"Invisible Victims: Examining the Legal Vacuum in Workplace and Sexual Offences Against Transgender Persons Under the BNS, 2023 And the POSH Act, 2013"

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ABSTRACT

The persistent exclusion of transgender persons from India's legal framework governing workplace sexual harassment and sexual offences raises serious concerns regarding equality, dignity, and access to justice. This article examines the Protection of Women from Sexual Harassment at Workplace Act, 2013, the Bharatiya Nyaya Sanhita, 2023, and the Transgender Persons (Protection of Rights) Act, 2019 to identify the legislative and institutional gaps that deny transgender survivors effective legal protection. The study adopts a doctrinal research methodology, relying on constitutional provisions, statutory analysis, judicial precedents, comparative legal frameworks, and secondary sources to evaluate the adequacy of existing laws. It argues that despite constitutional recognition of gender identity, the continued reliance on gender-specific definitions of workplace harassment and rape, coupled with procedural and institutional barriers, creates a legal vacuum that undermines substantive equality. The article concludes by advocating gender-inclusive reforms to criminal law, workplace harassment legislation, and enforcement mechanisms to ensure comprehensive legal protection and equal access to justice for transgender persons in India.

Keywords: Transgender Rights; Sexual Harassment at Workplace; Bharatiya Nyaya Sanhita, 2023; POSH Act, 2013; Gender-Inclusive Criminal Law; Access to Justice

INTRODUCTION

The promise of equality under the Indian Constitution is measured not only by the rights it guarantees, but also by the extent to which those rights are experienced by those living on the margins of society. Among the communities that continue to face profound legal and social exclusion are transgender persons, whose struggle for dignity extends far beyond formal recognition of their identity. Although the Supreme Court's landmark decision in *National Legal Services Authority v. Union of India* (2014) and the enactment of the Transgender Persons (Protection of Rights) Act, 2019 marked significant milestones in affirming gender identity and prohibiting discrimination, legal recognition has not translated into equal protection against sexual violence. The reality remains that many transgender persons continue to encounter harassment in workplaces, public institutions, police custody, healthcare facilities, and other spaces where the law is expected to provide security rather than indifference.

This disconnect becomes particularly evident within India's legal framework governing sexual offences. The Protection of Women from Sexual Harassment at Workplace Act, 2013 continues to restrict its protection to an "aggrieved woman," while the Bharatiya Nyaya Sanhita, 2023 retains a gender-specific definition of rape, leaving transgender survivors without an effective legal remedy for many forms of sexual violence. The repeal of Section 377 of the Indian Penal Code has further widened this gap by removing the only provision that previously addressed certain non-consensual sexual acts against male and transgender victims. Consequently, survivors are often compelled to rely on general offences relating to hurt or assault, reducing grave violations of bodily autonomy to ordinary physical injuries.

This article critically examines the legal framework governing sexual offences against transgender persons in India by analysing constitutional principles, statutory provisions, judicial precedents, and comparative international practices. It argues that meaningful equality requires more than symbolic recognition of gender identity; it demands a legal system that protects every individual from sexual violence irrespective of gender. By identifying the existing legislative and institutional shortcomings, this study proposes reforms aimed at building a more inclusive, rights-based criminal justice framework that reflects the constitutional values of dignity, equality, and equal protection of the laws.

WHERE ARE THEY RECOGNISED

For transgender persons in India, recognition didn't begin with a law. It began in a courtroom, with a single sentence that changed everything on paper, if not yet in practice: your gender is yours to define. In 2014, the Supreme Court's judgment in *National Legal Services Authority v. Union of India*[1] said something Indian law had never quite managed to say before that gender isn't something the state hands out based on a body it never bothered to examine, but something a person gets to name for themselves. The Court recognised transgender persons as a "third gender," free to self-identify without proving anything to a doctor, a bureaucrat, or a judge. It rooted this in the Constitution itself equality before the law under Article 14[2], protection from discrimination under Article 15[3], the freedom to express one's identity under Article 19[4], and the right to dignity and self-determination folded into Article 21's promise of life and personal liberty.[5] For the first time, four Articles that had existed for decades were finally read to include people the law had spent those same decades pretending not to see.

