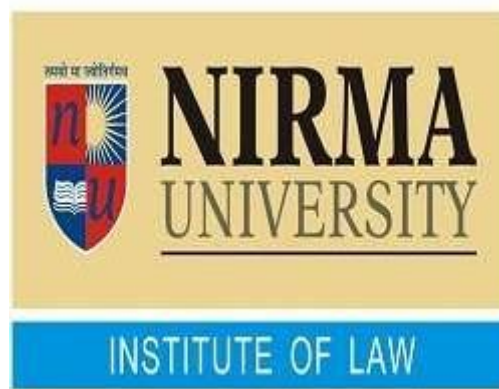


**A DISSERTATION**  
**ON**  
**IS THE LEGAL RECOGNITION OF TRANSGENDER, END OF THE**  
**ROAD?**

SUBMITTED TO:



As fulfilment for requirement of the  
**LL.M DEGREE**  
**(BATCH 2020-21)**

Under the guidance of  
**Prof. (Dr.) Varsha Bhagat-Ganguly**

SUBMITTED BY:  
**MILI GUPTA (20ML015)**

## DECLARATION

---

I, MILI GUPTA (20ML015), declare that this dissertation entitled “**Is the Legal Recognition of Transgender, End of the Road?**” which is being submitted for the award of LL.M Degree is the outcome of research carried out by me under the supervision and guidance of Prof. (Dr.) Varsha Bhagat-Ganguly, Institute of Law, Nirma University.

I, further declare that all the information, views, and opinions cited in the dissertation are taken from the existing literature and are duly acknowledged at proper places. I further declare that to the best of my knowledge, the dissertation doesn't contain any part of any work which has been submitted for award of any degree either in this University or in any other University/Deemed University for the award of any other Degree or Diploma or Fellowship.

I further undertake that the contents of the dissertation if found copied I will be personally responsible for the consequences.

**Date:** 29 July, 2021

**Name:** Mili Gupta

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## CERTIFICATE

---

I have the pleasure to certify that **MILI GUPTA (20ML015)**, a student of Institute of Law, Nirma University, has pursued her research work and prepared her dissertation entitled, **“Is the Legal Recognition of Transgender, End of the Road?”**, under my guidance and supervision. To the best of my knowledge, this dissertation is the result of original research. The work of the dissertation is of the standard expected of a candidate for Masters of Laws (LL.M) in Constitution and Administrative Law and I recommend it for submission and evaluation to the Examiner.

**Date:** 29 July, 2021

Prof. (Dr.) Varsha Bhagat- Ganguly  
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Ahmedabad

## ACKNOWLEDGEMENT

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Though only my name appears on the cover of this dissertation, a great many people have contributed to its production. I owe my gratitude to all those people who have made this dissertation possible and because of whom my gratitude experience has been one that I will cherish forever.

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I also take this opportunity to express gratitude to the *ILNU Library* which has provided me assistance to gather all resourceful material through their remote access facility during this pandemic.

On a personal note, I would like to thank my parents and family for unceasing encouragement, support and attention. I would also like to gratify my friends for their constant support during this time. I also place on record, my sense of gratitude to one and all, which directly or indirectly supported and helped me towards the completion of this dissertation.

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# CHAPTER- I

## INTRODUCTION

---

### MEANING: GENDER

Traditionally differentiation of human sex into male & female based only on the organic plan of their genitalia. Nonetheless, as a general rule, there are individuals who don't find a way into this custom and oppose the organic twofold. The homeless people who thump on the moved up windows of our vehicles at traffic lights or as artists in a nearby pub are defined as “Transgender” individuals. These transgender people carry on with a day to day existence full of difficulties. The word reference importance of the prefix “trans” signifies ‘over’, ‘beyond’ or ‘across’. However, the term transgender does not merely refer to a gender transition. This phrase is frequently misunderstood by the general public. It's a wide word that encompasses all people who, throughout the most of their life, have an intrinsic sense of gender that differs from the sex assigned to them at birth.

