

**SECTION 18 OF TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019: A BLEAK OR BRAVE GUARD AGAINST SEXUAL ABUSE OF A TRANS PERSON?**

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**Abstract**

*The research article is a doctrinal research on primary and secondary sources relating to sexual abuse of a transgender person. The author has discussed the various grounds on which The Transgender Persons (Protection of Rights) Act, 2019 lacks to protect transgender persons against sexual abuses. The article inculcates principles, arguments and views that supports the contentions of author. The author has reiterated the unequivocal contribution of judiciary by discussing landmark judgements which led to recognition of human and constitutional rights of a trans persons.*

*The research article discusses the lacunas of the act. It lays down a strong emphasis on the voices of unheard trans activist in regards to the act. The author has summed up the arguments which intends that the section 18 of the act violates Article 14 and 15 of Indian Constitution. The author has tried to bring out the inefficiency of legislature in drafting the act. The author analyses the insignificancy of the act that navigates in promotion of transmisogyny among the citizen of this great nation.*

*In view of the author gender neutral rape law is the only solution to the prevailing discrimination. Author has tried to tackle the argument that are against the gender neutral laws. The research gap which this article tries to fill up is how gender neutral laws can be brought by amendments in existing penal provisions.*

**INTRODUCTION**

We are a country of 1.3 billion people, coming from diverse sects of this great nation. A nation that is the world's biggest democracy and has got the longest written Constitution. A country that has been evidence of the evolution of the human race and yet fails to guarantee some of

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the very basic human and constitutional rights to its “4.9 lakh of the population”.<sup>2</sup> The community has been deprived of humane treatment since the independence of this great nation. It was the census of 2014 when the transgender community (TG) was recorded in government records for the first time. “While transgender activists estimate the numbers to be six to seven times higher”.<sup>3</sup> Indian legislature repealed the draconian colonial law of “The Criminal Tribes Act, 1871”<sup>4</sup> in the year 1948 but it took them an unjustified period of 67 years to recognise the third gender community of this country.

*“Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex”.*<sup>5</sup> The society has treated “transgender person”<sup>6</sup> as an “anathema”.<sup>7</sup> The prejudiced and stigmatic mindset of cisgender has very often led to discrimination, exploitation and sexual abuse of transgender person at various public places. As per a “survey”<sup>8</sup> conducted by “NACO”<sup>9</sup> in the year 2014-15 it was observed that “in a sample population of 5000 transgender people, one-fifth of the population was subjected to sexual abuse”.<sup>10</sup> This depicts the failure of legislative machinery in the enactment of required laws that could have safeguarded the transgender community from sexual abuse.

## **LIGHTING A RAY OF DIGNITY**

It is the unequivocal contribution of the Indian Judiciary which has always through various rhetorical judgement recognised the human and constitutional rights of the transgender person. In the year 2014, the apex court of India laid down the landmark judgement “*NALSA Vs. Union of India*”.<sup>11</sup> In this case, the court reiterated that “transgender people were to be treated as a third gender and their rights should be safeguarded under the Constitution”.<sup>12</sup> It laid down various guidelines to evade discrimination and abuse faced by a transgender person.

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<sup>2</sup> Reema Nagarajan, First Count of Third Gender in Census, THE TIMES OF INDIA 2014 (Jun.21, 2021, 9:00 PM) <https://timesofindia.indiatimes.com/india/first-count-of-third-gender-in-census-4-9-lakh/articleshow/35741613.cms> .

<sup>3</sup> Reema, supra, note 1.

<sup>4</sup> K.S Radhakrishnan, J reiterated in *NALSA Vs. Union of India & Ors.* , “the Criminal Tribes Act, 1871, which deemed the entire community of Hijras persons as innately ‘criminal’ and ‘addicted to the systematic commission of non-bailable offences”

<sup>5</sup> *National Legal Services Authority v. Union of India and Ors.*, AIR 2014, SC 1863.

<sup>6</sup> The Transgender Persons (Protection of Rights) Act, § 2 (k), No. 40, Act of Parliament, 2019 (India).

<sup>7</sup> *Ms. Sushma v. Commissioner of Police and Anrs.*, 2021, MHC.

<sup>8</sup> Government of India, Department of Health & Family Welfare, National AIDS Control Organisation, National IBBS 2014-15, 53, (2016).

