on 22 April 2024).

¹²⁸Ibid.

susceptible to AIDS and other sexually transmitted diseases. The Ministry of Health considers transgender people to be "at risk" and has permanently prohibited them from donating blood because of this susceptibility".¹²⁹

So by reviewing all these data, disparities, and incidents, it can be stated that transgender people are a more vulnerable class as compared to women. By omitting to mention the definition and punishment of rape against transgender people in the Transgender Persons (Protection of Rights) Act, 2019, we make the lives of transgender people more vulnerable. Most of the sexual violence cases against transgender people are not even reported because of a lack of legal recognition of these offenses. This is a huge gap in the violation of transgender rights, which urgently needs to be filled.

CONSTITUTION SAFEGUARDS AND JUDICIAL DECISIONS

Human rights are those rights that an individual has had since birth. These are inherent rights that cannot be created or destroyed by any government. These rights correspond to the fundamental rights, which include the right to equality, freedom, dignity, food, clothing, and shelter. These rights are universal in nature and are received by all individuals regardless of their nature, gender, sex, colour, religion, and language.¹³⁰

Article 14 guarantees the right to equality before the law and equal protection of the law. Article 15 plays a crucial role in protecting and safeguarding an individual from discrimination on the basis of religion, race, caste, sex, place of birth, or any of them. The future right to choose its own gender is part of the fundamental right that falls under Article 21 of the Constitution. The particular articles 14, 15, and 21 would be violated if any individual discriminated on the ground of gender.¹³¹

The primary purpose of Article 14 is to implement the law of our nation in uniformity, irrespective of gender identity. Further to prohibit unequal treatment in the legal framework. However, in examining the existing legal provisions of sexual violence against transgender people under the Transgender Persons (Protection of Rights) Act

¹²⁹Mansi Singh, Transgender Persons and Public Spaces: Lack of Protection from the Law, CENTER FOR LAW AND POLICY RESEARCH (25 March 2023), <https://clpr.org.in/blog/transgender-persons-and-public-spaces-lack-of-protection-from-the-law/> (Last visited on 22 April 2024).

¹³⁰Human rights, (22 April 2024) In Wikipedia https://en.wikipedia.org/wiki/Human_rights.

¹³¹Kairali V.S, Article 14 And 15 Of The Indian Constitution-Eradicate Discrimination And Bring Equality, LEGAL SERVICE INDIA E- JOURNAL , <https://legalserviceindia.com/legal/article-2754-article-14-and-15-of-the-indian-constitution-eradicate-discrimination-and-bring-equality.html> (Last visited on 28 April 2024).

2019, It has been found that law makers use different terminology to define the sexual offence against transgenders, which mitigates the punishment. As a result, there is no punishment for rape offences against transgender they become easy targets of sexual violence, which makes them a more vulnerable class.¹³²

In the *Naz Foundation v. NCT of Delhi*¹³³ The judgement represents a watershed moment in Indian legal history, highlighting the judiciary's role in promoting inclusivity and addressing social issues affecting marginalised communities. At its core, the case challenged the constitutionality of Section 377 of the Indian Penal Code, which criminalized consensual sexual acts between adults of the same gender. The Delhi High Court's decision to strike down this provision was grounded in principles of equality, dignity, and the right to privacy guaranteed by the Constitution.

The Court's analysis reflected a nuanced understanding of human rights and social dynamics. It acknowledged that Section 377 not only violated the privacy of individuals but also perpetuated discrimination and stigmatisation against LGBTQ+ persons. By criminalising same-sex relations, the law marginalised an already vulnerable community, impeding their access to healthcare, education, and employment opportunities. The judgement recognized sexual orientation as an intrinsic aspect of personal identity, deserving of protection from arbitrary state interference.

In favouring the decriminalisation of homosexuality, the Court addressed the arguments raised by the petitioners, including the Naz Foundation, which highlighted the societal harm caused by Section 377. They argued that LGBTQ+ individuals faced systemic discrimination, harassment, and violence due to the law's existence, leading to profound social and psychological impacts. The judgement underscored the need for laws to evolve with changing societal norms and values, emphasising the judiciary's role in safeguarding minority rights against majoritarian biases.

Beyond its legal implications, the Naz Foundation judgement sparked a broader societal conversation on LGBTQ+ rights in India. It catalysed movements for equality and social acceptance, challenging entrenched prejudices and fostering empathy and

¹³²Ibid.

¹³³*Naz Foundation v. NCT of Delhi*, (2009) 160 DLT 277.

understanding across communities. The judgement's impact extended to legislative and policy arenas, influencing subsequent legal reforms and advocacy efforts aimed at securing comprehensive rights for LGBTQ+ individuals.

In summary, the Naz Foundation case exemplifies the judiciary's pivotal role in promoting social justice and inclusivity. Through its thoughtful analysis and principled decision-making, the Delhi High Court affirmed the dignity and rights of LGBTQ+ persons, setting a precedent for future legal advancements in India's journey towards equality and human rights for all.