That recognition took a while to become something you could hold a certificate, a section number, a right written into a statute. It arrived, eventually, as the Transgender Persons (Protection of Rights) Act, 2019, in force from 10 January 2020. Section 2(k) tries to define who the Act is even for: a person whose gender doesn't match the one assigned at birth, a definition that reaches trans-men and trans-women whether or not they've had surgery or hormone therapy, intersex persons, genderqueer persons, and those carrying older socio-cultural identities like kinnar, hijra, aravani, and jogta.[6] Section 4 goes a step further, promising every transgender person the right to a self-perceived gender identity the *NALSA* principle, finally written into black-letter law.[7] But the promise comes with fine print. Section 4(2) still asks for a District Magistrate's certificate before that self-identified status counts for anything a small bureaucratic gatekeeper standing in the doorway of a right the Supreme Court had already said didn't need one.[8] Critics have pointed out how uncomfortably this sits next to

[1] *Nat'l Legal Servs. Auth. v. Union of India*, (2014) 5 SCC 438 (India).
[2] INDIA CONST. art. 14.
[3] INDIA CONST. art. 15.
[4] INDIA CONST. art. 19(1)(a).
[5] INDIA CONST. art. 21.
[6] The Transgender Persons (Protection of Rights) Act, No. 40 of 2019, § 2(k) (India).
[7] The Transgender Persons (Protection of Rights) Act, No. 40 of 2019, § 4 (India).
[8] Id. § 4(2).

Justice K.S. Puttaswamy v. Union of India (2017), the same court's own ruling that privacy, including the privacy to decide who you are, is a fundamental right.[9]

India isn't alone in this slow, uneven process of catching up. Nepal, Malta, and the UK have all, in their own time and their own ways, moved toward recognising gender beyond the binary some years ahead of India, some by very different legal paths. It's a comparison worth returning to later in this paper, because recognition, it turns out, is the easy part. What comes after is where most countries India included start to struggle.

SEXUAL HARASSMENT OF TRANSGENDER IN INDIA

India has been making slow progress in improving the lives of trans people for more than a decade, recognising the community as a "third gender" in 2014 and enacting the act for them. In India, it has been come to noted that one of the biggest loopholes in recognising the rights of transgender is that they face discrimination at workplaces. But as per the legal aspect, only Sexual Harassment of Women at Workplace Act, 2013 (POSH) is being recognised. This act lacks complete gender-neutrality. Section 2(a) of the POSH Act recognises the complainant to be an 'aggrieved woman', thereby excluding the possibility of the transgender persons to the subject of this definition.[10] This act has also not tried to define 'women' from which it can be interpreted that there is no legal jurisdiction to proceed against a complaint filed by any other person belonging to any other gender. This all contradicts with the Transgender Persons (Protection of Rights) Act, 2019 which prohibits discrimination against transgender in educational institutions, workplaces or any other place having similar setting as stated in Section 9 of the Act.[11] Also, it violated their fundamentals rights- Article 14, 15 and 16 as these were constructed to include "gender identity" thus prohibiting discrimination based on sexual orientation.[12] As mentioned in the case of Anamika v. Union of India (2020), Delhi HC mentioned that all transgender persons can seek protection under all the sections of the IPC protecting women from sexual abuse.[13] Similarly, in Ms. X v. State of Uttarakhand (2019) the court recognised that sexual harassment laws extend to all individuals who identify as women.[14] The court acknowledged that rape applies to trans women as well. Organisations

[9] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1 (India).
[10] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, No. 14 of 2013, § 2(a) (India).
[11] The Transgender Persons (Protection of Rights) Act, No. 40 of 2019, § 9 (India).
[12] INDIA CONST. arts. 14–16.
[13] *Anamika v. Union of India*, Delhi High Court (2020).
[14] *Ms. X v. State of Uttarakhand*, Uttarakhand High Court (2019).

should reorganise transgender persons as human beings as human beings and not judge them based on their gender preference. It is even noticed that transgender face harassment within their own community as well. Their legitimate authoritarian 'Guru' forces their 'Chela' into prostitution. But many complaints remain unnoticed and unregistered as those persons are stuck in the loophole of unavailability of the income source and financial necessity. It follows that if we fail to protect the rights of transgender persons in India against sexual harassment then we will certainly fail to protect the rights of everyone else.

EMPLOYER LIABILITY AND VICARIOUS LIABILITY DOCTRINE

It is recognised that POSH compliance and transgender inclusion aren't optional policies rather they are now statutory governance responsibilities. The Code on Wages, 2019[15] and Social Security Code, 2020[16] prohibit discrimination. Every individual, whatever their identity, is entitled to equal pay. It is also seen that in many companies their working policies include the statement that they include working environment for 'both the sexes. It has been noticed when the claimant (a transgender person) files a complaint regarding the discrimination faced in the workplace, it is dismissed based on sex identity. In Fischer v. London United Busways Limited, a claimant emailed HR department applying for the job.[17] After the claimant was requested that she make his job application by telephone rather than online due to her identity. Similarly, the employers must honour and respect transgender and non-binary employee's requests regarding their gender identity and personal pronouns.

