

LEGALFOXES LAW TIMES

SEXUAL OFFENCES AGAINST TRANSGENDERS – TIME TO SPEAK OUT OF THE AMBIT

By Nishtha Ms. Bajpai

Abstract: The term “**transgender**” has been given justice through an orbiter dictum. The world now is considering them as **third gender** and some opportunities are also opening their arms for welcoming and celebrating the respectful arrival of transgender people in the society of just two genders “male” and “female”. Since ages transgender community has faced humiliation, abuse, mockery, and other atrocities which are not only bad in the eyes of law but also a sin in human rights. In this era of **#Metoo**, where women’s are coming up for their rights, fighting with society and its taboos so boldly, in that street of hustle; a voice is cornered and ignored; which is of a transgender who was once subjugated to sexual offence, but her voice was sabotaged and was ignored brutally. There are many helping hands for tortured women and hopeless men, but there are few who come forward with a helping hand for this unwanted community. The sexual offences against trans-genders might seem impossible or rarest of rare incidents but in reality it’s an offence which happens in every country approximately. Whether it is a developed nation or developing or underdeveloped nation, the people of that nation or the Mens rea of the populous decides the fate of such helpless people in that nation. We have given them status, gender recognition; but still we are not able to provide security, love, respect and hope to them till today. Here the constitution fails, here the human rights are shattered, and here humanity fails. Even after knowing the ground zero situation, the authorities are mum; police administration has sealed its lips because directly or indirectly they are also responsible for the injustice happening to an innocent community.

TRANSGENDER COMMUNITY: JOURNEY FROM EUNUCH TO THIRD GENDER

The foundation genes of eunuch is not a topic, which is highly talked and discussed in the zero hour of schools or on the dining table of a normal household, substantially making this community’s existence a bad omen. There are several texts explaining the origin of this third gender, everybody is having their own story to sell, the eunuch’s are born when some genetic

error takes place, or some changes happen in the hormone of a kid while he or she is in embryo. The eunuch's were considered loyal devotees of lord ram, although no strong text has verified it but the ancient plays have shown the eunuchs as loyal devotees of Lord Ram. The Mughal period used transgender as sexless watchdogs for the "HARAM" (palace where queens used to live) transgenders were treated very badly in Mughal era. They were used as servants and were not granted a respectful life. This is not the end of misery, the British era was more brutal towards transgender community; the battle of recognition has taken a lot from this community and has not given them ample of things to celebrate in return. The Hijra community has been an integral part of Indian soil, as everybody is equal and is considered a child of the God. The British used to consider the Eunuch as waste and invaluable in society, according to them the eunuch's were not suitable for the well settled society, the eunuchs were portrayed as people addicted to sex , filth and disease, they believed that they are shame for human race and were a threat to colonial authority.

The dark picture of colonial era can be imagined and we can justify the picture with the assumption that at that time, the education was not very up to the mark, the Indian aura was colonized by Britishers, and some myths and misunderstanding have always been an important part of Indian culture since the time immemorial. But the 21st century is also the same for eunuchs, the lack of education, the torture from the family, forced sex work, physical assault, body shaming, and lack of employment is the modernized picture of equality in India. India is a hub of cultures, customs, rituals and beliefs, so it is not very common in India to accept the notion of transgender behaving normal and getting rights as male or female in the society. That is why the offence against transgenders is more common in India. This mindset towards the third gender community has not changed even after the judicial pronouncements, many countries are still behaving disrespectfully with the third gender community, which makes their life more miserable.

