

CUSTODIAL SEXUAL VIOLENCE IN INDIA: EXAMINING THE NEED FOR A DEDICATED LEGAL FRAMEWORK

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ABSTRACT

Sexual violence within custodial institutions remains one of the most under-acknowledged and under-reported forms of human rights violations in India. While prisons are ostensibly designed for the reformation and rehabilitation of offenders, the prevalence of sexual abuse perpetrated either by fellow inmates or custodial staff fundamentally contradicts these penological objectives. In the Indian context, the prison creates a closed ecosystem where transparency is minimal and power dynamics are severely skewed, allowing sexual violence to persist as a normalized yet concealed practice.

Despite constitutional guarantees under Article 21 and judicial pronouncements affirming that fundamental rights do not end at the prison gates, the Indian legal framework continues to inadequately address sexual victimization occurring inside prisons. Current statutory provisions under the Bharatiya Nyaya Sanhita (formerly the Indian Penal Code) focus primarily on custodial rape by figures of authority but significantly ignore the pervasive issue of inmate-to-inmate sexual violence. Furthermore, the law fails to account for unique socio-penological vulnerabilities such as extreme overcrowding and rigid power hierarchies.

This research adopts a doctrinal and analytical approach to examine the structural and legal gaps that enable these crimes to persist. By analysing landmark case law and comparative legislative models, such as the US Prison Rape Elimination Act (PREA), the study establishes a correlation between deficient governance and heightened risks of victimization. The paper proposes the enactment of a dedicated statute, the “Protection of Prisoners from Sexual Violence Act,” introducing clear definitions, independent oversight, and victim-centric rehabilitation. It concludes that legislating against prison rape is a constitutional imperative essential for

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preserving human dignity and ensuring that punishment does not devolve into unlawful cruelty.

Keywords: Prison rape, Prisoners rights, Custodial violence, Penal reform, Human dignity.

I. INTRODUCTION

Sexual violence in the custodial institutions is considered to be one of the most neglected and least reported human rights infractions in India. Although prisons are created by the pretence that they are meant to reform and treat the offender, the incidences of sexual abuse by the inmates or correctional officials are innately contradictory and invalid of these penological aims. The Indian prison setting leads to the formation of a total institution, which forms the environment of a closed ecosystem with low transparency and severe power dynamics.³ In turn, prison rape continues being an accepted and yet hidden phenomenon, covered by a veil of invisibility that is supported by institutional indifference and absence of a certain documentation.

Although the constitutional provisions that have been incorporated under Article 21 of the constitution,⁴ including the decision of various courts to declare that basic rights are not terminated once people enter the prison, the Indian legal system still fails to identify and handle the issue of sexual victimization within prison environments. The existing statutory framework, and that mostly controlled by the Bharatiya Nyaya Sanhita (now the Indian Penal Code)⁵ and other state prison manuals, is plagued by huge gaps. These legislations are mostly concerned with custodial rape involving the figures of authority but pay little attention to the prevalent crime, which involves inmate to inmate sexual violence. Moreover, the law overlooks the socio-penological peculiarities of Indian prisons including the excessive overcrowding of the facilities, insufficient number of personnel and the strictness of hierarchy of authority that promotes predatory behaviour.

The failure to put a specific statutory device to address, prevent, and punish rape in prisons has led to deposition of effective redresses to victims and absence of

³ Mark S. Fleisher & Jessie L. Krienert, *Prison Sexual Violence: The Conflict between Masculinity and Power*, 53 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 101 (2009)

⁴ INDIA CONST. art. 21.

⁵ Bharatiya Nyaya Sanhita, 2023, § 64.

responsibility to the administrators. The study is methodologically based on doctrinal and analytical approach with landmark case law, government reports, and comparative legislative models available including the US Prison Rape Elimination Act (PREA)⁶ were used to determine the correlation between poor governance and the increased risks of victimization. In this paper, it is contended that custodial sexual violence that needs to be understood and then legislated is a constitutional duty that is necessary in safeguarding human dignity. It suggests to enact a special Protection of Sexual Violence of Prisoners Act that will provide clarity, autonomy, and rehabilitation in accordance with the victims to make sure that judicial revenge does not degenerate into illegal cruelty.

