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IN THE HON'BLE SUPREME COURT OF WONDERLAND

**SPECIAL LEAVE TO APPEAL UNDER ARTICLE 136 OF THE CONSTITUTION OF
WONDERLAND**

STATE OF THUNDER PRADESH PETITIONER

VERSUS

ROMSAY BOLTONRESPONDENT

ALONG WITH

**WRIT PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF
WONDERLAND**

LGBT RAKHSHAKHS PETITIONER

VERSUS

UNION OF WONDERLANDRESPONDENT

Most Respectfully Submitted before the Hon'ble Supreme Court of Wonderland

MEMORANDUM ON BEHALF OF THE PETITIONERS

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INDEX OF AUTHORITIES

CASES CITED

S. NO.	CASE	CITATION
1.	AB and AH v. State of Western Australia and Anor	[2011] HCA 42
2.	Abuducker Siddique v. State	AIR 2011 SC 91
3.	Alagupandi alias Alagupandian v. State of Tamil Nadu	AIR 2011 SC 91
4.	Amit v. State of Uttar Pradesh	AIR 2012 SC 1433
5.	Anand P. Chanar vs The State Of Maharashtra	Bail Application No. 1504/2016
6.	Anuj Garg v Hotel Association of India	(2008) 3 SCC 1
7.	Bandhua Mukti Morcha v. Union of India	AIR 1986 SC 802
8.	Bengal Chemical and Pharmaceutical Works Ltd., Calcutta v. Their Workmen	AIR 1959 SC 633
9.	Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nandkarni	(1983) 1 SCC 124
10.	Brahm Swaroop v. State of U.P.	AIR 2011 SC 280
11.	Buddhadev Karmaskar v Union of India	(2011) 10 SCC 283
12.	C.C.E. v. Standard Motor Products	AIR 1989 SC 1298
13.	Chunni Lal Mehta v. Central Spinning and Manufacturing Co.	AIR 1962 SC 1314

14.	Collector of Central Excise v. Standard Motor Products	AIR 1989 SC 1298
15.	Dhankeshwari Cotton Mills v. CIT	AIR 1955 SC 65
16.	Francis Coralie Mullin v. Union Territory of Delhi & Ors.	AIR 1981 SC 746.
17.	Ganga Kumari v. State & Ors.	W.P.(C) No. 14006/2016.
18.	Gopal Singh v. State of M.P.	AIR 1972 SC 1557
19.	Hanumant Govind Nargundkar v. State of M.P.	AIR 1952 SC 343
20.	Harban Singh v. State of Punjab	1962 (1) Cri.L.J. 479
21.	Harsh Mander & Anr v Union of India	W.P.(C) 10498/2009
22.	Haryana State Industrial Corp. v. Cork Mfg. Co.	(2007) 8 SCC 359
23.	Hem Raj v. State of Ajmer	AIR 1965 SC 462
24.	Indian Oil Corporation Ltd. v. State of Bihar and Ors.	1986 4 SCC 146
25.	Jackuline Mary v. The Superintendent of Police, Karur District	W.P. No. 587/2014
26.	Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai	AIR 2004 SC 1815
27.	Justice K.S. Puttuswamy (Retd.) v. Union of India	W.P. (C) No. 494/2012.
28.	Kharak Singh v State of Uttar Pradesh	AIR 1963 SC 1295
29.	Khusal Rao v. State of Bombay	(1958) Cri.L.J. 106
30.	Kokkiligadda Veeraswamy vs State Of A.P.	2005 Cr.L.J. 869

31.	Kunhayammed v. State of Orissa	AIR 2000 SC 2587
32.	Munnu Raja v. State of M.P.	AIR 1976 SC 2199
33.	Myladimmal Surendran and others v. State of Kerala	AIR 2010 SC 3281
34.	Nar Singh Pal v. Union of India	(2000) 3 SCC 589
35.	National Legal Services Authority v Union of India	W.P. (C) No. 400/2012
36.	Navtej Singh Johar & ors. v. Union of India	W.P. (Crl.) No. 76/2016.
37.	Olga Tellis v. Bombay Municipal Corporation	AIR 1986 SC 180
38.	Phool Chandra and Anr. v. State of U.P.	(2014) 13 SCC 112
39.	Prem Chand Garg v. Excise Commissioner	AIR 1963 SC 996
40.	Public Prosecutor, Andhra Pradesh v. Appallaneni Haribabu	(1975) 1 Andh WR 304 (309)
41.	People's Union For Democratic Rights v. Union Of India & Others, v. Union of India	AIR 1982 SC 1473
42.	Ramawati Devi v. State of Bihar	AIR 1983 SC 164
43.	Ramesh Chandra Agrawal v. Regency Hospital Ltd.	AIR 2010 SC 806
44.	Romesh Thappar v. The State of Madras	AIR 1978 SC 124
45.	Roop Kishore vs State Of U.P.	Crl.A. No. 1080/2006
46.	Samsuddin Sheikh v. State of Gujarat and another	AIR 2012 SC 37

47.	Sanwat Singh and Ors. v. State of Rajasthan	AIR 1961 SC 715
48.	Shakti Vahini v Union of India	AIR 2018 SC 1601
49.	Sharad Birdhi Chand Sarda vs. State of Maharashtra	AIR 1984 SC 1622
50.	Sharda v. State of Rajasthan	AIR 2010 SC 408
51.	S.P. Gupta v. Union of India	AIR 1982 SC 149
52.	State of Rajasthan v. Smt. Kalki and another	AIR 1981 SC 1390
53.	State of Rajasthan v. Sohan Lal	(2004) 5 SCC 57
54.	State of U.P. v. Ram Sagar Yadav	AIR 1985 SC 416
55.	Sudhakar v. State of M.P.	2012 Cr.L.J. 3985
56.	The State of Bombay v. Rusy Mistry and Anr.	AIR 1960 SC 391
57.	Union of India and Anr. v. Ashok Kumar Aggarwal	2014(3) CHN (SC) 128
58.	XY v. Ontario	[2012] OHRTD No. 175

BOOKS REFERRED

S. No.	BOOKS
1.	H.M Seervai, Constitutional Law of India (4th edition Vol 2 2010)
2.	Durga Das Basu, Introduction to Constitution of India (21 st edition)

3.	V.N. Shukla and M. P. Singh, Constitution of India (1990)
4.	Ratanlal Ranchhoddas, Ratanlal & Dhirajlal's Law of Crimes: A Commentary on the Indian Penal Code, 1860 (2007)
5.	M. Monir, The Law of Evidence (2012)
6.	Oxford Law Dictionary, 7th edition
7.	Black's Law Dictionary, Bryan A. Garner, 8th edition

STATUTES REFERRED

S. NO.	STATUTES
1.	Criminal Law (Amendment), 2013
2.	Criminal Tribes Act, 1871
3.	Immoral Traffic (Prevention) Act, 1956
4.	Information Technology Act, 2000
5.	Juvenile Justice (Care and Protection of Children) Act, 2015
6.	Prevention of Children against Sexual Offences Act, 2012
7.	Wonderland Evidence Act, 1872
8.	Wonderland Penal Code, 1860
9.	Wonderland Trafficking of Persons (Prevention, Protection and Rehabilitation) Act, 2019
10.	Wonderland Transgender Persons (Protection of Rights) Act, 2019

TABLE OF ABBREVIATIONS AND ACRONYMS

ABBREVIATION/ ACRONYM	DEFINITION
AIR	All India Reporter
Anr.	Another
Art.	Article
Co.	Company
Corp.	Corporation
Cri.L.J.	Criminal Law Journal
CrI.A.	Criminal Appeal
Cr.P.C.	Criminal Procedural Code, 1973
DATC	District Anti Trafficking Committee
HC	High Court
HCA	High Court of Australia
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LGBTQ	Lesbian, Gay, Bisexual, Transgender, Queer
ITPA	Immoral Traffic (Prevention) Act, 1956
IT Act	Information Technology Act, 2000

