

Strengthening the Rule of Law | Legal Reform Ideas for Tamil Nadu

Gender and Criminal Justice

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Preface

Vidhi Centre for Legal Policy (**'Vidhi'**) is an independent and non-partisan think-tank that undertakes high-quality legal research to enable evidence-based law-making. Since its inception in 2013, Vidhi has worked on over 400 legal and policy reforms, through engagements with both the union and state governments. In order to expand our efforts to work with state governments, we have recently set up a dedicated **Vidhi Tamil Nadu** team to engage with the government of Tamil Nadu.

Vidhi Tamil Nadu aims to work with the Tamil Nadu government to enhance law drafting capacity, support policy-making with sound legal advice, and draft primary legislation, rules, and regulations in relevant areas of reform.

This **concept paper** is the second in a series exploring legal reform ideas for Tamil Nadu. The key legal reform ideas in this concept paper include eradicating caste discrimination in Tamil Nadu prisons, recalibrating the Protection of Children from Sexual Offences Act ('POCSO') to balance protection and consent, decriminalising drug addiction and adopting a public health approach, enacting a framework for Deed of Familial Associations, and state amendments to the new criminal codes to further gender justice.

This concept paper will be presented at a closed-door **workshop**, which will bring together key stakeholders to shape the future of Tamil Nadu's legal landscape, focusing on strengthening the rule of law to support both economic development and social welfare. The workshop is an opportunity to gather expert insights and collect feedback on proposed legal reform ideas from a diverse group of participants, ensuring that the reforms are practical, effective, and tailored to Tamil Nadu's unique context, leading to refined, actionable legal reform proposals for the state.

Select ideas from the concept paper series will be collated as part of a **briefing book** outlining suggested legal reforms for Tamil Nadu.

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1. Eradicating caste discrimination in Tamil Nadu prisons

Issue

Caste discrimination is an unfortunate reality in Indian prisons, including those in Tamil Nadu. Investigations into Tamil Nadu prisons reveal that prisoners are housed and assigned work exclusively based on their caste identity. For example, in the Palayamkottai Central Prison, four wards are reserved for Thevars, two for Dalits, and one for Nadars, Udayars, and other castes. Similarly, in the Madurai Central Prison, in addition to such segregation, cleaning work and scavenging of officers' residences and other inmates' cells are assigned exclusively to Dalit prisoners.¹

Despite constitutional safeguards against inequality and untouchability, these discriminatory practices continue to plague our prison system. Caste discrimination in prisons is an extension of societal caste inequality which has been exacerbated by legal instruments that pertain to prison management and prisoners' treatment.

Scope for legal reform

In Tamil Nadu, prisons are governed by the Tamil Nadu Prison Manual, which contains the Tamil Nadu Prison Rules, 1983. The manual is largely based on the outdated Prisons Act, 1894, and the Prisoners Act, 1900: two archaic legislations that codify caste discrimination. Given below is an illustrative list of provisions of the prison rules that perpetuate caste segregation or hierarchies, and/or have discriminatory undertones:

- Rule 225 (Classes of prisoners) allows for categorising prisoners into Class A prisoners and Class B prisoners. Prisoners are eligible for Class A if they are accustomed to a superior mode of living by virtue of their social status, education or habit of life.
- Rule 273 (Men who work together to sleep together) promotes occupation-based segregation of prisoners for the purpose of sleeping.
- Rule 438 (Allowance for social status) provides discretion to the Classification Committee to allot prison tasks based on the education, intelligence, aptitude and previous habits of prisoners.
- Rule 472 (Sweepers and water carriers for official quarters) allows for manual scavenging by sweeping gangs, often comprising lower caste Class B prisoners.
- Rule 447 (Restrictions on extramural employment of convicts) specifically prohibits members of wandering or criminal tribes from being employed in any labour outside the prison walls without the sanction of the Inspector-General.

As a first step towards eradicating caste discrimination in Tamil Nadu prisons, the Tamil Nadu government ought to update the prison rules to amend and/or repeal provisions that perpetuate caste discrimination in prisons.