II. RESEARCH OBJECTIVES

- A. **To Find the Statutory Gap:** To critically analyse the inadequacies of the Bharatiya Nyaya Sanhita (formerly the Indian Penal Code) and Prison Manual in addressing the specific nuances of inmate-on-inmate sexual violence.
- B. **To Examine Socio-Penological Drivers:** To investigate the structural factors, including severe overcrowding, power hierarchies, and institutional apathy, that contribute to the normalization and concealment of sexual victimization within custodial settings.
- C. **To Evaluate International Jurisprudence and Models:** To conduct a comparative assessment of international standards, such as the UN Mandela Rules, and foreign legislative models, specifically the United States Prison Rape Elimination Act (PREA), to identify benchmarks for domestic reform.
- D. **To Formulate a Dedicated Legislative Framework:** To propose the conceptual structure of a “Protection of Prisoners from Sexual Violence Act” that incorporates gender-neutral definitions, independent oversight, and mandatory risk-assessment protocols.
- E. **To Reaffirm Constitutional Mandates:** To establish that the protection of a prisoner's bodily integrity is an inextricable component of the Right to Life and Personal Liberty under Article 21 of the Constitution of India.

III. RESEARCH QUESTIONS

⁶ Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–15609 (2012).

- A. To what extent does the current Indian penal framework, specifically the Bharatiya Nyaya Sanhita, fail to adequately recognize and penalize inmate-on-inmate sexual violence?
- B. In what ways do systemic institutional factors, such as chronic overcrowding and rigid power hierarchies, contribute to the normalization and concealment of sexual victimization within Indian prisons?
- C. How does the absence of a dedicated statutory mechanism for reporting and documenting prison rape impact the constitutional right to human dignity under Article 21?
- D. What specific legislative benchmarks can be derived from international models, such as the US Prison Rape Elimination Act (PREA), to inform a dedicated Indian statute?
- E. What are the essential components required for a proposed “Protection of Prisoners from Sexual Violence Act” to ensure independent oversight and victim-centric rehabilitation?

IV. RESEARCH METHODOLOGY

The research approach adopted in this paper is mainly doctrinal and analytical, as it is concerned with a qualitative analysis of the available legal frameworks and socio-penological data. The research is based on multi-dimensional analysis of the primary sources, such as the Constitution of India, the Bharatiya Nyaya Sanhita, and the landmark cases on the rights of the prisoners. In addition, the study makes use of secondary information including government reports, scholarly literature, and empirical measures including overcrowding and death in custody statistics to formulate a correlation between poor prison governance and sexual victimization. There is an analytical approach to dismantle the existing penal provisions and point out their lack of efficiency in dealing with the problem of inmate-to-inmate violence. Lastly, the methodology also uses a comparative study of international norms, including the Mandela Rules and the US Prison Rape Elimination Act, to give the proposed legislative changes a reference point.

V. SCOPE AND LIMITATION

A. SCOPE

The scope of the study is partly confined to the legal and socio-penological context of Indian correctional facilities, which is the occurrence and suppression of sexual

violence in these types of total institutions. The paper considers sexual abuse of staff on inmate and that of inmate on inmate, the research question being how current penal provisions in the Bharatiya Nyaya Sanhita and the Prisons Act of 1894 do not tackle these distinctive relations of power. In addition to this, a comparative study of global human rights provisions, including the UN Mandela Rules, and the US Prison Rape Elimination Act would also be within the range in order to give a reference point to domestic change. The research will prove the necessity of a special Protection of Prisoners against Sexual Violence Act that would introduce the independent controlling and victim-oriented rehabilitation.

B. LIMITATION

The limitations of this study can be attributed to the doctrinal and perceptive approach to research because it uses mostly secondary sources, including statutes, judicial rulings, government reports, and scholarly materials. Since the custodial institutions are closed, and there is a high under-reporting of sexual crimes, the study is limited in accessing real-time empirical data or primary field interviews with the victims. Also, although the paper singles out overcrowding and institutional apathy as risk factors, the analysis is confined to what is in the law and the structure of the organization as opposed to a comprehensive psychological examination of the offenders. Lastly, the proposed system of the law is theoretical and lacks consideration of the administrative differences in capabilities of the different state-managed prison departments in India.