JJ Act	Juvenile Justice (Care and Protection of Children) Act, 2015
OHCHR	Office of the United Nations High Commissioner for Human Rights
PIL	Public Interest Litigation
POCSO	Prevention of Children against Sexual Offences Act, 2012
Ors.	Others
TGP Act	Transgender Persons (Protection of Rights) Act, 2019
S.	Section
SC	Supreme Court
SCC	Supreme Court Cases
u/s.	Under Section
U.N.	United Nations
UDHR	Universal Declaration of Human Rights
V.	Versus
W.P.	Writ Petition
W.P.C.	Wonderland Penal Code, 1860
W.P.E.	Wonderland Evidence Act, 1872

STATEMENT OF JURISDICTION

THE HON'BLE SUPREME COURT OF WONDERLAND EXERCISES JURISDICTION TO HEAR AND ADJUDICATE OVER THE MATTER(S) UNDER ARTICLE 136 AND ARTICLE 32 OF THE CONSTITUTION OF WONDERLAND.

THE PROVISION UNDER WHICH THE PETITIONERS HAVE APPROACHED THIS HON'BLE COURT AND TO WHICH THE PETITIONERS HUMBLY SUBMITS IS READ HEREUNDER:

Article 136 of the Constitution of Wonderland, states that

“(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.”

Article 32 of the Constitution of Wonderland, states that

“32. Remedies for enforcement of rights conferred by this Part

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part

(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.”

STATEMENT OF FACTS

Factual Backdrop— Alish Kumar, a young boy, living in the State of Thunder Pradesh, Wonderland realised that he identified himself with the opposite gender. After facing a lot of hardships, he moved to Tumbai to fulfil his dreams. On acquaintance with a member of the LGBT community, he underwent a sex reassignment surgery on **23.01.2009** and thereafter adopted the name of Alice. Soon she became a successful LGBT icon of the fashion industry.

Alleged incident and its aftermath— On **25.12.2014** Alice claimed to have been sexually assaulted and raped by Mr. Romsay Bolton, a leading Producer (and a member of the ruling party) at a Christmas Party. On **02.03.2015**, Alice committed suicide after uploading a video in which she blamed Mr. Romsay Bolton for her death. Subsequently, Romsay was charged under ss. 306 and 377 of W.P.C. The trial court convicted him and on appeal, HC acquitted him of all charges.

Upheaval in the society— In 2017, an I-TOO movement began where sexually abused victims recounted their pain. Soon, the entire nation was divided into two sections, one favouring the recognition of LGBTQ community's rights and the other against it.

New Legislations— The Transgender Persons (Protection of Rights) Bill, 2018 and The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 were passed by the Parliament and came into force on **15.01.2019**. LGBT community challenged these laws through a writ petition, alleging that they took away the sole means of their livelihood as some of them heavily relied on begging and as sex workers, along with challenging the law of rape discriminatory to the Transgenders and not being gender neutral.

Present— The Hon'ble Supreme Court has decided to hear the appeal against Romsay and has admitted the PIL for their Final disposal together on **16.03.2019**.

STATEMENT OF ISSUES

ISSUE I

WHETHER THE PRESENT MATTERS BEFORE THE HON'BLE SUPREME COURT ARE MAINTAINABLE.

ISSUE II

WHETHER THE ACQUITTAL OF THE RESPONDENT IS BAD IN THE EYES OF LAW.

ISSUE III

WHETHER THE WONDERLAND TRAFFICKING OF PERSONS (PREVENTION, PROTECTION AND REHABILITATION) ACT, 2019 IS CONSTITUTIONALLY VALID.

ISSUE IV

WHETHER THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 IS CONSTITUTIONALLY VALID.

ISSUE V

WHETHER THE EXISTENT RAPE LAWS ARE CONSTITUTIONALLY VALID.

SUMMARY OF ARGUMENTS

ISSUE 1 WHETHER THE PRESENT MATTERS BEFORE THE HON'BLE SUPREME COURT ARE MAINTAINABLE.

It is humbly submitted that the present petitions are maintainable under Art. 136 and Art. 32 of the Constitution of Wonderland. Art. 136 is the discretionary power granted to the SC to do justice where the court is satisfied injustice has been caused; when a substantive question of law of general public importance arises, and therefore can be granted for the instant criminal appeal. Art. 32 is the remedial provision in the Constitution of Wonderland which provides right to seek remedy from the Hon'ble Supreme Court when any of the Fundamental Rights get infringed, which has happened in the instant case.

ISSUE 2 WHETHER THE ACQUITTAL OF THE RESPONDENT IS BAD IN THE EYES OF LAW.

It is submitted that the acquittal is bad in the eyes of law as the impugned judgement is unjust to the deceased. That the dying declaration of the deceased along with the direct act of the Respondent have led the deceased to commit suicide. That there is evidence that the Respondent committed a sexual offence against the deceased when she was under the influence of alcohol along with sufficient circumstantial evidence which is in favour of the deceased. Therefore, the Respondent is liable u/s. 306 and 377 of W.P.C.

ISSUE 3 WHETHER THE WONDERLAND TRAFFICKING OF PERSONS (PREVENTION, PROTECTION AND REHABILITATION) ACT, 2019 IS CONSTITUTIONALLY VALID.

It is humbly submitted that the present Act is not constitutionally valid. The Anti trafficking Act violates the Fundamental rights of the citizens under Art. 19 and 21 of the Constitution, and it also fails to meet the required UN standards. Right of consent and autonomy, dignity and livelihood under Art. 21 and the right to freedom of speech and expression, and freedom to trade and occupation enshrined under Art. 19(1) (a) and (g) respectively are violated. The said Act also violates Palermo Protocol, Global Compact on Migration, OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking.

ISSUE 4 WHETHER THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 IS CONSTITUTIONALLY VALID.

It is most respectfully submitted that the Wonderland TGP Act, 2019 violates Articles 14, 19 and 21 of the Constitution. It takes away the right of transgenders to self-perceived gender identity, thus violating Art. 14 and 19. Moreover, its provisions infringe the personal autonomy of transgenders and wipe out their sole means of livelihood, effectively depriving them of Art. 21. The benefits of Art. 15 and 16 are also not extended to them.

ISSUE 5 WHETHER THE EXISTENT RAPE LAWS ARE CONSTITUTIONALLY VALID.

It is humbly submitted that the existing rape laws violate Art. 14, 15 and 21 of the Constitution. Transgenders and men are subjected to discrimination on the ground of 'sex' and their right to dignity and bodily integrity is completely ignored. In the light of various legislative changes and landmark judicial pronouncements, it is submitted that making rape laws gender neutral is a priority.

ARGUMENTS ADVANCED**ISSUE 1. WHETHER THE PRESENT MATTERS BEFORE THE HON'BLE SUPREME COURT ARE MAINTAINABLE.****1.1. THAT THE SPECIAL LEAVE PETITION FILED BY THE PETITIONER IS MAINTAINABLE.**

The instant SLP is against the impugned judgment of the High Court, by which the High Court acquitted the Respondent. *At first*, the Petitioner submits that the exceptional and special circumstances exist in the present petition; therefore, the leave should be granted by the Hon'ble Supreme Court by invoking the discretionary powers granted to it under Art. 136. *Secondly*, that there exists a substantial question of law.

