

TEAM CODE- TC-D

**SIR SYED & SURANA & SURANA NATIONAL CRIMINAL LAW MOOT COURT
COMPETITION, 2019**

BEFORE THE HON'BLE SUPREME COURT OF WONDERLAND

SPECIAL LEAVE PETITION AND PUBLIC INTEREST LITIGATION

**UNDER ARTICLE 142 READ WITH ARTICLE 136 AND ARTICLE 32 OF THE
CONSTITUTION OF WONDERLAND**

STATE OF THUNDER PRADESH.....APPELLANT

v.

ROMSAY BOLTAN.....DEFENDANT

&

LGBT RAKHSHAKHS.....PETITIONER

v.

UNION OF WONDERLAND..... DEFENDANT

ON SUBMISSION TO THE HONOURABLE SUPREME COURT OF WONDERLAND

MEMORIAL ON BEHALF OF THE APPELLANT/ PETITIONER



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



TABLE OF CONTENTS

1. Index of authorities-----	iv-v
2. Statement of jurisdiction-----	vi
3. Statement of facts-----	vii
4. Statement of issues-----	viii
5. Summary of arguments-----	xi-x
6. Arguments advanced-----	1-30
[1]. WHETHER THE WONDERLAND TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 IS CONSTITUTIONALLY VALID-----	1
[1.1]. Chapter III (recognition of identity of transgender persons) of WTPA Violates the Article 19 and 21 of Wonderland Constitution-----	1-4
[1.2]. Chapter VIII (offences and penalties) Violates the Article 15 and 16 constitution of Wonderland-----	4-7
[1.3]. Application of Doctrine of Severability -----	8-9
[2]. WHETHER THE WONDERLAND TRAFFICKING OF PERSONS (PREVENTION, PROTECTION AND REHABILITATION) ACT, 2019 IS CONSTITUTIONALLY VALID-----	9-10
[2.1]. The Act Violates Article 21 of the Wonderland Constitution-----	10-11
[2.1.1]. Right to Fair Trial-----	11-15
[2.2]. The Act violates the Article 19(1) (g) of Wonderland Constitution-----	15-17
[3]. WHETHER LAW RELATED TO RAPE OF WOMAN IN WONDERLAND DISCRIMINATORY TO THE TRANSGENDER COMMUNITY AND NOT BEING GENDER NEUTRAL-----	17

MEMORIAL ON BEHALF OF THE APPELLANT/ PETITIONER



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



[3.1]. Definition of rape under Section 375 of the Wonderland Penal Code being ultra vires and violative of Articles 14, 15 and 21 of the Constitution of Wonderland-----	17-18
[3.1.1]. Article 14 & 15 is violated-----	18-19
[3.1.2]. Article 21 is violated-----	19-20
[3.2]. A Need arising for reviewing and modifying the penal laws of the country to the extent of making them gender neutral-----	20-21
[3.2.1]. Rape as mere penile-vaginal, both men and women and other sexual minorities can be victims, perpetrators of rape-----	21-22
[3.2.2]. Insofar the definition of rape there under does not account for gender-neutrality-----	22
[4]. WHETHER THE HC IS JUSTIFIED IN ACQUITTING THE ACCUSED FOR THE OFFENCE U/S 306 AND 377 OF WPC-----	22-23
[4.1]. Acquittal u/s 306 of Romsay Bolton by High Court was not justified-----	23-27
[4.2]. Acquittal u/s 377 Romsay Bolton by High Court was not justified-----	27-29
[5]. WHETHER THE JUDGMENT OF ACQUITTAL IS LIABLE TO INTERFERED WITH-----	29-30
7. PRAYER-----	XI



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



INDEX OF AUTHORITIES

CASES:

- Amalendu Pal v. State of West Bengal, (2010) 1 SCC 707-----24
- Anuj Garg v. Hotel Association of India (2008) 3 SCC 1-----3
- Avishek Goenka v. Union of India & Anr, (2012) 5 SCC 321-----20
- Corbett v. Corbett (1970) 2 All ER 33-----4
- Francis Coralie Mullin v. Administrator, Union Territory of Delhi (1981) 1 SCC 608-----2
- Hanumant Govind Nargundkar v. State of M.P, AIR 1952 SC 343-----30
- Harsh Mander & Anr v. UOI & Ors, W.P. (C) 10498/2009 & CM APPL. 1837/2010-----10
- Karnika Sawhney v. Union of India & Ors, W.P. (C) 1630/2015-----10
- Khudiram Das v. State of West Bengal, AIR 1975 SC 550-----20
- Madan Mohan Singh v State of Gujarat and another, (2010) 8 SCC 628-----24
- Minu B. Mehta and Anr v. Balkrishna Ramchandra Nayan and Anr, 1977 SCR (2) 886---20
- National Legal Services Authority v. Union of India, (2014) 5 SCC 438-----2,4,6,21,27
- Navtej Singh Johar v. Union of India & Ors, W.P. (Crl) No. 79/2016-----18
- Praveen Pradhan v. State of Uttranchal & Anr, CRIMINAL APPEAL NO.1589 of 2012---26
- R v. Tan (1983) QB 1053-----4
- Randhir Singh v State of Punjab, (2004)13 SCC 129-----25
- Ramesh Kumar v. State of Chhattisgarh, 2001 (9) SCC 618-----25
- Satvir Singh v. State of Punjab, AIR 2001 SC 2826-----24
- S. Puttaswamy (Retd) v. Union of India, 2017 10 SCC 1-----21

MEMORIAL ON BEHALF OF THE APPELLANT/ PETITIONER



Faculty of Law

SIR SYED & SURANA & SURANA

NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019

Surana & Surana
International Attorneys

- State of Himachal Pradesh v. Mast Ram, (2004) 8 SCC 660-----29
- Suresh Kumar Koushal & Anr v Naz Foundation & Ors, CIVIL APPEAL NO 10972 OF 2013-----28
- Secretary, Department of Social Security v. SRA, (1993) 43 FCR 299-----4
- Vaijnath Kondiba Khandke v. State of Maharashtra and Anr, CRIMINAL APPEAL NO. 765 OF 2018-----24
- Zahira Habibullah Sheikh v. State of Gujarat, AIR 2006 SC 1367-----12

ARTICLES:

- The Trans Bill and Its Discontents – II, Bhatia Gautam
- Transgender Bill: Denying Constitutional Rights to the Community?, S. Yogesh
- Transgender rights in India, K. Jha Manoj
- The Transgender Persons (Protection of Rights) Bill 2018: When inclusion discriminates, Pawar Yogesh

BOOKS:

- D. D. Basu Commentary on the Constitution of India, Vol. 3, 3138 (8th ed., Lexis Nexis Butterworth Wadhwa Publications, Nagpur, 2008).
- H.M. Seervai, Constitutional Law of India, VOL. I, 252 (4th edn., Universal Law Publishing, Allahabad 2010).

