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SEXUAL OFFENCES AGAINST TRANSGENDER: AN UNRESOLVED PUZZLE

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ABSTRACT

There are multiple accounts that historically as well as mythologically the existence of transgender community is not an alien concept for the Indian society. Indeed the Hijra community in India can trace their existence from the epics Ramayana as we all Mahabharata. However, it is disheartening to see that in the present century India is struggling to strive for not only gender equality but also gender neutrality. Time and again our judiciary through various judgments such as National Legal Service Authority v. Union of India & Ors., AIR 2014 SC 1863, Navtej Singh Johar v. Union of India, AIR 2018 SC 4321, KS Puttaswamy (Retd.) v. Union of India, 2019 (1) SCC 1 have tried to sensitized our legal system towards the plight of transgender yet, there are numerous documental proves which suggest that cases of sexual and physical violence against transgender are on an increase in our society. Moreover, one can find a lack of inclusivity towards transgender in the criminal laws of our country. The aim of this article is to comparatively analyse the criminal laws regarding sexual offences of our country and selected nations across the globe to scrutinize whether they embrace sexual offences against the transgender. The article further intends to suggest changes in our legal system to address the plight of the transgender in our community.

Key-words: *Gender, Transgender, Sexual Offences, Criminal Laws*

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I. INTRODUCTION

In the *Ramayan* when Lord Ram was leaving for the exile he instructed all men and women to not follow him. Among the followers were some transgender who thought that these instructions were not for them as they do not fall in either of the category and therefore, they followed Lord Ram. Impressed by their devotion, Lord ram gave them the power to confer blessings on auspicious occasions.[1]

Ones who were given the boon of giving blessings on auspicious occasions are now fighting for their basic rights. The transgender community has faced various difficulties over a period of time in our country. When the term sexual offence is used the instant thought is of a man committing the offence against a woman. However it is not true in the real sense. This crime can be committed by anyone against anyone. As per the report of the National Crime Record Bureau in the year 2022 it was reported that nine transgender persons were murdered only one was kidnapped and there were no cases of physical assault or rape in which transgender persons were victims. These data may show a very ideal situation however the transgender community says otherwise.[2]

In the present article the authors aim to identify the meaning of the term transgender, gender identity, sexual orientation, trace the legal history of transgender in our country, understand the laws dealing with sexual offences against transgender and compare it not only with the laws of other nation but also with the laws for sexual offences against women in India and thereby suggest changes in our legal system.

1.1 Meaning of the term Transgender

To understand the meaning of the term transgender it is first important to evaluate the difference between a few terms such as sex, gender identity and sexual orientation. A person's sex is given at the time of his/her birth. It is usually given by the doctor at the time of birth. This term basically means either of the two groups i.e. male or female in which most living beings are divided on the basis of their reproductive abilities howbeit, there are a few individuals who are born with the bodies that incorporate the aspects of both male and female.[3]

1 National Legal Service Authority v. Union of India & Ors., AIR 2014 SC 1863 at para 12, 13.

2 Huda Ayesha, *If only transgender lives were as rosy as depicted in ncrb-data*, THELEAFLET.IN (May 29, 2024, 9:00 PM), https://theleaflet.in/if-only-transgender-lives-were-as-depicted-in-ncrb-data/#:~:text=NCRB%20data%20registered%20no%20cases,incidents%20of%20crime%20against%20them.

3 BUREAU OF EDUCATIONAL AND CULTURAL AFFAIRS, https://eca.state.gov/files/bureau/sogi_

There can be times when there exists a problem that is related to the gender anatomy of the person whereafter their inner perception of themselves may not be in confirmation with the sex that was given to them at the time of their birth. It can also include those who are in the stage of pre or post sex re-assignment surgery and those who either do not undergo the same or do not have the means to get it done or had a failed surgery. Gender identity means a person's internal and individual experience of gender (which may or may not correspond with the sex that was given to him/her at the time of birth) or personal sense of body which can include a freely selected appearance after a surgical procedure. It means a person's self-identification as a man, woman, transgender or any other identified category.