The power given to the Supreme Court by Art. 136 (1) is a sweeping power, which is exercised outside the preview of ordinary law to meet the pressing demands of justice. The Supreme Court has characterized its power under Art. 136 as “an untrammelled reservoir of power incapable of being confined to definitional bounds; the discretion conferred on the Supreme Court being subjected to only one limitation, that is, the wisdom and good sense of justice of the judges.”¹

I. THAT THERE EXISTS SPECIAL AND EXCEPTIONAL CIRCUMSTANCES FOR INVOKING ARTICLE 136.

The powers of this Court under Art. 136 are exceptional and extraordinary.² The jurisdiction conferred under Art. 136 on this Court is corrective and not restrictive.³ The exercise of jurisdiction

¹Kunhayammed v. State of Orissa, AIR 2000 SC 2587.

² Dhankeshwari Cotton Mills v. CIT, AIR 1955 SC 65; Union of India and Anr. v. Ashok Kumar Aggarwal, 2014(3) CHN (SC) 128.

³ Haryana State Industrial Corp. v. Cork Mfg. Co., (2007) 8 SCC 359.

conferred by Art. 136 on this Court is purely discretionary, conditioned by the existence of self-imposed conditions: special circumstances⁴; miscarriage of justice⁵; violation of principles of natural justice⁶; disregard of legal principles⁷; existence of substantial question of law⁸; existence of question of general public importance.⁹ A duty is enjoined upon the Apex Court to exercise its power by setting right the illegality.¹⁰ It has been held in a plethora of cases¹¹ that when the question of law of general public importance arises, the jurisdiction of the Supreme Court can be invoked by filing an S.L.P.

II. THAT THERE EXISTS A SUBSTANTIAL QUESTION OF LAW.

It is submitted that in the instant case there exists a substantial question of law as to the interpretation of the constitutional validity of the act. The Supreme Court has held that, *“the proper test in determining whether a question of law raised in the case is substantial would be whether it is of general public importance, or whether it directly and substantially affects the rights of the parties and so whether it is an open question in the sense that it is not finally settled by this*

⁴ Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai, AIR 2004 SC 1815.

⁵ State of Rajasthan v. Sohan Lal, (2004) 5 SCC 57.

⁶ Bengal Chemical and Pharmaceutical Works Ltd., Calcutta v. Their Workmen, AIR 1959 SC 633.

⁷ The State of Bombay v. Rusa Mistry and Anr., AIR 1960 SC 391.

⁸ Indian Oil Corporation Ltd. v. State of Bihar and Ors., 1986 4 SCC 146.

⁹ Collector of Central Excise v. Standard Motor Products, AIR 1989 SC 1298.

¹⁰ H.M. Seervai, Constitutional Law of India (4th edn. Vol. 2 2010); C.C.E. v. Standard Motor Products, AIR 1989 SC 1298.

¹¹ Hem Raj v. State of Ajmer, AIR 1965 SC 462; Phool Chandra and Anr. v. State of U.P. (2014) 13 SCC 112; Sanwat Singh and Ors. v. State of Rajasthan, AIR 1961 SC 715.

court".¹² It is humbly submitted that the High Court erred while passing the impugned judgment by not triggering the criminal law machinery against the Respondent.

Further, there has been violation of maxim, "*lex plus laudatur quando ratione probatur*" i.e law is more praised when it is supported by reason. The High Court vide its impugned judgment while acquitting the Respondent gave no reasons and thus the judgment of the High Court is unjust and requires re-consideration by the Hon'ble Supreme Court.

1.2. THAT THE WRIT PETITION FILED UNDER ARTICLE 32 OF THE CONSTITUTION IS MAINTAINABLE.

That the petition is maintainable under Art. 32 of the Constitution, since it is filed in public interest by the LGBT Rakshakhs, an NGO and the Wonderland Trafficking of Persons (Prevention, Protection And Rehabilitation) Act, 2019 and the Wonderland Transgender Persons (Protection of Rights) Act, 2019 are violative of the Fundamental Rights of various citizens and groups, guaranteed under Part III of the Constitution of Wonderland.

I. THAT THE PETITIONER HAS A *LOCUS STANDI*.

'*locus standi*' is the right of a party to appear and be heard on the question before any Tribunal. It means the legal capacity to invoke the jurisdiction of the court. In landmark cases¹³, this Hon'ble Court has evolved a new rule viz., any member of the public acting *bona fide* and having sufficient interest can seek redressal of the public wrong or public injury. In *S.P. Gupta v. Union of India*¹⁴, Court observed that, "*any member of the public having sufficient interest can maintain an action for judicial redress for a public injury arising from breach of public duty or from violation of the*

¹² *Id.* at 16.

¹³ People's Union For Democratic Rights v. Union Of India & Others, v. Union of India, AIR 1982 SC 1473; Bandhua Mukti Morcha v. Union of India, AIR 1986 SC 802.

¹⁴ AIR 1982 SC 149.

provisions of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision.” Therefore, the *locus standi* of the Petitioner which is an NGO for the protection of LGBTQ rights should not be in question.

II. THAT THERE IS A VIOLATION OF FUNDAMENTAL RIGHTS OF THE PETITIONERS.

It is most humbly submitted that there is a violation of Fundamental Rights of the Petitioner (or the LGBTQ Community) due to the said laws. The Fundamental Rights are fundamental in the sense that human liberty is predicted on their availability and vice versa, and thus cannot be waived.¹⁵ Anti-Trafficking Act violates Art. 19 and 21, while TGP Act violates Art. 14, 19 and 21 of the Constitution of Wonderland.

III. THAT THERE EXISTS A SUBSTANTIVE QUESTION OF LAW.

It is humbly submitted that in the instant case there exists a substantial question of law as to the interpretation of the constitutional validity of the aforesaid Acts. That this Hon’ble Court in *Chunnilal Mehta v. Central Spinning and Manufacturing Co.*¹⁶ has held that, “*the proper test in determining whether a question of law raised in the case is substantial would be whether it is of general public importance, or whether it directly and substantially affects the rights of the parties and so whether it is an open question in the sense that it is not finally settled by this court*”. The case involves the matter of general public importance which shakes the conscience of the citizens and it directly and substantially affects the rights of the Petitioner.

¹⁵ *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180; *Nar Singh Pal v. Union of India*, (2000) 3 SCC 589.

¹⁶ AIR 1962 SC 1314.

IV. THAT THERE IS NO REQUIREMENT FOR THE PETITIONER TO EXHAUST LOCAL REMEDIES.

It is humbly submitted that the right under Art. 32 is not subject to the exhaustion of local remedies. The right to approach this Hon'ble Court in case of violation of Fundamental Rights is itself a Fundamental Right enshrined in Art. 32. In *Prem Chand Garg*¹⁷ case, it was held that this right is absolute and may not be impaired on any ground. Moreover, this Hon'ble Court has on multiple occasions expressly rejected an argument that called for exhaustion of local remedies.¹⁸

ISSUE 2 WHETHER THE ACQUITTAL OF THE RESPONDENT IS BAD IN THE EYES OF LAW.

It is submitted that the Respondent is liable for abetting the suicide of the deceased as well as for committing the offence u/s. 377 of the W.P.C. against the deceased. Therefore, the impugned judgement acquitting the Respondent is bad in the eyes of law.

2.1. THAT THE RESPONDENT IS LIABLE FOR ABETTING THE SUICIDE OF THE DECEASED.

It is evident that the Respondent is liable for abetting the suicide of the deceased. This argument is twofold: *firstly*, the dying declaration of the deceased is a direct evidence against the Respondent; *secondly*, the act(s) of the Respondent did abet the deceased to commit suicide.

I. THAT THE DYING DECLARATION OF THE DECEASED IS THE DIRECT EVIDENCE AGAINST THE RESPONDENT.

“Where words are scarce, they are seldom spent in vain;

They breathe the truth, that breathe their words in pain.”

¹⁷ Prem Chand Garg v. Excise Commissioner, AIR 1963 SC 996.