In the *NALSA v. Union of India*¹³⁴ judgement is a profound testament to the Indian judiciary's commitment to inclusivity and equality, particularly for transgender individuals. It marked a transformative moment where the Supreme Court recognized transgender persons as deserving of the same rights and dignities as any other citizen. This decision wasn't just about legal recognition; it was about affirming the identities of countless individuals who had long faced societal rejection and discrimination.

The issues at the heart of this judgement were deeply personal and societal. Transgender individuals in India often faced immense challenges—being denied access to education, healthcare, and employment opportunities simply because their identities weren't legally acknowledged. The petitioners eloquently argued that denying legal recognition not only infringed on their fundamental rights but also perpetuated a cycle of marginalisation and exclusion. The arguments in favour of the decision were compelling and rooted in human dignity. Advocates passionately articulated that every person should have the right to define their own gender identity without fear of prejudice or discrimination. They pointed to international human rights standards to emphasise that India, as a global participant, had an obligation to protect the rights of transgender individuals under its constitution.

The Supreme Court's ruling wasn't just about legal theory; it was about practical change. By mandating affirmative actions like reservations in education and employment, the Court sought to level the playing field and ensure that transgender individuals could participate fully in society. It recognized the need for societal education and sensitivity, acknowledging that acceptance begins with understanding and respect.

¹³⁴NALSA v. Union of India, (2014) 5 SCC 438.

More than a decade after the NALSA judgement, the conditions for many transgender individuals continue to be challenging. Structural barriers such as societal stigma, discrimination, and lack of access to education and employment opportunities persist. The enforcement of the Supreme Court's directives has been inconsistent, with many state governments and institutions failing to implement the necessary policies effectively. Moreover, the Transgender Persons (Protection of Rights) Act, 2019, which was introduced to follow up on the NALSA judgement, has faced criticism from the transgender community for not fully addressing their concerns and for certain provisions that are seen as regressive.

This disconnect between judicial pronouncements and on-ground realities highlights the complexities of social change. While the NALSA judgement provided a legal framework for the recognition and protection of transgender rights, societal attitudes and systemic challenges have hindered the actualization of these rights. Comprehensive and sustained efforts, including public education campaigns, rigorous policy implementation, and community engagement, are essential to bridge this gap. The journey towards true equality and dignity for transgender individuals in India is ongoing and requires a concerted effort from all sectors of society to translate legal victories into tangible improvements in their daily lives.

In *Navtej Singh Johar v. Union of India*¹³⁵ judgement by the Supreme Court of India marks a pivotal moment in the nation's legal history, especially regarding LGBTQ+ rights and non-discrimination principles. This case questioned the constitutionality of Section 377 of the Indian Penal Code, which criminalized consensual homosexual acts between adults. The Supreme Court's decision to abolish this colonial-era law underscored its dedication to equality, dignity, and personal autonomy as enshrined in the Indian Constitution.

The Court's reasoning in the Navtej Singh Johar case showcased a profound grasp of human rights principles and the evolving societal attitudes towards sexual orientation. It recognized that Section 377 violated the right to privacy and perpetuated stigma and discrimination against LGBTQ+ individuals. By criminalising same-sex relations, the

¹³⁵Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

law marginalised LGBTQ+ persons, subjecting them to harassment, discrimination, and violence, thus denying them their fundamental rights as equal citizens under the law.

In its judgement, the Supreme Court considered the arguments presented by the petitioners, including Navtej Singh Johar and others, who eloquently highlighted the personal and societal harms caused by Section 377. They argued that the law's existence prevented LGBTQ+ individuals from fully participating in society, resulting in significant psychological and social impacts. The petitioners emphasised the need for legal recognition of diverse sexual orientations and gender identities, asserting that the freedom to love and live without fear of criminal prosecution is a basic human right.

The Supreme Court's decision to strike down Section 377 was not merely a legal triumph but also a crucial step towards societal acceptance and inclusion. It affirmed that sexual orientation is an intrinsic aspect of personal identity that should be respected and protected by law. The judgement sparked a shift in public discourse, challenging stereotypes and fostering greater empathy and understanding towards LGBTQ+ individuals in India.

Beyond decriminalisation, the Navtej Singh Johar judgement has had far-reaching implications for LGBTQ+ rights in India. It has inspired legislative and policy reforms aimed at ensuring equal rights and protections for LGBTQ+ individuals in various aspects of life, including employment, healthcare, and education. The judgement exemplifies the judiciary's role in advancing social justice and protecting the rights of marginalised communities against societal prejudices and discrimination.

In summary, the Navtej Singh Johar case stands as a landmark decision in India's legal history, marking significant progress towards equality and non-discrimination based on sexual orientation. Through its principled analysis and progressive interpretation of constitutional rights, the Supreme Court reaffirmed India's commitment to justice and dignity for all its citizens, regardless of their sexual orientation or gender identity.

