

## RECOGNIZING THE UNRECOGNIZED: UNRAVELLING THE DISCUSSION ON TRANSGENDERS

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### ABSTRACT

*Any dialogue on the “Transgender” breaks out with the issue of their recognition and the sufferings through which they have lived. The society at large abstains from the recognition of equal rights of these people, thereby discriminating and putting them at space. Abandoned by their families and acquaintances, these people are shunned, thus placing them at a vulnerable position in the society. Having guaranteed protection and recognition from the judiciary, they still face the music because of lack of implementation. Although decriminalization of consensual sexual intercourse between two consenting adults of the similar sex has resulted in recognition of their fundamental right to an extent, yet it is not sufficient for them to have a separate and dignified status in the society. The present Article aims to highlight the existing condition of the Transgender Community in India, and to shed light on the ‘The Transgender Person (Protection of Rights) Act, 2019’, which aims to bridge the existing gap in the society, however, it fails due to various drawbacks. At last the Article focuses on the steps taken by the judiciary to ameliorate the dignity and status of Transgenders in India.*

### I. INTRODUCTION

***‘Sex is what you are born with, gender is what you recognize and sexuality is what you discover.’ – A. Chettiar***

Before unfolding the discussion on the Transgender, it must be duly noted to begin it with the much neglected and overlooked distinction in the area of the “sexual orientation” as well as the “gender identity” of any person. Defining it further, the gender recognition of a person is associated with one's inner and independent experience of gender which may be in

correspondence with sex allotted to that person after birth, whereas the sexual orientation of an individual relates to his romantic, enduring physical or emotional attraction to some other person. Forming a fundamental part of a person's personality, it goes on to define the freedom and independence of an individual to make a choice. Transgender have been classified as persons whose gender identity differs from what they were thought to be at the time of their birth, which is further divided into Trans- men (who lives as a male today but were believed to be females at the time of their birth) and Trans-women (who lives as a female today but were believed to be females at the time of their birth).<sup>1</sup>

Having an insight to the 1960s, it is clear that most of the literature before that period has defined an individual's identity purely in terms of biology of a person. It failed to acknowledge the difference between the sex and gender, followed by sexual differentiation from the sex discrimination.

What forms the fundamental part of the private space is the sexual orientation of an individual, expressed through the relations that a person forms which are sexual in nature. Considering the nature of this, it should be an inalienable part and form one of the components of Right to Life and Liberty of a person under the ambit of Article 21 of the Indian Constitution. Considering the fact that the human dignity goes along with both physical as well as psychological probity, and empowerment, the dignity of a person lies in freedom of one's choice.

Further adding to it, the dignity of a person is elevated by the implementation of those laws which are the need of the hour and are especially made to serve the requirements and standards of different individuals, thereby keep in mind the conditions of underlying their differences. Stating the Right to Dignity, it comprises expressing a person in different or diverse form, all of which forms a fundamental and inalienable part of the complete development and evolving the identity of any person.

In regard to all these issues, the paper attempts to put forth the exploitation and injustice faced by the victims having alternative identities, having been subjected to social and legal aspect and also, the laws and the judicial pronouncements that should be implemented to deal with the problem effectively.

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<sup>1</sup> The Transgender Person (Protection of Rights) Act 2019, (Act No. 40 of 2019) s 2(k).

## II. TRACING THE HISTORICAL EXISTENCE

Discussing and revisiting the era in the past, it can be seen that those transgender people who have to face frequent criticism today, were once adored and acknowledged for their existence. Tracing and going back to the stories of Hindu Mythology, where numerous instances of divinities evolving genders and showing as an Avatar of other gender exist, it can be asserted that the existence of transgender is much old and can be dated back to the mythological era. Gods were viewed as to represent both male as well as a female form at various focuses and in different incarnations.