The term Transgender is derived from the Greek meaning “*Keeper of the Bed*”. Vedic society appears to have recognized three distinct genders. According to one's personality or Prakriti, the Vedas depict people as falling into one of three groups between 1500 and 500 BC. Different writings recommend that third gender people were notable in pre-modern India & also included male and female bodied individuals just as intersexual. The Manu Smriti, the founding text of Hindu law, clarifies the biological beginnings of the three genders. The Mahabhaya, a treatise on Sanskrit grammar, written by, Indian scholar Patanjali, states that three linguistic sexual orientations are formed from three natural sexes. The previous Tamil Grammar “*Tolkappiyam*” likewise alludes to hermaphrodite as a third “neuter” sexual orientation<sup>1</sup>. The nine planets are each appointed to one of three sexes in Vedic Astrology. Mercury, Ketu and Saturn are connected to the third sexual orientation, “*Tritiyaprakrati*”. In Puranas, there are references to 3 forms of devas: music & dance, **Aspsaras** [female], **Gandharva** [male] & **Kinnars** [neuter]<sup>2</sup>.

The Transgender or popularly termed as ‘Hijra’ is defined in English as “*Eunuch*” or “*Hermaphrodite*”, where the abnormality of the male genitalia is fundamental of the term<sup>3</sup>. Nonetheless, hijras are conceived male, a couple having been brought into the world with

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<sup>1</sup> M. Michel Raj, “*Historical Evolution of Transgender Community in India*”, 4 Asian Review of Social sciences, (2015), PP- 17-19

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

intersex varieties. Some of them go through a commencement custom into the Hijra local group referred as 'Nirwaan' which alludes to the evacuation of penis, scrotum & gonads. LGBT Communities is a well-known transgender community. Gay, lesbian, bisexual, and transgender people are all part of the LGBT population. On the one hand, gay and lesbians are persons who are inclined to people of the same gender (also referred as homosexuals based on sexual orientation), whereas bisexuals are individuals both of whom are homosexual and straight<sup>4</sup>. Persons whose gender identification differs from the sex authorized at birth are referred to as transgender. There is a little distinction between transgender and transsexual individuals in this regard. People who seek medical therapy to change their sex are known as transsexuals. There are two opinions to every story, as the adage goes. Here, too, the similar rule applies. Despite the fact that transgender people are accepted by society, they are nonetheless viewed as aliens after decades.

In the evolution of sexual traits in biological systems, both environmental and genetic variables are important. Although there are two genders, hermaphrodites may arise in lieu of one or both. Some animals don't have a fixed sex and can shift depending on environmental factors. As a result, scientists still doesn't have a complete understanding of the complicated sex-determination mechanism in the animal world<sup>5</sup>. In most cases, however, sex is determined genetically, with men and females having separate alleles or sets of genes that dictate unique sexual appearance. The development of reproductive system in humans is primarily dependent on gene activity and interconnections inside the embryo, as well as interconnections with certain other embryos in the uterus if there are any, and the maternal surroundings. However, sexual identity persists in modern culture, and instances of such mayhems occasionally appear in the headlines involving well-known athletes<sup>6</sup>.

*"Gender is an identity formed via repeated bodily acts"*, says gender theorist Judh Butler. The word transgender acquired prominence in the United States in the 1990s as a result of increased campaigning and research. The word was widely adopted in the mid-1990s by groups of persons of various types who do not conform to their anticipated sexes and living the sexuality that was not given to them at origin. The term *"Western transgender"* refers to a variety of persons whose sexuality is uncertain and are living the sexes that were not

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<sup>4</sup> Ina G & Nayar KR, *"Trajectories of the Transgender: Need to Move from Sex to Sexuality"*, Economic and Political Weekly, Volume (47), No. 47-48, (2012), PP- (20-22)

<sup>5</sup> Ehrlich, P., *"Human Natures: Genes, Cultures, & the Human Prospect"*, New York: Penguin Book, (2001).