The study of sexual offences against transgender has not been an all-time favorite topic for researchers, as these topics are rarely discussed. In India the third gender community has really faced many humiliations and atrocities, even they have not been considered as a gender for a long time but then the voice of change brought a wave of reformation in the lives of transgender when they were considered as **"Third Gender" by the Hon'ble Supreme Court of India in the celebrated judgment – NALSA vs. Union Of India** " the Supreme court held that the right to

gender identity was protected under Article 19 and 21 of the Constitution of India, henceforth the eunuch are to be considered as Third gender community.¹ In the NALSA judgment, the solid motive of Hon'ble Supreme Court was to gift eunuchs a respectful life, and the apex court was of the view that we should consider the transgender community as socially and educationally backward society so that for a time being they can get some benefits from the reservation scheme as enshrined under the **article 15 and 16 of the Indian Constitution**, because the current situation of transgender is alarming and tensioning. For the benefit of transgender's an Act was passed "**The Transgender Persons (Protection of Rights) Act**" but that Act showed that how irresponsibly the government has drafted the Act. The Act has a list of shortcomings and loopholes which has to be addressed and solved for the benefit of a community which has faced extreme humiliation, abuse, assault, emotional traumas and other atrocities which are not only painful and awful but also raises a question on humanity.

SEXUAL OFFENCES AGAINST THIRD GENDER AND OTHER ATROCITIES: A PUNISHMENT AWARDED FOR BEING DIFFERENT

When expression "**sexual offence**" is used the first thought which pops in the mind is all about woman being a victim and male as a perpetrator, majority of times only this assumption is drawn by a person who hears any news on rape or molestation or on any other sexual offence but rarely do we shift our focus towards the **LGBTQ** community, that such offences can take place with them too, such mishappenings can happen to them too, but the mindset never allows to switch to new horizons of society, we are not comfortable in embracing the change and new concepts. The LGBTQ community is already a bad omen, a matter of dishonor for the family; it is not restricted to Indian soil but also to different European nations and other countries where war is happening or the governmental stability is not present.

On 17 June 2011, the United Nations (UN) Human Rights council agreed on resolution which described the violence and discrimination ²against individuals who are not sexually same as other two genders i.e. male and female and those who are not having the normal sexual preferences, the report expressed its deep concern over issues of violence against this particular community (which includes beatings, kidnapping, murder, rape, forced labor and other atrocities) and all these things are very brutal and arbitrary in nature, the report said that these cases are

¹ NALSA vs. UNION OF INDIA, (2014), 5 S.C.C 438 (INDIA).

² <https://www.hrw.in>

increasing in leaps and bounce, there is no serious concern over this issue even in developed countries, and that what makes situation more miserable for us; when government is not ready to listen when its subjects are denying the existing of such facts then it becomes very problematic for other organizations to step up and interfere in the matters. Violence on the basis on sexuality portrays the image of a hopeless society which has created a stigma for its people, and has drawn a line of control which shouldn't be crossed at any cost. Even after judicial developments and line of several NGOs who are fighting for their rights still there are some offences which need to be addressed urgently.

a) **Rapes of transgender: An illusion for some but still a painful reality** – The rape of third gender person seems impossible and not acceptable, because harsh reality is not shown to us in crystal clear manner. **On June, 5, 2014 one trans-woman among the group of eight was raped by a policeman** when she was travelling from Mumbai to Ajmer (to visit Urs of sufi saint Moinuddin chisti), the victim was captured on the station and was taken to police station, there happened this mishappenings with her; the victim was released on June,10, 2014 and she filed an FIR against the accused, but the charges imposed were of attempt to rape not of custodial rape, and the police officer **Vijay Singh choudhary** extorted the amount of Rs. **40,000** from the victim. In such a hard situation, our administration is thinking of looting the victim instead of helping her out.

When a press conference was hosted by the Voice against 377 along with the People's Union for Civil Liberties (PUCL), the victim said **"I want them to feel the pain which I endured for 40 minutes"**

The witness for the case was also traumatized, and there was no proper action from the side of Rajasthan Police. Even after the reporting of the case and after 3 months of the incident the accused was serving in the police station of Ajmer, and this condition is awfully ridiculous and substandard.³

In 1999, transgender advocate Gwendolyn Ann Smith started the tradition of celebrating the November, 20 as Transgender's day in the memory of Rita Hister, a transgender woman, who was stabbed brutally at her own residence in Massachusetts on 28th November, 1998. This year in 2020, we are going to celebrate 21st year of Transgender's

³ Manisha chanchalani, *Transgender rape victim still waiting for justice*, THE HINDU, (Sep, 12, 2014,10: 30 PM IST) <https://www.thhindu.in>

day but unfortunately, we have lacked in providing them the rights which they deserve since their birth.