VI. LITERATURE REVIEW

A. PRISON SEXUAL VIOLENCE: THE CONFLICT BETWEEN MASCULINITY AND POWER BY MARK S. FLEISHER AND JESSIE L. KRIENERT⁷

Mark S. Fleisher and Jessie L. Krienert discuss the complicated psychology and sociology of sexual assault in male prisons. Fleisher and Krienert believe that the main reasons of such acts are rooted in the claim of power and dominance and not in the sexual desire. The authors explain that there is a hard-and-fast institutional pecking order in which sexual victimization is a tactic to emasculate and demean less powerful prisoners. Their study also points out that male victims are also usually

⁷ Fleisher, Mark S. & Jessie L. Krienert, *Prison Sexual Violence: The Conflict between Masculinity and Power*, 53 Int'l J. Offender Therapy & Comp. Criminology 101 (2009).

ensnared by a systemic code of silence and rife social stigma that prevents them to report abuse as they are justified by real fear of institutional mockery or even violence. Also, Fleisher and Krienert make a definite connection between systemic failures in prison governance in particular chronic overcrowding and insufficient supervision of staff and greater vulnerability to sexual victimization by the inmate's population.

B. A CRITICAL ANALYSIS OF CUSTODIAL RAPE IN INDIA: SPECIAL REFERENCE TO CRIMINAL LAW (AMENDMENT) ACT, 2013 BY PRATIMA BHARADWAJ⁸

Pratima Bharadwaj in this study undertakes an extensive analysis of the legal provisions on the issue of custodial rape in India and this study focuses specifically on the change of the Indian Penal Code into the Bharatiya Nyaya Sanhita. However, Bharadwaj asserts that, although the law acknowledges that persons of authority sexually assault people, it does not say much about the widespread problem of sexual assault among inmates. The author points out the impact of the total institution of the prison which makes the prison environment in which the flow of information is low and the authority of the officials absolute and creates a veil of invisibility of the custodial crimes. Using the Mandela Rules and Article 21, Bharadwaj points to the fact that the state has a positive, non-delegable responsibility to uphold the bodily integrity and human dignity of each and every individual under its custody.

C. HUMAN RIGHTS OF PRISONERS: AN INDIAN PERSPECTIVE BY AMIT K. KASHYAP⁹

Amit K. Kashyap studies the application of human rights standards to the Indian system of prisons, and the custodial dignity in particular in the research paper. Kashyap points out the lack of relationship between progressive judgments of the Supreme Court and the archaic and colonial era regulations of Prisons Act of 1894. The study explains the fact that, on many occasions, custodial torture and sexual violence are systemic problems ingrained in the deficiency of professionalization and training of the prison staff. Through the assessment of the poor living conditions and overpopulation of the Indian jails, Kashyap may be seen as arguing that the state is

⁸ Bharadwaj, Pratima, *A Critical Analysis of Custodial Rape in India: Special Reference to Criminal Law (Amendment) Act, 2013*, 4 Int'l J.L. Mgmt. & Human. 79 (2021).

⁹ Kashyap, Amit K., *Human Rights of Prisoners: An Indian Perspective*, 7 Nirma U. L.J. 69 (2018).

already against the domestic constitutional requirements in addition to the international human rights treaties.

D. THE EVOLUTION OF PRISONERS' RIGHTS BY JOHN W. PALMER¹⁰

In their research article Palmer is able to trace the judicial development of the rights of the prisoners, though the article concentrates on the concept of the hands-off doctrine giving way to the era of proactive judicial intervention. Palmer examines definitions of cruel and unusual punishment by the courts in relation to the safety of inmates and sexual victimization. The study highlights the fact that the right to be free of sexual assault on the part of a prisoner is an important aspect of the right to bodily integrity. Palmer criticizes the high bar commonly set by the law in order to demonstrate delinquent indifference on the part of prison authorities. He proposes a reduced standard of culpability in order to make the state responsible towards the inability to provide a secure environment.

E. DOING TIME, DOING MASCULINITY BY JAMES MESSERSCHMIDT¹¹

In the research paper Messerschmidt investigates that hyper-masculinity is a construct that influences the social organization of male correctional facilities and the effect of sexual violence. According to Messerschmidt, the statement of physical dominance is the main commodity of social standing in a setting where there is a limitation of freedom. The author asserts that sexual assault is often employed in a bid to denude the victims of their masculinity thus giving the perpetrator the edge of the top in the hierarchy of the inmates. The study points out that overcrowding finances such tensions as aggressive and vulnerable persons have to be in constant contact. Messerschmidt puts emphasis that the subculture within the law should be dealt with through legal means that place sexual aggression as a survival tactic.