MEMORIAL ON BEHALF OF THE APPELLANT/ PETITIONER



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



STATEMENT OF JURISDICTION

The Appellant and petitioner have approached the Hon'ble Supreme Court of Wonderland under Article 142 of Constitution of Wonderland. Taking the cognizance of the complexity of the matter; the Hon'ble Supreme Court has clubbed the petition of Special Leave under Article 136 and writ petition under Article 32 of Constitution of Wonderland. The present memorial sets forth the facts, contentions and arguments in the present case.

MEMORIAL ON BEHALF OF THE APPELLANT/ PETITIONER



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



STATEMENT OF FACTS

Alosh born in thunder Pradesh and after that he shifted to Tumbai. On 23 January 2009, Alosh underwent a sex change surgery and adopted the name of Alice. On 25th Dec, 2014, Alice went to a Christmas party in Tumbai. Around 2 am, Alice came shouting and crying from upstairs of the beach house. She alleged that she was sexually assaulted and raped by Mr. Romsay Bolton. Alice was medically examined, there were slight marks of injuries and the medical examination concluded that she was subjected to a sexual intercourse. On the night of 2 March, 2015, Alice committed suicide by hanging herself at her Flat after making a video of her. In that video, Alice was seen crying and traumatized. Alice's postmortem report showed little amount of alcohol in her blood and cause of her death was concluded as a suicide. Soon, Mr. Romsay Bolton was arrested and he was brought to trial. Mr. Theon Greyjoy, director states Romsay and Alice were in a relationship. Mr. Han Solo, age about 77, a cataract patient, saw Mr. Bolton going downstairs from the same floor where alleged incident happened. Ms. Missendari closest friend said that Alice did not have any relationship. Mr. Grey Voram, who was the security in charge of the Christmas party, said Mr. Bolton left the party before Alice alleged rape by Romsay Bolton. Trial Court convicted the accused U/S 306 and 377 of WPC, 1860. The High Court acquitted the accused. Ms. Akea Stark, age 27 years, alleged harassment before 6 years at a party. Donald Singh, age 29, sexual assault by the alleged producer 5year ago. An appeal was made against the acquittal. LGBT Rakhshakhs, a NGO, filed a PIL before the Supreme Court in January, 2019 challenging the constitutionality of the Rape law under WPC and the constitutional validity of The Wonderland Transgender Persons (Protection of Rights) Act, 2019 and The Wonderland Trafficking of Persons (Prevention, Protection and Rehabilitation) Act, 2019 were challenged.

MEMORIAL ON BEHALF OF THE APPELLANT/ PETITIONER



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



STATEMENT OF ISSUES

ISSUE- 1

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

ISSUE- 2

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

ISSUE- 3

WHETHER LAW RELATED TO RAPE OF WOMAN IN WONDERLAND DISCRIMINATORY TO THE
TRANSGENDER COMMUNITY AND NOT BEING GENDER NEUTRAL?

ISSUE- 4

WHETHER THE HC IS JUSTIFIED IN ACQUITTING THE ACCUSED FOR THE OFFENCE U/S 306 AND
377 OF WPC, 1860?

ISSUE- 5

WHETHER THE JUDGMENT OF ACQUITTAL IS LIABLE TO INTERFERED WITH?

MEMORIAL ON BEHALF OF THE APPELLANT/ PETITIONER



SUMMARY OF ARGUMENTS

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

The counsel for the petitioner humbly submits that the wonderland transgender persons (protection of rights) act, 2019 infringes the fundamental rights enshrined under constitution of wonderland. As it violates Chapter III (recognition of identity of transgender persons) of WTPA Violates of Article 19 and 21 of Wonderland's Constitution, Chapter VIII (offences and penalties) Violates Article 15 and 16 of Wonderland's Constitution, and There is application of Doctrine of Severability.

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

The counsel for the petitioner submits that the wonderland trafficking of persons (prevention, protection and rehabilitation) act, 2019 infringes the fundamental rights enshrined under constitution of wonderland. As its violate the Act Violates Article 21 of the Wonderland Constitution, which talks about right to fair trial and The Act violates the Article 19(1) (g) of Wonderland Constitution.

3. WHETHER LAW RELATED TO RAPE OF WOMAN IN WONDERLAND DISCRIMINATORY TO THE TRANSGENDER COMMUNITY AND NOT BEING GENDER NEUTRAL.

The counsel for the petitioner submits that there is a reasonable basis to believe that the law of rape in WPC in wonderland is discriminatory as it violates article 14, 15, and 21 and also the law



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



in regards to rape is not gender neutral. As definition of rape under Section 375 of the Wonderland Penal Code, being ultra vires and violative of Articles 14, 15 and 21 of the Constitution of Wonderland and there is a need arising for reviewing and modifying the penal laws of the country to extent of making them gender neutral.

4. WHETHER THE HIGH COURT IS JUSTIFIED IN ACQUITTING THE ACCUSED FOR THE OFFENCE U/S 306 AND 377 OF WPC, 1860.

The counsel for the appellant humbly submits that there is a reasonable basis to believe that the charge under section 306 and 377 of WPC was heedful and hence Mr. Romsay Bolton is liable for the offences alleged on him and hence, the HC judgment of acquittal of the accused was not justified in each sense because Acquittal u/s 306 & 377of Romsay Bolton by HC was not justified.

5. WHETHER THE JUDGMENT OF ACQUITTAL IS LIABLE TO INTERFERED WITH.

The counsel for the defendant humbly submits that judgment of acquittal given by High Court should be interfered as there is clear infirmity established in regards to the same. The Evidence of witnesses who were relatives of deceased cannot be discarded as well as there is a clear chain of evidences which shows guilt of accused.

MEMORIAL ON BEHALF OF THE APPELLANT/ PETITIONER



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



ARGUMENTS ADVANCED

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

The counsel for the petitioner humbly submits that the wonderland transgender persons (protection of rights) act, 2019 infringes the fundamental rights enshrined under constitution of wonderland. As it violates [A]. Chapter III (recognition of identity of transgender persons) of WTPA Violates of Article 19 and 21 of Wonderland’s Constitution, [B]. Chapter VIII (offences and penalties) Violates Article 15 and 16 of Wonderland’s Constitution, and [C]. There is application of Doctrine of Severability.

1.1. Chapter III (recognition of identity of transgender persons) of WTPA Violates the Article 19 and 21 of Wonderland Constitution.

Article 19(1) of the Wonderland Constitution guarantees certain fundamental rights, subject to the power of the State to impose restrictions from exercise of those rights. The rights conferred by Article 19 are not available to any person who is not a citizen of India. Article 19(1)(a) includes the freedom to express one’s chosen gender identity through varied ways and means by way of expression, speech, mannerism, clothing etc. Gender identity, therefore, lies at the core of one’s personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1) (a)¹ of the Constitution of wonderland.

¹ “Article 19(1)(a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one’s right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, action or behavior or any other form. No restriction can be placed on one’s personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution.”

MEMORIAL ON BEHALF OF THE APPELLANT/ PETITIONER



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



A transgender personality could be expressed by the transgender behavior and presentation. State cannot prohibit, restrict or interfere with a transgender expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons, We therefore hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Constitution of Wonderland and the State is bound to protect and recognize those rights.²

Further Article 21³ is the heart and soul of the Wonderland Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that right. Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account of being humans.