Questions for discussion

- In addition to amendments to the manual and prison rules, is there merit in establishing an independent monitoring system that can regularly assess and ensure compliance with anti-discrimination mandates in prisons across Tamil Nadu? Can technology help in establishing a cost-effective monitoring system?
- How can an effective grievance redressal mechanism be structured to allow prisoners to report caste-based discrimination safely, and what safeguards can be put in place to protect against retaliation?
- What alternatives to the current work assignment system could be designed to ensure fair and non-discriminatory distribution of tasks among prisoners?

¹ Sukanya Shantha, 'From Segregation to Labour, Manu's Caste Law Governs the Indian Prison System' *The Wire* (3 October 2024) <<https://thewire.in/rights/india-prisons-caste-labour-segregation>> accessed 22 October 2024

2. Recalibrating POCSO: Balancing protection and consent

Issue

The Protection of Children from Sexual Offences Act, 2012 aims to safeguard children from sexual offences. However, a decade of implementation has exposed significant challenges in the POCSO law that warrant careful reconsideration. A primary concern is POCSO's blanket criminalization of all sexual acts involving children (anyone below 18 years). By rendering teenagers incapable of giving consent to sexual relationships, consensual romantic relationships between teenagers often get criminalised.² Several POCSO cases pertain to consenting minors and the law's stringent provisions are misused by the families of adolescents to thwart relationships that they do not approve of.³ In light of this, the Madras High Court has discouraged viewing consensual teenage relationships from a criminal lens and clarified that POCSO's objective is not to punish adolescent boys as offenders for entering into relationships with minor girls.⁴

Even in matrimonial disputes, false allegations under POCSO have been misused to influence custody decisions against fathers.⁵ Further, conflicts between POCSO and Muslim personal law regarding the age of marriage and consent have resulted in contradictory court judgments, creating legal ambiguity.⁶ POCSO's stipulation on the mandatory reporting of offences⁷ only compounds the problem by creating a hostile environment for adolescents seeking confidential sexual and reproductive health services, and impacting their wellbeing by deterring them from availing professional medical services.

These multifaceted issues underscore the need for a more nuanced approach to legislation on child sexual abuse, balancing the imperative of safeguarding children with the realities of adolescent relationships, while simultaneously incorporating robust safeguards to prevent misuse of the law. It is crucial to refine POCSO to ensure that it fulfils its intended purpose without unintended negative consequences.

Scope for legal reform

In response to challenges stemming from the implementation of POCSO, the Tamil Nadu government could propose targeted amendments to refine the law's application within Tamil Nadu. This approach would involve developing nuanced, state-specific amendments to POCSO, taking into account local contexts and experiences. The following sections detail potential amendments that may address key issues identified in POCSO's implementation.

² Ratna Singh, 'POCSO Act issues and challenges: How courts responded in 2022' *Bar and Bench* (1 January 2023) <<https://www.barandbench.com/news/pocso-act-issues-and-challenges-how-courts-responded-2022>> accessed 23 October 2024

³ Apoorva and others, 'A Decade of POCSO' *Vidhi Centre for Legal Policy* (November 2022) <https://vidhilegalpolicy.in/wp-content/uploads/2022/11/221117_Final-POCSO-Draft_JALDI.pdf> accessed 23 October 2024

⁴ *Vijayalakshmi v State*, 2021 SCC OnLine Mad 317

⁵ Manju Elsa Issac, 'POCSO Act Often Misused To Settle Personal Scores, Even In Matrimonial Disputes False Accusations Made To Deny Custody To Father: Kerala HC' *Live Law* (8 July 2024) <<https://www.livelaw.in/high-court/kerala-high-court/kerala-high-court-pocso-act-misuse-matrimonial-dispute-father-custody-262654#:~:text=The%20Court%20said%20that%20the%20Act%20is%20misused%20in%20cases,child%20would%20not%20get%20custody>> accessed 23 October 2024

⁶ Ratna Singh, 'POCSO Act overrides Muslim personal law; husband liable for sex with minor Muslim wife: Karnataka High Court' *Bar and Bench* (31 October 2024) <<https://www.barandbench.com/news/litigation/pocso-act-overrides-muslim-personal-law-karnataka-high-court>> accessed 23 October 2024; Shwetha Ramachandran, 'Shariat versus POCSO Act: Supreme Court must resolve the conundrum' *The Leaflet* (2 April 2023) <<https://theleaflet.in/shariat-versus-pocso-act-supreme-court-must-resolve-the-conundrum/>> accessed 23 October 2024