To discuss the state of the third genders at earlier times, references can be drawn from Mahabharata, where a character by the name of *Shikhandi*, has been one of the most significant transgender that could be seen throughout the stories of Hindu mythology. Having an insight to other instances of their existence and importance, *Aravan*, the offspring of *Arjuna* is another important person whom people believe to have laid down the bloodline of birth of transgender. Also in the Mahabharata, there exists an instance when *Arjuna* apparently took the identity of a eunuch named, *Brihandala*. Followed by the Mahabharata, Ramayana is another source where a great reference for, emergence of transgender could be found.<sup>2</sup> The story contemplates a reference, when lord Rama, before going to his journey to the forest for a period of 14 years, raised to his devoted followers, by referring them as “men and women”, to go back to the city. After this order, it came to Rama’s surprise that a third group of people still stayed back with him, the transgender decided to stay with him and didn’t feel obliged by the order. Seeing this, lord Rama got impressed by the devotion and gifted them with the power to give blessings to others on account of auspicious occasions.

Referring to the reign of the Mughal Empire, the transgender people were identified for the prestigious positions they held in the Mughal Royal Courts. They went about as political guides, executives, officers just as gatekeepers of the arrays of mistresses. They involved high positions in Islamic strict foundations and were likewise ready to impact state choices. Afterward, these advantages were expelled through enactment in the British time frame.

Their tumble from balance began during the British rule in the eighteenth century. They spent their lives on the edges of the society and confronted segregation in work environment,

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<sup>2</sup> Shruti Gulati, “Transgender and Hindu Mythology” *NALAD*, May 7, 2020.

employment, public places and education. Being individuals from minimized and socially avoided area, they were consistently at the negative conduct and disposition of the people. The exhibition of this unsatisfactory behaviour by the general population restricted their social commitments, bringing about low self-assurance and confidence, which subsequently secluded them from the general public.<sup>3</sup> The terrible condition of the transgender people intensified with the general public view and regarding them as individuals, not capable to fit into the specified sanctimonious bounds. Criticized and differentiated because of their separate gender identity, they were left with no choice and were soon found to be begging and practicing prostitution as their only occupation for their livelihood. Seeing the whole situation of dismay, particular rights were brought and enforced to uplift them, but as it turned out the implementation of these rights was filled with various obstacles.

### III. DETERIORATING CONDITION OF TRANSGENDER IN MODERN TIMES

Drawing a contrast from the earlier times of The Mahabharata and Ramayana, it can clearly be seen that ever since after that, the status and condition of the transgender community has been on the decline. Suffering from various forms of social exclusion and being discriminated with, they have gone to the extreme end of the social strata. Their sexual orientation is seen as deviant and disparaged in the prevailing dominant culture. Portrayed with distinctiveness and conflicting with the binary nature of social being, the transgender have always suffered discrimination at the hands of the dominant culture.<sup>4</sup>

Owing to the fact that these individuals are away from the normal category prevailing in the society, these people have their own bits, making the group heterogeneous and this in fact, is very often either understated or overlooked by most of the literatures. What enhances the heterogeneity is that the differences and contradictions that exist not just between identities, but also within them forming fundamental part of their identity.<sup>5</sup> Since the heterogeneity of the transgender community is not embraced in the world of the biological normal where existence of only male and female is found, therefore there is an apparent lack of empathy towards them.

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<sup>3</sup> *National Legal Services Authority v Union of India &Ors*, (2014) 5 SCC 438.

<sup>4</sup> MuskanPunia, "Rights of Transgender in India" *Indian Law Portal* (18 May, 2020).

<sup>5</sup> Tharika, "Respect and acceptance of transgender people in India" *International Planned Parenthood Federation*, 9 May 2020 <<https://www.ippf.org/stories/respect-and-acceptance-transgender-people-india>> (last visited on 30 August, 2020).

The society being prejudiced at large, and with the failure of the role of parliament and judiciary, the transgender community had to suffer social exclusion. The distinction between the sub-identities of an individual are often ignored and put aside, and are clubbed into a single community of LGBTQ. Consequently, the result of which is that they suffer sexually specific status injuries.

All this has resulted in a spread of phobia towards this particular community, and has penetrated through the different structures of the society, may it be family or any institution, depriving them of their basic human dignity. They are being deprived and excluded from education and the health care system; also there have been a number of times when they are thrown out of their houses just for the sake of the phobia which has engulfed the entire community. Owing to these conditions, there have been a lack of job opportunities for these people and therefore they are forced and pushed to opt for alternative jobs to earn their living, mostly this includes prostitution. It is the people from the transgender community who are emerging at an alarming risk of suffering from HIV and STDs, because of indulging into the prostitution.