In case of *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*⁴, the Hon'ble court held that the right to dignity forms an essential part of our constitutional culture which seeks to ensure the full development and evolution of persons and includes "expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings".⁵

² National Legal Services Authority v. Union of India, (2014) 5 SCC 438, held that at para 69.

³ "No person shall be deprived of his life or personal liberty except according to procedure established by law."

⁴ (1981) 1 SCC 608.

⁵ *Ibid* at (¶¶ 7 and 8).



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



Further Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution. Article 21, as already indicated, guarantees the protection of "personal autonomy" of an individual.

In the case of *Anuj Garg v. Hotel Association of India*⁶ the Hon'ble court 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 and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.⁷

TGPA disallows people to self-identify and denies them the basic right to privacy and dignity. According to this Sections 5⁸ and 6⁹ of this Act, a person would have to make an application to

⁶ (2008) 3 SCC 1.

⁷ *Ibid* at (¶¶ 34-35).

⁸ A transgender person may make an application to the District Magistrate for issuing a certificate of identity as a transgender person, in such form and manner, and accompanied with such documents, as may be prescribed: Provided that in the case of a minor child, such application shall be made by a parent or guardian of such child.

⁹ (1) On the receipt of an application under section 5, the District Magistrate shall refer such application to the District Screening Committee to be constituted by the appropriate Government for the purpose of recognition of transgender persons. (2) The District Screening Committee referred to in sub-section (1) shall comprise— (a) the Chief Medical Officer; (b) District Social Welfare Officer; (c) a Psychologist or Psychiatrist; (d) a representative of transgender community; and (e) an officer of the appropriate Government to be nominated by that Government.



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



the District Magistrate, who would then make an application to the District Screening Committee to identify and determine whether the person could be categorized as transgender. The involvement of the Screening Committee and various medical examiners or psychiatrists and others in determining whether they can be identified as a transgender person completely contradicts Section 4 of the Bill which states that transgender persons will have the right to "a self-perceived gender identity" This is an outright violation of the NALSA judgment directive, which read, "that any procedure for identification of transgender persons' which goes beyond self-identification, and is likely to involve an element of medical, biological or mental assessment, would violate transgender persons' rights under Article 19 and 21 of the Constitution".¹⁰ Moreover in the cases of **Corbett v. Corbett**¹¹ and **R v. Tan**¹² which applied a purely biological test that should not be followed.

In fact, Lockhart J. in SRA observed that the development in surgical and medical techniques in the field of sexual reassignment, together with indications of changing social attitudes towards transsexuals, would indicate that generally they should not be regarded merely as a matter of chromosomes, which is purely a psychological question, one of self-perception, and partly a social question, how society perceives the individual.¹³

1.2. Chapter VIII (offences and penalties) Violates the Article 15 and 16 constitution of Wonderland.

¹⁰ National Legal Services Authority v. Union of India, (2014) 5 SCC 438, ¶34.

¹¹ (1970) 2 All ER 33.

¹² (1983) QB 1053, 1063-1064.

¹³ Secretary, Department of Social Security v. SRA, (1993) 43 FCR 299.



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



In present Act, Chapter VIII (offences and penalties) violates Article 15 and 16 constitution of Wonderland as Section 19(a) of the act makes it an offence to ‘compel or entice a transgender person’ to commit the act of ‘begging’, Transgender persons have a well-documented history of suffering abuse at the hands of anti-vagrancy provisions such as this, simply because begging is often the only choice of income generation available.¹⁴ Due to the existing social stigma and lack of education, the community is forced into begging and sex work.¹⁵

Articles 15¹⁶ and 16¹⁷ sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. The discrimination on the ground of ‘sex’ under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression ‘sex’ used in Articles 15 and 16 is not just limited to biological sex of

¹⁴ Bhatia Gautam “Guest Post: The Trans Bill and Its Discontents – II”, 05 January 2018, available at: <https://indconlawphil.wordpress.com/tag/transgenders/> (Last Visited: 21 February, 2019).

¹⁵ S. Yogesh, “Transgender Bill: Denying Constitutional Rights to the Community?” 21December2018, available at: <https://www.newsclick.in/transgender-bill-denying-constitutional-rights-community>, (Last visited: 21 February 2019).

¹⁶ Article 15 states that the State shall not discriminate against any citizen, inter alia, on the ground of sex, with regard to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

¹⁷ Article 16 (2) of the Constitution of India reads as follows: “16(2). No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State.



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



male or female, but intended to include people who consider themselves to be neither male or female.

TGs have been systematically denied the rights under Article 15(2) that is not to be subjected to any disability, liability, restriction or condition in regard to access to public places. Transgender have no access to bathrooms/toilets and public spaces. The lack of access to bathrooms and public spaces access is illustrative of discrimination faced by transgender in availing each facilities and amenities. They face similar problems in prisons, hospitals and schools.¹⁸

TGs have also not been afforded special provisions envisaged under Article 15(4) for the advancement of the socially and educationally backward classes (SEBC) of citizens, which they are, and hence legally entitled and eligible to get the benefits of SEBC.¹⁹ The Act does not provide for employment opportunities through reservations, disregarding the directions of the apex court in the NALSA judgment which asked the state “to treat them (Tran’s people) as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.²⁰ State is bound to take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied.²¹ TGs are also entitled to enjoy economic, social, cultural and

¹⁸ K. JhaManoj “*transgender rights in India*”, available at: <https://iasscore.in/national-issues/transgender-rights-in-india> (last Visited: 21 February, 2019).

¹⁹ The Chairman v. Aradhana , W.A.No.330 of 2018 and CMP.No.2792 of 2018.

²⁰ National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

²¹ *Supra* note 19.



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



political rights without discrimination, because forms of discrimination on the ground of gender are violative of fundamental freedoms and human rights.

The community resorts to begging, as they do not enjoy parity with other genders when it comes to employment and alternative modes of employment, and not because they enjoy begging.²²

TGs have also been denied rights under Article 16(2) and discriminated against in respect of employment or office under the State on the ground of sex. While refusing to help create job opportunities where they can earn a living the TGPB criminalizes and threatens to target Trans persons begging for sustenance under anti-beggary laws, The state has not created equal opportunities of employment whereas forceful rehabilitation will put such individuals in unsafe abusive situations pushing them to self-harm/suicide.²³

TGs are also entitled to reservation in the matter of appointment, as envisaged under Article 16(4) of the Constitution. State is bound to take affirmative action to give them due representation in public services. Articles 15(2) to (4) and Article 16(4) read with the Directive Principles of State Policy and various international instruments to which Indian is a party, call for social equality, which the TGs could realize, only if facilities and opportunities are extended to them so that they can also live with dignity and equal status with other genders.

²² *Supra* note 15.

²³ Pawar Yogesh, “The Transgender Persons (Protection Of Rights) Bill 2018: When inclusion discriminates”, available at: <https://www.dnaindia.com/india/report-the-transgender-persons-protection-of-rights-bill-2018-when-inclusion-discriminates-2699261> (last Visited:21 February2019).



