



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL
ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

WWW.WHITEBLACKLEGAL.CO.IN

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of White Black Legal

– The Law Journal. The Editorial Team of White Black Legal holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of White Black Legal. Though all efforts are made to ensure the accuracy and correctness of the information published, White Black Legal shall not be responsible for any errors caused due to oversight or otherwise.

WHITE BLACK
LEGAL

EDITORIAL **TEAM**

Raju Narayana Swamy (IAS) Indian Administrative Service **officer**



Dr. Raju Narayana Swamy popularly known as Kerala's Anti Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala . He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University . He also has an LLM (Pro) (with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru

and a professional diploma in Public Procurement from the World Bank.

Dr. R. K. Upadhyay

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB , LLM degrees from Banaras Hindu University & Phd from university of Kota.He has succesfully completed UGC sponsored M.R.P for the work in the ares of the various prisoners reforms in the state of the Rajasthan.



Senior Editor

Dr. Neha Mishra



Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; Ph.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St.Louis, 2015.

Ms. Sumiti Ahuja

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi,

Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing Ph.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.



Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.



Dr. Rinu Saraswat

Associate Professor at School of Law, Apex University, Jaipur, M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.

More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.



Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US



WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

CONTEMPORARY POSITION OF PENAL LAWS **IN PROTECTING TRANSGENDERS FROM** **SEXUAL OFFENCES**

AUTHORED BY - JEEVITHA M & LAXMI PRIYA M

ABSTRACT

In this paper, we are going to focus on the Indian criminal justice system's, disparity on the transgender. Penal laws in our country for sexual offences are in nature of gender-specific. Thus, the criminal laws on considering the vulnerability of women, always have a special treatment to women. There are women-centric laws in criminal justice system to protect them. But the vulnerability of transgender is unnoticed and left out without any remedy in the criminal justice system. The substantial law of the criminal justice system itself left out transgender, then what more we can expect from the procedural law to stand for transgender? That is their fundamental rights which are being denied to them for a long period till now. The criminal justice system must be focused to provide those opportunities and their rights must be protected. If fundamental rights are violated, we can approach the court of law to enforce such rights. What will happen if the fundamental rights itself is not stipulated to specific community, though they are part of the society but unrecognized. This disparity must be focused and it must be remedied.

INTRODUCTION:

Transgender persons are often subjected to abuse or discrimination merely due to their sexuality, something they did not select at birth. It is a rare group among people who are born with both masculine and feminine traits. Having born into this group brings with it a host of challenges, such as societal acceptance, limits, discrimination, and violence, etc. Transgender people in India, also known as Hijras and Kinnars¹, have historically experienced discrimination, loss of self-identity, and severe stigma and violence. The criminal procedural law continues to suffer from the same flaw and fails to protect transgender people's dignity. This marginalised community is forced to depend on sex workers and begging for a living. This

¹ The Hijra, Kothi, Aravani: A quick guide to transgender terminology, Available at [Hijra, kothi, aravani: a quick guide to transgender terminology \(scroll.in\)](https://www.hijra.kothi.aravani.org/quick-guide-to-transgender-terminology)

exposes them to police intervention and criminal law regularly, leaving them vulnerable. Indian criminal law, in general, and safeguards in particular, are binary. Transgender people have a history of being excluded from the criminal justice system unless they have been treated as criminals.² Violence against transgender people is regularly underreported. Activism and Supreme Court decisions over the last decade have resulted in the development of a right-based narrative. Transgender people have now been granted the same fundamental rights as every other Indian citizen. They also have been granted third-gender status. Even though the courts have been at the frontline of protecting transgender people's rights, the criminal justice system continues to exclude, marginalise, and victimise transgender people. Indeed, by NGO's efforts shed light on cases of police brutality and illegal detention. Hence the need to reframe the transgender community's relationship with the criminal system and, ultimately, to create pathways to justice. Prosecution of transgender people, frequently on fabricated charges, as well as occurrences of illegal detention

