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Need for Rape Laws for Transgender

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ABSTRACT

The Rights of the Transgender have always been ignored and not addressed properly. This community is treated like an invisible for a long time. The existing rape laws in India aim to safeguard the rights of women only and not the men or the transgender. Indian Constitution embodies the principle of the Rule of Law which states that everyone shall be treated equally irrespective of any other factors such as gender, caste creed, race, etc. The Indian Constitution by incorporating the Golden Triangle in Article 14,19 and 21 of the constitution states that there shall be Equality, Freedom of Speech, and the Right of Life and Liberty. So that implies that the sections like 375 (Rape) and 354 (Outraging the Modesty of the Woman) of the IPC which only provide protection to the woman, should be made Gender Neutral for the Transgender. The Article aims to focus on the need for enactment of the rape laws for the transgender. It addresses the issue that why gender-neutral rape laws should be enacted in India.

I. INTRODUCTION

In the landmark case of the *National Legal Services Authority of India (NALSA), V. Union of India*², Supreme Court of India stated that the person who fails to fall under the category of male or female shall be considered to be identifying as the third gender. This was the first time in the Indian History when this gender identity issue was dealt.³

Indian Constitution strives to ensure equality for its citizens. But one of the worst things which have been witnessed in the Indian laws is that it still doesn't have Gender Neutralized law in terms of sexual offenses. In India, we don't have gender neutrality laws relating to certain sexual offenses such as rape. Transgender which is also known as the third gender is mostly out casted in Indian society. This gender faces a lot of problems such as being disowned by their own family, lack of education, etc. Their basic fundamental rights are being infringed. They face a lot of atrocities and one of the major atrocities which are faced by them is that they

¹ Author is a student at University of Petroleum and Energy Studies, India.

² AIR 2014 SC 1863

³ South Asian Translaw Database. 2021. NATIONAL LEGAL SERVICES AUTHORITY (NALSA) VS. UNION OF INDIA - South Asian Translaw Database - THIRD GENDER. [online] Available at: <<https://translaw.clpr.org.in/case-law/nalsa-third-gender-identity/>> [Accessed 26 March 2021].

are exploited sexually.

The incidents of transgender getting raped or gang-raped are very frequent and common in India but most of the cases go unreported, because of the reason that there is no proper law legislation governing the rights of the transgender.

II. NEED FOR GENDER NEUTRALITY LAWS

According to a survey of nearly 5,000 transgender people by the National AIDS Control Organization in 2014-15, one fifth said they had experienced sexual violence in the past 12 months.⁴ With the increasing number of cases of rape of transgender, it is a need and demand for gender neutrality laws in India. These laws shall be enacted with the aim of combating the rape of ensures against transgender and male also.

There are cases where the protectors have also become the harasser. In various interviews, Transgenders have spoken about that how police personnel harass them. A 2017 study by the National Human Rights Commission (NHRC) stated that the reason why most of the rape cases of the transgender go unreported is because of the fact that they fear the police. As they are often mistreated, harassed and exploited by the police.⁵

These incidents are well enough to prove that why there is a need for the gender neutrality law. There needs to be awareness and education about these issues. The state shall take measures and enact laws in order to combat this issue.

III. PROVISION IN THE INDIAN LAWS

Transgender Persons (Protection of Rights) Act, 2019 - This act talks about and provides the punishment for the sexual assault on the transgender. But the provision provided is not as exhaustive as that of the rape should be and the punishment for the sexual assault is only maximum 2 years whereas further under section 375 is 10 years to life imprisonment. Section 375 of the Indian Penal Code provides the definition of rape and its scope.

Section 375 of IPC - This section defines rape. It is the provision which comes under the category of "crimes against women" and therefore it does not include male or transgenders. As per that section, it can be said that the victim of the rape can be the only woman and not men or transgender. Transgender has been out casted from society. They are treated as an invisible community existing in our society.

⁴ Esha Mitra, C., India's rape laws don't cover transgender people. They say it's putting them at risk. CNN, (Mar 26, 2021, 22:27) <https://edition.cnn.com/2020/12/08/india/india-transgender-rape-laws-intl-hnk-dst/index.html>

⁵ Esha Mitra, C., India's rape laws don't cover transgender people. They say it's putting them at risk. CNN, (Mar 26, 2021, 22:27) <https://edition.cnn.com/2020/12/08/india/india-transgender-rape-laws-intl-hnk-dst/index.html>

Section 354 of IPC - This is the provision for outraging the modesty of the woman. But this section is also restricted to the woman and not to the man or the transgender. This section says that anyone who outrages the modesty of the woman by assaulting her or using criminal force against her shall be charged under this section. There is no such provision for safeguarding the dignity of the transgender.

