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# **COMPARATIVE STUDY OF** **TRANSGENDER RAPE LAWS IN INDIA** **AND OTHER COUNTRIES**

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## **Abstract**

Transgender who are commonly known as “HIJRAS” have been fighting for their HUMAN RIGHTS for a very long time now- in 2019 Supreme court of India recognized transgender as a ‘third gender’ - but before it they witnessed humiliation, sufferings and discrimination- they were expected to earn their living by doing odd jobs like begging, prostitution ,etc no dignified jobs were there available for them but in NALSA v. UOI the apex court of India provided them the dignity... dignity to live a life a dignified life by recognizing them as third gender and have also passed an act for their protection [THE TRANSGENDERPERSONS (PROTECTION OF RIGHTS) ACT, 2019] but was that enough? I guess NO. In India 40% of transgender people face sexual abuse even before turning 18. Rape- defined under section 375 of Indian Penal Code, 1860 which is a gender biased definition and transgender rape is not been included under the same.

In light of this, the paper will attempt to compare and evaluate the various legal frameworks regarding basic rape laws for transgender people that have been adopted by nations all over the world. It will also attempt to suggest some measures by which this vulnerable segment of society could not feel neglected and discriminated against and could lead a dignified life similar to that of other people.

## INTRODUCTION

Transgender are person whose outer body doesn't match their gender expression for example- a human being born in the body of a male but identifies as a female though these people are neither male nor female. In the history it was believed that when lord shiva and shakti came together to set an example that wife and husband are equal and are companion to each other no one is greater than the other , they are one soul with two bodies to prove this fact lord shiva and shakti came together and took '*ardhanarishvara*' avtar and it is well known in the history that transgender are born out of this avtar therefore in our country it was religiously believed that if you upset the hijras lord shiva will never forgave you for this sin. But as time changed this our society started neglecting this community and not only this but also started disrespecting the same and the story doesn't end here but they were also forced into prostitution. In the two holy Hindu mythological epics, the Ramayana and the Mahabharata, we also find mention of the hijra community. Lord Rama is supposed to have asked all the "men and women" to go back to the city when he turned around to leave the city in the epic Ramayana after being exiled from the kingdom for 14 years. Following his lead, the Hijra community elected to live with him because they did not feel obligated to go back.

We also find references to this group in the other epic, the Mahabharata. Arjun, the epic's hero, was exiled in one of the chapters of the Mahabharata. There, he adopted the identity of a hijra and carried out customs that transgender people now execute at marriage and childbirth. Another transgender-related tale can be found in the Mahabharata epic. The Mahabharata describes Aravan as the son of Arjuna and Nagakanya. He only stipulated that he would spend his final night in marriage before making an offer to be sacrificed to Goddess Kali in order to guarantee the Pandavas' victory in the battle of Kurukshetra.

Krishna took the form of Mohini, a stunning lady, and wed him because no woman would want to wed a man who was destined to die. The Tamil Nadu Hijras refer to themselves as Aravanis and view Aravan as their progenitor. One of Lord Shiva's numerous incarnations in Hindu mythology involves him combining with his wife Parvati to become the androgynous Ardhanari, who is especially significant to the Hijra people.

**Islamic Period-** During the Islamic era, the Hijra community also had a significant impact, particularly during the Ottoman and Mughal eras in medieval India. They once held important posts including political counsellor, administrator general, and harem guard. They had a reputation for being astute, reliable, and devoted to the royal throne. Due to their unrestricted access to all areas and demographic groups, they were essential in the politics of empire-building throughout the Mughal Empire. They were also thought to possess supernatural power and sought after for favors, especially during religious rituals.

**British Period:** At the start of British rule, certain Indian states granted transgender populations privileges. They had the right to obtain land from agricultural households, as well as food rights and a small quantity of money. Because they did not get their estates via family connections, such benefits were taken away from them during the British Period, and lands were also removed by British legislation. During British colonial rule, members of the Hijra community were labelled as criminals. During colonial control, they were considered a different caste or tribe.

Under the Criminal Tribes Act of 1871, all hijras were classified as criminal tribes because they were involved in kidnapping, castrating, and disguising as women to dance in public. Such conduct might result in up to two years in prison, a fine, or both.