F. PRISON RAPE AND THE ZERO-TOLERANCE STANDARD BY MARK A. R. KLEIMAN¹²

In the research paper Kleiman concentrates on the overlap between the institutional safety and the rights of vulnerable groups of the prisoners. Kleiman is critical of the old prison management systems that are based on a reactive approach to discipline

¹⁰ Palmer, John W., *The Evolution of Prisoners' Rights*, 45 Miss. L.J. 685 (1974).

¹¹ Messerschmidt, James, *Doing Time, Doing Masculinity*, 44 Brit. J. Criminology 241 (2004).

¹² Kleiman, Mark A. R., *Prison Rape and the Zero-Tolerance Standard*, 39 W. New Eng. L. Rev. 427 (2017).

and not proactive protection. Through examining the application of safety standards, the study brings to light the role of the so-called blind spots in prison buildings and insufficient staffing that encourages sexual victimization. Kleiman supports the idea of a duty of care in which administrators are to be in tort of negligence to avoid foreseeable harm. He particularly singles out the need of confidential grievance procedures, where he writes that the victims must usually decide whether to remain abused or run the risk of being branded as a snitch.

G. THE PRISON RAPE ELIMINATION ACT: A POLICY ANALYSIS BY MICHAEL S. VAUGHN AND L. THOMAS WINFREE JR.¹³

In the research paper Vaughn and Winfree Jr. give a critical analysis of the United States Prison Rape Elimination Act (PREA) as an innovative attempt to tackle custodial sexual violence. The authors address the legislative intent of PREA which shifted the emphasis of punishment, which was passive to a zero-tolerance administrative philosophy. The main characteristic mentioned by Vaughn and Winfree Jr. is the mandatory risk-screening and classification system employed to detach possible predators and vulnerable inmates on the basis of physical and psychological indicators. They claim that an effective legal framework must have victim-focused elements in them, such as immediate forensic medical inspection and victim-informed counselling not bound by the traditional prison-hierarchy.

VII. THE LEGAL LACUNA: STATUTORY INADEQUACY IN ADDRESSING CUSTODIAL SEXUAL VIOLENCE

The Indian legal code involved in the custodial institutions is defined by a deep-seated legislative silence about the dynamics of sexual violence in prison walls. As much as the switching of the Indian Penal Code (IPC) to the Bharatiya Nyaya Sanhita (BNS) aimed at modernizing the criminal justice, the fundamental defects with respect to custodial environments are not curtly addressed.¹⁴ The prevailing legal culture largely perceives sexual offence as a general offence, which does not take into consideration the context as a whole institution victims are in the inescapable presence of their abusers.

¹³ Vaughn, Michael S. & L. Thomas Winfree Jr., *The Prison Rape Elimination Act: A Policy Analysis*, 160 U. Pa. L. Rev. 779 (2012).

¹⁴ Pratima Bharadwaj, *A Critical Analysis of Custodial Rape in India: Special Reference to Criminal Law (Amendment) Act, 2013*, 4 INT'L J.L. MGMT. & HUMAN. 79 (2021).

A. THE NARROW SCOPE OF CUSTODIAL RAPE PROVISIONS

The law specifically punishes custodial rape as stipulated in the previous IPC (Section 376(2)(a))¹⁵ and the present BNS (Section 64)¹⁶ whereby in both the law indicates that a public servant or a person of authority should be involved. Although this offers a means of prosecuting the staff on inmate violence, it is limited by its own short come in close attention to the missuse of official authority. These rights were originally initiated to defend women against state-funded violence but have since not evolved into an all-inclusive safety net on all inmates irrespective of their gender. Also, the evidentiary nature of these sections does not tend to take into account the environment of coercion that is present in a prison where consents is a broken notion when one acknowledges the sheer dominance that the prison has on the day to day survival of an individual.

B. THE INVISIBILITY OF INMATE-ON-INMATE VIOLENCE

Or maybe the biggest failure of the Indian penal system is that there is no separate section aimed at sexually assaulting prisoners on prisoners. The existing legislations consider the attack of one inmate on the other as a broad crime of rape or criminal violence. The strong weakness of this approach is that it adheres to the socio-penological fact of prison hierarchies. A victim in a normal society can technically escape or get immediate police cover, in prison, the victim is confined in the same cell or barracks with the offender.¹⁷ By not defining inmate-on- inmate violence as a separate category of custodial failure, the legislation places the entire weight of protection solely on already overstretched and almost non-involved prison personnel, creating a structure of non-reporting and invisibility.