Sexual orientation on the other hand means an individual's romantic or emotional attraction to another person. It includes a transgender, homosexuals, bisexuals, heterosexuals, asexual etc. A person's self-defined sexual orientation is one of the most basic aspects of self-determination, dignity and freedom. It is different from the term gender identity as gender identity is the inner identification of one's gender and sexual orientation is the person's inner identification of an attraction towards another person.

In National Legal Service Authority v. Union of India & Ors., AIR 2014 SC 1863 the Supreme Court of India determined the term transgender. As per the court, the term transgender is a wide term that includes within its ambit various persons whose gender identity or behavior does not abide by the accepted notions of gender within the society. It also includes those individuals who do not relate with the sex that was assigned to them at the time of their birth i.e. the hijras or eunuchs who addresses themselves as the third gender. The term third gender can be understood as representing those who do not identify themselves as either male or female. They cannot be considered as men by the reason of their anatomy appearance and they cannot be considered as women even if they are like a woman without reproductive organs and menstruation. As they don't have the capacity to reproduce like men or women therefore, they are neither and claims that they are of a third gender. Hijras also include emasculated (castrated)men, non-emasculated (non-castrated) men and hermaphrodites (inter-sexed persons).

The term transgender also includes those individuals who have undergone the sex re-assignment surgery or those who underwent this surgery to align with their gender identity. They are popularly known as trans-sexual persons. The term trans-

terminology.pdf (last visited May 27, 2024).

sexual also incorporates within its ambit those persons who cross-dresses in the clothing of their opposite gender. These individuals might not have undergone the sex re-assignment surgery. They are popularly known as transvestites.

1.2 Legal History of Transgenders in India

The transgender community has a strong historical presence in our country Their presence was highlighted in various religious texts in the Hindu mythology. One finds the mention of the term *tritya prakriti* or *napunsaka* in several puranic literatures. The term *napunsaka* was used to signify those who have not procreative abilities. The history of transgender community in India can be traced in the following phases:

a. Pre-Independence

At the onset of British Rule the social position of transgenders changed evidently when Criminal Tribes Act, 1871 was passed. As per this Act, the community of transgenders or eunuchs were deemed as criminals and those who were into heinous crimes.[4] This Act provided penalty for eunuchs who dressed like a woman, danced or played music in any public place. They could be arrested without any warrants and were imprisoned up to two years along with a fine.[5] Moreover, the government had the power to register the names as well as place of residence and a record of property of those eunuchs who were suspected of committing offences, castrating children or kidnapping.[6] The eunuchs were not allowed to act as guardians of minor or adopt a son or make a gift deed or will.[7] This Act was repealed in August, 1949 however, there was another law that suppressed the rights of transgender even post-independence.

Even before the Criminal Tribes Act, 1871 was enacted another draconian law that penalised transgender persons was section 377 of the Indian Penal Code This section penalised all forms of penile-non-vaginal sexual acts which included anal and oral sex. It was passed at the time when transgenders were related to these sexual practices.[8]