NEED OF GENDER-NEUTRAL SEXUAL OFFENCES LAWS:

The term sexual offences does not defined under IPC, but all sexual offences are gender-specific, representing that the victim is always a woman and the man is always perpetrator. Sexual offences are crimes that violate an individual's dignity and bodily integrity, with or without his or her Consent. Criminal laws in India are strongly influenced by mindset of the people in society. The long-standing patriarchy ingrained in people's minds has resulted in a situation in which the man has always been perpetrator because of his gender and never the victim. This has resulted in gender-specific rape laws as well as other sexual offence laws, such as the sexual harassment voyeurism, stalking, POSH Act, 2013, which is designed to protect women in the workplace etc.,

DEVELOPMENT OF LAWS RELATING TO TRANSGENDERS RIGHT:

Amidst being hundreds of years old, the nation's criminal laws have been amended and modified numerous times to meet the needs of the ever-developing society. In 2013 the Indian penal code was revised to enlarge the scope of hate crimes and sex offences on women by the effect of the Nirbhaya case. So far, the Penal Code has indeed been amended 77 times. Currently,

² Discard Regressive Laws That Legitimise Violence Against Transgender People, Available at [Discard Regressive Laws That Legitimise Violence Against Transgender People \(thewire.in\)](https://thewire.in/regressive-laws-that-legitimise-violence-against-transgender-people)

the Penal Code was repealed as it contains age-old law and the new Bharatiya Nyaya Sanhita, 2023 came into force to rectify such. Whereas the BNS also fails to address the violence subjected on the trans community.

Much earlier than the 2018 decision, In 1991, the AIDS Bhedbhav Virodhi Andolan (ABVA) issued a report exposing atrocities being committed against the transgender community under guise of Section 377 IPC and recommending that the law be repealed. Hence the writ petition was also filed to proclaim Section 377 unconstitutional. However, the writ petition was dismissed on the grounds that upholding legal morality, and its declaration as ultra vires the Constitution would've been contrary to the general morality, public order, and decency. Although the petition was rejected on procedural grounds, it inspired the trans community to support equality and legal protections against sexual harassment.

i. In *Sudesh Jhaku v. K.C. Jhaku*

The concept of gender neutrality in sexual offences first originated in the *Sudesh Jhaku* case³ in 1996, in which the Delhi High Court pressured the legislation to make gender-neutral criminal law. The Supreme Court raised an issue for the Law Commission of India to examine as a result of this decision.

ii. 172nd Law Commission Report:

This commission recommended of making the law a gender neutrality in its Report on Review of Rape Laws.

iii. In *NALSA v. UOI*

In this case in the year 2014⁴, the judiciary granted the trans community legal recognition as a "third gender". The Court decided that the phrase "person" in Article 14 includes both men and women, and transgender people who either are male nor female. The decision also highlighted the community's lack of legal protections, stating that: the failure to recognise the authenticity of hijras/transgender people denies them equal legal protection, deciding to leave them incredibly vulnerable to harassment, violence, and sexual assault in public places, at home, and in jail, including by police. Sexual

³ *Sudesh Jhaku v. K.C. Jhaku*, 1996 SCC online del 397; 1998 Crl LJ 2428

⁴ *National Legal Service Authority v. UOI* AIR 2014 SC 1863

abuse, including molestation, sexual violence, forced anal and oral sex, gang rape, and stripping, is rampant, and there are accurate figures and materials to back it up.