COMPARATIVE ANALYSIS OF PUNISHMENT FOR SEXUAL OFFENCES

The comparative analysis of rape punishment for women and transgender individuals involves examination Indian penal code 1860 and the Transgender Persons (Protection of Rights) Act 2019 to identify the similarities and differences in the punishment. This analysis reveal the disparities in the punishment for rape offences and areas for legal reform to ensure justice and protection regardless of their gender identity.

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The definition for rape offences against women is defined under section 375 of the Indian Penal Code 1860. However, Section 375 does not include rape against transgender. The corresponding punishment for the crime is mentioned under Section 376 of the Indian Penal Code 1860, in which it states that whoever commits rape shall be punished with rigorous imprisonment of either description for a term which [shall not be less than 10 years, but which may extend to imprisonment for life, and shall also be liable to fine].

At the same time, in the Transgender Persons (Protection of Rights) Act, 2019, sexual offences against transgender individuals are defined as sexual abuse, but sexual offences against women are defined as rape under the IPC. Does it mean rape can only be committed against women and not against transgender. This disparities in defining the rape offence raises critical questions regarding the possibility of discrimination within the legal framework and highlights the need for a thorough examination to decide whether the Act effectively addresses the discriminatory practices and challenges faced by transgender individuals in their daily lives.

"However, under Section 18 Clause (d) of the Transgender Persons (Protection of Rights) Act, 2019, state that whoever harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and

economic abuse, shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 2 years and with fine".¹³⁶

Although section 18 clause (d) of the Transgender Persons (Protection of Rights) Act, 2019, provide the punishment for sexual abuse, but doesn't mention the punishment for the rape against Transgender which make the life of transgender more miserable or vulnerable.

Furthermore, the disparity in punishment not only fails to adequately deter sexual violence against transgender individuals but also perpetuates systemic injustice. The absence of specific legal provisions for rape against transgender persons diminishes the gravity of such crimes in the eyes of the law, potentially resulting in lighter sentences or inadequate legal responses compared to cases involving cisgender victims. This legal gap sends a damaging message that crimes against transgender individuals are less serious or deserving of stringent punishment, thereby reinforcing a climate of impunity for perpetrators. Consequently, transgender individuals may be disproportionately targeted for sexual violence as perpetrators exploit these legal loopholes and perceive diminished risks of severe consequences.

Addressing these disparities is imperative not only for ensuring equal protection under the law but also for combating pervasive discrimination and violence based on gender identity. By reforming legislation to explicitly recognize and punish rape against transgender individuals on par with offences against cisgender individuals, society can begin to rectify these inequities. Such reforms are crucial not only for upholding fundamental human rights but also for fostering a legal framework that promotes safety, dignity, and equality for all individuals, regardless of their gender identity or expression. Additionally, robust enforcement of these laws, coupled with comprehensive education and awareness programs, can contribute to a safer environment where all individuals are empowered to report crimes without fear of prejudice or inadequate legal recourse. Thus, achieving justice for transgender victims of sexual violence requires concerted efforts to bridge these legal and societal gaps effectively.

"India's first transgender judge, Swati Bidhan Baruah, stated that the huge discrimination in rape laws and punishment for sexual abuse against transgender is

¹³⁶Transgender Persons (Protection of Rights) Act, 2019 (Act No. 40 of 2019), Section 18 Clause (d).

another way of showing that our life doesn't matter. Furthermore, the author states that the Justice Verma Committee made recommendations in his report that sexual assault on men, as well as homosexuals and transsexuals, is a reality and the provisions have to be cognizant of the same, but it was not included in the final bill of the Criminal Law (Amendment) Act 2013."¹³⁷

In the case of *State of Punjab v. Ramdev Singh* (2004)¹³⁸ Supreme court observed that, the legislators do not just neglect the male population in sexual violence. It is a truth that offences pertaining to sexual assault and rape also affect transgender people. A comprehensive change to the criminal laws is necessary to ensure that victims of all genders have access to fundamental legal protections.

"Police officer refuse to register the rape offence due to inadequacies in law. Despite the enactment of the Transgender Persons (Protection of Rights) Act, 2019, instances occurred in Bhopal in 2020. In which one transgender being gang raped and when it went for register the FIR, the police officer refuse to register it, by stating that there is lack of specific provision of rape in the Transgender Persons (Protection of Rights) Act, 2019."¹³⁹

The Transgender Persons (Protection of Rights) Act, 2019, whose primary objective is to safeguard and protect the rights of transgender people, but lawmakers use different terminology to describe the sexual offence against transgender people, which helps mitigate the punishment. Although this act punished for the sexual abuse cases against Transgender but it also provides lesser punishment which is only 6 months to 2 years. Due to inadequacies in law or lack of specific provision for rape against Transgender, make difficult to law officer to register the complaint.

The Complexity of Transgender Experiences in Society¹⁴⁰

¹³⁷Esha Mitra, India's rape laws don't cover transgender people. They say it's putting them at risk, CNN, (9 December 2020), <https://edition.cnn.com/2020/12/08/india/india-transgender-rape-laws-intl-hnk-dst/index.html> (Last visited on 18 February 2024).

¹³⁸State of Punjab v. Ramdev Singh (2004) 1 SCC 421,424.