4 Criminal Tribes Act, 1871, preamble, No. 27, Acts of Parliament, 1871(India).

5 Criminal Tribes Act, 1871, § 26, No. 27, Acts of Parliament, 1871 (India).

6 Criminal Tribes Act, 1871 §. 24, 26, 27, No. 27, Acts of Parliament, 1871 (India).

7 Criminal Tribes Act, 1871 § 29, No. 27, Acts of Parliament, 1871 (India).

8 Queen Empress v. Khairati, (1884) ILR 6 All 204.

b. Post-Independence

Section 377 of the Indian Penal Code, 1860 is one of the most debated topic after independence. As was already highlighted this section penalises even consensual sexual intercourse of forms including penile-non-vaginal sexual acts which included anal and oral sex. A writ petition was filed by the NGO Naz Foundation in the High Court of Delhi whereafter this section was read down as unconstitutional to the extent that it penalises consensual sexual intercourse between two adults.[9] This decision was appealed in the Supreme Court whereafter the hon'ble court over-ruled the decision of Delhi High Court.[10] A curative petition against this decision of the Supreme Court was filed by the Naz Foundation and while this petition was pending the Supreme Court in the case of KS Puttaswamy (Retd.) v. Union of India, 2019 (1) SCC 1 declared that right to privacy is the fundamental right of every person. Following this, a writ petition was filed by Navtej Singh Johar, Sunil Mehra, Aman Nath, Keshav Suri, and Ritu Dalmia challenging the constitutionality of Section 377 and seeking the rights of sexual autonomy. In its famous judgment of Navtej Singh Johar v. Union of India, AIR 2018 SC 4321. The court finally read down section 377 as unconstitutional to the extent that it violates the sexual rights of two consenting adults. Even though the right to sexual autonomy was granted to transgenders through this judgment however their right to get married is yet not a legal right in India.[11] As per the judgement of the Supreme Court a transgender person in a heterosexual relationship has a right to get married under Special Marriage Act, 1954 or any other law but the same is not granted for transgenders who are in a homosexual relationship.

II. Scrutinising Laws Dealing with Sexual Offences in India for Inclusivity of Transgender

Sexual offence against any person is the harsh reality of the present time. Laws regarding sexual offences against woman have undergone many changes after independence. Some changes include the Criminal Law (Amendment) Act, 1983, Criminal Law (Amendment) Act, 2013 and Criminal Law (Amendment) Act, 2018. All these amendments have bought tremendous changes in the understanding of various sexual offences such as harassment, stalking, voyeurism, consent, rape and

9 Naz Foundation v. Union of India, (2009) 6 SCC 712.

10 Suresh Kumar Kaushal v. Naz Foundation, (2014) 1 SCC 1.

11 Supriyo @ Supriya Chakraborty and Anr. v. Union of India, 2023 INSC 920

assault. However, these changes are for crimes which are specifically mentioned can be committed against women only but The Transgender Persons (Protection of Rights) Act, 2019 has penalized sexual offences against transgender also. Therefore, it is pertinent to reflect and compare the laws that address sexual offences against woman and transgender in India. It needs to be securitized whether these laws in reality include transgender community and whether it is at par with the laws that deal with sexual offences against woman.

2.1 The Indian Penal Code, 1860

Before a discussion on the legal provisions that deal with sexual offences is conducted it is pertinent to note that as per the section 10 of this code it is mentioned that a man means a male human being of any age and a woman means a female human being of any age. The other provisions are as follows:

i. Section 354: This section provides a punishment of one year which can be extended up to five years if anyone intentionally or knowingly outrages the modesty of a woman.

ii. Section 354A: As per this section only a man can be punished for sexual harassment up to three years. A close reading of this section depicts that except clause iii, all the other clauses does not specify whether the victim should be a woman only. However, if one goes through the order of Delhi High Court in Anamika v. Union of India, W.P. (Crl.) 2537/2018. it can be seen that transgenders can also file a case under this section.

iii. Section 354B: Under this section a man can be punished for three years which can extend up to seven years for assaulting or using criminal force against a woman with the intent to disrobe her.

iv. Section 354C: A man will be punished for committing voyeurism against a woman. The punishment on first conviction will be one year which can be extended up to three years and on subsequent conviction he will be punished for three years which can extend up to seven years.

v. Section 354D: A man can be punished for stalking a woman either physically or virtually. His punishment on first conviction is three years and on second conviction it will be of five years.

vi. Section 375-Section 376E: Section 375 defines rape and according to this a

man can commit rape of a woman where he does any act as per section 375 without or against the will of the woman. As per section 376-376E stringent form of punishment is mentioned ranging from 7 years to 10 years to life imprisonment and even death penalty for gang rape.

vii. Section 377: This section criminalises any carnal intercourse against the order of nature. The punishment is imprisonment for life or with imprisonment which may extend to ten years and fine. Though this section does not specifically mentions transgender however, it was used to target even consenting homosexual adults. After the case of Navtej Singh Johar v. Union of India, AIR 2018 SC 4321 this section only penalise a non-consensual sexual intercourse.

viii. Section 509: This section punishes a person who does anything that intends to hurt the modesty of woman. The punishment under this section is of three years and fine.