Deepak kumar, who works with a NGO, narrated a spine chilling incident where he told that one transgender “shabnam” was raped by 17 police officers, they forcefully got physical with her, she was spotted heavily bleeding on the road, a stranger covered her from his shirt and drove her to hospital but she died few days later, and the case is still pending in the court with no outcomes.

Four out of ten transgender individuals in Indian soil have experienced that what sexual abuse is. The perpetrator is known to the victim majority of times; either that perpetrator is an intimate partner, or client or any neighbor person who knows the weakness of such helpless people.

An incident of Sonia was also shared where she was picked up by her friend Nadeem and his friend, they both took her to his farm house for a party and then raped her; this brutality was not enough for such beasts that they emptied the bottle of acid on her face and abandoned her at some unknown place, so that nobody can identify the body of deceased.

In June, 2017, a teen age transgender was gang raped by four men in Pune, but the problem in front of Police was that in which section the accused have to be booked, when victim went to hospital for the medical treatment, the questions from the medical team was that “how a transgender can be raped?” and the body language of nurses changed towards her and she was humiliated silently, as if this was her fault. There are only a few cases where the rights of the victim are discussed else everywhere the victim is given the benefit of doubt and the victim always lives in depression and anxiety. ⁴

- b) Society having a jaundiced eye towards Transgender’s-** The pain of being left unnoticed, and side-lined is what the transgender’s are enduring since time immemorial, the injustice happening to them is unnoticed, the research on such topics is not seen often and society doesn’t seem concerned regarding the rights of people of third gender, because even after passing gender neutral laws, we find ourselves standing on the same hopeless road of equality. The partiality happening with third gender is not restricted to

⁴ Vishnu gopinath, *On transgender day of remembrance, the screams that India ignored*, THE QUINT (Nov, 28,2018, 09:56 AM IST) <https://www.thequint.in>

Indian soil, even in the developed countries like America, there exists some inequalities which really infringes the basic rights of transgender's there are some political agendas and ideologies behind every act of government and its representatives, when ideology asks you to go against any community, idea, motive etc. then nothing in this world can bring your feet on the right path. Same happened in the South Dakota city of America, which was on the verge of passing the bill which restricted the rights of Trans students to use the washrooms and restrooms. **The South Dakota bill** is what it is called and it tried to restrict the access of Tran's students in regards to locker facilities and washroom facilities by giving a statement that it shall be used by the students of same sex. The republican governor of state Denis Daugaard was supporting the bill and in 2015, some legislation against LGBT was passed in states like Kentucky, Florida, Nevada and Texas.

5

By restricting them to use washrooms, restrooms and other basic facilities what kind of message they are trying to deliver among the masses; that we should deprive a particular gender from exercising all his human rights just because they are born with some different physical characteristics? The third gender community faces a different kind of torture in war prone areas too, women is all time victim of rape and molestation but men and transgender's too face humiliation and sexual abuse in a state ruled by combatants. **For e.g. Human rights watch conducted a study in Syria;** regarding the challenges faced by Tran's women, and non-binary people, the Syrian conflict is a very apt example of non- state actors' dominance and the infringement of human rights of Tran's people. **In their 77 pages report, the victims opened their hearts and told human rights watch about their horrible sexual assault.** They shared their ambiguous situation and expressed grief on how they are unable to take medical services there in Syria for plenty of reasons like: shame, guilt on their gender, fear, stigma and lack of trust. The management is poor and not so highly managed and developed which *makes it* difficult for Tran's people to take proper aid from concerned authorities.

