



SEXUAL OFFENCES AGAINST TRANSGENDER

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Abstract:- Crimes against transgender is not a new phenomena. With the advent of British empire in India and by passing of Criminal Tribes Act, 1924, they have been treated as criminals. Talking about the criminal law in India, a country where the law is progressive, still the penal laws of the country cannot protect the gender marginalized population of the country. Equality is firmly affirmed not only in the Preamble, but also is guaranteed by the Constitution. Yet, the Republic is far from achieving this equality specially the gender minorities suffer from the highest level of marginalization in every aspect. After passing of the landmark judgment by the Hon'ble Supreme Court of India in National Legal Service Authority vs. Union of India and the Transgender Person (Protection of Rights) Act, 2019, the transgender persons continue to suffer abandonment, abuse and harassment. The community deserves comprehensive and progressive legislation. The law must respect and protect them from marginalization. This article tries to analyze whether the penal laws of the country are sufficient while dealing with the crimes against the transgender. Also, the article throws light in having a gender-neutral law so that the gender minorities may get access to justice.

Key words:- Transgender, crimes, Indian penal code

One of the achievements of India in the 21st Century is the effective implementation of “gender equality” and “gender neutrality”, yet the judiciary is far to adopt the concept. In many instances it has been found that when it comes to the criminal justice of the transgender, they lack fair justice. The reason is obvious that still today the lex loci as well as the criminal laws identify only two genders, i.e., male and female, and there is no mention of third gender or transgender, and the result is utter confusion in providing remedy to the transgender. Since ages, transgender have been victims of several crimes which include human trafficking, molestation, hate crimes, but among all these the most heinous that they are the victims of sexual violence. There has been a noble step taken in this regard by passing of Transgender Persons (Protection of Rights) Act 2019. Through the enactment of the Act, today India not only legally recognize the two genders of the society, i.e., male and female, but has also taken a progressive step towards providing the transgender a legal recognition and bestowing them with the same fundamental rights and constitutional rights like other two genders.

In NALSA vs. Union of India¹, the Hon'able Supreme Court finally recognized the rights of the transgender and gave them the status of “third gender”. It is ironically that the country with a progressive notion to consider the transgender as a third gender, is still regressive when we talk about a gender neutral criminal legal system in our country. In the case, at last transgender achieved the constitutional equality, which is one of the basic and fundamental right of an individual

¹ (2014) 5 SCC 438.

irrespective of the gender one belongs to. The Constitution of India under Article 14² states that the every citizen of this country is equal before law and the law will protect every one irrespective of the sex of an individual.

Since vedic period till today the position of transgender in our contemporary society have changed radically. Due to lack of laws, there has been grave violation of their basic rights. Also, after the Independence, when the Constitution of India was adopted, transgender were denied of basic rights guaranteed under Article 14³, 15⁴, 19⁵ and 21⁶. The reasons are obvious that there is no gender neutral laws related to sexual offences in India. The society only identifies two types of genders, one is male and the other is female. Thus, there is no room for the people belonging to the third gender. More often, we assume that the physical violence and sexual violence can be levied on just male and female. We turn blind to the plight of the transgender community, which include hijras and kothis in Indian context. Furthermore, historically and mythologically, India has witnessed the existence of transgender and therefore it cannot be termed as new or an alien one. In fact, the transgender community in India traces their origin in epics of Ramayana and Mahabharata. In India various documents have shown violence against the transgender⁷, yet they have been the victim of sexual violence since ages. Yet there is no law in place to help them to seek justice. These offences include sex trafficking, rape, sodomy, stalking, sexual harassment, etc. A study by the National Human Right Commission (NHRC), India has found that 51% of the transgender community faced harassment by their school mates and 15% from their teachers which resulted in dropping out the schooling⁸. In a finding by the study conducted by the People's Union for Civil Liberty- Karnataka "Sexual violence is a constant, pervasive theme in all the narratives collected in our report. Along with subjection to physical violence such as beatings and threats of disfigurement with acid bulbs, the sexuality of the hijra also becomes a target of prurient curiosity, at the least, which leads to brutal violence, at the most. As the narratives indicate, the police constantly degrade hijras by asking them sexual questions, feel up their breasts, strip them, and in some cases rape them. With or without the element of physical violence, such actions constitute a violation of the integrity and privacy of the very sexual being of the person"⁹.

Discriminatory Penal Laws in India:

The debate for the need of inclusive and gender-neutral law has been carried on for last two decades. It is worthy to mention that, several changes has been made in this regard. Many landmark judgments have been passed where women have been given priority. While the transgender community has been the victim of sexual offences for long, not many had raised voices for them until recently. When a person is ostracized a severe impact is left on the physical as well as mental condition of the person. Most people have a misconception that the transgender persons are mentally ill because of which they face exclusion from their family and society. None of the families accept a child who is neither a male or a female.

The Rape Laws in India: The current definition of rape given in Section 375 of the Indian Penal Code 1860 states as "A man is said to commit rape if he:

² Article 14 of the Constitution of India states about equality before law and equal protection of law.