¹⁸ Kharak Singh v State of Uttar Pradesh, AIR 1963 SC 1295; Romesh Thappar v. The State of Madras, AIR 1978 SC 124.

Richard II

The principle underlying admissibility of dying declaration is reflected in the well-known legal maxim: *nemo moriturus praesumitur mentire* i.e., a man will not meet his maker with a lie in his mouth.¹⁹ Under s. 32(1) of the W.E.A., the statements of a deceased person relating to the cause of his death, or the circumstances or the transaction resulting in the death of the deceased, alone are admissible.²⁰ The suicide note can be treated as a dying declaration under s. 32 of the W.E.A.²¹ It is submitted that the video made by the deceased on the night of March 2, 2015 soon before her suicide alleging that the Respondent had compelled her to commit suicide is a valid evidence (dying declaration) under s. 32 of the W.E.A.

In *Sudhakar vs. State of M.P.*²², this Hon'ble Court has held: "*The dying declaration is the last statement made by a person at a stage when he in serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will speak the truth and only the truth. Normally in such situations the courts attach the intrinsic value of truthfulness to such statement. Once such statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person, then the courts can safely rely on such dying declaration and it can form the basis of conviction. More so, where the version given by the deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration.*"

¹⁹ Sharda v. State of Rajasthan, AIR 2010 SC 408.

²⁰ Public Prosecutor, Andhra Pradesh v. Appallaneni Haribabu, (1975) 1 Andh WR 304 (309).

²¹ Sharad Birdhi Chand Sarada vs. State of Maharashtra, AIR 1984 SC 1622.

²² 2012 Cr.L.J. 3985.

It is true that the dying declaration, if corroborated by other evidence leaves no doubt for the court to believe it, nevertheless, this Hon'ble Court has settled the principle that a dying declaration can be acted upon without corroboration. The primary effort of the Court has to be to find out whether the dying declaration is true. If it is so, no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear of convincing, then the Court may for its assurance, look for corroboration to the dying declaration.²³ There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.²⁴ It is a well settled law that if the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.²⁵

In the present matter, the dying declaration made by the deceased where she was traumatized by the act of the Respondent and held him solely responsible for her death, serves as a vehement evidence against the Respondent.

II. THAT THE ACT(S) OF THE RESPONDENT ABETTED THE DECEASED TO COMMIT SUICIDE.

That the Respondent is responsible for the death of the deceased as his direct act of sexual assault made the deceased to take such a step of ending her life. S. 107 of W.P.C. defines abetment of a thing wherein instigating any person to do a thing also amounts to abetment. It is submitted that it is the direct act of sexual offence committed by the Respondent which led the deceased to take such a step of ending her life, as mentioned by her in her dying declaration. The Andhra Pradesh

²³ Khusal Rao v. State of Bombay, (1958) Cri.L.J. 106; Harban Singh v. State of Punjab, 1962 (1) Cri.L.J. 479; Gopal Singh v. State of M.P., AIR 1972 SC 1557.

²⁴ Munnu Raja v. State of M.P, AIR 1976 SC 2199.

²⁵ State of U.P. v. Ram Sagar Yadav, AIR 1985 SC 416; Ramawati Devi v. State of Bihar, AIR 1983 SC 164.

High Court in the case of *Kokkiligadda Veeraswamy vs State Of A.P.*²⁶ had held that the commission of rape (sexual assault) on the victim does lead to direct abetment of suicide when the victim is unable to bear the insult:

“Insofar as Section 306, IPC is concerned, though there was no direct abetment, committing of rape can be said to be an insulting act. Unable to bear such insult, the deceased must have committed suicide. The prosecution, therefore, proved its case beyond reasonable doubt.”

The act of the Respondent that further traumatized and ruined the career of the deceased is responsible for her suicide, making the Respondent liable u/s. 306 of W.P.C.

2.2. THAT THE RESPONDENT HAD COMMITTED SEXUAL OFFENCE AGAINST THE DECEASED.

In the light of all the prosecution evidence, it is apparent that the Respondent committed sexual offence against the deceased. This argument is again twofold: *firstly*, the Respondent sexually forced himself on the deceased while she was under the influence of alcohol; *secondly*, the circumstantial evidence is in the favour of the deceased.

I. THAT THE RESPONDENT SEXUALLY FORCED HIMSELF ON THE DECEASED WHILE SHE WAS UNDER THE INFLUENCE OF THE ALCOHOL.

It is submitted that the medical evidence is in the favour of the deceased and against the Respondent. S. 45 of the W.E.A. indicates that where the Court has to form an opinion upon a point of foreign law or of science or art, the opinion upon that point of persons especially skilled in such matter becomes a relevant fact. The medical evidence supporting the claim of the deceased that there were slight marks of injuries on her body (which directs towards the idea of a physical

²⁶ 2005 Cri.L.J. 869.

scuffle) and she was subjected to a sexual assault is a valid fact u/s. 45 of the W.E.A. and thus substantiate her claim of sexual assault.

In the case of ***Ramesh Chandra Agrawal v. Regency Hospital Ltd.***²⁷, this Hon'ble Court has laid importance on the admission of medical evidence by saying:

“The first and foremost requirement for an expert evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the knowledge and experience of the layperson. Thus, there is a need to hear an expert opinion where there is a medical issue to be settled. The scientific question involved is assumed to be not within the court’s knowledge. Thus, cases where the science is involved, is highly specialized and perhaps even esoteric, the central role of expert cannot be disputed.”

It is submitted that the deceased was under the influence of alcohol on 25th Dec., 2014 when the alleged incident took place. It is an established principle set up by the High Courts that if a girl is intoxicated, it means mentally she is not capable to give a free and conscious consent. In a case of rape, when a woman says "No" for sexual intercourse, it means she is not willing; similarly, when she says "Yes", it should be free and conscious "Yes". Not every "Yes" is covered under the valid consent.²⁸ If consent of woman is there for sexual intercourse, and at the time of giving consent she was under intoxication or by reasons of her unsoundness of mind or she was unable to understand the nature of consequences of consent due to administration of unwholesome or any stupefying substance or she believes the person to be lawfully married and the man knows that he is not her husband, than even after consent of woman the act of sexual intercourse would be the

²⁷ AIR 2010 SC 806.

²⁸ Anand P. Chanar vs The State Of Maharashtra, Bail Application No. 1504/2016.

rape.²⁹ It is pertinent that the alleged incident took place when the deceased was under the influence of alcohol and therefore couldn't have given a valid consent for the same. Therefore, the Respondent is liable for sexually forcing himself on the deceased.

That the allegations of two more sexual assault survivors, Ms. Akea Stark and Mr. Donald Singh who have come forward against the Respondent claiming that the similar incidents took place with them as well further support the case of the deceased.

II. THAT THE CIRCUMSTANTIAL EVIDENCE IS IN THE FAVOUR OF THE DECEASED.

“A human being may lie, but circumstances do not lie.”

It is submitted that there exists a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the Respondent and it is such as to show that within all human probability the act had been done by the Respondent.³⁰

That the testimonies of the prosecution witness' support the case of the deceased without a doubt. It is a fact that though there is no eye-witness to the alleged incident, but the testimonies of the prosecution witness' provide the circumstantial evidence which prove the liability of the Respondent. When the prosecution case hinges on circumstantial evidence, it is an accepted proposition of law that even in cases where no direct evidence is available in the shape of eye-witnesses etc. a conviction can be based on circumstantial evidence alone. The hypothesis which can form the basis for conviction purely on circumstantial evidence was stated by the Court in the case of *Hanumant Govind Nargundkar v. State of M.P.*³¹ There is no rule or practice that in every

²⁹ Roop Kishore vs State Of U.P., CrI.A. No. 1080/2006.