It can be inferred that only section 354A and section 377 in the Indian Penal Code considers a transgender a victim. Transgenders can file a case only if an offence of sexual harassment or unnatural offence is committed against them.

2.2 Bharatiya Nyaya Sanhita, 2023

This Act shall replace the Indian Penal Code, 1860 from July, 2024. This Act has majorly retained all the definitions and punishments as given in the Indian Penal Code, 1860. An analysis of this laws gives the following observations:

i. Section 73: It deals with outraging the modesty of a woman for which a punishment of one year to five years is mentioned.

ii. Section 74: This section deals with sexual harassment and gives the punishment of three years or fine. An implication of the order of Delhi High Court on section 354A will be that even transgenders can be a victim under section 74 of Bharatiya Nyaya Sanhita, 2023.

iii. Section 75: This section provides punishment for assaulting or using criminal force upon a woman with the intention or knowledge of disrobing her. The punishment is three years to seven years.

iv. Section 76: This section provides punishment for committing voyeurism against a woman. Under this section the punishment on first conviction

will be one year which can be extended up to three years and on subsequent conviction he will be punished for three years which can extend up to seven years.

v. Section 77: This section punishes a man for stalking a woman. On first conviction the punishment is three years and on second conviction it will be of five years.

vi. Section 78: This section punishes a person who does any gesture or act that intends to insult the modesty of woman. The punishment under this section is of three years and fine.

vii. Section 63-section 72: Section 63 defines rape and it is same as was given in the Indian Penal Code, 1860. Section 64-72 provides for punishment of rape and is similar to the Indian Penal Code, 1860. Just like the Indian Penal Code, this section also does not allow a transgender to file a case of rape under Bharatiya Nyaya Sanhita, 2023.

An inference of all these provisions is that except section 354A none of the section addresses the transgenders. As there is no legal provision pertaining to unnatural offences it needs to be seen how our legal system will deal with such cases which were addressed by section 377 in the Indian Penal Code, 1860.

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

In Vishaka and Ors. v. State of Rajasthan, (1997) 3 SCJ 584 the Supreme Court of India laid guideline to protect which must be followed by every organisation to protect women from sexual harassment at workplace. These guidelines acted as a base for this Act. However, as the name of the Act says it is applicable only on women and transgenders are not included within its ambit.

2.4 Immoral Traffic (Prevention) Act, 1956

This Act does not consider transgender as victims of human trafficking however they can be an accused within the purview of this Act. However, a new bill namely Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021 is pending which will incorporate not only women and children as victims but also include transgenders as well.

2.5 Transgender Persons (Protection of Rights) Act, 2019

As per section 18(d) if any person causes sexual abuse then that person will be punished under this Act. The punishment is for a term not less than six months but can extend upto two years along with fine. However, the section does not give whether the offence is bailable or not or cognizable or not. If one reads the schedule of the Code of Criminal Procedure, 1973 any offence that is punished with an imprisonment of less than three years is taken as a bailable offence and non-cognizable offence. Thus an inference can be drawn that any sexual abuse of a transgender under this Act is a bailable offence and non-cognizable offence.

III. Laws Dealing with Sexual Offences against Transgender in Other Nations

Several countries across the globe have changed their legal provisions regarding sexual offences to an extent that it now incorporates transgender as well. The examples of those nations are as follows:

i. United States of America

The United States of America has made its laws regarding sexual offences gender neutral. In its laws on sexual offence the term person is used for the accused as well as for the victim. The section says that if any person commits a sexual assault which can be by penetration or application of mouth etc. is considered as a rape.[12]

ii. England

As per the Sexual Offences Act, 2003 the laws are gender neutral in England as well. The laws uses the term person for not only the accused but also for the victim. The section on rape states that it can be committed by penetration without the consent of the victim.[13] Similarly the offence of sexual assault can be committed if there is any sexual touching without consent by a person upon another person.[14]