¹³⁹Esha Mita, India's rape laws don't cover people. They say it's putting them at risk, CNN, (9 December 2020), <https://edition.cnn.com/2020/12/08/india/india-transgender-rape-laws-intl-hnk-dst/index.html> (18 February 2024).

¹⁴⁰Akshara Harish, Sexual assault against transgender women: Shatter the silence, stop the violence, volume 7 & Issue 11, International Journal of Novel Research and Development (IJNRD) (ISSN: 2456-4184) page 259 (2022).

The sexual attack that occurred in Hyderabad, India on July 8, 2017. Everything started when ten uniformed jawans of Indian Army Officials approached the survivor at a bus stop and started pressuring her to have sex. They assaulted the survivor and pulled her inside the cantonment area when she adamantly refused. Her pleas that she is a trans woman were rejected since they believed her to be a woman. She spent several hours unconscious following this vicious attack. Later, when she and a few other transgender activists demanded that a FIR be registered, they were humiliated at the police station. She was subjected to numerous taunts and acts of humiliation simply because she was transgender. Only after intense pressure from higher officials, FIR was registered.

This case reveals multiple layers of discrimination against transgender individuals in India, highlighting systemic biases and societal stigma. The delay in registering the FIR reflects institutional barriers. From a human rights perspective, it emphasises the urgent need for legal and social reforms to protect transgender individuals from discrimination, ensure sensitive handling by law enforcement, and hold perpetrators accountable.

DIFFICULTIES IN REGISTERING COMPLAINTS, AND POLICE HARASSMENT

In 2020, the National Crime Records Bureau (NCRB) identified 236 transgender victims (or 0.006% of all crime victims), but no occurrences of rape, buying and selling minors for prostitution included trans people. Experts argue that this is not due to a low crime rate, but rather to a lack of documentation of transgender people, which results in a deceptive record of crimes against the group.¹⁴¹

Nonetheless, "even after 2014, only a few transgender persons have their certificates made or documents updated," said LGBT rights campaigner Philip C. Philip. "So, when a crime occurs, the police first review a document with a binary identifier and if any transgender doesn't have proper documentation, then they don't even register their complaint. That is why the recorded number of offences against the transgender population is so low. Further the main reason for not having proper documentation is the lack of education and awareness, a large number of transgender people are uneducated and they don't know the importance of these documents so there is a need

¹⁴¹Vandana Bansal, Why Only 236 Trans Person Victims Of Crimes Were Recorded In India In 2020, INDIASPEND (23 June 2022), <https://www.indiaspend.com/gendercheck/why-only-236-trans-person-victims-of-crimes-were-recorded-in-india-in-2020-823034> (Last visited on 26 April 2024).

to launch the awareness program so that the importance of these documents is known by every individual.¹⁴²

The first obstacle, even after proper paperwork or proof, that an aggrieved transgender person has to face when he goes to file a complaint in the police station is that, what if they harassed in the proceeding or asked pointed questions about their gender identification. Or, "What if there is a need to involve their family or they asked awkward questions?"

So even the first simple step in getting the justice against sexual violence is not really simple in the life of transgender. These are not the exceptional cases but it happens with the large population of transgender. Almost every transgender victim of the sexual violence needs to go with this horrific process to get the justice. One of incident were as follows:

Agencies' Failure in Reporting Cases¹⁴³

Before gaining the confidence to call the police, 'A' endured repeated rapes for almost three months. Her landlord would give her dinner and drinks almost every week, but she would always say no to the sexual abuse as long as she couldn't afford the rent.

After working as an office assistant for a non-profit for roughly three months, she was able to pay her overdue rent a few weeks later. She claimed, "That's when he became abusive and raped me once more." "I made the decision to go to the police the next morning. "She hadn't yet disclosed that she was transgender at the time. She stated she was still wearing shirts and trousers. However, my body language, gestures, and speech patterns were sufficient to convey my sexual orientation. She said that she was made fun of and humiliated at the police station.

"Some men just stared at me, but one of them started singing songs as soon as I walked into the local police station," the she said. She approached a police officer who seemed older than the others and said that she was going to report someone for rape. She remarked, "They asked me to repeat what I had said, and almost everyone laughed

¹⁴²Ibid.

¹⁴³Jigyasa Mishra, Raped, Mocked by Police For Seeking Justice: India's Rape Laws Do Not Cover Transwomen, ARTICLE 14 (7 July 2022), <https://article-14.com/post/raped-mocked-by-police-for-seeking-justice-india-s-rape-laws-do-not-cover-transwomen--62c65919a04a3> (Last visited on 22 April 2024).

aloud." She was about to leave, embarrassed and terrified, when one of the policemen offered to come to the house and talk to the owner in order to assist her.