Denial of complete privileges and the rights of a citizen as well as the lack of protection thereby, increases the problem for them. Enduring shame and assault, they are denied of basic privilege of marriage as well as parenthood. This puts a bar on their rights of expression and to freedom of one's opinion. Adding to the existing misery, there are instances where the media portrays a stereotypical image of this community and thereby they have to face harassment and are disparaged in everyday life by the people.

However, in the year 2014, the transgender community came under the ambit of political recognition and were labelled as "the others" on the electoral rolls for the process of Lok Sabha elections, this in fact, proved to be derogatory in particular to their dignity as instead of labelling them as "third gender", as done on Adhaar Card, they were merely mentioned as "the others". Using of the term "eunuch" as opposed to "transgender" or "third gender" on the passport of a third gender person was considered to be disparaging and inappropriate as it could have been empathetic to use the latter terms.

Adding to the existing plight, the 2011 census data<sup>6</sup> discloses that a total number of 4.9 lakh transgender exist in India. Nevertheless, there exist certain claims among the members of the community that the actual number is much higher as opposed to the data being recorded. The discrepancies between the recorded and the claimed data exist because of the fears of detrimental reactions and differing terminologies employed while collecting data. In addition to this, the census data also reveals a very low level of the literacy rate among the transgender community. It exists at around 46% in comparison to the 74% in the general population. The reason stated behind this was primarily because of the high rate of dropout from the educational institutions due to the harassment and discrimination faced. It is a vicious cycle where the people with alternate sexualities are caught and have to suffer various forms of violence, emotional, mental, and even physical injuries. The fact of non recognition of their identity makes it further worse, and they become vulnerable to harassment and sexual assaults.

#### IV. ROLE OF JUDICIARY IN SECURING RIGHTS OF TRANSGENDERS

With the contemporary time, progress against the traumatic and tragic situation of Section 377 greatly improved, and finally it was on July 2, 2009 that the Supreme Court of Delhi ruled in favour of LGBT people in a landmark decision by *NAZ Foundation v. The Government of NCT Delhi*, promulgating Section 377 of the 177 years of the Indian Penal Code 1860, which legalizes homosexual crime in India and violates Articles 14, 15 and 21 and repealed this section, allowing for consensual sex between two people of the same sex over the years. The 18-year-old is fully functional in nature.

Not much late but the matter again went to the Supreme Court in the case of *Suresh Kumar Koushal and another v. NAZ Foundation and Others*, whereby the Supreme Court overruled the judgement passed by the High Court in the much celebrated case of the NAZ Foundation. Adding to the explanation further, *Justice Singhvi* said that Section 377 of the Indian Penal Code, does not has any lacuna or shortcoming. The matter to amend or to change it should be left to the competent authority, i.e. the legislature, to monitor and evaluate the legitimacy of this section before striking it and to allow for consensual sex between two adults of the same sex in private.

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<sup>6</sup> Government of India, "Report on SRS Stastical" (Ministry of Home Affairs, 2003).

The court in referring to the Indian and Foreign judgement came to a conclusion and held that,

“The sphere of privacy allows person to develop human relations without interference from the outside community or from the State<sup>7</sup>. The exercise of autonomy enables an individual to attain fulfilment, grow in self-esteem, build relationships of his or her own choice, and fulfil all legitimate goals that he/she may set. In the Indian Constitution, the right to live with dignity and the right of privacy are recognized as dimensions of Article 21.”<sup>8</sup>

The right awarded to each individual setting a basic standard are implicit in the Universal Declaration of Human Rights, 1948. Drawing a reference from here, the judgement of Delhi High Court reflects a general conscience towards sexual minorities. Awarding them with respect and dignity, they should not be discriminated in any field, be it education or job opportunity, they have a right to seek justice. In April 2014, the Supreme Court of India declared transgender to be the 'third gender' in Indian law, thereby allowing them the much awaited social recognition they have wanted. Furthermore, Justice KS Radhakrishnan noted in his decision that, "Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex".<sup>9</sup>