"Naila", a 21 year old transgender woman shared her terrible and extremely painful experience **that she was brought in prison and the authorities brought the stick of**

⁵ Molly Redden, "Separate bathroom bill for transgender students poised to pass in South Dakota", THE GUARDIAN (Feb 16, 2016, 21.28 EST) <https://www.theguardian.com>

the mop and tried to do unnatural sex with her, the effect of that particular incident was that, naila started bleeding heavily and was mutilated.⁶ The perpetrators were not at all guilty about the same, rather they were happily doing this shameless task on the ground that this gender deserves extensive kind of humiliation.

The conditions are still the same, and nobody cares or is concerned over the same, the pain which naila and other third gender women have endured is beyond imagination, one would run speechless while describing their plight, no word can make us feel that pain which those innocents have tolerated for committing no offence. What kind of non-humanitarian is this? Was this a play? Aren't they the humans? What gender neutral laws are doing then? These questions go unanswered because there is little strong reason behind all this torture. The society has done extreme brutality with this community and still the process is going on, unnoticed and unanswered.

c) Unemployment leading to sex slavery: Victims of Sexually transmitted diseases –

The third gender community is facing the problem of employment, not everyone wants to dance and sing on the roads and trains, some want to study and plan their future accordingly, but they are not able to grab a job for themselves, which automatically shifts them to the road of forced sex work. The hygiene conditions of the area is not taken care of and due to this negligence many of them catch some severe diseases like HIV – AIDS, AIDS is a deadly disease and demands for an extensive treatment, which is not possible for these socially and backward people. The World health organization has reported that these communities are at more risk of infection because of being marginalized and criminalized and lack of treatment and testing for them, the committee found out that HIV data for trans women is available only for 15 countries and among which **India tops the battle with 43.7% of highest prevalence of HIV in Trans woman.**⁷ The health data shows that there is a huge difference between distribution of resources among normal people and third gender people, which is wrong according to the Indian constitution. The distribution of resources shall take place equally is not only a fundamental right of citizens but also directives which are given to state governments so that the administration shall run smoothly.

⁶ Brian Stauffer, "*Sexual Violence Against Men, Trans Women in Syria conflict*", HRW, (Jul,29,2020, 2:00 AM EDT)

⁷ (Bulletin of the World Health Organization 2016; 94:790-791) <https://www.who.int>

d) No stand in favor of third gender in society : Covid 19 circumstances

No man is an island, is an idiom for describing how desperately we need people and community for us, community makes us stronger and clever, with the support of community one can make changes in course of order of government and other things. We have always been asked by our forefathers to be in our herd and support our herd for claiming protection when required. But in contrast, the third gender community is not getting any support from any of the communities existing there. The example which will substantiate the claim is “Covid-19” situation; the reports have shown that transgender community has suffered a lot during the period of lockdown, **Zoya Thomas** a transgender has shared her grief that she is not able to earn money and buy essentials for herself, Zoya used to earn from Mumbai local compartments, she used to earn 1000 Rs a day and from that money she lives,⁸ because transgender are considered nothing for good in India, so begging is the only bread and butter for them. She said that normal groceries are not available in this lockdown period and we cannot go and buy them as the police are not at all cooperating and chase them away for coming in public. She says that as she is living in transgender area that is helping her to get some relaxation in rent. Not only this the society has made this community as a blot on the human race, the Mumbai slums are having narrow roads and small interconnected houses, and this is evident prima facie that these communities are more vulnerable to the disease in comparison to us.

In Hyderabad, trans phobic posters were posted on metro station with the tag line “if you will talk to transgender then you will catch coronavirus”⁹ This statement shows us how well NALSA judgment is going in India and how insulting such posters and things are, when the whole world is fighting in solidarity we are side lining a particular community who is not well to do many social and economic horizons.