³⁰ Abuducker Siddique v. State, AIR 2011 SC 91.

³¹ AIR 1952 SC 343.

case the evidence of such a witness be corroborated by other evidence before a conviction can be allowed to stand but as a rule of prudence the Court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record.³²

That the W.E.A. does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, s. 118 of the Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease – whether of mind, or any other cause of the same kind. It is submitted that the testimony of Mr. Hans Solo that he had seen the Respondent going downstairs from the same floor where alleged incident happened. This testimony of witness further crystallizes the liability of the Respondent. Mr. Hans, though old and a patient of cataract, is a reliable and competent witness as only age is not a criterion to disable a witness to testify and he has cataract only in his left eye. Furthermore, the testimony of Mr. Theon Greyjoy that the deceased was in a relationship with the Respondent is unreliable as a contradicting statement is given by Ms. Missendari, a close friend of the deceased that the deceased was not in any relationship. It is submitted that being seen laughing and talking with the Respondent on the sets does not in any way puts forth the idea that the two were in a relationship. This Hon'ble Court through its many judgements³³ that an interested witness must have some direct interest in having the accused somehow convicted for some extraneous reason and a near relative of the victim is not necessarily an interested witness. Their relationship to one of the parties is not a factor that effects the

³² Alagupandi alias Alagupandian v. State of Tamil Nadu, AIR 2012 SC 2405.

³³ Brahm Swaroop v. State of U.P., AIR 2011 SC 280; Amit v. State of Uttar Pradesh, AIR 2012 SC 1433; State of Rajasthan v. Smt. Kalki and another, AIR 1981 SC 1390; Myladimmal Surendran and others v. State of Kerala, AIR 2010 SC 3281; Samsuddin Sheikh v. State of Gujarat and another, AIR 2012 SC 37.

credibility of a witness, more so, a relation would not conceal the actual culprit and make allegations against an innocent person. It is submitted though Ms. Missendari is a close friend, her testimony cannot be rejected.

It is the testimony of Mr. Grey Voram, who was the security in charge of the Christmas party may be treated as unreliable for being a beneficiary of Rs. 2000/- from the Respondent, to which he has agreed in his testimony himself. [ARGUENDO] Moreover, even if the testimony of Mr. Grey is taken to be true, it doesn't anyhow prove the innocence of the Respondent. There exists a possibility that he committed the sexual assault, left the party and only after that the deceased alleged the sexual assault.

It is most humbly submitted that the above-mentioned issues and the arguments put thereunder substantiate the case of the Petitioner, thereby proving the guilt of the Respondent.

ISSUE 3. WHETHER THE WONDERLAND TRAFFICKING OF PERSONS (PREVENTION, PROTECTION AND REHABILITATION) ACT, 2019 IS CONSTITUTIONALLY VALID.

That the Wonderland Trafficking of Persons (Prevention, Protection and Rehabilitation) Act, 2019 is *ultra vires* the Constitution of Wonderland. That it violates Articles 19 and 21 of the Constitution of Wonderland. That it doesn't comply with the UN standards.

3.1. THAT IT VIOLATES ARTICLES 19 AND 21 OF THE CONSTITUTION OF WONDERLAND.

It is most humbly submitted that the said Act aims to supplement existing criminal law provisions on trafficking. However, in doing so it does not take into consideration Art. 13(2) of the Constitution of Wonderland. Although, this Act is meant to fulfil the noble purpose of Art. 23 of the Constitution of Wonderland of protecting persons from forms of exploitation such as forced

labour, the constitutional scheme is such that in seeking to fulfil the mandate of one Fundamental Right, one cannot violate other constitutional rights. However, the Wonderland Anti Trafficking Act, 2019 ends up violating Art. 21 and Art. 19.

I. THAT IT VIOLATES RIGHT TO DECISIONAL AUTONOMY, CONSENT AND RIGHT TO LIVELIHOOD UNDER ART. 21.

Article 21 of the the Constitution of Wonderland reads— *No person shall be deprived of life or personal liberty except by procedure established by law.*

That concept of life and personal liberty have been extensively interpreted by the Supreme Court over a period of time. The concept of life has been held to be more than mere animal existence and includes the right to life with dignity³⁴. Under this Art., the notion of right to livelihood³⁵ and decisional autonomy³⁶ has also been interpreted to be a part of one’s right to life and personal liberty.

DECISIONAL AUTONOMY: The s. 2 (1) (w)³⁷ of the Anti-Trafficking Act, by adopting the definition of trafficking from s. 370 of the W.P.C., in effect hits at the autonomy of the so -called victims. Explanation 2 of s. 370 states that the consent of the victim is immaterial in the determination of the offence of trafficking. It ousts the possibility of an accused taking the defence of consent of the victim to any act of physical exploitation or another form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs. Pursuant to an Application for clarification, it was stated that s. 370 of the W.P.C. will have no application in a

³⁴ Francis Coralie Mullin v. Union Territory of Delhi & Ors., AIR 1981 SC 746.

³⁵ *Id.* at 15.

³⁶ Justice K.S. Puttuswamy (Retd.) v. Union of India, W.P. (C) No. 494/2012.

³⁷ w) “trafficking of person” shall have the meaning assigned to it in sub-section (1) of s. 370 of the W.P.C.

case wherein the sex workers engaged in prostitution of their own volition, and not pursuant to any inducement, force or coercion. This would be a question of fact and a subject matter of investigation. It is for the Investigating Officer to consider during rescue, whether the sex workers had engaged themselves in prostitution of their own volition or they were victims of sexual exploitation as explained by s. 370 of the W.P.C. Therefore, the Act implicitly targets adult sex workers who choose to enter into consensual sex as a livelihood option³⁸, voluntary surrogates³⁹, transgenders who might be undergoing hormonal therapy for sexual reorientation⁴⁰, young people who are trying to elope and get married against dominant norms of caste and class⁴¹ etc., all which have been deemed as “aggravated forms of trafficking”. The State of Wonderland must defend adult persons to exercise their right to autonomy, dignity and freedom to make decisions either about choosing their partner⁴², sexuality or work.

That as regards to the act of begging⁴³, the Act doesn't differentiate between force or induced begging and voluntary begging for livelihood. This ambiguity easily takes away the right to livelihood of such persons for whom begging is a means of sustenance and makes them a victim eligible for rehabilitation. Further, this can lead to arrest of transgenders who work as a community in an organized way, denoting begging as an organized crime of trafficking perpetrated by their

³⁸ S. 31(i) of Anti- Trafficking Act, 2019.

³⁹ S. 31(ii), *id.* at 38.

⁴⁰ S. (iv), *id.* at 38.

⁴¹ S. 31(v), *id.* at 38.

⁴² *Shakti Vahini v Union of India*, AIR 2018 SC 1601.

⁴³ S. 31(ix), *id.* at 38.

Gurus, resulting in their victimization. Furthermore, punishment of this and other aggravated forms of trafficking is higher than the punishment for some other major offences such as slavery.

CONSENT TO BE REHABILITATED— That the said Act makes no provisions for ascertaining the wishes and taking the consent of persons to be prevented, rescued or rehabilitated under the proposed law⁴⁴. In fact, it prescribes that the Magistrate may reject the application of an adult victim for release on the grounds that it has not been made voluntarily⁴⁵. It may be noted that the provision does not set down any criteria that the Magistrate must follow before placing the victim in the home. As such, it is entirely up to the discretion of the Magistrate to decide whether to place a person in rehabilitation or not. It may also be noted that other acts that permit institutionalization, for example, the JJ Act also mention that institutionalization should be of last resort. In fact, the JJ Act repeatedly stresses upon the importance of family and familiar surroundings.