By recognizing transgender as a third party, the Court not only maintained a standard of conduct, but also further promoted class equality, to the point of being denied their equal and protected rights. In this way, a provision that ensures equality not only for the transgender but also in addition equality for the general public. Social justice does not mean uniformity under the law, but to clarify the spirit of the constitution, respected in the preamble, fundamental rights and the Directive Principles of State Policy are broad enough that they can bring within their scope and hold the right to inform the transgender in the first place. Non-acknowledgment of the personality of transgender people prevents them equivalent insurance from securing law, in this manner leaving them defenceless against viciousness and injuries,

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<sup>7</sup> *Suresh Kumar Koushal and another v NAZ Foundation and Others*, 2013.

<sup>8</sup> *Kharak Singh v State of U.P.*, AIR 1963 SC 1295.

<sup>9</sup> *National Legal Services Authority v. Union of India*, AIR 2014 SC.

out in the open spaces or in prison by the police.<sup>10</sup> Furthermore, non-acknowledgment of character of transgender individual outcomes in confronting extraordinary segregation in all circles of society, particularly in the field of education, employment, health services and so forth.

Not only this, discrimination with the transgender community had penetrated even the sphere of public places like restaurants, cinemas, shops, shopping malls, etc.<sup>11</sup> The people were consumed by the phobia and segregated themselves from the community. Thereby, with the coming of the applicability of judgment, it was restricted by the Supreme Court only to the transgender community and thereby explicitly excluded the other communities such as Lesbians, Gays and Bisexual, thereby avoiding and not going in the controversial aspect of the question of validity of Section 377 of Indian Penal Code.<sup>12</sup>

In its decision-making process, the Supreme Court considered the importance of gender in the exercise of various human rights, followed by international instruments in this regard. With the adjudication, the recommendations made by the Department of Social Justice and the Empowerment Expert Committee were evaluated on the basis of legal declarations and were made within six months. Following this, it increased the desire for recognition of transgender community rights. High Court bench containing Justice K.S. Radhakrishnan and Justice A.K. Sikri stated that<sup>13</sup>:

1. Hijras and eunuchs, aside from binary gender, should be treated as "third sex" to shield their rights under Part – III of our Constitution as well as the laws made by Parliament and State Legislature.
2. Institutional and state governments must officially recognize gender identity as a man, a woman or a third party, and transgender have the right to determine their identity.
3. Treating them under the ambit of socially and educationally backward class of citizen, the transgender community should be given all kinds of reservation, may it be education institute or job sector.

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<sup>10</sup> *Dattatraya Govind Mahajan v State of Maharashtra*, AIR 1977 SC 915.

<sup>11</sup> Damini Ratnam, 'Supreme Court recognizes Transgender right' *Live Mint*, April 16, 2014.

<sup>12</sup> *National Legal Services Authority v Union of India*, AIR 2014 SC.

<sup>13</sup> *ibid.*



4. Treating the transgender under a separate HIV surveillance centre as they suffer from high chances of sexual health issues. The Centre and State government had to take measures in this regard.

5. Providing proper medical care and health facilities, the Centre and State government should also keep a check and provide for separate public toilets for the transgender people. Also, steps should be taken to inform the public so that transgender people can feel that they too are part of the community and can be considered as untouchables.

6. The Institution and the State Government must also take steps to create various social welfare schemes in order to develop and take steps to restore their dignity and place in society that they once enjoyed in our cultural and social life.<sup>14</sup>

Therefore, owing to this judgement it can be observed that the judiciary has played an active role in determination of rights of transgender and to elevate their social status in the society. The recognition as “third gender” has not only elevated their dignity but also gave them a prominent place among the different subject of the society, hence, making their existence and life in a better state.

## V. MOVING TO THE MODERN TIMES: THE NALSA JUDGEMENT

Bringing a ray of hope and promise to the community, the NALSA judgment<sup>15</sup> should certainly be praised for putting a stop to discrimination because of sexual orientation of a person, and by carrying out the expectations and hopes of a society that has always been outside the foundation of justice. With confidence and vision, the judges granted legal recognition to each of those individuals whose bodies were not in line with popular sexual behaviour. One further part of the judgment came as important reductions in the current laws enshrined in marriage, adoption, labour laws and the legacy that would require from now on the double arrangement of man and woman to promote the legal rights of transgender people. Moreover, it is hard to ignore the injustice that this decision was made a few months after the trial of Suresh Kumar Koushal and another V. NAZ Foundation and Others maintains the provisions of Section 377 of the Indian Penal Code. The Court, tolerating that Section 377 is

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<sup>14</sup> *Supra* note 12 at 8.