The decision directed the Central and State Authorities to implement positive action to ensure that fundamental human rights, healthcare, and socioeconomic health of the community were not infringed. The LGBTQA community felt happy because their human rights were recognised despite their small number. Despite acknowledgment, the rational reality remained constant until 2018, in *Navtej Singh Johar v. UOI*.

iv. In *Navtej Singh Johar v. UOI*

The Supreme Court's decision in this case decriminalized Section 377 of the IPC. Section 377 of the Criminal Code is gender specific and encompasses both heterosexual and homosexual sexual behavior; however, the burden of proof frequently falls solely on the accused⁵. The Supreme Court's Constitutional Bench unanimously declared Section 377 IPC unconstitutional in so far as it is consensual sexual conduct between two adults in private, whether between homosexuals, heterosexuals, same sex or transgender sex, but it continues to govern non-consensual sexual acts against adults, minors, and bestiality. It stated that such a consensual act is "natural" and does not violate the "order of nature."

v. Transgender Persons (Protection of Rights) Act, 2019

The Lower House first introduced and passed the Transgender Persons (Protection of Rights) Bill, 2016. However, the Upper House did not pass the bill, bringing the legal situation to a halt. Nonetheless, the Bill was reintroduced in 2019 and was passed by both Houses with presidential assent, becoming an Act. While this Act was harshly criticized for the lack of consultation with trans community representatives, it also highlighted and brought to light some of the really common issues faced by transgender people that had previously gone unnoticed.

The Act contains punishments for transgender-related offences which are as follows⁶:

- (i) forced or bonded labour
- (ii) physical, sexual, verbal, emotional, or economic abuse.
- (iii) denial of use of public places,

⁵ *Navtej Singh Johar v. UOI*, Writ Petition (Criminal) no. 21 of 2018.

⁶ Section 18 of "*The Transgender Persons (Protection of Rights) Act, 2019*"

(iv) removal from household and village, and for these offences range from six months to two years in prison, and a fine.

Though by the way of this Act, the transgender and their rights have been recognized, this seems useless in working nature, as most of them were subjected to offences against them, where is no law to redress such at the work ground.

POSITION OF TRANSGENDERS UNDER THE CRIMINAL JUSTICE SYSTEM:

While there is no contradiction that sexual offences are gendered crime which on a large scale shakes women, the community that constantly undergoing incomprehensible harm through sexual offences being excluded even from the definition of rape is the transgender community. Section 375 of the Indian Penal Code, deals with Rape and section 377 of IPC deals with unnatural offences. The relation between section 375 and section 377 will be discussed widely hereunder. Even though the Supreme Court in the year 2018⁷ declared that Section 377 was unconstitutional, still section 377 was remained in the statute, because by the order of the court it excluded only consensual sexual intercourse between consenting adults, By this pronouncement of the court the act of non-consensual sexual intercourse still an offence need to be prosecuted as an “*unnatural offence*” under Section 377 of IPC.

By the order of Supreme Court section 377 of IPC still prosecutes the person who engaged in non-consensual sexual intercourse, this pronouncement protected the homosexuals and transgender from sexual offences. Section 375 being a gender-specific provision which applies only to women victims, it fails to cover transgender people. Hence sexual offences against transgender covered under Section 377.

Position under New Criminal Enactment :

Positive change made in new penal law of Bharatiya Nyaya Sanhita, 2023 is the addition of “*transgender*” in definition clause of the BNS⁸, which clarifies that the term 'he' refers to all individuals, including men, women, and transgender persons, unless specified otherwise, the term transgender under this act shall have same meaning assigned to it in section 2(k) of Transgender persons (protection of rights) Act, 2019. This is a tiny step to include transgender

⁷ Supra 4

⁸ Section 2(10) of Bharatiya Nyaya Sanhita, 2023.

people within the domain of the Criminal Justice System, where transgender people have been left out of the legislation itself.

By the new code of the Bharatiya Nyaya Sanhita, 2023 (BNS) which replaces the IPC, section 377 was wholly removed, this deletion of section 377 makes the life of queer people even more harder than before. No section was placed in new criminal law in order to protect queer people and transgender from sexual offences. Rape against transwomen which is not covered under the 375 IPC and also in section 64 of BNS, thus the trans people remaining unprotected over a long period till now.