RAPE AND SEXUAL OFFENSES UNDER BNS

On July 1, 2024, India's criminal justice system underwent one of its most significant transformations in over 150 years, as the Bharatiya Nyaya Sanhita replaced the Indian Penal Code. It was billed as a clean break from a colonial-era code a chance to write criminal law for a modern, constitutionally aware India. And yet, on the question of rape, the new code chose continuity over change. Section 63 still defines rape in exactly the terms the IPC once did, an act committed by a man against a woman.[18] Section 64 carries the punishment forward on that same footing.[19] Nowhere in this framework is a man or a transgender person recognized as someone who can be raped in the eyes of the law not because such violence doesn't happen to

[15] The Code on Wages, No. 29 of 2019 (India).
[16] The Code on Social Security, No. 36 of 2020 (India).
[17] *Fischer v. London United Busways Ltd.* (Emp. Trib.)
[18] The Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63 (India).
[19] Id. § 64.

them, but because the statute simply never contemplated it. In effect, rape has become a non-offence when the victim is male or transgender, regardless of how forcibly or violently the act was committed.

That omission sits uneasily with the Constitution the BNS is meant to operate under. Article 14 guarantees equality before the law and prohibits arbitrary classification, and it's hard to see what legitimate purpose is served by a law that protects one gender's bodily autonomy while leaving another's entirely unaddressed. Sexual violence causes the same devastation regardless of who it happens to the same violation of dignity, the same trauma, the same rupture of a person's sense of safety in their own body. A law that recognizes this harm for one group and not another isn't drawing a reasoned distinction; it's drawing an arbitrary one, and arbitrary classifications are precisely what Article 14 exists to catch.[20]

The consequence of this gap plays out starkly in how the law treats male and transgender survivors. Instead of falling under Sections 63 and 64 the provisions built with real sentencing weight and a legal vocabulary that names the offence for what it is their experience is folded into Sections 114 and 115 of the BNS, the general provisions on voluntarily causing hurt and grievous hurt.[21] A rape, in other words, gets processed by the system as if it were a physical injury rather than a sexual violation. It's a strange and telling substitution: the law has language sophisticated enough to distinguish degrees of hurt, but not enough to acknowledge that what happened was rape at all.

This wasn't inevitable. The BNS itself, under Section 10, widened its own definition of "gender" to expressly include transgender persons proof that the drafters could think beyond the binary when they chose to.[22] And it wasn't as though a gender-neutral option had never existed: Section 377 of the old IPC, whatever its troubled history of being weaponized against consensual same-sex relationships, had at least functioned as the only provision under which non-consensual acts against men or transgender persons could be prosecuted as a sexual offence.[23] When the BNS repealed it outright and put nothing in its place, it didn't just clean up an outdated law; it quietly closed the one door that had existed. Section 18 of the Transgender Persons (Protection of Rights) Act, 2019 remains on the books alongside all this, but it was

[20] INDIA CONST. art. 14.
[21] The Bharatiya Nyaya Sanhita, No. 45 of 2023, §§ 114–115 (India).
[22] Id. § 10.
[23] Indian Penal Code, No. 45 of 1860, § 377 (India) (repealed).

written to address discrimination and general harm, not sexual violence, and was never built to carry the weight of a rape charge.[24]

NON-REGISTRATION OF CASES OF OFFENCES AGAINST TRANSGENDERS

The real-time effectiveness of any legal system depends upon the ability to provide equal access to justice to every individual, irrespective of their gender identity. However BNS under Sec 199(c) criminalise refusal to record any FIR[25] , but only for closed list of cognizable offence including Section 64,65,66,67,68,70,71,76,124,143 and 144, concise only to women specific offences and there is no such provision that touches transgender specific offences as a result of which a 2025 study in the journal Transgender Health, drawing on a 2014-15 survey of 4,964 transgender persons, found 27.2% had experienced physical violence and 22.3% sexual violence in the preceding 12 months alone. That gap between lived incidence and recorded cases is the empirical signature of the non-cognizable problem and itself evidences towards lack of applicability.

Moreover, the Section 18 of Transgender Person Act is itself both non cognizable and bailable offences, making it convenient for official to escape the stress.[26] The police official who refuses to record a transgender complainant's information faces no analogue of the criminal liability that would attach for refusing to register a complaint of rape, acid attack, or trafficking against women

Another significant issue is struggled to obtain valid transgender identity certificates as it is mandatory to be recognised by the police and medical officials and in India most of the people belonging to this community does not have such authorised certificate which would establish their identity.