³ Article 14: Equality before law and equal protection of law

⁴ Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

⁵ Article 19: Protection of certain rights regarding freedom of speech, etc

⁶ Article 21: Protection of life and personal liberty

⁷ Human Rights Violations against the Transgender Community: A Study of Kothi and Hijra Sex Workers in Bangalore, India, (2003), Peoples' Union for Civil Liberties, Karnataka (PUCL-K). Available at : <https://www.pucl.org/Topics/Gender/2004/transgender.htm> visited on 20/03/2022 at 10:30 am.

⁸ Shruti Jain, Pride Month 2020: Evaluating the Transgender Persons Act, 2019, Observer Research Foundation, available at: <https://www.orfonline.org/expert-speak/pride-month-2020-68965/>, visited on 20/03/2022 at 11:00 pm

⁹ Human Rights Violations against the Transgender Community: A Study of Kothi and Hijra Sex Workers in Bangalore, India, (2003), Peoples' Union for Civil Liberties, Karnataka (PUCL-K). Available at: <https://www.pucl.org/Topics/Gender/2004/transgender.htm> visited on 23-03-2022.

- a. *Penetrates his penis, to an extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*
- b. *Inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*
- c. *Manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of the body of such woman or makes her to do so with him or any other person; or*
- d. *Applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person”.*¹⁰

Section 376 of the Indian Penal Code, 1860 contains the provision of aggravated rape, where the perpetrator is in a position of power over the victim, and these offences attracts harsher punishments.¹¹ Section 114A of the Indian Evidence Act, 1872, which was introduced after the Criminal Amendment Act, 2013, shifted presumption of an absence of consent in the prosecution of rape where the woman in her evidence testifies that she did not consent in such situations of aggravated rape. These provisions depicts the power of equation when it comes to rape. However, the presumption remains static that such skewed power equation can only occur between a man and a woman, is a restricted view of reality. Thus, while analyzing the words of the laws, it can be said that the offence of rape can be committed by men on women. Transgender are also victims of these skewed power equation as well. Once a transwoman- a person who is assigned the male gender at birth but identifies as female- who participated in one of the studies for transphobia said that when she went to a hospital after being gang raped, the doctor asked her- “*how can you be raped?*”¹² This indicates the lack of sympathy and understanding the dire situation of sexual violence that threatens the community.

Rape laws in India before the infamous Mathura Rape Case¹³, was quite narrow and discriminatory for women. For a very long time, the burden of proof in rape cases was upon the victim, but the same was shifted after passing of the landmark judgment of the case.¹⁴ Another important aspect that came into limelight through the judgment is that such cases to be held *in-camera*¹⁵. The Indian women’s revolt to amend the rape laws in India was quite long, and at last in the Criminal (Amendment) Act, 2013, the rape law in India became more accommodative to all forms of non-consensual sexual activities. Nonetheless, after the amendment also, the law could not be termed as gender-neutral law and hence the transgender are excluded. On the other hand, there did exist legal safeguards to those sexual offences who do not come under the purview of the definition of ‘rape’ mentioned in Section 375 of the Indian Penal Code, 1860. Such offences could be filed under Section 377 of the Indian Penal Code, 1860¹⁶. The explanation to the Section states that penetration is sufficient to constitute carnal intercourse necessary to attract the offence mentioned under the Section 377 of IPC, 1860.

While this provision could act as a legal safeguard, it was also very discriminatory in nature, as this provision was transphobic in nature by defining these acts as “unnatural acts” merely because it did not fit into the normative acceptable definition of what constitutes “natural”. What seems strange and unfortunate is the fact that the provision

¹⁰ Section 375 of the Indian Penal Code, 1860.

¹¹ Section 376 of the Indian Penal Code, 1860

¹² Ankita Ramgopal, Rape laws: Why is sexual violence against India’s transgender community not being taken seriously?, available at: <https://scroll.in/article/868907/rape-laws-why-is-sexual-violence-against-indias-transgender-community-not-being-taken-seriously>, visited on 27th march, 2022 at 06:30 pm

¹³ Tukaram vs. State of Maharashtra, (1979) 2 SCC 143

¹⁴ Mathura Rape Case (Tukaram vs. State of Maharashtra, (1979) 2 SCC 143)

¹⁵ In camera is a legal term meaning to held in private, in particular taking place in the chamber of the judge, where press and public are excluded.

¹⁶ Section 377: *Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*, Bare Act, Indian Penal Code, 1860

merges a male on male or on female rape to voluntary sexual activity between two consenting homosexuals, thereby indicating the regressive nature of the law.