<sup>9</sup> National AIDS Control Organisation

<sup>10</sup> Government of India, supra note, 7.

<sup>11</sup> Supra note 4.

<sup>12</sup> Supra note 4.

Given the 2014 judgement, the parliament introduced a series of bills addressing the rights of transgender people. The most recent one was introduced in July 2019, which, came to be known as the Transgender Persons (Protection of Rights) Act, 2019. The act got the assent of the President on 5th December 2019.<sup>13</sup> The Act is said to be a ray of dignity in the grey world of a transgender person. It promises them identity, equality and “protection from offences laid down under Chapter VIII of the act”.<sup>14</sup> Though the trans community doesn't find the act to be so promising. The trans activists have labelled the provisions of the act to be “*regressive*”.<sup>15</sup> They have termed the day it was approved by the Lok Sabha as “*Gender Justice Murder Day*”.<sup>16</sup>

### **CIS GENDER DIGNITY MORE VALUABLE THAN TRANSGENDER?**

The “*NALSA judgement*”<sup>17</sup> observed that various sexual abuse such as, “*Sexual assault, including molestation, rape, forced anal and oral sex, gang rape and stripping is being committed with impunity and there are reliable statistics and materials to support such activities*”.<sup>18</sup> “As per a survey conducted by an NGO Kinaar Maa Trust one out of four-person from the transgender community has been a survivor of some sexual abuse”.<sup>19</sup> The Transgender Persons (Protection of Rights) Act, 2019 (TPA) was expected to be a brave guard against the heinous crimes that are faced by the third gender community on regular basis. It could have been a lawful shield to the transgender person against such grave offences. Contrary to such expectations the act enlists different forms of offences under one provision. “*Section 18 of the act*”<sup>20</sup> lays down an umbrella provision for certain grave offences which the TG persons are generally subjected to in their day to day life. This makes the law vague and ambiguous in its objective. It succumbs to provide any legal resort to the trans people, who have been the victim of prolonging inhumane treatment by the cisgender people.

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<sup>13</sup> Ministry: Social Justice and Welfare, PRS INDIA, <https://prsindia.org/billtrack/the-transgender-persons-protection-of-rights-bill-2019>.

<sup>14</sup> The Transgender Persons (Protection of Rights) Act, § 18, No. 40, Act of Parliament, 2019 (India).

<sup>15</sup> Chaitanya Mallapur, Why New Bill Meant To Benefit Transgender People Is Termed Regressive, INDIA SPEND, 2019, ( Jun. 21, 2021, 9:05 PM), <https://www.indiaspend.com/why-new-bill-meant-to-benefit-transgender-people-is-termed-regressive/>.

<sup>16</sup> Chaitanya, supra note 13.

<sup>17</sup> Supra note 4.

<sup>18</sup> Supra note 4.

<sup>19</sup> Pallavi Pundir, Transgender People Tell Us Why India's Newly Proposed Rape Laws are Discriminatory, VICE, 2019, (Jun 21, 2021, 9:10 PM), <https://www.vice.com/en/article/bjwjbd/transgender-queer-people-tell-us-why-indias-newly-proposed-rape-laws-lgbt-are-discriminatory>.

<sup>20</sup> Whoever,— (a) compels or entices a transgender person to indulge in the act of forced or bonded labour other than any compulsory service for public purposes imposed by Government; (b) denies a transgender person the right of passage to a public place or obstructs such person from using or having access to a public place to which other members have access to or a right to use; (c) forces or causes a transgender person to leave household, village or other place of residence; and (d) harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.

“Section 18 clause (d) penalises sexual abuse of a TG person but it fails to define the term. The punishment laid down under the act for the offence of sexual abuse is *imprisonment for not less than six months and which may extend to two years and a fine*”.<sup>21</sup> Providing such lenient punishment for such grave offences labels them as petty offences. The India Penal Code, 1860 (IPC) lays down punishment for sexual abuses committed against a woman. The punishment laid down under IPC for any kind of sexual abuse committed against a woman ranges from “*three years of imprisonment to life imprisonment and fine*”.<sup>22</sup> Grave offences such as “*rape causing death or persistent vegetative state of victim, rape of a minor under 12 years of age, gang rape of minor under 12 years of age or repeat offender are punishable with capital punishment*”.<sup>23</sup> There is an evident difference between the provisions of the aforesaid acts for alike offences. This makes section 18 (d) of the TPA “discriminatory and unconstitutional”.<sup>24</sup> “*Lighter sentences make transgender people more vulnerable to attack, by sending a message to society that their lives aren't worth protecting*”.<sup>25</sup> The unequal treatment of a victim of the same offence distorts the idea of equality between the third gender and cisgender. “It violates the Criminal Jurisprudence and Positive Law School principle which states that there should be similar punishment for the same class of offence”.<sup>26</sup>