MEDICO-LEGAL EXAMINATION PROTOCOLS

In India, courts always try to protect the dignity rape survivors. Earlier, doctors used ‘TWO-FINGER TEST, to examining the rape victim. A test to check the women physically that is she was ‘used to sex’ and using that guess to question whether she had really been raped. It has no scientific basis and the very examination meant to help the survivor ends up hurting her instead.

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[24] The Transgender Persons (Protection of Rights) Act, No. 40 of 2019, § 18 (India).
[25] The Bharatiya Nyaya Sanhita, No. 45 of 2023, § 199(c) (India).
[26] The Transgender Persons (Protection of Rights) Act, No. 40 of 2019, § 18 (India).

Researchers call this secondary victimization: harm caused not by the original crime, but by the very system meant to protect her. It questioned in *Lillu v. State of Haryana (2013)*[27], but it took a second ruling in case *State of Jharkhand v. Shailendra Kumar Rai @ Pandav Rai*[28], 2022 to make the test punishable and finally push for real training. Calling it a violation of a survivor's privacy, dignity, and bodily integrity, and even pointing to international human rights agreements to support this.

Soon after the 2013 ruling, the Ministry of Health issued an official guideline for doctor, how should they examine rape or sexual assault survivors and astonishing this guideline have a whole section for transgender and intersex survivors, affirming that gender identity must be respected regardless of a person's anatomy.[29]

But being named on paper is not the same as being protected in practice. A 2017 Human Right Watch investigation found that only 9 out of 28 had adopted these guidelines and this research entirely focused on cisgender women, never once asked what was happening to transgender survivors.[30] That silence speaks for itself. If the very group these guidelines centred was already being failed, and no one thought to check on the group mentioned only in smaller, secondary section, transgender survivors were likely to being ignored twice over, once by the hospitals, and once by the researchers meant to hold them accountable. A 2019 Canadian study confirms this isn't a hypothetical concern: even in well-funded hospitals with trained staff, only a third let transgender survivors register as such, and just 15% used documentation designed for their bodies.

CUSTODIAL AND INSTITUTIONAL VIOLENCE

When Section 377 IPC was dropped after the commencement of BNS on 1st July 2024, there was no gender-neutral sexual assault provision, the Parliamentary Committee specifically recommended retaining section 377 to address non-consensual act against males and transgender persons.[31] In the Kurukshetra Case, June 2026 the vacuum that operates in real time was addressed when a 30-year-old Bank employee who was cisgender and undergoing

[27] *Lillu @ Rajesh v. State of Haryana*, (2013) 14 SCC 643 (India).
[28] *State of Jharkhand v. Shailendra Kumar Rai @ Pandav Rai*, (2022) 14 SCC 299 (India).
[29] Ministry of Health & Family Welfare, Government of India, *Guidelines & Protocols: Medico-Legal Care for Survivors/Victims of Sexual Violence* (2014).
[30] Janice Du Mont, Sarah D. Kosa, Rebecca Abavi, Hannah Kia & Sheila Macdonald, *Toward Affirming Care: An Initial Evaluation of a Sexual Violence Treatment Network's Capacity for Addressing the Needs of Trans Sexual Assault Survivors*, 36 J. Interpersonal Violence NP12436 (2021).
[31] Indian Penal Code, No. 45 of 1860, § 377 (India).

chemotherapy alleged that he was sexually assaulted by police officials inside police station, despite allegations of sodomy his complaint was registered only under Section 114 BNS, this clearly depicts the major issue of non-recognition of their cases.

In M Shrinivasan v. State (2015) case a transwomen was physically assaulted in a public office, but the alleged person appealed for quashing of FIR in High Court on the ground that transwomen should not be considered as women rejecting the eligibility to be considered as victim of sexual offences.[32] However Hon'ble HC dismissed the appeal on the grounds of self-determination of gender and upheld the application of harassment laws must extend to anyone who identifies as women.

Unlike physical violence, the institutional violence is often integrated within everyday system, making it less visible but ever more damaging. The exclusion of transgender person from equal legal protection, harassment in police stations, denial of healthcare, workplace discrimination are the barriers in accessing justice. The Supreme court, in *NALSA V. Union of India*[33] recognised that gender identity is an integral component of the rights to dignity, equality and personal liberty under Article 14,19,21. However eliminating institutional violence requires comprehensive legal reforms, gender inclusive legislation, and effective implementation of anti-discrimination measures.