The next day, 'A' claims, she was raped by the policeman in her landlord's house. She did not resist because she was afraid he would hit her. A police officer who commits rape may face a sentence of harsh imprisonment for a minimum of 10 years, as stipulated under section 376 (2) of the IPC. A, however, was unable to go back to the police station. She was told by the policeman not to visit the police station ever again. She followed orders. "I could never have imagined doing this being in a new city and taking on the ego of a police officer," she remarked. She struggled suicidal thoughts for weeks before moving out of her landlord's house and into a flat with other transgender people. A, who works for a nonprofit that educates the trans community about safe sex and HIV testing, said, "I felt much safer then."

IMPACT ON THE TRANSGENDER COMMUNITY OF THESE PUNISHMENTS.

The impact of inadequate or non-existent punishment for rape offences under the Transgender Persons (Protection of Rights) Act, 2019, has dynamic and multifaceted effects on the transgender community in India. These impacts include increased vulnerability, legal ambiguity, psychological trauma, and heightened health risks.

Firstly, the lack of stringent punishment for rape offences against transgender individuals promotes their vulnerability. Transgender individuals become easy targets for sexual violence as they often lack support from family and friends. In many cases, they have no recourse other than to seek help from police stations, where they frequently face further harassment, and their complaints are often not even registered. This systemic failure leaves them with little to no protection and exacerbates their marginalisation.¹⁴⁴

¹⁴⁴Jigyasa Mishra, Raped, Mocked By Police For Seeking Justice: India's Rape Laws Do Not Cover Transwomen, ARTICLE 14, (7 July 2022), <https://article-14.com/post/raped-mocked-by-police-for-seeking-justice-india-s-rape-laws-do-not-cover-transwomen--62c65919a04a3> (Last visited on 22 April 2024).

Legal ambiguity and reluctance to report crimes further compound the issue. The disparities between the Indian Penal Code of 1860 and the Transgender Persons (Protection of Rights) Act, 2019 create significant hurdles for transgender individuals attempting to file First Information Reports (FIRs) for sexual violence. During the complaint process, they often endure harassment, and the absence of specific legal provisions for rape offences against transgender individuals results in many complaints going unregistered. This legal void not only denies them justice but also perpetuates a culture of impunity for perpetrators.¹⁴⁵

The psychological and emotional impact on transgender individuals is profound. Many suffer from severe depression and mental trauma that can take years to overcome. The lack of family support and the hostile reception at police stations leave them feeling isolated and unprotected. The disparities in punishment for sexual violence make their lives even more miserable, as they navigate a society that offers them no safe haven.

Moreover, the precarious nature of their existence often forces many transgender individuals into sex work, which significantly increases their vulnerability to AIDS and other sexually transmitted diseases (STDs). Unregulated sex work presents numerous challenges, including the lack of decision-making power regarding condom use, control over working conditions, pricing, and hours. As a result, transgender sex workers are at a high risk of contracting STDs. The Ministry of Health classifies transgender individuals as "at risk" and permanently prohibits them from donating blood due to this heightened vulnerability. Additionally, sex workers face frequent assault and harassment from pimps, goons, and police officers, who often fail to report or take action on their complaints of sexual harassment, further increasing the incidence of such crimes.¹⁴⁶

Additionally, the socioeconomic marginalisation of transgender individuals in India exacerbates their vulnerability. Many transgender people face discrimination in education and employment, leading to limited economic opportunities and pushing them into precarious livelihoods such as begging or sex work. This economic instability

¹⁴⁵Akshara Harish, Sexual assault against transgender women: Shatter the silence, stop the violence, volume 7 & Issue 11, International Journal of Novel Research and Development (IJNRD) (ISSN: 2456-4184) page content 261 (2022), <https://www.ijnrd.org/papers/IJNRD2211127.pdf>.

¹⁴⁶Mansi Singh, Transgender Persons and Public Spaces: Lack of Protection from the Law, CENTER FOR LAW AND POLICY RESEARCH (22 April 2024), <https://clpr.org.in/blog/transgender-persons-and-public-spaces-lack-of-protection-from-the-law/> (Last visited on 22 April 2024).

makes them more susceptible to exploitation and abuse, as they often have no choice but to rely on unsafe and informal sectors for their survival. The lack of financial independence and social security leaves them at the mercy of those who exploit their marginalised status, further perpetuating a cycle of violence and poverty.

The inadequate legal framework also undermines efforts to integrate transgender individuals into mainstream society. Without robust legal protections, initiatives aimed at promoting the rights and welfare of transgender people, such as affirmative action in education and employment or public awareness campaigns, are less effective. The absence of strong legal deterrents against sexual violence not only fails to protect transgender individuals but also signals societal indifference towards their plight. To foster a more inclusive society, it is imperative to strengthen legal protections and ensure that transgender individuals can live with dignity and security, free from fear of violence and discrimination. By addressing these systemic issues, India can make significant strides towards achieving true equality and justice for all its citizens.

In summary, the inadequate legal provisions for punishing rape offences against transgender individuals under the Transgender Persons (Protection of Rights) Act, 2019, lead to significant and multifaceted adverse effects on the transgender community in India. These include increased vulnerability to violence, legal hurdles in seeking justice, severe psychological trauma, and heightened health risks, all of which contribute to their continued marginalisation and suffering. To address these issues, it is crucial to amend the existing laws to provide specific and stringent punishments for crimes against transgender individuals, ensuring their protection and access to justice.