⁷ POCSO Act 2012, s 19

The Madras High Court has recommended that the definition of 'child' under Section 2(d) of POCSO should be 16 years instead of 18 years, and that consensual relationships after the age of 16 years should be excluded from rigorous punishments under POCSO.⁸ Legal reform of POCSO requires a holistic approach wherein child sexual abuse is penalised keeping in mind the scope and context of the situation. Revisiting the age of consent is crucial, potentially introducing close-in-age exemptions or more liberal provisions for consensual relationships among adolescents. Clear guidelines must be developed to differentiate consensual relationships between teenagers above 16 years, from exploitative situations of sexual assault on children below 16 years.

In matrimonial disputes, additional scrutiny and fast-track investigations could prevent POCSO's weaponisation in custody battles. To combat misuse, stronger safeguards against false accusations should be implemented, including enhanced penalties for fabricated complaints under Section 22 of POCSO.

Harmonisation of POCSO with personal laws is necessary to resolve legal ambiguities, while maintaining child protection as the paramount concern. Procedural reforms could include mandatory appointment of support persons and enhanced training for all stakeholders. The law should also develop a stronger focus on rehabilitation, especially for minor offenders in consensual cases. Finally, establishing a comprehensive data collection and analysis system would assist in informing future amendments, ensuring that POCSO evolves to meet its protective goals effectively.

Questions for discussion

- Is it advisable for the government of Tamil Nadu to establish an expert committee to comprehensively review the implementation of POCSO, given the urgent need to address its current challenges?
- What role can child psychologists and adolescent health experts play in the implementation and potential reform of POCSO, and how can their expertise be integrated into the system?

⁸ Sabari v Inspector of Police, 2019 (3) MLJ CrI 110

3. Decriminalising drug addiction and adopting a public health approach

Issue

The Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS') and the attendant Tamil Nadu Narcotic Drugs Rules, 1985, were enacted to make stringent provisions for controlling and regulating operations related to narcotic drugs and psychotropic substances. However, its implementation prioritises criminalisation of small-time users and addicts. 75% of NDPS cases involve cases of personal consumption, including both recreational users and addicts.⁹ This skewed approach addresses the problem of drug use inefficiently amidst growing concerns about the prevalence of drugs in campuses and entertainment clubs in Tamil Nadu,¹⁰ which stands as the fourth highest state in terms of the number of registered NDPS cases.¹¹ The existing approach not only criminalises and marginalises drug users (including addicts), but also denies them necessary support, with socially and economically disadvantaged groups bearing a disproportionate burden.¹² Moreover, the overcriminalisation of drug users has overburdened courts and investigating agencies.¹³

A criminal justice response to drug use is outdated and counterproductive to public health. Criminalising addiction stigmatises users and their incarceration hinders access to de-addiction centres and quality healthcare needed for recovery. Currently, Tamil Nadu's drug demand reduction efforts are limited to awareness campaigns and civil society interventions. Moreover, inadequate regulation compromises the quality and safety of rehabilitation services, with instances of unqualified and fraudulent persons running de-addiction centres, resulting in violations of the law and human rights.¹⁴ The Madras High Court has held that rehabilitation or de-addiction centres can be run only after obtaining proper permission and necessary licences, and that authorities are duty-bound to safeguard public interest by periodically inspecting centres run by private persons to ensure that they are following the law.¹⁵ It is imperative to develop legislative and policy interventions that holistically tackle drug use in Tamil Nadu, shifting the focus from criminalisation to public health.

Scope for legal reform

To effectively address drug addiction in Tamil Nadu, legal amendments to the NDPS and the Tamil Nadu Narcotic Drugs Rules, 1985 are essential. Currently, under Section 27 of the NDPS, the punishment for consumption could be as severe as rigorous imprisonment for one year. First, the NDPS should be amended to decriminalise the consumption of drugs, particularly in small quantities, thereby reducing stigma and prioritising treatment over punishment.