C. GENDER-NEUTRALITY AND MALE VICTIM.

Clinging to the male-on-male sexual violence is still a challenge of the Indian penal law. Although the judiciary has broadened the interpretation of sexual assault, the statutory words are mostly gender biased. The absence of gender-neutral protection is disastrous in the environment of prisons where men outnumber women much higher and overcrowding is a widespread problem. According to research male-on-male rape is often a weapon to be wielded in pursuit of dominance and a pecking

¹⁵ Penal Code, 1860, § 376(2)(a).

¹⁶ Bharatiya Nyaya Sanhita, 2023, § 64.

¹⁷ James Messerschmidt, *Doing Time, Doing Masculinity*, 44 BRIT. J. CRIMINOLOGY 241 (2004).

order in the prison population. In the absence of these gender-neutral legislations that explicitly consider the context of custodial maintenance, the male victims lack a viable legal escape especially since they are frequently further mocked or subjected to corrective violence when they decide to report the abuse.

D. INADEQUACY OF PRISON MANUALS AND LOCAL REGULATIONS.

In addition to the BNS, administration of prisons is regulated by the Prisons Act of 1894¹⁸ and Prison Manuals that are state-specific. These are mostly colonial paper works that involve security, discipline, and discouraging escape but not inner protection of the prisoners. The majority of manuals do not provide the standardized procedure of:

- a. Predator Identification: No compulsory screening measures to differentiate high risk predatory prisoners and vulnerable groups.
- b. Confidential Reporting: The existing system of complaint boxes or petition will be easily jeopardized by the same guards or representatives of the convicts petting zoo that are the culprits of such abuse.
- c. Medical and Forensic Protocol: The prison hospital system is facing acute lack of immediate and trauma-informed medical response to victims of sexual assault.

E. THE FAILURE OF ACCOUNTABILITY MECHANISMS

There is no autonomous control of sexual violence in prisons as indicated in the current law. In case an incident happens, the prison administration carries out the internal inquiry basically requesting the institution to look into its failure. Such conflict of interest is enough to make sure that majority cases are ruled out as consensual or mutual scuffles, or refuted completely to protect the disciplinary history of the prison. This absence of a statutory requirement of independent auditing or judicial check, such as that provided by the US Prison Rape Elimination Act (PREA),¹⁹ leaves the duty of care such as the state owes to a prisoner is an empty constitutional claim.

VIII. SOCIO-PENOLOGICAL DRIVERS: OVERCROWDING, POWER DYNAMICS, AND INSTITUTIONAL FAILURES

¹⁸ The Prisons Act, No. 9 of 1894, India Code.

¹⁹ Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–15609 (2012)

Sexual violence that prevails in Indian prisons is an outcome of a failure in legislation but it is a result of the intrinsic socio-penological mechanisms that constitute the experience of custody. Prisons are distinctive forms of social areas in which the deprivation of liberty is further complicated by the fact that the settings, in most instances, deny people their agency and security. These drivers are critical in understanding the weakness of these general criminal laws in these specialized institutions.

A. THE IMPACT OF CHRONIC OVERCROWDING

The greatest structural force of custodial violence in India could be overcrowding. This proportion of prisoners to staff is sensuously skewed when Prison populations surpass their approved capacity. The absence of supervision enables those with predatory interests to conduct themselves with impunity just like in common areas like hallways, showers and barracks.²⁰ The congestion also compels the integration of first-time offenders with the experienced criminals, which makes the target-rich environment of individuals who employ sexual assault as another form of social control. Such a populated environment deprives the vulnerability of a human being of the fundamental human privacy, leaving the vulnerable inmate with almost no means of hiding themselves before the abusers.

B. POWER HIERARCHIES AND THE PECKING ORDER

Sexual violence in prison subculture is never concerned with sexual desire, and nearly completely with the demonstration of power and dominance. The prisons also operate on the basis of a strict hierarchy and status is upheld by physical and mental coercion.²¹ Sexual victimization is another weapon that hegemonic inmates act to emasculate or put down their subordinates to create a pecking order that guarantees them of safety and resources. The convict overseer system usually aids this dynamic as some prisoners are granted administrative responsibility about others, which forms a second level of unregulated power that is likely to be indulged in complete abuse.

