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# Transgender Right against Sexual Offences

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## ABSTRACT

*From the time of Ramayana and Mahabharata to the royal courtyards of mughal emperors to the contemporary society of today, the transgender community have played an important role in our culture. Nonetheless, such an important part of our society has for decades tolerated various inequalities on a daily basis. They have been the most marginalised, forgotten, and deprived sections of Indian Society and face discrimination and violence as compared to other genders. When the landmark NALSA judgement came the Transgender Community was elated and contented. It was expected that optimum shift would take place in the attitude of society towards the community, however, results lack the enthusiasm. The lack of implementation of that judgment is the reason that they are still fighting against discrimination and are not recognised in society. (1)It was only in 2019 that the Indian Parliament enacted the nation's first legislation, namely the Transgender Persons (Protection of Rights) Act, 2019 (hereinafter "TPA"), to address the issues faced by transgender persons in the country. However, the judgment and the Act still lack the protection of the community from sexual offenses.*

## I. INTRODUCTION

*"It's not just about one person, it's about thousands of people. It's not just about me, it's about all of us accepting one another. We're all different."*

—Caitlyn Jenner

The existing rape laws in India aim to safeguard the rights of women only and not the transgender or any such gender beside female.. 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.<sup>(2)</sup> With the changing times and the fluidity of gender roles in modern society, it has been an often debated subject as to whether the Union of India requires a law governing the offence of rape that is gender neutral, which means allowing for men and women to be regarded to as both potential offenders and potential victims, and now after the consideration of transgender as a third gender, also regarding them as both potential offenders

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and potential victims. Sexual violence is a serious violation of human rights. While it has many forms, sexual violence means that someone forces, manipulates, or harms someone else into unwanted sexual activity without their wilful agreement and informed consent. Sexual violence can affect people of all genders and ages.

## II. EVOLUTION OF RAPE LAWS IN INDIA AND EXCLUSIVITY OF TRANSGENDER

Rape is unlawful intercourse or penetration done to the vagina, anus or mouth of another person with or without force by body part, sex organ or foreign object without the consent. Going beyond the premise that "rape is a conscious process of intimidation by which all men keep all women in a state of fear",<sup>(3)</sup>rape has been one of the means through which the social hierarchy of power relationships is maintained and nurtured in a gendered society<sup>(4)</sup>

The first amendment of 1983 from the highly criticized Supreme Court judgment of the Mathura case, giving rise to The criminal Amendment bill 1983. The uproar of women's movement brought about awareness and several changes in attitude in society and in the subsequent years courts started giving progressive judgements and holding sensitive perspective for rape victims. In the coming years, from the case of *The State Of Punjab v. Gurmit Singh & Ors in 1996* to the PIL petition filed by a NGO named Sakshi in 2002, more amendments took place and the victims of rape were given more recognition.

In 2012 in the wake of the Nirbhaya case, there was huge demand for change in rape laws which lead to the the set up of Justic JS Verma Committee, various recommendations for changes pertaining to marital rape, death penalty for violators, two finger test of rape victims were submitted. In consonance with the report given by the Justice Verma Committee the Criminal Law Amendment Act 2013 came into force on the 3rd of February, 2013, which introduced comprehensive changes in the Indian Penal Code,1860. The recent revision replaced section 375 of the IPC and expanded its definition to include any bodily penetration as rape. Age of consent was raised to 18 years from 16 years.

Despite the advantages of the amendment, the act was also criticized for not incorporating certain provisions recommended by the Justice Verma Committee such as making rape and sexual assault laws gender-neutral.<sup>(5)</sup>

Through various changes and amendments, we can see how many such changes were brought about by people's movement demands and the society's stand but even so the rights of transgender people are still overlooked. It undoubtedly leads to the question that do transgender individuals receive the same defence and support as other groups? Does society even treat Transgender people as equal to women and men?

Transgender people face discrimination every face of their life because they do not fit into gender roles of society. Every transgender person must have encountered verbal, sexual and physical violence at least once in their life. It is interesting to note that unlike any other social norms and rules, human behaviour towards the transgender's have deteriorated.

Transphobia is also the biggest reason for such discrimination and violence against these people which India still sees as being quite persistent. Transphobia is a form of hatred, disbelief, terror, fear or distrust for transgender people or people whose gender expression do not conform to the traditional gender roles.<sup>(5)</sup> The battle for their rights in sexual offences, work, education, and health care and sexual offences is nevertheless unilateral. Violence against transgender person is often manifestations of stigma and discrimination because they do not fit into traditional gender categories.<sup>(6)</sup>

They face violence like sexual violence, physical violence, assault etc. simply because of who they are. It is hugely upsetting that because of such ignorance and stigmatisation, the number of violences oftens gets unreported. The government gathers annual NCRB data that details crimes against people, but there is no particular reference to crimes against transgender people. Rights activists, who work with transgenders and bisexuals, say such incidents are a common occurrence. "I have come across several such cases of brutal sexual assault on transgenders by the cops. They come and narrate their horror tales to us. A transgender reported being raped by cops for weeks inside a famous Delhi prison. We can't do much in such cases because the victims themselves back out from identifying the cops, fearing revenge, and we have no proof," says lawyer and activist Shashi Bhushan of Naaz.<sup>(7)</sup>

Rudrani Chettri, director, Mitr Trust, says she comes across at least one such case of sexual abuse in which policemen are the culprits. "When a transgender is new in sex trade, she doesn't know the rules. When a cop asks for sex, she tries to run away. That's when she is chased and put in a PCR van. The rape takes place inside the lock-up, often in the most brutal manner," Chettri said.<sup>(7)</sup>