In this regard, a plea was filed by trans activist Swati Bidhan Baruah in the Supreme Court of India challenging the constitutional validity of the TPA, 2019. Her plea stated that Section 18 of the Act violates of Article 14 and 21 of the Indian Constitution. It stated that the provisions are completely arbitrary and irrational. The punishment prescribed for such heinous offences is grossly inadequate. “In addition to it, a plea was filed in Karnataka High Court challenging the constitutional validity of section 18 and 18 (d). The plea stated that Section 18 of the Act, which prescribes maximum punishment up to two years in cases of certain offences like physical or sexual abuse of a transgender person, is discriminatory in nature”.<sup>27</sup> Both the courts have issued notice to the central government upon hearing the petitioners and a response from the government is awaited.

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<sup>21</sup> Supra note 18.

<sup>22</sup> The Indian Penal Code, Chapter -XVI of the Act, No. 45, Act of Parliament, 1860 (India).

<sup>23</sup> The Indian Penal Code, § 376-A, 376-AB, 376-DB, 376-E, No. 45, Act of Parliament, 1860 (India).

<sup>24</sup> Almas Shaikh, Grace Banu Ganesan & Ors. v. Union of India & anr. | A constitutional challenge to The Transgender Persons (Protection of Rights) Act 2019, CENTER FOR LAW AND POLICY RESEAECH, 2020, (Jun 21, 2021, 9:20 PM), <https://clpr.org.in/litigation/grace-banu-ganesan-ors-v-union-of-india-anr/>.

<sup>25</sup> Isha Mitra, India's rape laws don't cover transgender people. They say it's putting them at risk, CNN, 2020, (Jun 21, 2021, 9:25 PM), <https://edition.cnn.com/2020/12/08/india/india-transgender-rape-laws-intl-hnk-dst/index.html>.

<sup>26</sup> James Edwards, Theories of Criminal Law, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, 2018, (Jun 21, 2021, 9:32 PM), <https://plato.stanford.edu/entries/criminal-law/#Bib>.

<sup>27</sup> Special Correspondent, HC notice on plea challenging constitutionality of law to protect rights of transgender persons, THE HINDU, 2020, (Jun 21, 2021, 9:35 PM), <https://www.thehindu.com/news/national/karnataka/hc-notice-on-plea-challenging-constitutionality-of-law-to-protect-rights-of-transgender-persons/article32913376.ece#>.

Swati Bidhan Baruah, who is also one of India's first transgender judges reiterated that "*The 2019 Act is completely draconian and will infringe the fundamental rights of transgender persons...*".<sup>28</sup> The unequal treatment of TG in comparison to a woman for the same offence promotes "transmisogyny"<sup>29</sup>. It demonstrates the narrow mindedness of society. The intent of the legislative organ also comes under question when it enacts such law which justifies transphobia and discrimination on the ground of sex. It again brings up the issue of a downtrodden TG person i.e. its fight for a dignified life.

### **NEUTRALITY WILL BRING EQUALITY**

"The overarching ideals of individual autonomy and liberty, equality for all sans discrimination of any kind, recognition of identity with dignity and privacy of human beings constitute the cardinal four corners of our monumental Constitution...".<sup>30</sup> The former CJI Deepak Mishra through these aforesaid words of wisdom emphasized the idea of individuality and how discrimination of any form or kind violates our Constitution. A TG person is entitled to live a life of dignity and has the power to exercise all his constitutional rights. To value and safeguard his dignity at par with cisgender, the legislature needs to enact gender-neutral rape laws or amend the existing rape laws. The Justice Verma Committee Report, 2013 suggested that "... *the possibility of sexual assault on men, as well as homosexual, transgender and transsexual rape, is a reality the provisions have to be cognizant of the same*".<sup>31</sup> Though this valuable suggestion didn't make it to the final Criminal Law (Amendment) Act, 2013. It was "*because very little consideration was given to how the law affects transgender people*".<sup>32</sup> But after a period of 7 years, the same issue was brought up in a plea before the Supreme Court by Advocate Reepak Kansal. "The petition stated that 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 the offence of sexual assault does not extend to transgenders. The State cannot discriminate against them on the ground of gender, violating Articles 14 to 16 and 21 of the Constitution of India".<sup>33</sup> The then sitting CJI, S A Bobde remarked this plea as a "*good petition*".<sup>34</sup> The positive remark by ex-CJI marks the need for the formulation of gender-neutral rape laws.