The Transgender Persons (Protection of Rights) Act, 2019, Section 18 of the Act provides offences and penalties for compelling transgender for act of forced or bonded labour or denying their right to passage or abstracting from public access and harm or injury to life, well-being, acts includes physical abuse, sexual abuse, emotional and economic abuse will be punished only with a maximum of two years of imprisonment as punishment for such abuse, which is very much lower than that of punishment provided under Section 376 IPC (now Section 64, BNS) which provides a minimum of ten years and upto life imprisonment for the accused for sexual offence.

DISCRIMINATION ON BASICS OF PHYSICAL FEATURES:

The police violence and court responses to transgender identity issues, while contradictory in the outcome, one violent and the other emancipatory, possess their roots in biology and the body as the site of intervention. The Act of 2019 mentions the concept that gender determination is firmly embedded in biological essentialism. Section 5 of the Act states that a transgender person has to make an application before the magistrate for a certificate that certifies their identity. The condition imposed under Section 5 of the Act to obtain gender certificate itself violates transgender people's right to self-determination and also contradicts the NALSA decision's right to self-identify. What tends to happen when the right to gender identity is exposed to the State's voyeuristic tendencies, specifically the criminal justice system? Why does the state would like to intervene in biology and the human body? What effect does fusing gender identity and biology have on the State and its mechanisms? Perhaps the idea of the state regulating its subjects is worth considering. The concept of non-confirming body surveillance stems from the idea that bodies, or the social and construction of bodies, are deeply informed by ideas of

culture, gender, and sexuality⁹. The emphasis on biological essentialism creates a dichotomy within the State narrative of gender non-confirming individuals who have undergone surgery versus those who self-identify as transgender. One reason for emphasising the biological aspect could be to bring communities under closer scrutiny and maintain surveillance by having some details of their surgeries, transitions, and identities.

INCLUSIVITY OF TRANSGENDER UNDER CRIMINAL PROCEDURE LAW:

Search on Arrested Person:

Both The criminal procedure code and the newly enacted Bharatiya Nagarika Suraksha Sanhita, 2023 contain special procedure for arrest and custody of women and children but transgender is completely left out also in the procedural law of the country. Section 46(4) Crpc (section 43 of BNSS) prohibits arrests after sunset. No arrests after sunset- In response to concerns about violations of women's rights, prohibits the arrest of women after sunset and before sunrise, except in exceptional circumstances, in which case the arrest can be carried out by a female police officer after filing a written report and obtaining prior permission from the concerned Judicial Magistrate of First Class, but this has not been the case for transgender.

According to section 53(2) CrPC (Section 51 of BNSS), Medical examination by a female practitioner for a females and Section 164 of Cr.P.C (section 183 of BNSS) provides Right to privacy while recording statement a woman, who has been raped can record her statement before a District Magistrate while the case is being tried, with no one else present. Conversely, she can record the statement with only one police officer and one female constable in a convenient location that is not crowded and doesnot allow for the statement to be overheard by a third person. Same is not applied in case of transgender.

Section 51 of the Criminal Procedure Code, 1973 Cr.P.C (Section 49 of BNSS) specifies the search procedure to be followed following an arrest a woman can only be searched by a female officer and only under strict conditions of decency.

When the person arrested is transgender none of the above mentioned protection applies, they

⁹ Article titled "*Legal Safeguards for Transgenders from Sexual Offences*" Authored by Charvi Devprakash [Legal Safeguards for Transgenders from Sexual Offences: The Need of the Hour | SCC Blog \(sconline.com\)](https://www.scconline.com/blog/legal-safeguards-for-transgenders-from-sexual-offences-the-need-of-the-hour/)

face a number of challenges. To begin with, determining the gender is the foremost problem. Many jurisdictions use the arrestee's self-identification as the means of determining the custodial safeguard, where a female field officer searches a transgender person who recognises herself as female. However, India's transgender law uses a certification model to determine gender. An individual can only be recognised as transgender after obtaining a certificate of identity from the District Magistrate, which requires the individual to undergo sex-reassignment surgery.