That it is also in violation of the order of the Supreme Court in *Buddhadev Karmaskar v Union of India*⁴⁶, which recommended adoption of community-based rehabilitation, that is, alternatives that are not contingent on trafficked women staying in state-run ‘homes. Another suggestion was to revise laws like the ITPA so as to distinguish between those coerced into sex work and those who engage in it voluntarily, so that interventions are tailored to those who need them.

It is submitted that even those who are trafficked have the right to make decisions about their life. By empowering authorities to place persons who are trafficked in custodial institutions without their consent, the Act fundamentally hits at the notion of individuals having autonomy of decision making under the constitutional framework of Wonderland.

⁴⁴ S. 16(3), *id.* at 38.

⁴⁵ S. 17(4), *id.* at 38.

⁴⁶ (2011) 10 SCC 283.

That by taking away this right of the “victims” and treating them as those without agency, it robs them of their dignity. Recognizing the dignity of individuals means that all persons including victims have the right to make decisions about their own life. Right to autonomy and dignity of a person does not desert the person even in the most difficult circumstances. A victim of trafficking is entitled to Art. 21 and should be able to make decisions about his or her life rather than being forcibly sent to a protection home.

II. THAT IT VIOLATES ART. 19(1)(A) AND 19(1)(G) OF THE CONSTITUTION OF WONDERLAND.

That the Anti Trafficking Act violates Art. 19(1)(a) of the Constitution of Wonderland. S. 36 and 39(2) of the Act have tremendous potential to regulate and impose restrictions on free speech. The term “*promoting trafficking or exploitation*” has wide amplitude and many actions can be construed to come within this clause. Under this, there is a high possibility of authors of adult material, videographers, film makers and internet sites to be charged with promoting trafficking or exploitation. The clause might build a legal link between hosting or producing pornography and trafficking. In such event, any of the self-appointed moral guardians could also pull within this provision any artistic work that they may personally find offensive or ‘obscene’. There is a threat that s. 36, will be read with s. 79 of the IT Act which will have huge ramifications on the internet freedom in Wonderland. There exist several evidences, research work and accepted jurisprudence to link mere hosting of porn and sex work to sex trafficking. If the same is extended to Wonderland, this section will be used as a tool to ban YouTube videos, Facebook, Twitter, Tinder, Soundcloud and related hosting sites’ profiles in the name of “promoting trafficking of a person”. Needless to say, this paves way for a severe chilling effect on free speech, especially on critical speech around trafficking issues.

That the Act also violates Art. 19(1)(g) of the Constitution under which a citizen has the right to practice any profession or to carry on any occupation, trade or business. Persons doing sex work are often at the bottom of the socio-economic hierarchy in Wonderland. They seek to make a livelihood in extremely difficult circumstances. As the respondent has failed at providing equality of opportunities, the majority of the transgender community in Wonderland depends upon this profession.

That this Act by implicitly including sex workers, majority of whom are transgenders, within the definition of ‘trafficked persons’, makes the lives of those who seek to make a livelihood from sex work much more precarious. Under the guise of protection, the respondent seeks to withdraw one of the few options these people have, to make ends meet.

It is submitted that injustice of withdrawing the right under Art. 19(1)(g) from adult persons also hits at the norm of equality. It is only when it comes to the question of sex work that the respondent treats adults who engage in that profession as persons in “need of protection”. This is because the question of sex work is freighted with notions of morality. For Wonderland, the impulse to defend a majoritarian morality prevails over the impulse to allow adult persons to exercise their right to autonomy, dignity and freedom to practice the profession of their choice. It is important for the government to recognize that its mandate is not to implement the morality of the majority (popular morality). Rather, the government must conduct its policy within the ambit of constitutional morality. The idea of constitutional morality as propounded by Dr. B.R. Ambedkar is of a morality which does not impinge upon constitutional rights. Thus, public morality cannot be a justification for depriving persons of their fundamental rights. Adherence to constitutional morality would require that the government protect the right to autonomy, dignity and profession of persons in sex work, regardless of what a majoritarian morality demands.

3.2. THAT THE ACT DOESN'T COMPLY WITH THE U.N. STANDARDS.

I. THAT IT VIOLATES PALERMO PROTOCOL, GLOBAL COMPACT ON MIGRATION AND OHCHR RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING.

It is submitted that the Act conflates sex work with trafficking for the purpose of sexual exploitation, which is not in line with the *Palermo Protocol* definition. The prolonged detention of irregular migrants, especially women and children, including potential victims of trafficking not promptly identified is in contrast with current international efforts, including the *Global Compact on Migration*, which aims at addressing protection gaps for migrants in vulnerable situations. Finally, the Act is also not in accordance with human rights law, including the *OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking*.

That the U.N. has repeatedly given recommendations to the Legislature but to no avail. The Act remains fundamentally motivated by a criminalizing impulse. It relies heavily on criminal law without many of the substantive and procedural safeguards that are integral to criminal law systems around the world. Issues which have to be seen through the lens of development are sought to be dealt with by criminal law. It creates new offences which are unrelated to trafficking, creates vaguely worded offences with disproportionate sentencing, reverses the burden of proof and introduces absolute liability offences which are constitutionally invalid. It introduces strict liability offences which impose huge burden of proof on defendants (particularly third parties like owners of property where trafficking is committed⁴⁷), and creates offences that are cognizable, non-bailable and punishable with mandatory sentences, including life imprisonment for the remainder of one's natural life. No clear sentencing policy is discernible in the Act. Provisions relating to bail

⁴⁷ S. 34, *id.* at 38.

presume guilt rather than innocence. S. 52 of the Act denies the accused person the right to anticipatory bail by specifically denying all persons accused of offences carrying a punishment of above two years the right to approach the court under s. 438 for anticipatory bail. This is extremely harmful as it is highly likely that this provision will be misused, and false cases will be booked against victims. This is the experience under the ITPA where women in sex workers are arrested and tried as brothel owners and pimps. By denying those arrested under this Act the right to anticipatory bail, the Act eliminates provisions meant to prevent misuse. This criminalization approach is also evident in the fact that trafficking for the purposes of begging is seen as an aggravated form of trafficking. The victims in this case as well can be sent to custodial institutions. The DATC has been given vast and unfettered powers in relation to identification of a victim (s), their rescue, protection, assistance, rehabilitation and repatriation. As per s. 14 of the Anti-Trafficking Act, the decisions of the DATC are final and not open to appeal in courts. In event that a victim disagrees with or wishes to challenge the decision of the DATC regarding care, protection or repatriation, there is no avenue for the same even within the judicial system. Also, the Committee, even though is powerful, doesn't have representation from affected communities depicting biasness in its core.

More problematic is the provision of mandatory referral u/s. 24(3) of the Act by the Special court in the exercise of its functions. An ever-present fear of this functioning mechanism is that the decisions of the judiciary are supplanted by a powerful committee at the district level, with no recourse to appeal for the victim. When read in conjunction with the other provisions, it creates an undesirable accretion of powers without transparency, appeal and accountability. The Act seems to promote 'rescue raids' by the police, and the institutionalization of victims in the name of rehabilitation, rather than applying appropriate screening methods and standard operating

procedures for the identification and referral of victims or potential victims of trafficking and social integration programs which are respectful of their rights.

That other problematic aspects include an “over-broad and vague nature” of some of the Act’s provisions, which could lead to blanket criminalization of activities that do not necessarily relate to trafficking.

It is most humbly submitted that this Act seeks to repatriate a “victim” to his/ her state of origin after counselling. It is not clear what counselling is to be provided to the individual. This Act calls on the State Nodal Officer to obtain informed consent but does not lay down the procedure to be followed in the event the “victim’ does not wish to move back to his/ her home state except for recommending the victim for counselling. It is not clear whether such individual will be sent to a rehabilitation home. The rescued persons should be counselled and informed of all available options including the choice of going back to their place of origin. The affected person should also have the right to appeal from any such order of the Committee and appropriate legal aid and other legal assistance should be provided to such individuals.