One such story is of Mahi, a transwoman, whose life has been fraught with difficulty and peril. Poverty, discrimination and lack of employment opportunities forced her to start work as a sex worker. One day on her way to work, she faced violence at the hands of a few local goons who gang-raped her as well as robbed all her money. They also beat her up so badly that she broke her arms. Mahi reported this incident to the Wajood outreach worker over the phone. Immediately, the Wajood outreach worker reached her place, and she was provided necessary medical support through Basera, an NGO working on transgender rights in North Delhi. The

team worked closely with her and provided support through counselling, unconditional positive regard and active listening so that she could overcome the incident. Recognizing the legal limitations of the country with respect to transgender rapes and taking cognizance of the fact that in India police complaints hardly ever lead to substantive punishment, the team worked with the goons of the area, and sensitized them on “trans” issues so that such horrific incidents are not repeated.<sup>(8)</sup> These stories are not new to our eyes and such treatment is been faced by transgender community for years, they suffer discrimination, publically derogated, victims of sexual offences and are feared to report it to authorities and even if they are, limited rights are available to them. The need of the time is to widen our views as society and also from a legal perspective. A legal right against sexual offences inclusive of transgender people can go a long way for giving them an equal presence in the society, protecting their rights and a fair and equal chance to ask for rights as any other cis gender person would.

### III. LEGAL BLIND SPOT OF TRANSGENDER RIGHTS AGAINST SEXUAL OFFENCES

According to a survey in 2015, overall one fifth of transgender people reported to have experienced some form of physical violence in the 12 months preceding the survey. Those who reported to have been beaten by someone were asked to identify the perpetrators of such physical violence.

Though in the judgement of *NALSA v. Union of India*, transgender people were legally recognised under law as the “third gender” but the recognition and equality against sexual offences still feels like a far fetched dream. Although this judgement which gave rise to the Transgender Persons (Protection of Rights) Act 2019 still failed to protect transgender community from the equal treatment in physical and sexual abuse.

A minimum of six months and a maximum of two years in prison and a fine are the penalties for assaulting transgender people physically and sexually.

Men who are convicted of raping a woman, however, must serve a minimum of 10 years in jail, with the possibility of an additional life sentence. If a woman is left in a vegetative state, if the criminal commits the same crime twice, or if a girl under the age of 12 is raped, the death sentence may also be applied.

From a punitive standpoint, this claim does not appear to be very compelling. The TPA works to improve the treatment of transgender people in order to advance gender equality. Therefore, it is essential that any rape-related laws therein (if any exist) be at least on par with, if not better than, those found in the Indian Penal Code, 1860 (hereafter, "IPC"). However, the TPA maintains that the maximum sentence that may be imposed for sexual abuse is only two years,

which is far less than the minimum sentence that can be imposed for perpetrating rape against women, which is set at ten years under the IPC. Additionally, the TPA defines imprisonment as "simple," although the IPC does not.

Swati Bidhan Baruah, one of India's third and Assam's first transgender judges said, "The huge discrepancy in rape laws and the punishment for sexually assaulting a transgender person is just another way of showing that our lives don't matter".

A plea was made by Advocate Reepak Kansal citing the absence of any provision in the Indian Penal Code that deals with sexual assault by any male, female or transgender on a transgender. It said that Section 354 of the IPC dealing with offence of sexual assault does not extend to transgenders.

"The Indian laws are for men and women and therefore, considering transgender...they generally could not get justice from the authorities due to lack of law/Act. The third gender... are being deprived of many of the rights and privileges which other persons enjoy as citizens of this country. The State cannot discriminate them on the ground of gender, violating Articles 14 to 16 and 21 of the Constitution of India," the petition contended.<sup>(9)</sup>

The advocate asked the court to frame guidelines to protect the third gender from sexual offences, to make anti-discrimination laws that safeguard the citizenship rights of the community members.<sup>(10)</sup>

#### **IV. CONCLUSION**

The Indian Constitution's Golden Triangle is composed of Articles 14, 19, and 21. The primary objectives of the Golden Triangle Articles are to guarantee equality, the right to life, and the fundamental human rights that are necessary for an individual to exist in society. 6 These Articles guarantee that citizens' fundamental human rights, including their right to liberty, fraternity, and equality, are not violated.

According to some, this right is the cornerstone of our legal system, the most organic and progressive provision in our living constitution. The Supreme Court ruled in the case of *Shri Bodhisattwa Gautam vs. Miss Subhra Chakraborty* that "rape is thus not simply a crime against a woman victim's person, it is a crime against the entire society." Therefore, the most despised crime is rape. The supreme court went on to say that it is a breach of a person's right to life. It wouldn't be incorrect to assume that the judgement has the same effect on rape victims who are male or transgender even though it was made with women in mind.

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*“Why is my humanity only seen or cared about when I share the ways in which I have been victimized and violated?”*

—I'm Afraid of Men

Challenges persist, but there is a clear movement toward the recognition, in law and policy, that gender identity is a fundamental personal characteristic that must be recognized and respected. We've come a long way since courts only overturned anti-cross-dressing laws because of their effect on non-transgender people. Transgender lives are no longer just a footnote in the law books, their identities no longer uniformly bound to surgical requirements. As principles of dignity and equality move into the forefront of legal thinking, transgender people are not an afterthought anymore.

Transgender people must be treated and viewed as members of society. They should be treated equally and should not be subjected to discrimination in order to make that possible. The goal of the law ought to be to protect the rights of that segment of society that is frequently overlooked and not treated equally.

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