Faculty of Law
Aligarh Muslim University

SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



Surana & Surana
International Attorneys

Further in the case of *Harsh Mander & Anr v. UOI & Ors*²⁴ and *Karnika Sawhney v. Union of India & Ors*²⁵ decriminalized begging on the grounds that it is the responsibility of the state to provide for means of sustenance and create job opportunities to such people.

1.3. Application of Doctrine of Severability.

According to article 13, a law is void only “to the extent of the inconsistency or contravention” with the relevant Fundamental Right. The whole Act which would not be held invalid by being inconsistent with Part-III of the Constitution but only such provisions of it which are violative of the Fundamental Rights, provided that the part which violates the Fundamental Rights is separable from that which does not isolate them but if the valid portion is so closely mixed up with invalid portion that it cannot be separated without leaving an incomplete or more or less mingled remainder the court will declare the entire Act void.²⁶ This process is known as Doctrine of Severability or reparability.

The Present act fails to understand the core principle of ‘self-identification’ in defining a transgender person, it struggles with the question of non-discrimination, and takes an approach to residence and begging that doesn’t appreciate the nuances of the law and its relationship with the ground realities faced by transgender persons, creating a regulatory framework for transgender persons is undoubtedly a complex and delicate task.²⁷ On the points of residence and begging

²⁴ W.P. (C) 10498/2009 & CM APPL. 1837/2010.

²⁵ W.P. (C) 1630/2015.

²⁶ Section 13 of Indian Constitution.

²⁷ Bhatia .Gautam “Guest Post: The Trans Bill and Its Discontents – II”, 05 January 2018, available at: <https://indconlawphil.wordpress.com/tag/transgenders/> (Last Visited: 21 February, 2019).



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



however, the act seems to lack an understanding of ground realities required to upturn generations of neglect towards transgender persons. Even in their best possible forms, these provisions would require sensitive administration to have a meaningful impact in the long run. Perhaps what is most troubling is that none of the criticisms raised in this piece or the last are new.

Further the valid portion is so closely mixed up with invalid portion that it cannot be separated without leaving an incomplete or more or less mingled remainder so applying the Doctrine of severability court will declare the entire Act void.

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

The counsel for the petitioner submits that the wonderland trafficking of persons (prevention, protection and rehabilitation) act, 2019 infringes the fundamental rights enshrined under constitution of wonderland.

If one tries to discern the legislative intent behind the Trafficking of Persons Act 2019, the statement of objects and reasons references Section 370 of the WPC and The Immoral Traffic (Prevention) Act 1956. This indicates that the act aims to supplement existing criminal law provisions on trafficking.

However even if the Act is expressly meant to supplement existing criminal law, it would still be necessary to look at it within the lens of the Fundamental Rights Chapter of the Constitution. If one is to derive a constitutional rationale for this legislation, the legislation would most likely be meant to protect persons from exploitation. The relevant article would be Article 23 which reads:

MEMORIAL ON BEHALF OF THE APPELLANT/ PETITIONER



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

However even if this Act is meant to fulfill the noble purpose of Article 23 of protecting persons from forms of exploitation such as forced labour, the Constitutional scheme is such that one cannot in seeking to fulfill the mandate of Article 23 then violate other constitutional rights.

The problem with this Bill that in seeking to potentially fulfill the mandate of Article 23, it ends up violating core protections embodied in Article 21 and Article 19.

2.1. The Act Violates Article 21 of the Wonderland Constitution.

Article 21 is considered the heart and soul of the Indian a Constitution. It reads: No person shall be deprived of life or personal liberty except by procedure established by law. The concept of life and personal liberty has been extensively interpreted by the Supreme Court. The concept of life has been held to be more than mere animal existence and includes the right to life with dignity.²⁸

The concept of both life and personal liberty include the notion of privacy.²⁹ The key notions underlying Article 21 are dignity and autonomy. The Trafficking Act in effect, by adopting the

²⁸ The Supreme Court has held: The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Justice Bhagwati, Francis Coralie Mullin Versus Union Territory of Delhi. <https://indiankanoon.org/doc/78536>

²⁹ The Supreme Court in a nine -judge bench decision in Puttuswamy v Union of India noted: Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



definition of trafficking under Section 2(1)(w) from Section 370 of the WPC which defines victims as those who cannot consent, in effect hits at the autonomy of the so called victims.³⁰ 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,³¹ the Act fundamentally hits out at the notion that individuals under the Wonderland Constitutional framework have autonomy of decision making.

By taking away the autonomy of so called victims and treating victims as those without agency, it robs victims 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 Article 21 rights and should be able to make decisions about his or her life rather than forcibly being sent to a protection home.

protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.

http://www.supremecourtfindia.nic.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf

³⁰ See Section 370 in particular clause 370. Trafficking of person—(1) Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by— Sixthly— by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking. Explanation 2- The consent of the victim is immaterial in determination of the offence of trafficking.

³¹ Section 17 of the Wonderland Trafficking of Persons (Prevention, Protection and Rehabilitation) Act, 2019.

MEMORIAL ON BEHALF OF THE APPELLANT/ PETITIONER



Faculty of Law
Aligarh Muslim University

SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



Surana & Surana
International Attorneys

2.1.1. Right to Fair Trial.

The right to a fair trial is one of the universally accepted guarantees under the Universal Declaration of Human Rights, the cornerstone of the international human rights system, adopted in 1948 by the world’s governments. This right has since become legally binding on all states as part of customary international law.³² The right to a fair trial has been reaffirmed and elaborated since 1948 in legally binding treaties such as the ICCPR.³³ India’s Supreme Court has also ruled that the right to a fair trial is a fundamental part of Indian criminal jurisprudence.³⁴

Section 13 of the WTPA Act calls for the creation of District-level committees for “exercising the powers and performing such functions and duties in relation to prevention, rescue, protection, medical care, psychological assistance and need-based rehabilitation of victims.”³⁵

When read in conjunction with the provisions on “preventive measures” (Section 20) which vaguely discusses prevention in terms of “coordinating the implementation of all the programs, schemes and plans relating to the prevention of trafficking of persons” and “developing appropriate law and order framework”, and confirms that District Anti-Trafficking Committees can “undertake all measures to protect and prevent vulnerable persons from being trafficked”,³⁶ there is a risk of conflation of powers. Notably, the District Anti-Trafficking Committees could

³² See Amnesty International, Fair Trial Manual (2nd Edition), 2014, Index: POL 30/002/2014.

³³ Article 14 of ICCPR.

³⁴ *Zahira Habibullah Sheikh v. State of Gujarat*, AIR 2006 SC 1367.

³⁵ Section 13(1) of the act: The appropriate Government shall, by notification, constitute for every District, a District Anti-Trafficking Committee for exercising the powers and performing such functions and duties in relation to prevention, rescue, protection, medical care, psychological assistance and need-based rehabilitation of victims.

³⁶ Section 20(1), *Wonderland Trafficking of Persons (Prevention, Protection and Rehabilitation) Act, 2019*.