12 United States Code, 1996, art. 120, §920, No. 10, Acts of Parliament, 1996 (United States).

13 Sexual Offences Act, 2003, § 1, Acts of Parliament, 2003 (England).

14 Sexual Offences Act, 2003, § 3, Acts of Parliament, 2003 (England).

iii. Scotland

According to the Sexual Offences (Scotland) Act, 2009 the term person is used for accused and the term victim is used for a person upon whom rape is committed. Similarly for sexual assault as well the term victim is used. As per the laws of Scotland rape is when there is penetration without the consent of victim. [15] Sexual assault takes place when there was a sexual contact by one person upon the victim without consent.[16]

iv. Northern Ireland

According to the Sexual Offences (Northern Ireland) Order, 2008 a person commits rape upon another person if he penetrates without the consent of another person. The law uses the term person and does not limit it to man or woman.[17] Even for sexual assault the Act has used the term person and has kept its laws gender neutral. Sexual assault can be committed by a person upon another person if one person touches another person sexually without consent.[18]

v. New Zealand

According to the Crimes Act, 1961 a person can be punished for sexual violation if he sexually assaults another person with an intention of committing sexual violation.[19]

An analysis of the legislations of all these countries depicts that all of them have made their laws regarding sexual offences gender neutral. This aspect is not only seen for the victim only but is also seen in the case of the perpetrator. The most common term that is used by all these nations is person for accused as well as for the victim.

IV. SUGGESTIONS

The aforesaid discussion reveals that in India we have recognised transgender as third gender but have not given them equal protection as is given to the other two

15 Sexual Offences (Scotland) Act, 2009, §1, Acts of Parliament, 2009 (Scotland).

16 Sexual Offences (Scotland) Act, 2009, § 3, Acts of Parliament, 2009 (Scotland).

17 Sexual Offences (Northern Ireland) Order, 2008, § 5, Acts of Parliament, 2008 (Northern Ireland).

18 Sexual Offences (Northern Ireland) Order, 2008, § 7, Acts of Parliament, 2008 (Northern Ireland).

19 Crimes Act, 1961, § 129, Acts of Parliament, 1961 (New Zealand).

genders by the society. Undoubtedly both legislation as well as the judiciary has come a long way towards the transgender as compared to the laws that we had before independence however, there is a long road which needs to be travelled. As per the Transgender Persons (Protection of Rights) Act, 2019 sexual offences against the transgenders are penalised however the punishment is nothing compared with the sexual offences against women which is enshrined within the Indian Penal Code, 1860 or even in the upcoming new criminal law i.e. Bharatiya Nyaya Sanhita, 2023. Additionally, where rape is a non bailable and cognizable offence under the Indian Penal Code, 1860 as well as Bharatiya Nyaya Sanhita, 2023; it is a bailable and non-cognizable offence for transgender. In light of this it is suggested that:

i. The criminal laws must be made gender neutral with regard to not only the accused but also the victim.

ii. There are multifarious sexual offences such as sexual assault, harassment, stalking, voyeurism, disrobing, rape, eve-teasing however, the same cannot be said about the transgenders. Given the understanding of the term transgender it is necessary to address all these offences which can be committed against them as well.

iii. The sexual offences against transgenders must be made non-bailable and cognizable to highlight the seriousness of these offences.

iv. Even though the intervention of our judiciary towards the rights of transgender should be applauded however, it needs to take steps towards the sexual offences which are committed against transgender.

v. Last but not the least the legal community can also join hands to come together and spread awareness about the concerns of the transgenders amongst the masses.

It cannot be denied that a society cannot be free from crimes forever. With the advancement of technology new ways of committing crimes is being seen. However, we as a nation needs to come forward and protect the rights of the vulnerable section of our society. The plight of transgender must be addressed in a proper manner. It is not to ring bells in vain rather it is necessary to take steps which can protect the sexual autonomy of every person in our country.



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