Second, legal provisions must mandate that drug addicts seeking treatment be referred to health and social services instead of the criminal justice system. Additionally, comprehensive legislation is needed to regulate de-

⁹ National Crime Records Bureau, *Crime in India 2022: Vol I* (Ministry of Home Affairs, Government of India 2022)

¹⁰ The Hindu Bureau, 'Worst fears about presence of drugs in Tamil Nadu confirmed, says Governor R.N. Ravi' *The Hindu* (10 March 2024) <<https://www.thehindu.com/news/national/tamil-nadu/worst-fears-about-presence-of-drugs-in-tn-confirmed-says-governor-rn-ravi/article67935904.ece>> accessed 23 October 2024

¹¹ Press Information Bureau, 'Drugs cases in the country' (26 July 2023) <<https://pib.gov.in/PressReleasePage.aspx?PRID=1942884>> accessed 23 October 2024

¹² 'Reshaping the Public Narrative on Drug Laws in India' *Vidhi Centre for Legal Policy* <<https://vidhilegalpolicy.in/reshaping-the-public-narrative-on-drug-laws-in-india/>> accessed 23 October 2024

¹³ Upma Gautam, Priya Das, 'Why we must focus on curing, not criminalising drug users' *The Indian Express* (6 May 2023) <<https://indianexpress.com/article/opinion/columns/why-we-must-focus-on-curing-not-criminalising-drug-users-8594067/>> accessed 23 October 2024

¹⁴ Bosco Dominique, 'Rehab Centre took to physical abuse to 'reform' inmates' *The Times of India* (13 July 2024) <<https://timesofindia.indiatimes.com/city/chennai/rehabilitation-centre-accused-of-physical-abuse-on-inmates/articleshow/111700522.cms>> accessed 23 October 2024

¹⁵ *M.Syed Ali Fathima v State*, WP No. 5058 of 2015 (MadrasH.C.) (17 March 2023) Unreported

addiction centres and rehabilitation facilities, ensuring they operate in compliance with legal and ethical standards, with routine inspections established to verify adherence to these regulations.

Finally, complementary amendments to existing laws may be required to harmonise the NDPS with public health initiatives to better support prevention and education efforts.

Questions for discussion

- What challenges does the government face in shifting the focus from criminalisation to a public health approach in addressing drug addiction, and how can these challenges be effectively overcome?
- How can a diversion program be designed to effectively redirect drug users from the criminal justice system to health services? What criteria should be used to determine eligibility for diversion?
- What role can community organisations and healthcare providers play in the successful implementation of a public health approach to drug addiction, and how can they be integrated into the legal framework?

4. Enacting a framework for Deed of Familial Associations

Issue

Members of the LGBTQIA+ community face pervasive discrimination and harassment in various aspects of their lives. They often encounter discrimination in critical areas such as employment¹⁶ and housing.¹⁷ They also combat violence, ill-treatment, or social ostracism¹⁸ from society at large and even their own families. The situation is further complicated by the fact that same-sex marriages are not recognised under Indian law, and there is inadequate legal regulation to protect individuals in same-sex partnerships and other non-conformist family structures. This absence of legal safeguards leaves queer persons vulnerable without clear recourse within the existing legal framework, highlighting the need for targeted legislation to address these issues.

Recognising the problems faced by members of the queer community, the Supreme Court had directed the government to address the discrimination that queer families face on account of exclusion and non-recognition.¹⁹ Subsequently, the Madras High Court suggested that the Tamil Nadu government could consider recognising a Deed of Familial Association ('DFA') entered into between LGBTQIA+ couples, enabling them to live with some degree of protection without being disturbed or harassed. The court urged the state government to come up with a procedure for registration of such deeds, besides defining their scope.²⁰ The draft Tamil Nadu Gender and Sexual Minority Policy of 2024 also recommends recognition of same-gender relationships by means of a DFA and other forms of existing/legacy relationship establishment methods.²¹

Scope for legal reform

The DFA could serve as a contract stipulating that two adults of sound mind have consensually entered into a relationship with one another, recognising the right of partners to choose to form queer families. As a formal document evidencing the commitment of the parties to one another and their intention to live as a family unit, the DFA would be a means to ensure recognition of the relationship and protect queer families against harassment or violence, especially from natal families. The DFA could potentially deter discriminatory actions and serve as proof of the relationship's legitimacy in various social and institutional settings, enabling queer families to avail socio-economic benefits.