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



be tasked with undertaking law enforcement procedures. The lack of clear delineated roles and responsibilities among government units can compromise due process guarantees, including the right to fair trial.³⁷

The act makes no reference to the individuals' right to access legal representation or engage with their families (if desired). Any person arrested or detained should have access to a lawyer as soon as they are deprived of their liberty.³⁸ If a detained person does not have legal counsel of their choice, they are entitled to have a lawyer assigned whenever the interests of justice require it. If the person cannot afford to pay, assigned counsel must be provided free of charge.³⁹ Moreover, detainees are to be given all reasonable facilities to communicate with and receive

³⁷ AMNESTY INTERNATIONAL INDIA SUBMISSION TO THE MINISTRY OF WOMEN AND CHILD DEVELOPMENT ON THE TRAFFICKING OF PERSONS BILL, 2018, 22 March, 2018, available at: <https://amnesty.org.in/wp-content/uploads/2018/05/AMNESTY-INTERNATIONAL-INDIA-SUBMISSION-TO-THE-MINISTRY-OF-WOMEN-AND-CHILD-DEVELOPMENT-ON-THE-TRAFFICKING-OF-PERSONS-BILL-2018.pdf> (last visited: 23 February 2019)

³⁸ Article 37(d) of the Convention on the Rights of the Child, Principle 17 of the Body of Principles, Principle 3 and Guidelines 3 para. 43(b) and (d) and 4 para. 44(a) of the Principles on Legal Aid, Guideline 20(c) of the Robben Island Guidelines, Principle V of the Principles on Persons Deprived of Liberty in the Americas; Human Rights Council resolution 13/19, UN Doc. A/HRC/RES/13/19(2010) para. 6, HRC Concluding Observations: Georgia, UN Doc. CCPR/C/79/Add.75 (1997) para. 27, Jordan, UN Doc. CCPR/C/JOR/CO/4 (2010) para. 9; CAT Concluding Observations: Latvia, UN Doc. CAT/C/CR/31/3 (2004) §§6(h), 7(c); *Dayanan v Turkey* (7377/03), European Court of Human Rights (2009) paras. 30-33; CPT 12th General Report, CPT/Inf (2002) 15, paras. 40-41.

³⁹ HRC Concluding Observations: Tajikistan, UN Doc. CCPR/CO/84/TJK (2005) para. 11, Slovenia, UN Doc. CCPR/CO/84/SVN 26 (2005) para. 9; CPT 12th General Report, CPT/Inf (2002) 15 para. 41.



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



visits from family and friends.⁴⁰ Restrictions and supervision are permitted only if necessary in the interests of justice or security and good order in the institution.⁴¹ The right to receive visits applies to all detainees, regardless of the offence of which they are suspected or accused.⁴² Denying visits may amount to inhuman treatment.⁴³ The UN Rules for the Treatment of Women Prisoners instruct authorities to encourage and facilitate women’s contact with their families, including children, and to counterbalance disadvantages faced by women detained in institutions far from their homes.⁴⁴

Some of the fair trial rights implicated by the Act include “pre-trial” rights including the right to access legal counsel and family, rights and safeguards during questioning, and detention-related rights.⁴⁵ The act also potentially jeopardizes rights during trial such as presumption of innocence, burdens and standards of proof, and rights to appeal.⁴⁶

⁴⁰ Article 17(2)(d) of the Convention on Enforced Disappearance, Article 17(5) of the Migrant Workers Convention, Article 16(2) of the Arab Charter, Rules 26-28 of the Bangkok Rules, Guideline 31 of the Robben Island Guidelines, Rule 92 of the Standard Minimum Rules, Section M(2)(e) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas, Rules 24 and 99 of the European Prison Rules, Regulation 100(1) of the ICC Regulations.

⁴¹ Principle 19 of the Body of Principles, Rule 92 of the Standard Minimum Rules, Section M (2) (g) of the Principles on Fair Trial in Africa, Rule 24 of the European Prison Rules, Regulation 100(3) of the ICC Regulations.

⁴² See *Marc Romulus v Haiti* (Case 1992), Inter-American Commission on Human Rights (1977).

⁴³ *Civil Liberties Organisation v Nigeria* (151/96), African Commission, 13th Annual Report (1999) para. 27.

⁴⁴ Rule 26 of the Bangkok Rules.

⁴⁵ *Wonderland Trafficking of Persons (Prevention, Protection and Rehabilitation) Act, 2019*.

⁴⁶ *Ibid.*



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



The act makes no reference to the individuals' right to access legal representation or engage with their families (if desired). Any person arrested or detained should have access to a lawyer as soon as they are deprived of their liberty.⁴⁷ If a detained person does not have legal counsel of their choice, they are entitled to have a lawyer assigned whenever the interests of justice require it. If the person cannot afford to pay, assigned counsel must be provided free of charge. Moreover, detainees are to be given all reasonable facilities to communicate with and receive visits from family and friends. Restrictions and supervision are permitted only if necessary in the interests of justice or security and good order in the institution. The right to receive visits applies to all detainees, regardless of the offence of which they are suspected or accused. Denying visits may amount to inhuman treatment. The UN Rules for the Treatment of Women Prisoners instruct authorities to encourage and facilitate women's contact with their families, including children, and to counterbalance disadvantages faced by women detained in institutions far from their homes.

2.2. The Act violates the Article 19(1) (g) of Wonderland Constitution.

The Act also violates Article 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

⁴⁷ Article 37(d) of the Convention on the Rights of the Child, Principle 17 of the Body of Principles, Principle 3 and Guidelines 3 para. 43(b) and (d) and 4 para.44(a) of the Principles on Legal Aid, Guideline 20(c) of the Robben Island Guidelines, Principle V of the Principles on Persons Deprived of Liberty in the Americas; Human Rights Council resolution 13/19, UN Doc. A/HRC/RES/13/19(2010) para. 6, HRC Concluding Observations: Georgia, UN Doc. CCPR/C/79/Add.75 (1997) para. 27, Jordan, UN Doc. CCPR/C/JOR/CO/4 (2010) para. 9; CAT Concluding Observations: Latvia, UN Doc. CAT/C/CR/31/3 (2004) §§6(h), 7(c); Dayanan v Turkey (7377/03), European Court of Human Rights (2009) paras. 30-33; CPT 12th General Report, CPT/Inf (2002) 15, paras.40-41.



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



are often at the bottom of the socio-economic hierarchy. They seek to make a livelihood in extremely difficult circumstances. This act by implicitly including sex workers within the definition of persons who are trafficked, makes the lives of those who seek to make a livelihood from sex work that much more precarious.

Under the guise of protection, the State seeks to withdraw one of the few options persons have to make ends meet. The injustice of withdrawing the right under Article 19(1)(g) from adult persons also hits at the norm of equality. It's only when it comes to the question of sex work that the state 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 the Indian state, the impulse to defend a majority 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. Rather the government must conduct its policy within the ambit of constitutional morality.