The healthcare facilities for transgender community is a challenge, because a tendency runs in society that they don't need anything, they should manage everything by their own, they have nothing to do with society, society functions, and other things, we have

⁸ Kenneth Rosario, “COVID –19 lockdown: transgender community pushed further to the margin”, THE HINDU (Apr, 06,2020, 1:18 IST) <https://www.thehindu.com>

⁹ Kenneth Rosario, “COVID –19 lockdown: transgender community pushed further to the margin”, THE HINDU (Apr, 06,2020, 1:18 IST) <https://www.thehindu.com>

fed our minds with this psychology that transgender community is not community to hang with us or to reside with us, we always see them from judgmental eyes which is wrong legally and morally altogether.

REASONS FOR THE DISCRIMINATION AND HATRED:

Several reasons have played an important role in traumatizing the community, but there are few reasons which have really added the fuel into the fire and they are:

- a) **Scarceness of sensitivity and awareness in society:** Might sound a normal and repeated reason but this is so true that society does play a very significant role in deciding the status of a person. In the case of the third gender too, the society has played a very big role in making their life miserable, society is so insensitive against the third gender that they started practices against them so that a particular section of society can never raise its head and live with dignity. The society is always judgmental and non - supportive, they mock the condition of these helpless people, and this is what shows how insensitive we have become.
- b) **Negative viewpoint of government:** The responsibility of government is to keep its subjects safe and sound, to make policies which are enlightening and benefiting for the public, but the governments across the world are ignoring the plight of transgender's as their life means nothing to them. The most disappointing factor is that despite the crystal clear image of their condition, governments are mum. The sexual offences against third gender are not highlighted in a manner as women molestation is highlighted, the thing the government has left this community on its own accord and the development of this community is not at all on the manifesto of any of the proposed governments.
- c) **No support from the family:** If India is to be taken in consideration then it is no wonder to say that here third gender gets any support from family; instead of support they curse the birth of such child, and blame that child for such disability. Many a times they sell their children for prostitution so that they can escape burden and liability of transgender child. There are few families in India who supports such disability and tries their best to make environment healthy for their transgender kids. But still the ratio of such families is very less. All these family and peer pressure

brings a transgender child into frustration, loneliness and depression and the problem starts when the only blood relatives leave one alone in this whole capricious world.

d) Economic and social backwardness: The economic and social backwardness is appoint where really some work has to be done, the third gender being an isolated community faces social stigma and thus are not able to share their plights commonly, which gives the perpetrator a good chance to molest them boldly, when they share their plights people laugh on them, or consider it as a joke, nobody pays heed to what a person or living being is saying, or somebody is asking for help, there is no social communication for transgender. Economically they are very backward, they have been asked as why do they beg and earn, why don't they find a regular job, then we all know the answer that they don't get jobs so easily, no one wants to employ them until and unless there is urgent need, or that person is a real philanthropist otherwise they call for help but nobody takes a dig on that. These partialities hurt them to the core and then isolate themselves in a different periphery where assault happens to them but the darkness of social stigma doesn't let us see.

e) Failure of law and order: Law and order are gems of crown named Democracy, in democracy we have equal status, equal say and everything is distributed to us equally, but law and order has failed in imparting justice to the third gender community to an extent, just giving recognition is not enough, even females of this nation are recognized as humans but are treated like animals by their intimate partners, so we can imagine what recognition means to our nation in general. The Protection of Transgender rights Act has proved a big failure for the Trans people. It does not provide a separate section for sexual offences against transgender. The maximum punishment was 2 years and fine, which is equivalent to summon case, and the liberty in punishment shows that how serious we are regarding the protection of Transgender.

The strong implementation is a dream in the case of transgender protection, the rules and regulations are all there but still there are many viewpoints which have to be considered while dealing with the issue of transgender. Like:

Behavior of police towards third gender

No strong awareness regarding the Act and its implementation

Social acceptance of Trans people

In many sexual abuse cases, policemen were the culprits and they were not terminated from their service for committing a crime like rape. It means that forced sex with transgender is not a rape? Is it rights which police authorities are exercising?