In terms of its scope, the DFA could be used as supporting documentation in various contexts. The union government has stated that LGBTQIA+ couples will now be considered as part of the same household for the purpose of ration cards, and directed state governments to take measures necessary to ensure that partners in queer relationships are not discriminated against in the issuance of ration cards.²² While applying for ration cards

¹⁶ Vivian Ho, 'The discrimination pushing LGBTQ workers to quit' *BBC* (6 March 2023) <<https://www.bbc.com/worklife/article/20230303-the-discrimination-pushing-lgbtq-workers-to-quit>> accessed 23 October 2024

¹⁷ Bindisha Sarang, 'Why it's doubly difficult for gay renters to find homes' *Firstpost* (12 November 2013) <<https://www.firstpost.com/living/why-its-doubly-difficult-for-gay-renters-to-find-homes-1224225.html>> accessed 23 October 2024

¹⁸ Christiane M. Buttner, 'Ostracism Experiences of Sexual Minorities: Investigating Targets' Experiences and Perceptions by Others' *Personality and Social Psychology Bulletin* (3 April 2024) <<https://journals.sagepub.com/doi/10.1177/01461672241240675?cid=int.sj-abstract.citing-articles.8>> accessed 23 October 2024

¹⁹ *Supriyo @ Supriya Chakraborty & Anr v Union of India*, 2023 INSC 920

²⁰ *S. Sushma and Ors v. Commissioner of Police, Greater Chennai Police and Ors*, WMP No. 31112 of 2023 in WP No. 7284 of 2021 (MadrasH.C.) (17 November 2023) Unreported

²¹ *S. Sushma and Ors v. Commissioner of Police, Greater Chennai Police and Ors*, WP No. 7284 of 2021 (MadrasH.C.) (17 November 2023) Unreported

²² The Hindu Bureau, 'LGBTQIA+ couples to be treated as part of same house for ration card: Centre's 'interim measures' *The Hindu* (1 September 2024) <[https://www.thehindu.com/news/cities/Delhi/lgbtqia-couples-to-be-treated-as-part-of-same-house-for-ration-card-centres-interim-measures/article68593595_ece#:~:text=The%20Centre%20on%20Sunday%20\(September,of%20Food%20and%20Public%20Distribution](https://www.thehindu.com/news/cities/Delhi/lgbtqia-couples-to-be-treated-as-part-of-same-house-for-ration-card-centres-interim-measures/article68593595_ece#:~:text=The%20Centre%20on%20Sunday%20(September,of%20Food%20and%20Public%20Distribution)> accessed 23 October 2024

or welfare schemes, the DFA could allow partners to be recognized as a family unit and avail benefits accordingly without unnecessary hassle.

The government has also stated that members of the LGBTQIA+ community can open joint bank accounts and nominate each other as beneficiaries,²³ which could be made easier through the backing of a DFA.

The DFA could also facilitate the inclusion of partners in employer-provided health insurance plans or pension schemes. In case of medical emergencies, the DFA could be presented as evidence of the relationship, potentially allowing partners to make medical decisions for each other or to be recognized as next of kin.²⁴ Further, the DFA could potentially ease the process of finding housing and reducing discrimination from landlords who might otherwise be hesitant to rent to unmarried couples.²⁵

Questions for discussion

- What might the registration procedure for a DFA entail? How can the process be designed to be accessible, efficient, and maintain the privacy of LGBTQIA+ couples?
- What measures would be required to ensure that DFAs are recognized across various government departments and institutions (e.g., banks, hospitals, housing authorities)?
- How can the law address potential resistance or non-compliance from certain officials or institutions in recognizing DFAs?
- What are the potential fiscal implications of recognizing DFAs for welfare schemes and benefits, and how can they be planned for?