Finally, it should be noted that this Bill by denuding sex workers of their right to practice the profession of their choice, hits at the right to life itself. The state having failed to ensure equality of opportunity, now proceeds to make the precarious lives of those in very difficult circumstances even more unviable. This act is one with other measures of the Wonderland state which increase the already sharp socio-economic divides in Wonderland society. The Indian



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



state must heed the warning of Dr. Ambedkar⁴⁸ and begin to address the problems of trafficking from the lens of redressing socio-economic inequality and not by criminalizing the livelihoods of the poor. If it continues to follow the current course of ignoring the interests of those at the bottom of the socioeconomic hierarchy, it put ‘our political democracy at peril’ and there is a very real possibility that ‘those who suffer from inequality will blow up the structure of political democracy’. Further it violate article 19(1) (g).

3. WHETHER LAW RELATED TO RAPE OF WOMAN IN WONDERLAND DISCRIMINATORY TO THE TRANSGENDER COMMUNITY AND NOT BEING GENDER NEUTRAL.

The counsel for the petitioner submits that there is a reasonable basis to believe that the law of rape in WPC in wonderland is discriminatory as it violates article 14, 15, and 21 and also the law in regards to rape is not gender neutral. [A.] Definition of rape under Section 375 of the Wonderland Penal Code, being ultra vires and violative of Articles 14, 15 and 21 of the

⁴⁸ As Amebedkar presciently warned: On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which is Assembly has to laboriously built up.” Speech to the Constituent Assembly, 25 November 1949.



Faculty of Law
Aligarh Muslim University

SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



Surana & Surana
International Attorneys

Constitution of Wonderland. [B.] A Need arising for reviewing and modifying the penal laws of the country to extent of making them gender neutral.

3.1. Definition of rape under Section 375 of the Wonderland Penal Code being ultra vires and violative of Articles 14, 15 and 21 of the Constitution of Wonderland.

Section 375 of the Indian Penal Code, 1860 being ultra vires and violative of Articles 14, 15, 21 of the Constitution of India in the absence of the element of gender-neutrality in the definition of rape under the aforementioned provision of the Code. Intention of the Petitioner is not to undermine the experiences of women subjected to rape and discrimination. But, as society matures, we must develop empathy for all and this includes male and transgender rape victims and other sexual minorities who faces reluctance in such matter.

3.1.1. Article 14 & 15 is violated.

The definition of rape is ultra-virus and violative of article 14 (equality in protection and safeguarding measures) and article 15 (no discrimination on basis of sex) as under Section 375 to Section 376E of the WPC in the present form refers to ‘sexual offenses’. It defined rape as sex without consent, with consent but under the fear of death or with consent but under false pretenses. It also defined ‘statutory rape’ as sex with a woman under the age of 16. It makes no mention of rape as a crime against a transgender or other sexual minorities since it was assumed that Section 377 of the Code would cover non-penile, non-vaginal intercourse between adults.

However, Section 377 criminalized both participants while including male and transgender victims while in Section 375 would have criminalized only the rapist and not the victim. This loophole discourages transgender rape victims from complaining against their rapists as it may lead to their prosecution as well.



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



In the case of *Navtej Singh Johar v. Union of India & Ors*⁴⁹, the Hon'ble court rightfully observed that the phraseology of Section 377 is gender neutral and that of Section 375 is female-centric. In the absence of equal protection to men and women alike, the provision of Section 375 of the Code is grave violative of Articles 14, 15 and 21 of the Constitution of India.

Crime has no gender and neither should our laws. Women commit crime for the same reasons that men do. The law does not and should not distinguish between criminals on basis of gender and every person who has committed an offence shall be liable to punishment under the Code.

Thus, the intention behind this petition is to protect the rights of men and women, homosexual or heterosexual, and that of transgender alike, from being physically violated by another person without their consent. It is stoutly emphasized that once the element of consent is taken out of the dynamics of any physical relationship, any person, regardless of their gender or sex could be subjected to sexual violation or rape by another person.

3.1.2. Article 21 is violated.

The Right to Live with Dignity is imbibed in the Constitution of India under Article 21. It cannot be forgotten that discrimination is the antithesis of equality and recognition of equality in its truest sense will foster the dignity of every individual. The lack of acknowledgment of male and transgender rape has impacted the ability of victims to recognize their own victimization.

In the case of *Khudiram Das v. State of West Bengal*⁵⁰, the Hon'ble court held that new needs of a person for liberty in the different spheres of life can now be claimed as a part of personal liberty under Article 21 and these personal liberties cannot be restricted either by legislation or

⁴⁹ *Ibid.*

⁵⁰ AIR 1975 SC 550.



Faculty of Law
Aligarh Muslim University

SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



Surana & Surana
International Attorneys

by law except satisfying Articles 14. Fundamental freedoms can be effectively enjoyed only if a person is to live with dignity, freedom, and safety which further ensure a good quality life which, falls within the mandate of Article 21 of the Constitution. In the case of *Minu B. Mehta and Anr v. Balkrishna Ramchandra Nayan and Anr*⁵¹, the Hon'ble court observed that every person has a right to safety and security of his person.

In the case of *Avishek Goenka v. Union of India*⁵², the Hon'ble court held that whatever are the rights of an individual, they are regulated and controlled by the statutory provisions of the Act and the Rules framed there under. The citizens at large have a right to life i.e. to live with dignity, freedom, and safety. This right emerges from Article 21 of the Constitution of India. As opposed to this constitutional mandate, trivial individual protection or inconvenience, if any, must yield in favor of the larger public interest.

Hence, the above mentioned judgments substantiate Article 21 has been infringed as 'Right to Life', 'Right to Safety and Security' and 'Right to Dignity' has been compromised with. The abovementioned judgments place the onus on the State.

Also in the case of *National Legal Services Authority of India (NALSA) v. Union of India*⁵³ the Hon'ble court held Article 15 & 21 of the Constitution of India including the right to gender identity and sexual orientation, thereby recognizing transgender as the 'third gender'. However, no recognition was afforded to the sexual assault and rape that transgender persons are subjected to.

⁵¹ 1977 SCR (2) 886.

⁵² (2012) 5 SCC 321.

⁵³ (2014) 5 SCC 438.



Faculty of Law
Aligarh Muslim University

SIR SYED & SURANA & SURANA

NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



Surana & Surana
International Attorneys

3.2. A Need arising for reviewing and modifying the penal laws of the country to the extent of making them gender neutral.

The counsel for the petitioner humbly submits that there is a need arising for reviewing and modifying the penal laws of the country to extent of making them gender neutral and Rape as mere penile-vaginal, both men and women and other sexual minorities can be victims, perpetrators of rape and Insofar the definition of rape there under does not account for gender-neutrality.