COMPARATIVE ANALYSIS

Looking beyond India's borders, it becomes clear that the rest of the world has largely moved past the binary framing that still shapes both the POSH Act and the BNS. The UK is a useful starting point here, because it tackles the problem from two directions at once. On the criminal side, the Sexual Offences Act, 2003 defines rape and sexual assault without tying them to a particular gender anyone can be a victim, anyone can be an offender.[34] On the civil and workplace side, the Equality Act, 2010 does something similar, describing harassment simply as "unwanted conduct which violates someone's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment."[35] Notice what's missing from that definition there's no mention of "women" or "female employees." That's exactly the kind of double coverage India doesn't have, POSH protects women at work, the BNS protects women (and to

[32] *M. Srinivasan v. State*, Madras High Court (2020).
[33] *Nat'l Legal Servs. Auth. v. Union of India*, (2014) 5 SCC 438 (India).
[34] Sexual Offences Act 2003, c. 42 (U.K.).
[35] Equality Act 2010, c. 15 (U.K.).

a limited extent, transgender persons) from sexual violence, but nowhere do the two frameworks meet to protect everyone else.

Malta takes this even further. Its GIGESC Act, 2015 is built entirely around the idea of self-determination a person's stated gender identity is simply taken as fact, no medical or judicial gatekeeping required and this gender-neutral approach isn't confined to one law but runs across Malta's entire legal system.[36] Nepal tells a slightly more complicated story. The *2007 Pant v. Nepal* decision was genuinely groundbreaking for South Asia, recognising self-identified gender years before most of the region even began the conversation.[37] Scotland, meanwhile, is still fighting its own version of this battle the Gender Recognition Reform Bill remains politically contested but its Equality Act protections continue to function in the background regardless of how that debate ends.

RECOMMENDATION

If India is serious about closing the gap this article has traced, the fixes don't need to be radical they need to be consistent. The first step is a simple one, extend Internal Complaints Committees, currently built only around "aggrieved woman" under the POSH Act, so transgender employees can actually walk through that same door and file a complaint, rather than being left to the mercy of informal HR goodwill. The second is to bring the same logic to campuses, where transgender students report some of the highest rates of harassment of any group UGC regulations need a gender-neutral redressal mechanism with the same teeth, timelines, and confidentiality currently promised only to women. But the recommendation that cuts deepest is also the simplest to state, if a transgender person can be named the accused in a rape case, tried, and sentenced like anyone else, then the law has clearly already decided it can see them. The refusal to extend that same clarity of vision to them as victims is not a technical oversight it's a double standard the law has no honest justification for. Fixing this means rewriting sections 63 and 64 of the BNS in gender-neutral terms, so that culpability and victimhood are finally judged by the same yardstick.[38] Alongside these three changes, a few others would matter just as much: reinstating a dedicated, consent-based offence to replace what Section 377 once covered before its repeal left nothing behind; requiring the NCRB to start recording crimes against transgender persons as its own category, since a problem the data

[36] Gender Identity, Gender Expression and Sex Characteristics Act, Cap. 540 (Malta).
[37] *Sunil Babu Pant v. Nepal Government*, Writ No. 917 of 2007 (Sup. Ct. Nepal).
[38] The Bharatiya Nyaya Sanhita, No. 45 of 2023, §§ 63–64 (India).

doesn't see is a problem policy will keep failing to address; and training police officers and medical examiners to handle these cases with basic dignity, so that even a good law doesn't collapse in practice. None of this asks India to invent a new legal philosophy only to apply the one it already has, equally.

CONCLUSION

Twelve years ago, NALSA told transgender persons that who they are is not the states' to decide. That promise barely survived contact with the rest of the legal system. POSH protects women at work but leaves no door for a transgender complainant. The BNS protects women from rape but writes transgender survivors and men out of the offence entirely, folding sexual violence into the same provision as a bruise. The one statute built for transgender persons, the 2019 Act, criminalises abuse but attaches no consequence to an officer who refuses to record it and even the medico-legal guidelines meant to protect them remain largely unimplemented. This is not one failure but a pattern: the law recognises transgender persons wherever recognition costs nothing and stops the moment it would require rewriting a definition, training an officer, or reallocating a budget. Britain's gender-neutral rape law and Malta's identity-first code show the alternative already works elsewhere — India need not invent anything new, only apply NALSA's own principle consistently. A transgender person can be convicted as an accused under India's rape law; the same law will not recognise them as its victim. A system precise enough to punish is precise enough to protect. So far, it has chosen to do only the first.