India needs more than a law, law doesn't work here, and we need something more strong, because if laws could do wonders then there would be no rape of girls in India.

SUGGESTIONS FOR THE BETTERMENT OF TRANS COMMUNITY:

- a) **Role of Family:** The root of every solution is one's own family, when families will start supporting the third gender kids of their own family then only some possible positive outcome would be there, we should keep this thing in our mind that charity starts from our home and if we want change then we have to change ourselves, the aura and mentality. We have to make sure that if such kids are near us then we should make them feel happy and protected rather than insulting them and terrifying them for no reason. When families will start supporting them then for sure some changes will be there, and those changes will bring positive outcomes for the entire society.
- b) **Role of Media:** The media has a very important role, media is the fourth pillar of democracy which imposes a great responsibility on our journalism, but unfortunately our media is always focused upon how political parties are doing or what issues are raised for elections, only political agendas and their news is discussed but, if in real sense the media will go for a change then they will surely find many issues where they really have to report and bring change. If media will take this issue up then surely it is going to benefit the transgender people a lot.
- c) **Role of Judiciary:** Role of judiciary is more like an institution who has to keep a check on policies and actions taken in favour of transgender person. While delivering NALSA judgment, the Supreme Court was very affirmative in regards to the future of Trans people, and thus judiciary if steps into the matter of infringement Trans people rights then it will do wonders for that innocent community.
- d) **Role of United nations as a policy framer and whistleblower:** United Nations is having a strong effect on all the nation- states but on transgender topic even UN is keeping the lips sealed, we need UN to step into this matter, recognition is totally

different from sexual offences, we need to aware people regarding the rights third gender people so that an equilibrium of equality can be achieved. If the UN will step in then surely countries will think more seriously on this issue, when symposiums and other things will be hosted then automatically third gender people will feel more protected and confident and then they will start speaking for their rights. We need to empower everyone on this soil of God; whether male, female or LGBTQ all have some human rights and we are ought to respect them accordingly.

- e) **Role of social campaigns:** Social campaigns and programs will bring people together, when they will assemble together, they will start connecting and we need this connection for the betterment. NGO's will play a significant role in initiating such campaigns bringing people together for solving those issues which are important and necessary.

PETITION OF ADVOCATE REEPAK KANSAL IN THE HON'BLE SUPREME COURT: A WAVE OF CHANGE FOR A NEW SUN FOR TRANSGENDERS:

A petition has been filed in the Hon'ble Supreme Court of India, through Advocate Reepak kansal who has requested the apex court regarding reviewing the matter of transgender and the sexual offences happening against them. The kansal has argued that Section 375 of IPC (which defines rape – the victim is only woman) whereas the third gender people are also the victim of rape and sexual assault and thus the section of IPC is ultra vires to the Articles 14,15 and 21 of the Indian constitution.

While hearing the petition the bench of CJI SA bobde, Justices AS bopanna and V. Ramasubramanian, the CJI said that this is a good petition and as there are no strict rules regarding such a grievous offence the court would like to hear the matter.¹⁰

CONCLUSION: We know the fact that a society can never be crime free, there will be some or the other elements who will try to bang the peace and create fuss for all, but the thing is if we will stop protesting then the things would become worse. The third gender community is silent after getting recognition, because they know if they will try to speak up in this matter, nobody will listen to them and that is a shame for the world's largest democracy, role of media, judiciary and united nations can really help the one in need. We have to raise our voice and demand an

¹⁰ Sanya talwar, "This is a good petition" says CJI Bobde while issuing notice on plea seeking equal protection for transgender's against sexual crimes", LIVE LAW (Oct, 12, 2020, 1:58 PM IST) <https://www.livelaw.in>

answer for all the wrong happening, the pain and suffering of transgender is not restricted to them, women's too are the victim of such brutality, we should understand the pain of that other community too. Just sitting and cursing won't bring change, through continuous efforts and protest we can bring a change and that is fixed.



LEGAL FOXES

"OUR MISSION YOUR SUCCESS"