3.2.1. Rape as mere penile-vaginal, both men and women and other sexual minorities can be victims, perpetrators of rape.

Article 14 talks about equality where the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. Sexual crimes beyond the so-called ‘traditional’ and heteronormative spectrum are rampant today, and the absence of a legal framework to address them leaves their victims helpless.⁵⁴ Because more importantly, the aforementioned proposed provisions of Section 375 to the extent of gender-neutrality for both victims and perpetrators was prior to the legalization of transgender and decriminalization of consensual carnal intercourse against order of nature under Section 377. In light of the decisions of this Hon’ble Court in the cases of NALSA⁵⁵, Puttaswamy⁵⁶ and Navtej Singh Johar⁵⁷, there is

⁵⁴ Alolika Chakraborty & Samidha Mathur, ‘Why Heteronormativity makes our rape laws problematic: The dilemma of the transgender community’, <http://jtl.columbia.edu/why-heteronormativity-makes-our-rape-laws-problematic-the-dilemma-of-the-transgender-community>.

⁵⁵ *Supra* note 6.



Faculty of Law
Aligarh Muslim University

SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



Surana & Surana
International Attorneys

an impending and irrefutable need to provide protection from sexual assault to transgender including but not limited to homosexuals and men.

3.2.2. Insofar the definition of rape there under does not account for gender-neutrality.

Present legal framework lacks distinction b/w consensual and non-consensual acts.⁵⁸ Because gender neutrality within rape statutes is the concept that the criminal law should recognize that both men and women can be rape victims as well as perpetrators. Gender neutrality within rape reflects modern understandings of the nature, effects, and dynamics of nonconsensual penetrative sex acts, and is an evidence-led means of appropriately labeling criminal conduct.

Scholars have criticized traditional rape laws that only prescribe penile-vaginal intercourse, arguing that these laws exclude ‘a great deal of behavior which is remarkably similar to the act legally designated as rape and such exclusion appears to rest on no logical or justifiable grounds. The physical and psychological trauma caused by non-consensual penetration of the vagina, anus, and mouth by the penis or other objects. Moreover, in understanding what constitutes rape, international law has evolved from viewing it just as penile-vaginal to penile-orifice and then to penetrative-orifice, all within a non-consensual context. Even in the case of Nirbhaya, the physical violation with blunt objects was classified as rape.

**4. WHETHER THE HIGH COURT IS JUSTIFIED IN ACQUITTING THE ACCUSED FOR THE OFFENCE
U/S 306 AND 377 OF WPC.**

⁵⁶ Justice K.S. Puttaswamy (Retd) v. Union of India, 2017 10 SCC 1.

⁵⁷ *Supra* note 2.

⁵⁸ *Ibid.*



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



The counsel for the appellant humbly submits that there is a reasonable basis to believe that the acquittal from the charges under section 306 and 377 of WPC was not justified in each sense. [A.] Acquittal u/s 306 of Romsay Bolton by HC was not justified. [B.] Acquittal u/s 377 Romsay Bolton by HC was not justified.

4.1. Acquittal u/s 306 of Romsay Bolton by High Court was not justified.

The learned Counsel for the appellant seriously contends that the acquittal of the appellant is totally unsustainable because no ingredients of offence under section 306 of the Code can be made out in the facts, circumstances and evidences of this case, therefore, the order of the same shall not sustain.

In the case of *Gurcharan Singh v State of Punjab*⁵⁹, the Apex Court observed that the basic ingredients of Section 306 of IPC are suicidal death and the abetment thereof. To constitute abetment, the intention and involvement of the accused to aid or instigate the commission of suicide is imperative.

In the case of *Satvir Singh v. State of Punjab*⁶⁰ court held that Section 306 renders a person punishable of abetment to suicide only if the condition of commission of suicide is fulfilled. This is essential because it is possible to abet the commission of suicide and not a mere attempt in furtherance of same. It would be preposterous if law would penalize such attempts also. In the present case it is very evident from the post mortem⁶¹ report that deceased died due to suicide and even video posted by him also indicates the same.

⁵⁹ (2017) 1 SCC 433.

⁶⁰ AIR 2001 SC 2826.

⁶¹ Moot proposition, ¶13.



Faculty of Law
Aligarh Muslim University

SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



Surana & Surana
International Attorneys

In the case of *Madan Mohan Singh v State of Gujarat and another*⁶² it was opined that in order to bring out an offence under Section 306 of IPC, specific abetment as contemplated by Section 107 IPC on the part of the accused with an intention to bring about the suicide of the person concerned as a result of that abetment is required.

In the case of *Vajinath Kondiba Khandke v. State of Maharashtra and Anr*⁶³, court held that Even when the accused persons have no such intention, if they create situation causing tremendous mental tension so as to drive the person to commit suicide, they can be said to be instigating the accused to commit suicide.

In the case of *Amalendu Pal v. State of West Bengal*⁶⁴ court held that if it transpires to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.

In the case of *Randhir Singh v State of Punjab*⁶⁵, The Supreme Court enunciated on the pith and purport of Section 306 IPC and opined as Abetment involves a mental process of instigating a person or intentionally aiding that person in doing of a thing and More active role which can be

⁶² (2010) 8 SCC 628.

⁶³ CRIMINAL APPEAL NO. 765 OF 2018.

⁶⁴ (2010) 1 SCC 707.

⁶⁵ (2004)13 SCC 129.



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



described as instigating or aiding the doing of a thing is required before a person can be said to be abetting the commission of offence under Section 306 of IPC.

In the present case *Ramesh Kumar v. State of Chhattisgarh*⁶⁶ it was held that ‘instigation’ may be inferred from a series of acts on the part of accused that led to creation of such circumstances where the deceased had no other option left with him or her than committing suicide. This series of acts may include use of force, words, conduct, willful omission or deeds or for that matter even silence of accused in order to annoy or irritate the deceased which resultantly caused the latter to take steps to put an end to one’s life.

In the present case section 306 IPC has pure application to the facts of the present case. It was submitted that with respect to the defendants by their behavior created situation so as to create unbearable pressure by mental harassment and deceased Alice was left with no option but to commit suicide. Incidents such as rape and sexual assault⁶⁷ followed by losing work assignments, job and reputation⁶⁸, threat calls⁶⁹ etc.

In the case of *Praveen Pradhan v. State of Uttaranchal & Anr*⁷⁰ court held that where no straight jacket formula which can be laid down to find out as to whether in a particular case there has been instigation which forces the person to commit suicide. In some particular cases, there may not be direct evidence in regard to instigation which may have direct nexus to suicide.

⁶⁶ 2001 (9) SCC 618.

⁶⁷ Moot proposition, ¶ 9.

⁶⁸ Moot proposition, ¶ 11.

⁶⁹ *Supra* note 6.

⁷⁰ CRIMINAL APPEAL NO.1589 of 2012.



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



Therefore, in present case, there is an inference drawn from the circumstances and it is determined that circumstances in the same case had been such which in fact had created the situation that a person felt totally frustrated and committed suicide. The learned counsel for the appellant further contends that even taking the contents of the very facts of moot problem, as true, it would warrant an offence under Section 306 IPC and would show aiding acts on the part of the appellant, forcing the deceased to commit suicide. There is complete presence of intention on the part of the accused provoking the deceased to commit suicide.