ISSUE 4. WHETHER THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 IS CONSTITUTIONALLY VALID.

Transgenders, an integral part of the Indian community, have faced oppression and ostracism for years. It is quite ironic that those who give ‘*badhaai*’ on joyous occasions, have themselves been subjected to torture and discrimination through legislations time and again, be it the Criminal Tribes Act, 1871 or Section 377. It was just a few months ago when this Hon’ble Court decriminalized consensual sexual acts between two adults in private, giving the transgender community, along with others, a reason to smile.⁴⁸ But this joy was short-lived as the Parliament

⁴⁸ Navtej Singh Johar & ors. v. Union of India, W.P. (CrI.) No. 76/2016.

brought into force the Act in question, i.e., the Wonderland Transgender Persons (Protection of Rights) Act, 2019.

4.1. THAT IT VIOLATES ARTICLES 14, 19, 21 OF THE CONSTITUTION OF WONDERLAND.

It is most respectfully submitted that this Act, through its various provisions, seeks to institutionalize the already existing discrimination against the transgender community. One of the first contentious provisions is related to legal recognition of gender identity. In the case of *National Legal Services Authority v Union of India*⁴⁹, this Hon'ble Court categorically referred to 'gender identity' as an individual's self-identification as a man, woman, transgender or other identified category and ruled that the power to determine gender lies with the individual alone. But the said Act clearly goes against the mandate of this Court through its Chapter III provisions which talk about the recognition of identity of transgender persons. While s. 4(2) of this Act speaks the tongue of this Court and says that every transgender has a right of self-perceived gender identity, the rest of the provisions talk about how such an individual is supposed to make an application to be certified as a transgender. This Act further necessitates the referring of application to a District Screening Committee.

As if this was not enough, the present legislation has also introduced mandatory sex reassignment surgery for those transgender people who seek to identify their gender within the binary (male/female) framework. This amounts to disobeying the orders of this Hon'ble Court which in the abovementioned case had clearly stated that any insistence for SRS for declaring one's gender would be illegal and immoral. It is submitted that such provisions denying the right of self-determination of one's gender, are in direct conflict with the fundamental right to live with

⁴⁹ W.P. (C) No. 400/2012; Jackuline Mary v. The Superintendent of Police, Karur District, W.P. No. 587/2014.

dignity under Art. 21. Not only that, it also violates Art. 19(1)(a) of the Constitution which provides to every citizen the right to freedom of speech and expression, including one's right of expression of his self-identified gender. In this respect, the Court made a reference to the case of *Anuj Garg v Hotel Association of India*⁵⁰, wherein this Court had held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression. Since the conferment of transgender rights depends upon the certificate provided by the Committee, it consequently denies the transgenders 'Right to Equality', guaranteed to every person under Art. 14 of the Constitution of Wonderland. This also goes against the words of the Preamble, wherein 'equality of status and opportunity' has been included as an objective of the nation. It is submitted that the State should ensure that it has a mechanism in place to support transgender people in the process rather than taking over the decision making.

That s. 13(3) of the Act which states that a transgender person shall be placed in a rehabilitation home on the orders of a competent court if the immediate family of such a person is unable to take care of him. This clearly implies that according to the State, a transgender person is incapable of independent living and needs to perpetually depend upon others. Looking at the pathetic condition of shelter homes in the nation, rather than helping transgenders, this move will put them in unsafe abusive situations which may have dangerous consequences. By defining family in context of a transgender as "a group of people related by blood or marriage or by adoption made in accordance with law", the State turns a blind eye towards the unique kinship and bonds that exist in the transgender community, where in the company of similar people, a transgender individual finally

⁵⁰ (2008) 3 SCC 1.

feels at home. This also goes against the right to privacy as guaranteed under Art. 21 as this provision amounts to unwarranted interference of the State in the personal matters of the individual.

Moreover, the first clause of s. 13 of the Act says that a ‘transgender child is not to be separated from his parents or immediate family on the ground of being a transgender’. In majority of cases, it is the family which abuses and beats the transgender child, either out of a feeling of shame or under the impression that beating will solve the ‘problem’. As a result, this provision, rather than being of any help, will close all the doors of escape for the child.

Like others, the chapter of ‘Offences and Penalties’ also reeks of discrimination. The first clause of s. 19 of the Act criminalizes the act of begging and other similar forms of forced or bonded labour by seeking to punish anyone who ‘compels or entices a transgender person to do such acts. Here, the State has very conveniently ignored the social dimension of why a transgender person chooses to beg, i.e., because of lack of opportunities related to education and employment. Instead of making their access to education and employment easier, the government is trying to make their sole means of sustenance an offence.

It was only recently that the Delhi High Court decriminalized begging. In this case of *Harsh Mander & Anr v Union of India*⁵¹, the court held that “Criminalizing begging violates the most fundamental rights of some of the most vulnerable people in our society. People in this stratum do not have access to basic necessities such as food, shelter and health, and in addition criminalizing them denies them the basic fundamental right to communicate and seek to deal with their plight.”

This is nothing less than a direct attack on Art. 21 of the Constitution. In cases like *Board of*

⁵¹ W.P.(C) 10498/2009.

*Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nandkarni*⁵² and *Olga Tellis v Bombay Municipal Corporation*⁵³, this Hon'ble Court has expanded the scope of 'Right to Life' and implied that the said Art. also includes the Right to Livelihood.

Within clause (d) of the same section, the Act also states that 'whoever 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 punished with imprisonment ranging from six months to two years and fine'. *Firstly*, the Act does not define what is exactly meant by 'sexual abuse', thus making it difficult for the transgenders to report such cases. *Secondly*, if all degrees of sexual offences are covered under the single term, then the same punishment for all its degrees will defeat the purpose. This also indicates how the State does not treat the transgenders at par with cisgenders and considers them as lesser beings.

That s. 22 of the Act provides complete immunity to the concerned government from any kind of legal proceedings in respect of anything done or intended to be in good faith or in pursuance of the provisions of this Act. When the legislation already reeks of prejudice and indifference towards the transgenders, it is not a wise idea to give the State unrestrained power and total impunity. This will lead to a situation of 'injustice without remedy' for the marginalized transgender community as it will deprive them of the right to approach courts under Art. 32 and Art. 226 in event of any infringement of their fundamental rights.

That at a global level, international organizations like United Nations have been very vocal about equal rights for every individual without any discrimination. The International Bill of Human

⁵² (1983) 1 SCC 124.

⁵³ (1985) 3 SCC 545.

Rights, consisting of UDHR, ICCPR and ICESCR advance the same thought. It is humbly submitted that India, being a member state of the United Nations and a nation that has ratified the above conventions, is required to follow them. Art. 253 of the Constitution of Wonderland read with Art. 51, empowers the Parliament to make laws for giving effect to the International agreements.

It is submitted that ‘Yogyakarta Principles’, developed by International Commission of Jurists and International Service for Human Rights, in behalf of a coalition of human rights organizations, address a broad range of human rights and their application to issues of gender identity and sexual orientation. Principle 3 of the aforesaid Principles specifically requires the State to ‘take all necessary legislative, administrative and other measures to fully respect and legally recognize each person’s self-defined gender identity’ and also ensure that ‘the procedures whereby the identity papers are issued are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned’.