### **A SUGGESTED STEP TOWARDS NETRALITY**

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<sup>28</sup> Isha Mitra, supra note, 24.

<sup>29</sup>(2021), <https://dictionary.cambridge.org/dictionary/english/transmisogyny> (last visited Jun 21, 2021).

<sup>30</sup> Navtej Singh Johar and Ors. v. Union of India and Ors., AIR 2018 SC 4321.

<sup>31</sup> Justice J. S. Verma, JUSTICE VERMA COMMITTEE REPORT, 416, (2013).

<sup>32</sup> Isha Mitra, supra note, 24.

<sup>33</sup> Sanya Talwar, This Is A Good Petition," Says CJI Bobde While Issuing Notice On Plea Seeking Equal Protection For Transgenders Against Sexual Crimes, LIVELAW.IN, 2020, (Jun 21, 2021, 9:40 PM), <https://www.livelaw.in/top-stories/this-is-a-good-petition-says-cji-bobde-while-issuing-notice-on-plea-seeking-equal-protection-for-transgenders-against-sexual-crimes-164320?infinite-scroll=1>.

<sup>34</sup> Sanya Talwar, supra note, 32.

The woman activists are yet not in favour of gender-neutral rape laws. There is a conceived notion that the accused man can file counter rape cases against the victim. To tackle this, issue the ambit of rape laws need to be redefined. There should be an attempt made by the drafters to protect the dignity of all humans irrespective of their gender. The legislative organ can try to formulate a standard definition of rape or sexual abuse of any person by combining the elements of “*section 375*”<sup>35</sup> and “*section 377*”<sup>36</sup> of IPC. The concept of consent and penetration can be taken from section 375 and the ambit of definition can be widened by taking the elements of section 377. This will formulate a new horizon that can be the basis of gender-neutral rape laws in India.

### **CONCLUDES WITH PRIDE**

After a prolonged fight with system and stereotype, the TG community expected the Transgender Persons (Protection of Rights) Act, 2019 to be a saviour but contrary to the expectations it is a bleak guard. The act fails at all fronts in terms of being a resort to TG person against any form or kind of sexual abuse. The discriminatory provisions of the act promote prejudiced notions. The pending petitions in the apex court have given hopes to the transgender community again that justice will be done. There is a rampant demand for amendment in the regressive provisions of the Act. The unconstitutional provisions of the act will be repealed and the legislature will come up with a new set of laws that uplifts the downtrodden dignity of the trans people.

Gender-neutral rape laws are the baton of fire that will light up the life of transgender persons against all remorse and trauma. The legislature has to come up with a law that makes the miserable lives of TG persons worth living with dignity. “The gender neutrality of rape law aligns with the doctrines of equality before the law and equal protection of the law, as envisioned under Article 14 of the Constitution of India. Therefore, incorporating a gender-neutral rape clause would not merely disregard the instances of the crime of a similar nature, that do not align with the gender specificity of the currently accepted definition, as mere unfortunate incidents, but instead provide similar protection of law to all the victims and punishment for all the perpetrators, irrespective of their gender”.<sup>37</sup>

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<sup>35</sup> The Indian Penal Code, § 375, No. 45, Act of Parliament, 1860 (India).

<sup>36</sup> The Indian Penal Code, § 377, No. 45, Act of Parliament, 1860 (India).

<sup>37</sup> Rishabh Chhabaria and Abhigyan Tripathi, Transgenders and Rape Law: Is equal protection of law still a pipe dream?, THELEAFLET.IN, 2020 (Jun 21, 2021, 9:50 PM), <https://www.theleaflet.in/transgenders-and-rape-law-is-equal-protection-of-law-still-a-pipe-dream/>.