## **Legislative framework for transgender community**

Transgender in 2019 got recognition under the eyes of law in the NALSA v. UOI case where the apex court of our country has tried to protect this group of our society.

## **CONSTITUTIONAL RIGHTS OF TRANSGENDER-**

the preamble of India have always promised justice to each and every human being despite of their caste, religion, economic, political or social status and have also highlighted that each and every person is equal in the eyes of law but transgender has always been deprived of their constitutional rights maybe because of the earlier policies made only recognized two genders- male and female and due to this they were deprived of many rights which includes the right to marry, vote, having their own property, etc..., the basic fundamental rights which included all the citizens under article 14, 15, 16 and 21 also included them.



On 6th September 2018 a very landmark judgment was passed by the supreme court of India - NAVTEJ SINGH JOHAR v. The constitutionality of IPC Section 377 was contested. This clause specifies that "voluntarily carnal intercourse against the order of nature with any man, woman, or animal shall be punished with imprisonment for life, or with imprisonment which may extend to ten years with a fine." The petitioner asked for the right to sexuality, the right to sexual autonomy, and the freedom to select a sexual partner to be recognized in Art. 21 of the Indian Constitution. Due to the inherent nature of sexual orientation as a component of one's self identity, The Honorable Supreme Court decriminalized Sec. 377 and ruled that denying the following rights would violate one's right to life and other fundamental rights that cannot be denied.

Many amendments in were also made in *Immoral Traffic Prevention Act, 1956 and Right of Transgender Bill 2014*

We all are aware of hathras and nirbhaya rape case these cases are the kinds which will always going be in our hearts these two cases literally shook each and every human being. These two cases bought a lot of great amendments in our criminal law specially the rape laws but if we read section 375 of Indian Penal Code it does not include transgender in its definition and nor there is any other rape laws which protects the rights of transgender.

The bill might, however, be passed by the Lok Sabha and then expire. After two years, the Lok Sabha received a fresh bill, the Transgender Persons (Protection of Rights) Bill, 2016. The 2016 Bill diverged considerably from the NALSA ruling in compared to the 2014 Bill. The Parliamentary Standing Committee on Social Justice cited many instances where the 2016 Bill differed from NALSA in its 43rd Report. The Lok Sabha, on the other hand, passed the Bill without considering the recommendations of the Standing Committee, and it became the Transgender Persons (Protection of Rights) Act, 2019. Many transgender people opposed the bill, alleging that certain provisions were unlawful. The Petitioners urge the Court to strike down Sections 4, 5, 6, 7, 12(3), 18(a), and 18(d) of the Act. Furthermore, they urge that the Court issue a Writ of Mandamus mandating the Centre and State Governments to provide reservations for transgender individuals in public employment and education, as advised by the Court in NALSA.

## **INTERNATIONAL CRIMINAL LAW-**

The International Criminal Court held that rape is a gender neutral crime in *AKAYESU* case - this akayesu case was the first ever case where rape committed on both men and woman was penalized. Rape was defined by identifying the following elements: sexual penetration to the victim's mouth, vagina, or anus, by the perpetrator's penis or any other object, with a threat of force or coercion directed at the victim or any such third party.

### **Rape laws in other countries-**

In 2013 USA in U.S. code (i.e. the primary criminal code of U.S.A.) has amended the definition of rape and made it gender neutral.

Canada, on the other hand, modified its definition of rape and sexual crime in 1983. In Canada, the word rape has been replaced with sexual assault in the definition of rape, and the maximum penalties for sexual assault, sexual assault with a weapon, threats or harm to a third party, and aggravated sexual assault have been prescribed as imprisonment for 10 years, 14 years, and life imprisonment. The Canadian position on rape legislation was repeated in the Justice Verma Committee report (Supra). However, numerous experts have criticised Canadian rape legislation change as being shallow. It has been argued that the change lessens the harm of rape by reducing it to sexual assault. Philippines in 1997 recognized rape as gender neutral offence and brought changes in its penal code.

Previously, male assault was not legally recognised under English precedent-based law. Rape of Mens was documented and punished as non-consensual buggery, which had a lighter punishment. From 1994 forward, the law considers men to be victims of assault. Assault is defined as the entrance of the respondent's mouth, buttock, or vagina with the respondent's penis under the 2003 Sexual Offences Act. While criticising, the Legal executive in Ismail has also prohibited distinguishing between "mouth, butt, or vagina." Guys are also shown as victims in the Scottish and Irish Sculptures for Sexual Offences. rather, a female or a non-male individual cannot be prosecuted with Assault; rather, they can be charged with Rape, which has a lower term.