<sup>15</sup> Shreya IlaAnasuya, “Over two years after landmark judgment transgender people are struggling” *THE WIRE*, May16, 2016.

biased against transgender people, explained that the decision leaves the Koushal case<sup>16</sup> untenable and in this way without assistance focused on legal recognition of the sexual community. One of the best changes in the judgment is the inclusion of fundamental rights enshrined in the Constitution, especially the application of Article 19, which, therefore, serves as a definitive decision to recognize the changing human rights.

In accordance with the judgement, there are various remedies and guidelines provided by the court for the government to act upon and ensure their proper implementation. To state few of them, the hijras have been stated as the third sex, for that of the trans-persons they have to choose between male, female or to have a place with the third genders, and that the transgender persons have to be duly offered all the advantages and privileges that are given under the government policies. This step has been taken because of the fact that they would qualify under the ambit of “socially disadvantaged, backward class”. In addition to these, the court has also stated for the availability of separate toilets and to provide them with proper medical treatment, so as to facilitate the treatment of HIV affected transgender people. Along with all this the government should create awareness to guarantee and promote their social acceptance. This would not only uplift their status in society but also provide them with social acceptance in various public spheres of life, thereby promoting and respecting their cultural identity.

## VI. LEGAL PROVISIONS PROTECTING THE TRANSGENDER – A MYTH OR REALITY?

Legal provisions and their enactment hold an integral position in the establishment of rights. Such provisions and legislations being much necessary for improving the condition and status of this community, have come into play under various acts. Talking about the Citizenship Act, 1955, which discusses about the determination of citizenship, does not take into consideration the sexual orientation or the gender determination of a person before granting of citizenship. Therefore, making the subject of citizenship available at equal footing for every individual irrespective of their gender.<sup>17</sup>

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<sup>16</sup> *Supra* note 7 at 7.

<sup>17</sup> Government of India, “Indian Citizenship” (Ministry of Home Affairs, 1955).

The Election commission has also taken special measures to enrol the transgender people as electoral and stated that for a person to be an eligible voter, they should be a citizen of India. In addition to this, the definition of the term “person” under the General Clauses Act, 1897 clearly states that, 'a person includes any company or association or body of individuals, whether incorporated or not'. Thereby, the ambit of the term person is quite large, and it engulfs the transgender community as well. A consistent reading of the provisions of the Constitution described above and the provisions of the Citizenship Act, 1955 and the General Act, 1897 may indicate that, in fact, no conflict or restriction imposed on the 'personal' mind by any of these rules and a Transgender person may undoubtedly fall into the definition of 'person'. Significantly, the Births and Deaths Registration Act, 1969 does not deal with a person's gender or sexual orientation in the event of his or her birth, this gives the Act a neutral character in this regard.

As already seen in the above discussion, most of the protection under the basic rights available to everyone, except that some rights are only available to Indian citizens. The major problems facing the transgender community are discrimination, unemployment, homelessness, lack of educational facilities, lack of medical facilities such as HIV care and hygiene, depression, and marital problems and acceptance. All these problems add to the existing plight of the transgender community and thereby throwing them into an abyss of darkness.

The only legislation at present for the protection of transgender in India is “**The Transgender (Protection of Rights) Act, 2019**”. It has been in effect since 10 January 2020. The Act was introduced in Lok Sabha, the lower house of Parliament, on 19 July 2019 by the Minister of Justice and Social Affairs, Thawar Chand Gehlot, due to the expiration of the People's Bill (Protection of Rights) 2018.