IV. WHY GENDER-NEUTRAL RAPE LAWS SHALL BE ENACTED

The **Rule of Law** states that there shall be no discrimination and everyone shall be treated as an equal before the eyes of law. So, as per that the laws governing rape or sexual offences shall be also equal for everyone. The laws shall be applicable for safeguarding the male and the transgender rights as well.

The **Fundamental Rights** were enacted with the aim to give the liberty, freedom of speech and equality to the citizens. The Fundamental Rights comes from the principle of the rule of law and aims to ensure that these rights are being provided to its citizens. These rights are given to the subjects so that they are not exploited by the government.

The **Golden Triangle** of the Indian Constitution which is the Article 14,19 and 21. The main aim of the golden triangle articles is to provide equality, right to life and the basic human rights which are essential for the human being to survive in the society.⁶ These Articles ensure that the citizens are not deprived of their basic human rights and they are entitled to the liberty, fraternity and the equality.

One of the most important aspects for the equality and the right to life is that there must be recognition and acknowledgement of the 'right of choice and self-determination'. The person should have the right to be recognized and determined to the gender to which he belongs and relates to. The person shall have the right of self-determination.⁷

Article 14 of the Indian constitution talks about the right to equality. This implies that all the Indian citizen has the right to live their life with the equal dignity. The Indian Constitution completely enshrines the principle of rule of law in this Article. The Article states that everyone is equal before the eyes of law. In the case of the *E.P Royappa v. State of Tamil Nadu & Another*⁸, it was held that the Article 14 shall be considered as the essential pillar or foundation

⁶ Lexology.com. 2021. Transgender rights, the 'Third Gender' and transforming the workplace in India | Lexology. [online] Available at: <<https://www.lexology.com/library/detail.aspx?g=b49d9488-c484-4d00-882c-2c386a041a07>> [Accessed 26 March 2021].

⁷ Lexology.com. 2021. Transgender rights, the 'Third Gender' and transforming the workplace in India | Lexology. [online] Available at: <<https://www.lexology.com/library/detail.aspx?g=b49d9488-c484-4d00-882c-2c386a041a07>> [Accessed 26 March 2021].

⁸ A.I.R. 1974, S.C.555

of the Indian Constitution and therefore its interpretation shall be not narrow and it shall be interpreted flexibly as this Article also holds the essence of the Rule of Law.⁹

Article 19 talks about the freedom of speech and expression. Being not able to raise the voice against the sexual crimes such as the rape clearly violates the Article 19 of the Transgender. To be not able to get justice for the assault done on the basis of the gender shall be considered to be the violation of the freedom of speech and expression.

Article 21 gives the right to life and personal liberty. It is the fundamental right which has been interpreted by the judiciary in the broadest manner. The Court has often quoted the following observation of Field, J., in *Munn v. Illinois*, an American case: “By the term ‘life’ as here used something more is meant more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg....”¹⁰

This right has been held to be the heart of the Constitution, the most organic and progressive provision in our living constitution, the foundation of our laws. In the case of *Shri Bodhisattwa Gautam vs Miss Subhra Chakraborty* the Supreme Court held that ‘rape is thus not only a crime against a person of a woman victim, it is a crime against the entire society. Rape is, therefore the most hated crime.’¹¹ The apex court further stated that it is the violation of the right of life.¹² Even though the judgment was stated while keeping in mind the women but still it won’t be wrong to consider that this has the same impact on the rape victims, who are male or transgender.

V. CONCLUSION

The transgender shall be treated and regarded as the member of the society. And in order to make that possible they should be treated as an equal and should not be discriminated. The aim of the law should be to safeguard the rights of that section of the society which is often discarded and not treated as an equal. This article tried to address the issue that why there is a need of a proper gender neutral rape law for the transgenders.

⁹ Samisti Legal. 2021. Article 14 -“Right to Equality”. [online] Available at: <<https://samistilegal.in/article-14-right-to-equality/>> [Accessed 26 March 2021].

¹⁰ Ramamoorthy, A., *Right to Life & Personal Liberty | Article 21 Explained*. LEGAL BITES, (Mar 26, 2021, 22:27) <https://www.legalbites.in/right-to-life-personal-liberty-article-21/> [Accessed 26 March 2021].

¹¹ 1996 AIR 922, 1996 SCC (1) 490

¹² Mallika A. Bhaskar, *Gender Neutrality of Rape Laws, 12 PENACCLAIMS* (Mar 26, 2021, 22:27), <http://www.penacclaims.com/wp-content/uploads/2020/10/Mallika-Bhaskar.pdf>.