About the genuineness of video which has been clearly established. An examination of the suicidal video would show that the accused is the root cause for her committing suicide as also referred by Alice⁷¹. And hence he abetted her commission of suicide. In these circumstances, the Trial court has rightly convicted him and appropriately punished him. All evidences and factual nexus between the suicide and indirect aiding act of Romsay Bolton establish all specific ingredients necessary u/s 306 beyond all reasonable doubts.

In view of the elaborate analysis of the evidence of the trial court and the high Court there is an infirmity found in the conclusion given by high court arriving at regarding guilt of the accused persons. Therefore, conviction should be provided and acquittal order by Hon'ble High Court should be reversed.

4.2. Acquittal u/s 377 Romsay Bolton by High Court was not justified.

Article 377 of WPC covers all sexual offences against the order of the nature; this also has implications for heterosexuals, as consensual sexual acts of adults. It operates in a vastly different manner for two classes of persons based on their “sexual orientation” i.e. the LGBT

⁷¹ Moot proposition, ¶ 12.



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



persons and heterosexual persons⁷². Section 377 penalizes all forms of non-penile vaginal intercourse.

As held in **National Legal Services Authority v. Union of India & Ors**⁷³. This Court granted equal protection of laws to transgender persons. There is therefore no justification to deny the same to LGBT persons. Section 377 creates an artificial dichotomy. The natural or innate sexual orientation of a person cannot be a ground for discrimination. Where legislation discriminates on the basis of an intrinsic and core trait of an individual, it cannot form a reasonable classification based on an intelligible differentia.⁷⁴

As stated in the case of **Suresh Kumar Koushal & Anr v. Naz Foundation & Ors**⁷⁵ The mere fact that the LGBT persons constitute a “miniscule fraction” of the country’s population cannot be a ground to deprive them of their Fundamental Rights guaranteed by Part III of the Constitution. Even though the LGBT constitute a sexual minority, members of the LGBT community are citizens of this country who are equally entitled to the enforcement of their Fundamental Rights.

In accordance to the present matter, Alice claimed to be a victim of sexual assault⁷⁶ after the postmortem report, which shows slight traces of injuries and evidence of sexual intercourse⁷⁷

⁷² Navtej Singh Johar v. Union of India, WRIT PETITION (CRIMINAL) NO. 76 OF 2016.

⁷³ WRIT PETITION (CIVIL) NO.400 OF 2012.

⁷⁴ *Ibid.*

⁷⁵ CIVIL APPEAL NO 10972 of 2013.

⁷⁶ Moot proposition, ¶ 9.

⁷⁷ Moot proposition, ¶ 10.



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



with her after the rape incident⁷⁸. This act of sexual intercourse was nonconsensual as Alice was found slightly injured and also there was no other relationship between Romsay Bolton and Alice other than professional alliance which was also affirmed by the witness Ms. Missendari while analysis of evidence given in trial court⁷⁹. The act of Romsay Bolton was totally out of professional capacity and was also forceful and fit to be penalized. As, Alice was a transgender her matter falls within the enclosure of section 377 of WPC and should be penalized accordingly as in the case of *Navtej Johar v. Union of India*⁸⁰, where it declared Section 377 violative of the Constitution to the extent that it criminalized consensual sex between adults of the same gender. While Section 377 continues to remain on our statute book, it now applies only in cases of non-consensual sexual acts against adults, all acts of carnal intercourse against minors, and acts of bestiality.

Another fact that Mr. Romsay Bolton was seen in the same floor where the alleged incident happened taking stairs to go down by the witness named Mr. Han Solo⁸¹. All the factual contentions lead to very precise and to the point conclusion in regards to the guilt of the accused for the charges made by the trial court u/s 377⁸², that the accused should be convicted for the same offence. Taking in account all the evidences and facts, which fulfills all the imperative ingredients of section 377 and hence the evidences considered by high court was not adequate.

⁷⁸ *Supra* note 18.

⁷⁹ Moot proposition, ¶18.

⁸⁰ WRIT PETITION (CRIMINAL) NO. 76 OF 2016.

⁸¹ Moot proposition, ¶17.

⁸² Moot proposition, ¶14.



5. WHETHER THE JUDGMENT OF ACQUITTAL IS LIABLE TO INTERFERED WITH.

The counsel for the defendant humbly submits that judgment of acquittal given by High Court should be interfered as there is clear infirmity established in regards to the same.

In the case of *State of Himachal Pradesh v. Mast Ram*⁸³, this Court observed that Evidence of witnesses who were relatives of deceased cannot be discarded in the absence of any infirmity in said evidence. The law on the point is well settled that the testimony of the relative witnesses cannot be disbelieved on the ground of relationship. The only main requirement is to examine their testimony with caution. Their testimony was thrown out at the threshold on the ground of animosity and relationship. This is not a requirement of law.

Similarly, in the present case statement given by Ms. Missendari who happen to be closest friend of Alice, that Alice did not have any relationship with Romsay Bolton, which clearly shows that she had only professional relation with Romsay Bolton and Alice didn't gave consent to Romsay Bolton and as per *Navtej Johar v. Union of India*⁸⁴, where it declared Section 377 violative of the Constitution to the extent that it criminalized consensual sex between adults of the same gender. While Section 377 continues to remain on our statute book, it now applies only in cases of non-consensual sexual acts against adults, all acts of carnal intercourse against minors, and acts of bestiality.

In the case of *Hanumant Govind Nargundkar v. State of M.P*⁸⁵, Court held that in case where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt

⁸³ (2004) 8 SCC 660.

⁸⁴ WRIT PETITION (CRIMINAL) NO. 76 OF 2016.

⁸⁵ AIR 1952 SC 343.



Faculty of Law
Aligarh Muslim University

SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



Surana & Surana
International Attorneys

is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

In the present case there is a clear chain of evidences which shows guilt of accused as statement given by Ms. Missendari who happen to be closest friend of Alice, that Alice did not have any relationship with Romsay Bolton, which clearly shows that she had only professional relation with Romsay Bolton and Alice didn't gave consent to Romsay Bolton and Mr. Hans solo stated that he saw Romsay Bolton going to downstairs from the same floor where alleged incident happened.



SIR SYED & SURANA & SURANA
NATIONAL CRIMINAL LAW MOOT COURT COMPETITION - 2019

15 – 17 March 2019



PRAYER

In light of the issues raised, arguments advanced and authorities cited, the counsel for the appellant/ petitioner humbly prays that the Hon'ble Court be pleased to adjudge, hold and declare:

- *Hon'ble court may issue the writ of mandamus or any other writ as court deems fit.*
- *The wonderland transgender persons (protection of rights) act, 2019 is unconstitutional.*
- *The wonderland trafficking of persons (prevention, protection and rehabilitation) act, 2019 is unconstitutional.*
- *Law related to rape of woman in wonderland discriminatory to the transgender community and not being gender neutral.*
- *Romsay Bolton should be liable for the offence u/s 306 and 377 of WPC.*

And,

Pass any other order that may deem fit in the interest of justice, equity and in a good conscious.

All of which is most respectfully submitted

(Counsel for the Appellant/ Petitioner)

MEMORIAL ON BEHALF OF THE APPELLANT/ PETITIONER