The Act has 23 sections and defines the term "Transformer" as a person of the opposite sex assigned to that person at birth and includes a male or female contact person (whether that person has had surgery or not. Or hormone therapy or laser therapy). or alternative medicine), a person with intersex diversity, same-sex and a person with social and cultural identities such as kinnar, hijra, aravani and jogta. The Act defines various rights for transgender such as

prohibition against discrimination, right of residence, health care rights, right for the recognition of identity and certificate of identity for a transgender person, various welfare measures by the government and establishment of a National Council for Transgender Person. The Act also calls for penalties for the offence of physical abuse, sexual abuse, verbal and emotional abuse and economic abuse against transgender person.<sup>18</sup>

The Act, however has drawn widespread criticism by various Trans activist and allied human groups for its various inconsistent provisions in comparison to the judicial pronouncements and international standard. They claimed that the Act violates their rights instead of empowering them and it does not adhere to the required concerns thus is not worth celebrating.

## A. Critical Analysis of the Act<sup>19</sup>

1. To begin with the act was primarily criticized for not having a proper discussion on it in the parliament.
2. Then comes one of the direst flaws in the law which mandates a legal gender recognition, it requires a screening committee to certify a person's trans status. Under this process Trans people can make alterations to their documents to reflect their identity. It is a two tier process.

Firstly, it makes a compulsion for an individual to apply for a " transgender certificate " from the District Magistrate of the area in which they reside. Secondly, people who cleared the first step can apply for a "change in gender certificate" which notifies the authorities to change their legal gender to male or female. However, in order to get through with the second step a proof of surgery is required by an official hospital to the District Magistrate for a second evaluation, and the official must be "satisfied with the correctness of such certificate." Analysis suggests that it will result in humiliation and harassment of the people as they solely rely on the District Magistrate for their gender recognition.

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<sup>18</sup> *Supra note 3 at 4.*

<sup>19</sup> *Id.* at 1.

Although the Bill was supposed to be in conformity with the NALSA judgment<sup>20</sup>, yet it turned out that it was flawed and lacked the understanding of the concerned community and its plight. This very principle has the right to determine your own gender as emphasized by the Supreme Court in the case of National Legal Services Authority v. Union of India and others, where the Court found that the right to self-determination, including "third sex", was an integral part of the constitutional right to dignity. The right to choose one's own identity is like the right to a dignified life and therefore falls under the right to life under the Constitution of India (Article 21).

Justice K.S. Radhakrishnan, writing for the bench, ordered that "Transgender persons' right to decide their self-identified gender" should be recognized by state and federal authorities. The court made clear that "any insistence for sex reassignment surgery for declaring one's gender is immoral and illegal." In another judgment delivered by Delhi High Court Justice Siddharth Mridul wrote, "A transgender person's sense or experience of gender is integral to their core personality and sense of being. Insofar as I understand the law, everyone has a fundamental right to be recognized in their chosen gender."<sup>21</sup>

In addition to violating court decisions, this provision of the law violates various international standards for legal sexual recognition, including those of the United Nations, the World Medical Association, and the World Professional Association for Transgender Health as all require legal separation and medical procedures. Therefore, there should be legal recognition for transgender people only on the basis of their independence and without medical intervention. The UN High Commissioner for Human Rights has recommended that the United States make arrangements to allow for the re-identification of eligible IDs with the preferred gender and name, without violating other human rights.<sup>22</sup>

Article 6 of the UDHR when read in conjunction with Article 16 of the International Covenant on Civil and Political Rights gives everyone the right to be recognized as a person before the law. In addition, Article 17 of the Agreement, inter alia, provides,

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<sup>20</sup> *Id. at 18.*

<sup>21</sup> *Shivani Bhatt v State of NCT Delhi and ors.* (2015).

<sup>22</sup> Vivek Diwan, Clifton Cortez, Marina Smelyanskaya, JoAnne Keatley, "Transgender social inclusion and equality: a pivotal path to development" *JIAS* (2016).

“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”.

3. **Specific law but not specific protection-** This Act prohibits discrimination against transgender people in educational institutions, public institutions, while hiring or purchasing property, accessing health care and using public services. However, the Act does not address the provision of education and public employment, although the Court has ruled that the said community should be treated as a 'socially and educationally backward class.'

Trans community mostly survives on begging and have no constant source of income. The suitable Indian work and learning place for transgender is going to be a tough task because accommodating social change and greater acceptance leaving the stigmas has always been a really slow process in India. Therefore, there need to be affirmative action by the government for this community to connect this legal acceptance with social acceptance for them and put them in equal pedestal with cis-gender.