CONCLUSION

Through this chapter, we can conclude that disparities in terminology based on gender identity have drastically impacted the lives of transgender people. Firstly, inadequate legal provisions for rape offenses against transgender individuals lead to increased vulnerability. Transgender people become easy targets for sexual violence because perpetrators know that transgender individuals have lack of family and friend support systems that women have, so no big action can be taken against them.

Secondly, even after experiencing sexual violence, transgender individuals often face refusal from police officers to register their complaints because the Transgender Persons (Protection of Rights) Act, 2019, does not include specific punishments for rape offenses against them. Additionally, if they lack proper identification documents, the police still refuse to register the complaint. Moreover, it is frequently observed that when transgender people attempt to file a complaint, police officers judge them based on their clothing, language, and appearance, leading to further harassment at the police station.

Thirdly, many transgender individuals are involved in sex work for their livelihood, where they have no control over the use of condoms, circumstances, prices, hours, or locations. This lack of control leads to sexual violence and harassment, resulting in AIDS and other STDs. Consequently, the Ministry of Health categorises transgender people as "at risk" and permanently prohibits them from donating blood. In India, if anyone needs blood for medical purposes, the family is required to donate blood first to maintain the blood bank supply. Only then can someone receive the blood of their choice or blood group. However, because transgender people are prohibited from donating blood, it becomes very difficult for them to obtain blood in emergency situations due to these conditions.

In this way, it can be concluded that the whole life of the transgender person suffers due to the absence of a proper law for rape offences against transgender. The disparities in defining sexual offences against transgenders and women, on the basis of their gender identity is a clear violation of Article 14, 15 and 21. From the beginning to the end of life, the transgender community's right to life and right to a dignified death are often violated, under Article 21 of the Constitution.

CHAPTER VI

CONCLUSION

This dissertation examined the critical issue of the different terminology used to describe sexual offences against women and transgenders in India. While, Section 375 of the Indian Penal Code (IPC), offences against women are termed as "rape", at the same time similar offences against transgender individuals are labeled as "sexual abuses" under Section 18 clause (d) of the Transgender Persons (Protection of Rights) Act. This disparity often results in lesser punishment for sexual crimes against transgender people, which is evident from the differing punishments provided for both of the offences.

The Transgender Persons (Protection of Rights) Act, 2019, was enacted in India to safeguard the rights of transgender individuals. While the Act includes provisions for anti-discrimination measures and guarantees access to education, employment, and healthcare, its effectiveness in addressing sexual offences specifically is debated. Critics argue that the Act lacks specificity regarding the punishment of sexual offences against transgender individuals, leading to inadequate legal protection. The distinction between terms like "rape" and "sexual abuse" in legal statutes often results in lighter penalties for crimes against transgender people, highlighting a significant gap in achieving true gender equality. Further research and policy reforms are necessary to ensure that transgender individuals receive equal protection under the law for sexual offences. This includes standardising legal terminology and ensuring that all victims of sexual crimes, regardless of gender identity, are afforded the same level of justice and protection.

Transgender people have existed since ancient times, but the recognition and acceptance of transgender individuals have evolved over time. Historically, dressing as the opposite gender and being transgender were often punishable by severe penalties, including death. While the modern concept of transgender identity didn't exist in ancient times, societal norms have changed, leading to greater exploration and acceptance of gender diversity. In the modern era, research into transgender identities and sexuality has developed significantly. Some researchers have viewed transgender identity as a mental disorder requiring surgical treatment, while others, such as Magnus Hirschfeld, have advocated for equal rights for transgender individuals. The 20th and 21st centuries have

seen significant advancements in legal and policy recognition of transgender people, who are increasingly acknowledged and affirmed in various societies worldwide. Despite this progress, transgender individuals still face numerous challenges, including issues of legal recognition and access to medical care. One notable disparity exists in the legal terminology used for sexual crimes, with "rape" often used for women and "sexual abuse" for transgender individuals. This distinction reflects societal biases and can lead to lesser punishments for crimes against transgender people. Addressing these disparities is crucial for ensuring gender equality and protecting the rights of all individuals, regardless of gender identity. The history of transgender people is marked by resistance and progress across social, economic, and political domains. While substantial changes have been made, the journey toward full equality for transgender individuals continues. Ensuring non-discrimination on the basis of gender identity requires rectifying current legal and policy shortcomings and establishing gender-neutral protections.

Disparities in Legal Terminology: Rape vs. Sexual Abuse in Indian Law

The Indian Criminal Justice System has evolved over centuries to encompass the police, judiciary, and prisons, crucial for maintaining law and order, justice, and offender rehabilitation. Central to its framework is Section 375 of the Indian Penal Code (IPC), which defines rape and emphasizes the importance of consent in sexual offences. However, disparities arise in how these offences are categorized: while offences against women are often termed "rape" under the IPC, the Transgender Persons (Protection of Rights) Act uses "sexual abuse" for similar offences against transgender individuals. This difference in terminology suggests potential discrimination and raises questions about the adequacy of legal protections for transgender people.