## **A CASE USED FOR GENDER NEUTRALITY**

Rape is mostly a crime of domination. It is an invasion and violation of sexual autonomy and physical integrity. It is regrettable that the offence is primarily perceived in terms of gender. Contrary to popular assumption, rape is common among gays, the transgender population, and even males raped by women. As a result, there is a normative and functional need to change the present rape legislation to encourage gender neutrality.

## **ENCLOSURE OF THE TRANSGENDER**

The distinctiveness of rape legal standards affects more than only male rape victims or women raped by women. Transgender persons are excluded from the rape conversion, which assumes binary genders. In India, the transgender population has been mistreated, abused, and discriminated against. In India, transgender persons face sexual assault, acid attacks, deformity, and other forms of physical violence. This may be attributed to transgender people's curiosity about their sexuality, as well as a culture that is hostile to anything unexpected or unconventional. The NALSA (Supra) ruling recognised transgender as the third gender, and it was an important step towards non-binary inclusivity. However, other than legal recognition, little has been done for the underserved transgender population, and the fact remains that they are raped, violated, and abused without being recognised victims under the definition of rape. Gender neutrality in the definition will not only legally recognise them as victims, but will also encourage them to come forward with information about crimes committed against them.

## **CONCLUSION**

India has made some progress in recognising and defending transgender people's rights. Transgender individuals were recognised as a third gender by the Supreme Court of India in 2014, and their constitutional rights were upheld. This important decision made it possible for transgender people to get access to school, employment, healthcare, and other social advantages.

In terms of rape legislation in India, Section 375 of the Indian Penal Code (IPC) addresses rape offences. Specific rules involving transsexual rape, on the other hand, may not be specifically established in the law. The definition of rape under Section 375 is based on non-consensual sexual

penetration and makes no distinction between the victim's and perpetrator's genders. It is applicable to all persons, regardless of gender identification.

It is important to note that transgender people, like any other rape victim, have the right to report and seek legal redress for sexual assault. Transgender victims should be subject to the legal requirements of Section 375 of the IPC. Furthermore, the Protection of Children from Sexual Offences (POCSO) Act protects all children from sexual abuse, including transgender children.

While India has taken measures to protect transgender people's rights, there are still obstacles to successfully implementing and enforcing these laws. Transgender people are frequently denied access to justice and support services because to discrimination, stigma, and a lack of understanding.

It is recommended to refer to latest legislative updates, consult legal professionals, or organisations working on transgender rights in India to fully grasp the current condition of transgender rape legislation in India.

Regrettably, simply identifying non-male offenders and non-female victims of rape is insufficient. The culture that believes in the truth of stereotypically gendered forms of victim and offender must also develop, and gender neutralizing the law is one way to do so.

All things considered, there is a need to recognise that rape is an assault against dignity, bodily integrity, and sexual autonomy, and that any and every victim deserves to be recognised as a victim regardless of their Gender or the Gender of their assailants. In order to establish Gender Neutrality and hence true gender justice, both the notions of Victim and Perpetrator must be neutral. Rape is a more serious crime than sexual assault. The International Criminal Law and the US Federal Statute, which recognise Gender Neutrality in circumstances of victim and perpetrator, are perfect models of Gender Neutrality across the world.

## **KEYWORDS**

1. HIJRA
2. TRANSGENDER
3. RAPE
4. SEXUAL ABUSE
5. GENDER NEUTRAL
6. POCSO
7. THIRD GENDER
8. SEX REASSIGNMENT SURGERY

## **BIBLIOGRAPHY**

- <https://theleaflet.in/transgenders-and-rape-law-is-equal-protection-of-law-still-a-pipe-dream/>
- <https://edition.cnn.com/2020/12/08/india/india-transgender-rape-laws-intl-hnk-dst/index.html>
- <https://www.legalserviceindia.com/legal/article-6137-recognizing-transgender-rapes-in-india.html#:~:text=The%20punishment%20for%20rape%20of,two%20years%20and%20a%20fine.>