Need for Inclusivity: In current decade, a lot of discussion along with vital judicial pronouncements have been done about the position of law, still there remains grey areas wherein the sexual minorities of transgender community are threatened. Some of them are as follows:

Indian Penal Code, 1860: A lot of discussions have already been made on the recommendations of reports and committees along with amendments and judicial pronouncements, Section 377¹⁷ is still not a concrete solution to the sexual violence against transgender. The main purpose of gender neutral of sexual offence under the IPC¹⁸ is to have an holistic approach and understanding of the offence beyond the lenses of gender. While decriminalization of Section 377 only extends to consensual acts of homosexuality between two adults, and other non-consensual sexual acts still falls under the ambit of “unnatural offences”, the position of the law remains dicey. Also, the ambit of the section is not wide enough to consider all forms of sexual harassments or assaults as an offence which can fill the criteria of sodomy. It does not include other forms of sexual offences such as rape, voyeurism, stalking, trafficking, to which the people of transgender community are the victims in their day-to-day life. It is also worthy to not that, all these offences do not fall under the “unnatural offence” and as a result do not come under the purview of the section.

The Justice Verma Committee Report, 2013¹⁹ significantly identified distinct sexual offences which can be committed on women only and there is no mention of other sexual offences were not mentioned under the umbrella of “rape”. Talking about other provisions of the Act relating to sexual offences, such as Section 354²⁰, which deals with offences like stalking, voyeurism, etc., needs to be amended wherein the word “women” to be replaced with “any person” to ensure the protection of transgender community, who face a lot of oppression not only in the society but also the law enforcement agencies due to their gender as well as their economical status. The importance is given on amending the Penal Code of 1860 into a gender neutral law and not having a new gender neutral penal law, as the new law may have the same impact as of the and gravity as that of the Penal Code of 1860. Also, it is the need of the hour to have holistic approach to other laws governing the criminal offences to have inclusiveness of the transgender community.

Position of transgender under POSH Act, 2013: The need for protection of women from sexual harassment at workplace came into the limelight through the famous case of Vishaka vs. State of Rajasthan²¹, where a woman was gang raped by 6 men in her workplace. It is unfortunate that during that time there were no laws to protect women from such horrific incidents in workplace, and until 2013, Vishaka guidelines were followed, when a new law was enacted. As the name suggests, Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013²² is gender specific, and it only protects the women from being sexually harassed in their workplace. It fails to take men and transgender into consideration, who may even fall as a victim of sexual harassment at workplace. Taking about the transgender in particular, this community is considered as sexual minority group and thus, is more prone to such sexual harassment than men due to their gender, and women due to lack of specific law to protect them. Each citizen of this contry has right to life and right to dignified life, and the law which protects the

¹⁷ Unnatural offences.—Whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with impris-onment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

¹⁸ IPC: Indian Penal Code, 1860

¹⁹ The Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013.

²⁰ Section 354 of the Indian Penal Code, 1860

²¹ (1997) 6 SCC 241.

²² Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013

rights of individuals and punish sexual offences cannot selectively protect one. In the current decade we have the examples of Taj Group of Hotels and Godrej, where there exists gender-neutral law to protect its all employees making no distinction of gender. We wish to have the same amendment in the current POSH Act, 2013 too.

Position of transgender under Immoral Traffic (Prevention) Act, 1965: It is a well known fact that the transgender are most affected when we are taking about human trafficking. The Immoral Traffic (Prevention) Act, 1956 was enacted with the only purpose of protecting the women and children from trafficking. However, in the year 1986, due to increase in the number of human trafficking for sexual exploitation, an amendment was made to include not only men and women but all those persons also who do not fall under these two categories. The result is that men and transgender became the offenders and women became victims. In other words, the Act failed to understand that transgender can also become victim of such trafficking for sexual exploitation. To add more, when the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018²³ was proposed, it affected the transgender community as the Bill criminalized the acts of beggary and consensual sex work. It also stated that any one undergoing “hormone therapy” would be arrested on the grounds of trafficking. It is worthy to mention in this context that, before 2016, when transgender community had gained legal recognition, it was still very difficult for them to find work in organized sectors. Due to decade long abandonment, they are forced to make their living through begging and indulge themselves in sex work. Criminalizing the beggary and sex work is a major drawback for them, as the Government neither consulted with the community nor planned any training or skill development program for them to make themselves self-sufficient and adopt themselves to the organized sector. When the Bill is proposed out of bona fide, it is quite feasible to have consultation with other stakeholders, and frame the law as justice to one set of people should not come at the cost of others.

Conclusion: While the laws of the country appear regressive, one must also consider that the concept of transgender and their position is still very sensitive and threatening and it would take a quite a long time to and social recondition to become more inclusive towards the third gender. Reforms are the need of the hour and we can witness an lot of change along with initiatives been taken up to make fast-track the process of gender neutral laws. To sum up, the laws on rape and sexual violence including assault should be made gender neutral as in the current time transgender community is equally vulnerable as that of women in our society and are prone to sexual violence and harassment due societal power dynamics. Right to seek protection against sexual offences is a vital right guaranteed by the Constitution of India and the same is one of the crucial pillars for gender justice, thus cannot be ignored at any cost. A gender neutral criminal law will reflect secured position of women, men and transgender community who can be both victim and perpetrators of crime.

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²³Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018, available at: <http://www.sconline.com/DocumentLink/271kNY72>, visited on 25th March, 2022 at 01:30 pm