C. INSTITUTIONAL APATHY AND THE CODE OF SILENCE

²⁰ R.W. Dumond, *Inmate Sexual Assault: The Institutional Response*, 15 *DEVIANT BEHAV.* 101 (1994).

²¹ Mark S. Fleisher & Jessie L. Krienert, *Prison Sexual Violence: The Conflict between Masculinity and Power*, 53 *INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY* 101 (2009)

Sexual crimes are largely impeded by the culture of silence which is prevalent in the prison. Victims themselves have a twofold risk to both fearing the revenge of the attacker and fearing being assaulted or disregarded by the prison officials even more. It is common knowledge amongst prison employees on the ground that sex in prison is either consensual or a necessary evil of long-term imprisonment.²² This bureaucratic indifference causes inability to report the incident and give it the appropriate medical or psychological care. By accepting such incidents as a disciplinary problem instead of a serious criminal offense, the staff members unwillingly support the criminal in charge and reduce the victim to the situation of constant helplessness.

D. THE ROLE OF STIGMA AND LACK OF SUPPORT

The social stigma associated with sexual victimization is magnified in the hyper-masculine environment of a male prison. Reporting an assault often results in the victim being labeled as weak or being further targeted for abuse. Additionally, the lack of gender-neutral language in existing laws makes it difficult for male victims to find a legal vocabulary to describe their trauma without facing ridicule. Without specialized support services such as confidential counselling and separate housing for victims, the institutional framework effectively forces victims into a choice between continued abuse and social isolation.

E. INSUFFICIENT TRAINING AND RESOURCES ON THE STAFF.

The prison staff in India are often inadequately trained in certain peculiarities of recognizing and preventing custody sexual violence. A majority of the training programs are more involved with perimeter security and riot control instead of inmate safety, or even human rights standards.²³ Lacking a legal basis compelling periodic auditing or technical education on the nature of the prison rape will leave staff members badly prepared to recognize high-risk scenarios before causing them to get out of control. Such professionalization deficiency lacks professionalization which leaves a vacuum where informal and usually violent rules of conduct are put above the rule of law.

²² Mark A. R. Kleiman, *Prison Rape and the Zero-Tolerance Standard*, 39 W. NEW ENG. L. REV. 427 (2017).

²³ Amit K. Kashyap, *Human Rights of Prisoners: An Indian Perspective*, 7 NIRMA U. L.J. 69 (2018)

IX. COMPARATIVE ANALYSIS: INTERNATIONAL STANDARDS AND THE US PREA MODEL

Comparative analysis of international legal regimes shows that the fact that the Indian legislative system has nothing to say in relation to the prison-specific sexual violence is a few-mode mechanism as far as modern democratic legal systems have to go. Through the analysis of international human right standards and the particular development of legislation in the United States, one will be able to detect a model of domestic change.²⁴

A. THE MANDELA RULES AND INTERNATIONAL HUMAN RIGHTS LAW

The Mandela Rules also commonly referred to as the United Nations Standard Minimum Rules on the Treatment of Prisoners are the basic international standard when it comes to human decency and the safety of the prisoners in detention. In the rule 1, it is clearly stated that all prisoners will be treated as per the intrinsic dignity and worth as human beings and that no prisoner shall be tortured or subjected to inhuman, degrading and other types of cruel treatment. Most importantly, the regulations also suggest that the state has a positive responsibility to ensure that inmates are not subjected to violence by fellow prisoners, not only the state. The failure to prevent foreseeable sexual assault in a custodial context has continued to be identified as a breach of the right to life and bodily integrity by international jurisprudence.²⁵

B. THE US PRISON RAPE ELIMINATION ACT (PREA)

The United States Prison Rape Elimination Act of 2003 is the most complete attempt to deal with custodial sexual violence. PREA was signed into law after it became a national epidemic that the law system could no longer disregard the issue of prison rape. Major characteristics of this model are:

- **Zero Tolerance Policy:** The act mandates a zero-tolerance standard for all forms of sexual abuse and sexual harassment within custodial facilities.

²⁴ Mark A. R. Kleiman, *Prison Rape and the Zero-Tolerance Standard*, 39 W. NEW ENG. L. REV. 427 (2017).