The IPC includes provisions beyond rape, such as assault with intent to outrage modesty (Section 354), sexual harassment (Section 354A), and stalking (Section 354D), focusing primarily on offences against women. In contrast, the Transgender Persons (Protection of Rights) Act, 2019 lists physical abuse, sexual abuse, verbal abuse, and emotional abuse as specific offences against transgender individuals. Such disparities in legal terminology may result in varying levels of punishment and protection for transgender individuals compared to women.

The study reveals significant disparities in the criminal legal system regarding punishments for sexual offences against women and transgender individuals in India. While the IPC provides a detailed framework for offences against women, including stringent penalties under the term "rape," the Transgender Persons (Protection of Rights) Act uses broader and potentially less severe terms like "sexual abuse." This distinction can lead to lighter punishments for similar offences against transgender individuals, highlighting systemic biases and inadequate legal protections.

Further analysis indicates a need for legislative reforms to standardise terminology and ensure equal treatment under the law for all genders. By addressing these disparities, India can enhance legal protections and promote justice for transgender individuals, aligning with principles of equality and human rights in the criminal justice system.

Comparative Analysis of Legal Frameworks: India vs. Canada on Transgender Rights and Sexual Offences

This chapter explores significant disparities between India's and Canada's legal frameworks concerning rape punishment and the treatment of transgender individuals. Canada has adopted progressive gender-neutral laws that offer substantial legal recognition and protection for transgender rights. These laws are supported by inclusive judicial interpretations that ensure consistent treatment and support services for victims of sexual assault, regardless of their gender identity. Canada's approach reflects a comprehensive effort to safeguard the welfare of transgender individuals who have experienced sexual abuse, underpinned by accessible reporting mechanisms and educational programs on sexual assault.

In contrast, India's legal landscape, despite landmark decisions like the NALSA judgement and the enactment of the Transgender Persons (Protection of Rights) Act 2019, faces significant implementation challenges. These challenges, coupled with persistent societal stigma, obstruct transgender individuals' access to justice. Importantly, India employs different legal terms and frameworks for addressing sexual offences based on gender identity. While the Transgender Persons Act uses the term "sexual abuse," the Indian Penal Code's Section 375 applies the term "rape" specifically to women. This discrepancy highlights explicit discrimination against transgender individuals, recognized as the third gender in India's legal system.

Overall, while Canada demonstrates a proactive stance with gender-neutral laws and inclusive support mechanisms for victims of sexual offences, India grapples with implementation gaps and societal biases that hinder the effective protection of transgender rights. The contrasting legal approaches underscore the broader challenges and disparities in ensuring justice and equality for transgender individuals across different legal systems.

The Impact of Legal Terminology on Transgender Vulnerability to Sexual Violence

In this chapter, the stark disparities in legal terminology based on gender identity profoundly impact the lives of transgender individuals in India. Unlike the Indian Penal Code (IPC), which categorizes sexual offences against women as "rape" with stringent punishments, the Transgender Persons (Protection of Rights) Act, 2019 uses the term "sexual abuse" for similar offences against transgender individuals. This distinction potentially leads to lighter punishments and exacerbates the vulnerability of transgender people to sexual violence. Moreover, transgender individuals often encounter significant hurdles when attempting to report such crimes. Police officers may refuse to register their complaints due to the absence of specific legal provisions under the Transgender Persons Act and often exhibit discriminatory behaviour based on the appearance and gender expression of the complainant.

Furthermore, many transgender individuals are marginalized into precarious occupations like sex work, where they face heightened risks of sexual violence and health issues such as HIV/AIDS due to lack of control over their working conditions. The stigma associated with their gender identity further perpetuates discriminatory practices, including a permanent ban on blood donations, which severely limits their access to essential medical services in emergencies. These systemic injustices not only violate the fundamental rights enshrined in Articles 14 (right to equality before the law), 15 (prohibition of discrimination on grounds of sex, among others), and 21 (right to life and personal liberty) of the Indian Constitution but also perpetuate a cycle of marginalisation and inequality throughout the lives of transgender individuals.

The research questions posed in this study underscore the legal and societal ramifications of these disparities. Firstly, the distinction between "rape" and "sexual abuse" in legal frameworks for women versus transgender individuals diminishes the

severity of offences and fails to provide equal protection under the law. This disparity highlights systemic discrimination against transgender individuals, contributing to their increased vulnerability to sexual violence and inadequate legal recourse. Secondly, the conflict between the general provisions of the IPC and the special provisions of the Transgender Persons Act regarding punishment for sexual offences further complicates legal enforcement and undermines efforts to ensure justice for transgender victims.