4. **No equal protection of law-** The very aim of the law may be to provide equal protection of law as cis-gender to transgender too, but it's still a pipe dream as this legislation does not extend equal protection of the law to this community in the matter of sexual offences as is enumerated in Article 14. Section 18(d) of this Act treats offences of a sexual nature against this class of people as petty and according to Code of Criminal Procedure 1973 and being less grave as compared to similar offences against women. This Act provides for a term of imprisonment for a term not exceeding six months and to a fine, to a person who injures or harms or endangers health, safety, health or well-being, whether mental or physical, to a person who commits or habitually engages in acts involving physical abuse, sexual harassment, verbal abuse. and emotional and economic abuse. In contrast, for crimes against women such as stalking (Indian Penal Code 354D) and sexual assault (Indian Penal Code 354A) is punishable by up to three years in prison and rape for life imprisonment. This is a clear violation of the spirit of the constitution and what has

been decided in the 2014 Supreme Court decision in the NALSA and Union of India case which recognizes the recognition of the opposite sex / third party as individuals' falling under the requirements of Article 14 of the Indian Constitution.

5. In addition, the Act states that where any parent or family member is unable to care for a transgender person, the competent court by order will direct that person to be placed in a correctional facility. Article 6 of the UDHR when read in conjunction with Article 16 of the International Covenant on Civil and Political Rights gives everyone the right to be recognized as a person before the law. In addition, Article 17<sup>23</sup> of the Agreement, inter alia, provides, “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”. According to the Human Rights Committee any interference by the State with regard to personal privacy, whether permitted by law, must be in accordance with the provisions, the purposes of the agreement and must, in any case, be reasonable. According to the Human Rights Committee, any interference by the State with regard to personal privacy, whether permitted by law, must be in accordance with the provisions, the purposes of the agreement and must, in any case, be reasonable in certain circumstances.<sup>24</sup> Also, the law does not provide the infrastructure, safety and medical conditions that these rehabilitation centers must comply with in order to provide adequate child care facilities. Studies<sup>25</sup> have shown that an absent family and community structure for trans children manifests in the form of mental health problems in trans children, and leads them to engage in destructive behavior like self-harm and substance abuse. But the Act does not account for this.

## VII. MARRIAGE, PARENTAL AND ADOPTION RIGHTS - A PIPE DREAM

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<sup>23</sup> International Convention on Civil and Political Rights, art.17 (December 16 1966), available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (last visited August 21, 2020).

<sup>24</sup> U.N. Human Rights Committee, CCPR General Comment No. 16, Article 17, “The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 1988”, available at: <https://www.refworld.org/docid/453883f922.html> (Last visited on August 22, 2020).

<sup>25</sup> Ryan, C. “Generating a revolution in prevention, wellness & care for LGBT children & youth”. *Temple Political & Civil Rights Law Review* 23(2014).

Decriminalization of homosexuality by the Supreme Court is worth celebrating but the amelioration of the trans gender's rights has miles to go. Homosexuals still have no marriage and parenting rights in India which show Indian society's hetero-normative ideals. It prevents them from having a rights-enabled and recognized family structure. Marriage is a legal union of two people as life-partners that enables a person to experience some of the very paramount ventures of life, such as family and parenting rights. It is that foundation stone without which there would not be any progress in the society.<sup>26</sup>The marriage of Hindus is governed by their Hindu Marriage Act 1955, which says that marriage can only be solemnized between two Hindus where at the time of marriage the bridegroom has completed the age of 21 [twenty-one years] whereas the bride has completed the age of 18 [eighteen years].<sup>27</sup> It excludes same-sex marriage by referring the term bride and bridegroom. Section 60(1) of the Indian Christian Marriage Act 1872 puts the condition that the age of the man and the woman intending to get married should be 21 and 18 years, respectively. Muslim Marriage also lacks provision for the recognition of same-sex marriage. They face differential treatment from their own family when it comes to these rights. Soon after the 377 judgment was pronounced a plea was filed by *Tushar Nayar*<sup>28</sup> in the Hon'ble Supreme Court seeking civil rights i.e., marriage and family rights for the LGBTQ community. The petition was dismissed on the ground of bizarre justification that the Court is not inclined to entertain it after its decision in *Navtej Singh Johar v. Union of India*. Similarly, a lesbian Couple in the *Shamli District* of Uttar Pradesh has to seek police protection after their families had threatened them, opposing their decision to get married.<sup>29</sup> Recently, regarding the recognition for same-sex marriage in Hindu Marriage Act 1955 a petition has been filed in the Delhi High Court, to which Solicitor-General on behalf of Union has said that our law, our legal system, our society, our values do not recognize same-sex marriages<sup>30</sup>. In January, a petition in the Kerala High Court