Essentially, a large portion of the transgender population is left without protection because they are unable to obtain certificates due to bureaucratic complications, do not wish to undergo sex reassignment surgery, or cannot afford such surgical procedures. In the lack of the certificate, a transgender person who could identify as female will be searched by a male officer and held in the same facility as male inmates. If law enforcement chooses to conduct a strip or intimate search, the experience can be excruciating. In many cases, despite having a gender certificate, a transgender woman was forced to undergo a medical examination for gender confirmation in order to identify her eligibility to file a molestation complaint.

Absence of Separate Custodial Rooms:

Due to the lack of separate custody rooms, transgender people are at a rising risk of violence, sexual abuse, and assault. Professor Valerie's research shows that the practise of incarcerating transgender women in men's prisons made them vulnerable to sexual assault and violence. when a male with feminine features, was sent to a male prison, where he undergoes lot of harassment by his cellmates in the custody. Due to this kind practice many of the transmen were forced to stay with male inmates, left jail with AIDS contracted from cellmates.

When "transgender individuals are brought to prison, they will be sent to the chief medical officer," according to procedure in Indian jails. They are classified as women if they have female genitals, So it is with those who have male genitals. This contradicts the NALSA decision, which grants transgender people the right to be recognized as 'third gender' if they do not identify with the male-female binary, and it was held that the gender of a people is to be determined by the person concerned, on the issue of gender determination. Gender identity, in other words, must be founded on self-identification, but not based on medical examination.

Special Medical Needs in Custody Rooms:

The existing law's failure to address the community's unique medical needs, according to section 55A of the Cr.P.C. (Section 56 of BNSS), it is the duty of the person in charge of an accused to take reasonable care of the accused's health and safety. The person in charge could be the police or the prison authorities. The above-mentioned healthcare protection should include procedures like hormone replacement therapy, sex-reassignment surgery, and well-trained professional assistance. However, it's been observed that the prison health-care system is hampered when it tends to come to transgender people.

When a transgender woman, was imprisoned in Prison, where she developed an infectious disease instead of referring to a hospital the prison medical officers who were not trained to treat trans people were treating them, it led to a lapse in medical treatment under the judicial structure. It was caused by two factors: general apathy and disregard for the well-being of transgender people, and, more importantly, a lack of preparedness among prison medical officers to deal with such cases. There are currently no guidelines in place to discuss the medical needs of arrested transgender people or those remanded in custody.

Police Unfair Treatment upon Transgender:

The other foremost problem is a lack of respect for transgender identity. There is a lacuna of specific guidelines for police to make interactions with transgender individuals in Criminal Procedure Code and police manuals. The police have complete discretion in not addressing and referring to transgender people by their adopted name and preferred pronouns. The practise of police officers mocking and embarrassing transgender people violates the fundamental right to life, basic dignity, privacy, non-discrimination, and freedom of expression.

CONCLUSION:

The current practices in India significantly violate the fundamental rights of transgender individuals, including the right to non-discrimination, a dignified life, and freedom of expression. India's current criminal procedural law fails to adequately address the genuine concerns of the community. To ensure effective gender-sensitive policing, it is essential to revise the laws related to gender identification, search, and custody, learning from the experiences of other countries. Only if the cases are registered, we can have a citation, to quote the instances. This is what happens if the executive fails to register, it is only seen as an incident

and not as a case. In Indian Criminal Justice System, the rights recognized hitherto for transgenders are by the judiciary through Judgments, based upon that no amendment or laws have been made by legislation to upload the rights of the transgender. Whensoever, they need to establish their rights in employment or to report any crime against them, they have to undergo a great deal of struggle in the hands of the judiciary to obtain what lawfully theirs.