It is humbly submitted that there have been many cases at an international level which have deliberated and decided on the concept of gender identity. In the case of *AB and AH v. State of Western Australia and Anor*⁵⁴, the Australian Supreme Court held that a person may be identified as male or female as characteristics are “confined to external physical characteristics that are socially recognizable” and “such recognition does not require knowledge of a person's sexual organs”. Even in Canada, in the case of *XY v. Ontario*⁵⁵, the Ontario Human Rights Tribunal decided that sex reassignment surgery is no longer required to be done by transgender persons in order to have their gender recognized.

⁵⁴ [2011] HCA 42.

⁵⁵ [2012] OHRTD No. 175.

4.2. THAT IT DOES NOT EXTEND THE BENEFIT OF ARTICLES 15 AND 16 TO TRANSGENDERS.

It has been held in recent landmark cases that the word ‘sex’ used in Articles 15 and 16 of the Constitution of Wonderland encompasses the concept of both gender identity as well as sexual orientation. This implies that no discrimination should take place on the basis of the gender identity of the person. In the case of *NALSA v. Union of India & Ors.*⁵⁶, this Hon’ble Court declared transgender to be treated as ‘socially and educationally backward classes. In line of this decision, the Court also directed the Central and State governments to extend all kinds of reservation in cases of admission in educational institutions and for public appointments to the transgender.

The present Act addresses the matter of discrimination in a very general manner. The provisions prohibit discrimination in educational establishments, employment settings, healthcare services, and in the housing context, among others. However, it does not provide a clear definition of what constitutes ‘discrimination’. It also does not provide any enforcement mechanism in case of violation of this anti-discrimination duty. It has done away with remedial measures to prevent sexual discrimination that were provided in the original draft.

Even after the Court’s clear mandate, the Act makes no mention of transgenders being a part of socially and educationally backward classes. Likewise, it does not make any provision for reservation of transgenders in the abovementioned institutions. This makes it quite evident that the provisions are just an eye wash and the State has no intention of according transgenders their rights and place in the society. Since the Constitution uses gender neutral words like ‘person’ and ‘citizen’, it takes into sweep the transgenders as well and does not pose any obstacle in the State’s

⁵⁶ *Id.* at 49.

way of uplifting the status of the transgenders.⁵⁷ Till this does not happen, they will never be able to become 'third gender' in the true sense.

ISSUE 5. WHETHER THE EXISTENT RAPE LAWS ARE CONSTITUTIONALLY VALID.

Rape is strictly construed as an offence committed by a man upon a woman. We, as a society, often ignore the other side of the coin. But as times change, our perspective also needs to change in order to develop empathy with the male and transgender rape victims. The lack of acknowledgement by law of male and transgender rape has impacted the ability of the victims to recognize their own victimization.

5.1. THAT THEY VIOLATE ARTICLES 14, 15 AND 21 OF THE CONSTITUTION OF WONDERLAND.

It is most respectfully submitted that the present rape laws discriminate on the basis of the gender of an individual, thus violating important fundamental rights under Articles 14, 15 and 21. For proving constitutional validity, any statute or law is to be tested on the touchstone of Art. 14, which envisages the 'Right to Equality'. For this purpose, the 'Test of Reasonable Classification' is to be applied.⁵⁸ In the instant case, there is no intelligible differentia between women rape victims and transgender and male victims. Rape is not about sexual gratification, it is violence using sexual means which can be committed by anyone upon anyone.

Through the Criminal Law (Amendment) Act, 2013, it was recognized that penetration in the offence of rape need not always be penile-vaginal; penetration can be through other orifices of the human body as well as by inanimate objects. Since the acts are no longer limited to penile-vaginal

⁵⁷ Ganga Kumari v. State & Ors., W.P.(C) No. 14006/2016.

⁵⁸ *Id.* at 36.

intercourse, it automatically implies that the same can be done by any person with any person. However, this Amendment rather than making the laws gender neutral, restricts its applications only to women as victims.

That as far as sexual offences against children below the age of 18 years are concerned, the respondent introduced the POCSO Act, 2012 which covers a spectrum of sexual offences ranging from sexual assault to aggravated offences. It would be apt to mention here that this law is gender neutral. It is quite unreasonable that as soon as an individual cross the threshold of 18 years, he is subjected to gender specific rape laws, a manifestation of the mentality of the society. This leads to the question that when rape laws can be made gender neutral by the respondent for children, why can the same not be done in case of adults?

This Hon'ble Court, in the NALSA case⁵⁹, has held that the word 'sex' with respect to Articles 15 and 16 should be understood to mean both gender identity as well as sexual orientation. Thus, the instant rape laws which are not gender neutral, clearly discriminate on the basis of 'gender' and violates the non-discrimination clause of the Constitution. Sec 377 of the WPC, made applicable to instances of non-consensual carnal intercourse against the order of nature by any person, does not account for the concept of bodily integrity, victimology, psychological trauma, coupled with societal stigmatization subjected to the aggrieved. Such an act being termed as an 'unnatural offence', rather than 'sexual assault' makes it completely devoid of dignity, bodily integrity, personal liberty and privacy, all enshrined under Art. 21 of the Constitution.

It is submitted that the 172nd Law Commission Report recommended long back in the year 2000, for rape laws to be made gender neutral by substituting the definition of 'rape' with that of 'sexual assault'. Unfortunately, this recommendation was never carried out in its totality. Then came the

⁵⁹ *Id.* at 49.

Criminal Law (Amendment) Bill, 2012, which had the same objective. This Bill further defined both the victim and perpetrator as ‘any person’, thereby making both parties gender neutral. However, Justice Verma Committee, constituted as a consequence of the Nirbhaya case, limited the role of perpetrator to man, leaving the victim as gender neutral. Finally, with the coming into force of the Criminal Law (Amendment) Act, 2013, there remained no gender neutrality either with respect to the victim or the perpetrator.

Nevertheless, with the recent milestone judgements of NALSA⁶⁰, Puttaswamy⁶¹ and Navtej Singh Johar⁶², there seems to be a new ray of hope. These cases do deal with the issues related to transgenders, but there are still lacunae left in the system which need to be done away with. While ‘transgenders’ are now understood to be the ‘third gender’, no recognition has been afforded to the sexual assault that they are subjected to. This leaves the transgender remediless when faced with such circumstances. Moreover, though this Hon’ble Court has decriminalized consensual carnal intercourse between two individuals in private, the non-consensual carnal intercourse is still referred to as ‘unnatural offence’ only and not as ‘sexual assault’. It is submitted that once the element of consent is taken out of the dynamics of any physical relationship, any person can be subjected to rape or sexual violence. Thus, making rape laws gender neutral is the need of the hour. It is most humbly submitted if and when the rape laws are made gender neutral, Wonderland will not be the first country to do so. Countries like United States of America, United Kingdom are few among the 63 nations with gender neutral rape laws.

⁶⁰ *Id.* at 49.

⁶¹ *Id.* at 36.

⁶² *Id.* at 48.

PRAYER

WHEREFORE, in light of the facts used, issues raised, arguments advanced and authorities cited, it is most humbly and respectfully prayed that this Hon'ble Court may be pleased to adjudge and declare that: -

- A. The acquittal of the Respondent was bad in law and uphold the judgement of the Trial Court;
- B. The Wonderland Trafficking of Persons (Prevention, Protection and Rehabilitation) Act, 2019 is *ultra vires* the Constitution and therefore void;
- C. The Wonderland Transgender Persons (Protection of Rights) Act, 2019 is *ultra vires* the Constitution and therefore void;
- D. The existing rape laws under W.P.C. are *ultra vires* the Constitution.

OR

The references to a woman under provisions of W.P.C., using the words “she” and “her” also be construed for the LGBT community.

Or grant such other relief as the court may deem fit in the light of justice, equity and good conscience.

AND FOR THIS ACT OF KINDNESS THE PETITIONER SHALL DUTY BOUND EVER
PRAY.

All of which is most humbly prayed
Counsel(s) for the *Petitioners*