<sup>26</sup> *Maynard v Hill*, 125 U.S. 190 (1888).

<sup>27</sup> The Hindu Marriage Act, 1955(ACT NO. 25 OF 1955).

<sup>28</sup> *Tushar Nayar v Union Of India*, W. P. (Cri) No(s). 176/2018.

<sup>29</sup> Lesbian Couple In Uttar Pradesh Village Seeks Police Protection To Marry' *NDTV*, 20 June, 2019, available at :<https://www.ndtv.com/india-news/uttar-pradeshs-lesbian-couple-in-uttar-pradesh-village-seeks-police-protection-to-marry-2056424> ( last visited September 21, 2020).

<sup>30</sup> Nilasish Chaudhary, "Not Allowing Homosexual Marriage A Violation Of Right To Life': PIL in Delhi HC Seeks Recognition Of Same-Sex Marriage" *Live law*, 13 September, 2020, available at :<https://www.livelaw.in/top-stories/not-allowing-homosexual-marriage-a-violation-of-right-to-life-pil-in-delhi-hc-seeks-recognition-of-same-sex-marriage-162869> (last visited September 21, 2020).



challenging the Special Marriage Act has been filed by a couple Nikesh Pushkaran and Sonu MS.

The lack of legal provisions for same-sex marriage in civil law and personal will either require an amendment to the special Marriage Act or new law which recognizes same-sex marriage. Uniform civil code for all sex can also be a resort to the problem.

There is also no provision in existing personal laws that allow trans couples to adopt. Most community members have a feeling that the right adopt is crucial and having no legal provision for the same makes it difficult for them to have a structured family as heterosexual couples. Another option for the trans-couple is to surrogate a child but it still requires a legal validation. The Surrogacy Draft (Regulation) Bill, 2019 creates a process, which is too small to send surrogacy that can prevent transgender from submitting surrogacy. It violates transgender rights in every way from violation of the right to equality, the right to privacy and the right to reproduction, the rights guaranteed by the Supreme Court in its judgment and the rights granted under the Transgender Act<sup>31</sup> if the Bill is passed and enacted.<sup>32</sup>

## VIII. CONCLUSION

From the above discussion it is quite evident that people with different sexual orientation i.e. the transgender people face bigotry, segregation and prohibition in the general public. While the judiciary has made a noteworthy move to evacuate the shame appended to the third sexual orientation, the legislature has flawed to give it a legal sanction. Government should take initiatives to elevate the status of these people as alone the judiciary cannot help. Adopting such measures which are suitable for the acceptance of these among the society should be promoted. Considering the guidelines laid down by the Judiciary, the government can work in alignment to these and henceforth promote the status of these people. The adoption of international conventions and treaties should be done by the government so that the plight of the transgender people could be improved. Recognition and treating of every individual with utmost respect and dignity is the fundamental principle of human existence and therefore it should be kept in mind while addressing any person or any community. Marriage is the most prominent and the most beautiful way to show affection towards one's partner and it should not be denied to the non-binary gender couple. Adoption and Surrogacy Rights must be given

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<sup>31</sup> *Id.* at 1.

<sup>32</sup> Surrogacy Draft (Regulation) Bill 2019.

a legal sanction to strengthen the rights of the community. Our society is still not equipped to deal with the homophobic attitude. Educating the people about the issues and problems faced by this community can be done from an early stage as well, this could help in reducing the school dropout rates of transgender students and provide them with a harmonious environment to study and avail the opportunities that lie ahead of them.