Addressing these issues requires comprehensive legal reforms to harmonise terminology and strengthen protections specifically tailored to the needs of transgender individuals. Establishing clear definitions and stringent penalties within the legal framework is essential to combating discrimination and ensuring equal rights for all genders in India. By aligning legislative measures with constitutional guarantees of equality and non-discrimination, the country can take decisive steps towards fostering a more just and inclusive society where the rights and dignity of transgender individuals are respected and protected at all stages of life.

"Revealing Disparities: A Closer Look"

The differential terminology used to describe sexual offences "rape" for women and "sexual abuse" for transgender individuals reflects a deeply rooted discrimination based on gender identity. This issue, central to this dissertation, highlights the systemic challenges transgender individuals face in their pursuit of justice and equality.

Transgender people encounter significant barriers when seeking legal recourse for sexual violence. The use of different terms for similar offences not only diminishes the perceived severity of crimes against transgender individuals but also exposes them to greater vulnerability and injustice. These disparities are a blatant violation of Articles 14, 15, and 21 of the Indian Constitution, which guarantee equality before the law, prohibit discrimination on grounds such as religion, race, caste, sex, or place of birth, and protect life and personal liberty.

The hypothesis posed in this dissertation that the differential terminology used in defining sexual offences in the IPC and the Transgender Persons (Protection of Rights) Act is discriminatory against transgender individuals holds true. The legal and societal treatment of transgender individuals underscores the urgent need for comprehensive reforms.

Transgender individuals deserve equal protection under the law. The government must enact and enforce laws that adequately safeguard their rights and provide proper protection against sexual violence. Addressing this issue requires not just legal changes but also a societal shift in attitudes toward transgender people. Transphobia and discrimination must be actively countered through education, awareness, and support.

Achieving true equality demands a concerted effort from both the government and society. Legal reforms must be accompanied by initiatives that promote respect, acceptance, and understanding of transgender individuals. This includes creating safe spaces, providing support services, and ensuring that transgender voices are heard and valued.

The journey towards full equality for transgender individuals is ongoing. It requires persistent and dedicated efforts to transform societal attitudes and legal frameworks to ensure a fair and just environment for everyone, regardless of their gender identity. Only by working together can we build a society that genuinely upholds the principles of equality and justice for all its members.

A LEGAL PATH OF EQUALITY BEFORE LAW

The differing terminology in the IPC and the Transgender Persons (Protection of Rights) Act highlights equality and discrimination issues. Two key suggestions are: reforming legal language to ensure equal severity for sexual offences and promoting societal acceptance and support for transgender individuals through education and awareness programs.

Equal Punishment for Sexual Violence:

To ensure equal punishment for sexual violence against transgender individuals, several key changes are necessary. Firstly, the Transgender Persons (Protection of Rights) Act should explicitly recognize offences equivalent to “rape.” By using consistent terminology with the IPC, transgender individuals would receive the same legal protection as cisgender women, affirming the seriousness of the crimes and acknowledging their equal rights. Secondly, the Act should prescribe penalties for sexual offences against transgender individuals that mirror those for cisgender women, ensuring that the severity of punishment remains consistent across all genders and reinforcing the principle of equal justice.

Conducting awareness campaigns and training programs for law enforcement officials, judges, and legal professionals is also crucial. These initiatives would sensitise them about transgender rights and the need for equal protection, fostering a more supportive and understanding legal environment. Furthermore, establishing accessible reporting mechanisms specifically for transgender victims of sexual violence would ensure their complaints are taken seriously and investigated promptly, providing them with the necessary support and legal recourse.

These steps are essential to protect the rights and dignity of transgender individuals, ensuring they receive the justice and protection they deserve. By addressing these issues, we can create a more inclusive and equitable legal system for all.

Gender-Neutral Legislations:

To promote equality and protect the rights of all individuals, regardless of their gender identity, a comprehensive approach to gender-neutral legislation is essential. This involves developing a legal framework that addresses all forms of sexual offences without regard to the victim's gender identity. Such a framework should encompass crimes like rape, sexual assault, harassment, and other related offences, ensuring that every individual is equally protected under the law.

Inclusive definitions are crucial in this context. Sexual offences should be defined in a manner that does not rely on binary gender categories. The language used must be inclusive of all genders, focusing on consent, bodily autonomy, and the violation of personal boundaries. This shift in terminology would ensure that the law recognizes and addresses the experiences of all individuals, including transgender and non-binary people.

Sensitivity training for legal professionals, police officers, and judiciary personnel is another key aspect. Training programs should cover gender diversity and the unique challenges faced by transgender individuals. This would promote fair treatment during legal proceedings and enhance the understanding and empathy of those who enforce the law.

Community involvement is equally important. Transgender advocacy groups, NGOs, and community members should be actively involved in the drafting and

implementation of gender-neutral legislation. Their input would ensure that the laws reflect the needs and experiences of the transgender community, making the legal protections more effective and inclusive.

Implementing these suggestions would mark a significant step towards true equality. A gender-neutral legal framework would not only protect the rights of transgender individuals but also promote a more just and inclusive society. It would signal a commitment to upholding the dignity and rights of every person, regardless of their gender identity, and ensure that all individuals receive equal protection and justice under the law.

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