²³ PTI, 'LGBTQ Persons can open joint bank account: FinMin advisory' *The Economic Times* (29 August 2024) <<https://economictimes.indiatimes.com/industry/banking/finance/banking/lgbtq-persons-can-open-joint-bank-account-finmin-advisory/articleshow/112902589.cms?from=mdr>> accessed 23 October 2024

²⁴ Gursimran Kaur Bakshi, 'Post Supriyo's no fundamental right to marriage, could Madras HC's familial association Order pave the way for recognising civil unions' *The Leaflet* (21 November 2023) <<https://theleaflet.in/post-supriyos-no-fundamental-right-to-marriage-could-madras-hcs-familial-association-order-pave-the-way-for-recognising-civil-unions/>> accessed 23 October 2024

²⁵ Neil Borate, Shipra Singh, 'How LGBTQs are alienated in India's rental market' *Live Mint* (20 April 2023) <<https://www.livemint.com/money/personal-finance/indian-rental-market-excludes-lgbtq-couples-shows-mint-analysis-of-99acres-listings-legal-recognition-of-same-sex-marriages-may-improve-situation-11682013970518.html>> accessed 23 October 2024

5. State amendments to the new criminal codes to further gender justice

Issue

The Bharatiya Nyaya Sanhita, 2023 ('BNS'), which has now replaced the colonial era Indian Penal Code, 1860 ('IPC'), aims to reform India's criminal justice system by decolonising and contemporising it. However, it falls short of making a marked departure from the colonial codes, and continues to retain vague and ambiguous provisions that hinder gender justice.

The BNS categorises gender into three classes – man, woman, and transgender (this includes transwomen, irrespective of whether they have undergone sex reassignment surgery, and any person who self identifies as a woman but whose gender assigned at birth is not female).²⁶ However, under the BNS, 'rape' is a gendered provision – where the offender can only be a man and the victim a woman.²⁷

Further, the BNS entirely removes the criminalisation of 'unnatural offences' contained in Section 377 of the IPC. Subsequent to the case of *Navtej Singh Johar v. Union of India* (2018), this provision no longer included consensual same-sex intercourse within its penal framework, but continued to criminalise bestiality and non-consensual same-sex intercourse. Omission of Section 377 in its entirety has effectively decriminalised bestiality and has left no safeguards against non-consensual same-sex intercourse. Given that rape continues to be a gendered offence, the safeguards under Section 377 should have been retained.

The BNS does not provide for a separate offence to cover rape of men and transgenders, and fails to penalise sexual violence against men and transgender persons.²⁸ The Tamil Nadu government could contemplate state-level amendments to the new criminal laws to address these concerns.

Scope for legal reform

Under Article 246(2) of the Constitution of India, various state legislatures, including Tamil Nadu, have in the past made changes to criminal laws to suit their specific needs and contexts. The BNS could be amended in its application to Tamil Nadu to address several key issues in the current legislation.

Section 63 of the BNS could be amended to redefine rape as a gender-neutral offense, encompassing all potential victims regardless of gender, and providing legal protection for male and transgender victims of sexual violence. Further, provisions could be introduced in the BNS to criminalise bestiality, filling the gap left by the removal of Section 377 of the IPC.

These amendments, if adopted, would significantly improve the BNS's ability to address sexual violence comprehensively and equitably, regardless of the gender identities involved. They would also ensure that Tamil Nadu's criminal justice system is more inclusive and protective of all its citizens, addressing the shortcomings of the current BNS in terms of gender justice and protection against sexual violence.

Questions for discussion

²⁶ Bharatiya Nyaya Sanhita, s 2(10)

²⁷ Bharatiya Nyaya Sanhita, s 63

²⁸ 'Criminal Law Bills 2023 Decoded #2: Concerns with the Proposed Landscape of Sexual Offences in BNS 2023' *The P39A Criminal Law Blog* (16 September 2023) <https://p39ablog.com/2023/09/criminal-law-bills-2023-decoded-2-concerns-with-the-proposed-landscape-of-sexual-offences-in-bns-2023/#_ftn8> accessed 23 October 2024

- Given the implementation of new criminal codes, is it advisable for the government of Tamil Nadu to consider commissioning a study to evaluate how these provisions address sexual violence against transgender persons?
- Are legislative amendments required to effectively address and prosecute instances of sexual violence perpetrated by women or transgender persons? How can our criminal codes evolve to recognize and respond to all forms of sexual violence, regardless of the perpetrator's gender identity?

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