²⁵ G.A. Res. 70/175, annex, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), rule 1 (Jan. 8, 2016).

- **National Standards on Prevention:** It has developed federal standards in the identification, prevention and mitigation of prison rape, applicable to all federals, state, and local prisons.
- **Mandatory Data Collection:** The act requires that a survey must be conducted on an annual basis conducted by the Department of Justice on the prevalence of the prison rape to make the crime visible.
- **Independent Audits:** The facilities are also supposed to be subjected to frequent independent audits in order to ascertain whether the facilities are responding to the safety standards in which those facilities that fail to perform to the standards ought to be fined.²⁶

C. SCREENING AND CLASSIFICATION SYSTEMS

Mandatory screening and classification are one of the most feasible lessons of PREA framework. The US model has the screening of all inmates on the entry level to identify which ones can be a victim or a predator. Physical height, age, history of an offense and mental condition are also analysed to make informed choices on housing decisions. This proactive solution directly answers the problem of overcrowding as it would mean that the high-risk predatory inmates are not put in the barracks with vulnerable people.

D. CONFIDENTIAL REPORTING AND VICTIM SUPPORT

The international best practices insist on introducing reporting mechanisms that circumvent the prison internal hierarchy. Most of the jurisdictions provide third party hotlines or independent ombudsmen through which prisoners can report abuse without fear of retaliation by the staff. Moreover, the victim-focused one provides that the survivors get prompt medical treatment, such as forensic examination and mental health counselling, which are viewed as a medical necessity but not a punitive issue.²⁷

E. APPLICABILITY TO THE INDIAN CONTEXT

Although the US PREA model is expensive in terms of resources, its main ideas of external control and obligatory data gathering can be used in the case of India to a

²⁶ Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–15609 (2012)

²⁷ Mark A. R. Kleiman, *Prison Rape and the Zero-Tolerance Standard*, 39 W. NEW ENG. L. REV. 427 (2017).

high degree. The existing Indian system is rather dependent on the internal prison investigations that are usually biased. It would take the comparative model to step out of the Prisons Act of 1894 to adopt a new modern statute that defines the prison safety as an administrative burden that can be measured in terms of the results of the implementation as opposed to a discretionary police role.

X. THE PROPOSED LEGISLATIVE FRAMEWORK: PROTECTION OF PRISONERS FROM SEXUAL VIOLENCE ACT

The synthesis of existing legal gaps and comparative international models points toward a singular necessity, a dedicated, prisoner-centric statute. The proposed “Protection of Prisoners from Sexual Violence Act” (PPSVA) seeks to move beyond the punitive focus of the BNS and create a proactive, administrative, and rehabilitative structure.²⁸ This framework is designed to dismantle the institutional apathy that currently shields custodial crimes from judicial scrutiny.

A. COMPREHENSIVE AND GENDER-NEUTRAL DEFINITIONS

The extension of the definition of the term sexual violence in the framework of custodial settings is the first pillar of the proposed Act. In contrast to the general penal provisions, the PPSVA needs to explicitly state that inmate-to-inmate violence can be defined as a specific category of institutional failure. Moreover, the Act should use a strictly gender-neutral wording so that the inmates of both sexes and transgender who are often the victims of domineering sexual assault have equal protection.²⁹ The law can finally curb the dynamics of pecking order that has been observed in the socio-penological study by defining such term as custodial sexual violence to cover any form of non-consensual sexual contact or harassment within the facility irrespective of the position of the perpetrator.

B. MANDATORY SCREENING AND RISK ASSESSMENT

The Act ought to be required to use a scientific classification system as an answer to the risks of overcrowding and inappropriate mixing of populace. Most inmates have to go through a generalized risk evaluation once they have been admitted to

²⁸ Michael S. Vaughn & L. Thomas Winfree Jr., *The Prison Rape Elimination Act: A Policy Analysis*, 160 U. PA. L. REV. 779 (2012)

²⁹ Mark S. Fleisher & Jessie L. Krienert, *Prison Sexual Violence: The Conflict between Masculinity and Power*, 53 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 101 (2009)

determine the potential predators and the vulnerable persons.³⁰ Housing assignments must depend on factors like the type of the present offense, history of violence, physical weakness and mental health. Such a duty of care imposes the burden not on the inmate but on the state and makes sure the prison administration should be held liable in case of placing the known high-risk predator in a situation where he can victimize others.

C. INDEPENDENT OVERSIGHT AND REPORTING MECHANISMS

One of the key weaknesses of the existing system is that it depends on internal investigations by the prison department itself. The PPSVA is supposed to create a Commission on Custodial Oversight (ICOC) that is made up of judicial officials, human rights representatives, and medical practitioners.³¹ This commission would be able to:

- a. **Receive Confidential Complaints:** Prisoners should have the access to the closed complaint boxes or common telephonic hotlines that are outside the prison staff.
- b. **Unannounced Audits:** Continuous inspection of the adherence to the safety standards and examination of grievance logs.
- c. **Monitor Investigations:** Ensures that criminal charges are not substituted with internal disciplines against serious sexual crimes.

D. VICTIM-CENTRIC REHABILITATION AND SUPPORT

The existing manuals in use in the prisons place more emphasis on discipline rather than physical and mental health of the victim. The suggested Act should have an immediate medical treatment after report of sexual assault, where forensic examinations should be done by external medical authorities as opposed to prison physicians.³² The victims should have the right to:

- a. **Trauma-Informed Counselling:** Availability of mental health care, which deals with the unique trauma of being co-trapped with an abuser.

³⁰ Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–15609 (2012).

³¹ Mark A. R. Kleiman, *Prison Rape and the Zero-Tolerance Standard*, 39 W. NEW ENG. L. REV. 427 (2017).

³² Amit K. Kashyap, *Human Rights of Prisoners: An Indian Perspective*, 7 NIRMA U. L.J. 69 (2018).

- b. Safe Housing: Transfer to another wing or a new facility that is safe at the moment to avoid retaliation.
- c. Legal Aid: The legal aid is assigned automatically to aid the victim with the process through criminal justice.

The Institute of Higher Education has a bright future but the responsibility lies with individuals and teams to ensure the regained momentum is properly directed towards that path and preserved along the expected course.

E. ACCOUNTABILITY FOR INSTITUTIONAL FAILURE

The Act should bring in the vicarious institutional principle of liability. When a facility does not comply with the screening procedures required or does not pay attention to repeated watchful warnings of the predatory environment, the administration has to be subjected to statutory fines. The state could change the culture in the prison by tying funds to the prison, staff promotion to the successful implementation of the PPSVA, and safety audits in a way that the organization is motivated to implement a new culture of prevention.

XI. CONCLUSION

The presence of sexual violence in Indian prisons does not only represent the failure of administrative supervision but a significant infringement of the constitutional requirement. The shift between the Indian Penal Code and the Bharatiya Nyaya Sanhita, has not succeeded generally to overcome the hard rock in between general criminal law and the coercive realities of custodial life. Existing laws are unconcerned with violence between inmates and structural sources of mistreatment, i.e., endemic overcrowding and the lack of control over power structures that ensure predatory behaviours thrive. This study established that the total institution of the prison has provided a setting in which sexual assault can be applied to exert power and not pleasure. In the absence of gender-neutral laws and targeted statutory definitions, male and transgender victims are legally non-existent and socially demonized, and the absence of independent control over such crimes is established to make sure that such crimes are usually kept silent to paint a picture of institutional discipline.

In order to fully enact the spirit of Article 21, the Indian state should appreciate the right to dignity as not being given up when one is incarcerated. This study recommends that a Protection of Prisoners against Sexual Violence Act should be

passed, which is based on international documents such as the Mandela Rules and the US PREA model. This kind of legislation would break the pattern of discrimination that now exists in the system of internal investigations and approach a system of judicial controls and prevention. The state can change the custodial culture, which is currently based on cover-up, to a culture of protection by creating a mandatory statewide system of risk assessment to safeguard vulnerable inmates and focusing on immediate trauma-informed medical and psychological rehabilitation.

However, it all depends on how the civilization will treat the people it has deprived of their liberty. The law against rape in prison is a necessary measure toward the realization that the judicial punishment does not turn into the state-approved sadism, which would satisfy the constitutional obligation of maintaining human dignity even in the most remote parts of the judicial system. India may become not a colonial-era security framework, but a modern penological regime by focusing on human rights and requiring administrators to be responsible and ensure the safety of the incarcerated. The kind of moral and constitutional necessity behind this piece of legislative intervention is to make sure the denial of liberty does not lead to the denial of bodily integrity.