<sup>6</sup> Fausto- Sterling, A., *"Sex/Gender: Biology in a Social World"*, New York: Routledge, (2012).

given at birth, as well as those who experience sexes that are not the standard definition of gender. Transgender is both male and female to male [F + M] and for female [M + F] gender transgressions. Third gender, third sex, & transgender are terms used in human culture to describe people that are neither male nor female. Some researchers have used this word to define gender identity, whereas others have thought of it as a masculine soul inhabiting a female body.

### **TRANSGENDERS IN INDIA-HIJRAS/KINNARS**

In Indian society, the phrase “Transgender” is frowned upon. For its western roots, the [M + F] and [F + M] binaries, and a variety of additional classifications that come under the tent of transgender, which is one of the primary distinctions between hijra identification in India and perhaps other M + F transgender orientations in western nations. In India, socially hijras are considered a third gender, while transgender or transsexual people in Western nations are supposed to fit into a rigorous sex or gender dichotomy. Now the issue is who really are transgender people? The basic appropriate response is that ‘a transgender person is an individual whose gender identification does not reflect the gender given to that individual at birth’. The Transsexual community is one of the most marginalized and powerless sections in Indian culture, where they are not regarded as human beings and are forced to live in isolation. As a result, the demand for a strict definition paved the way for the NALSA decision, which described the word as “*Transgender is often regarded as an umbrella term encompassing people whose sexual orientation, gender presentation, or behavior do not correspond to their biological gender*”<sup>7</sup>.

As a result, the phrase transgender may be used to address people whose genitals are intertwined as well as those whose gender orientation and behaviour deviate from the traditional standards anticipated from their natal sex. Some regional labels are used to denote the group in India. The name *kothi*, for instance, refers to a group of feminine-identified persons who were born with a masculine gender. *Hijras*, as a combination of feminine-masculine....*Aravani*, *Jogtas/Jogappas*, & *Shiv-Shaktis* are other significant regional & trans-regional characteristics that symbolize this category. This jumbled definition of transgender encompasses a slew of “Regional” words and characteristics. People who identified as neither man nor woman, kinnar (a Sanskrit word), or third gender are referred to as hijras<sup>8</sup>. Eunuchs, Transvestites, Hermaphrodites, and Gays are some of the other names given to them.

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<sup>7</sup> National Legal Services Authority vs Union of India & Others, (2014) 5 SCC 438

<sup>8</sup> Serena Nanda, “*Neither Man nor Woman: The Hijras of India*”, Belmont, CA: Wardsworth Publishing Company, 2<sup>nd</sup> Edition, (1999)

Hijra is an Urdu term originated from the Semitic Arabic root “*Hir*”, which means ‘*to leave one's tribe*’ and was adopted into Hindi<sup>9</sup>. Hijras reside mostly in northern Indian cities, where they have the most opportunity to fulfill their traditional duties, although they may be found across India.

The link between gurus (masters, teachers) and chela's is the foremost important in the hijra culture (disciple)<sup>10</sup>. When a person wishes to become a Hijra, he or she is escorted to Bombay to meet with one of the seven main gurus. The gurus offer the new female name during the initiative rite. The newcomer swears to follow the gurus' instructions and the community's regulations. The initiation charge is paid by the chela or, more often, somebody on her account, and the gurus put the disciple's initials in her record sheet. Hijras live in small groupings of 5 to 15 people, and the leaders of these smaller groupings are known as gurus. Within their society, Hijras make no distinctions based on caste or religion. Hijras are connected to each other through fictive kinship. To formalize their connection, fictional characters trade little amounts of wealth, clothing, jewels, and sweets. Hijras from all across India are linked by such links, and there is a continual flow of people visiting their gurus and fictive family in different places. Thousands of hijras from all across India attend yearly religious and secular meetings.

According to the 2011 census, Country's total transsexual demographic was 4.99 lakhs. The greatest share of the third sex population was found in Uttar Pradesh (U.P.), with 28%, following by 9% in Andhra Pradesh (A.P.), 8% apiece in Maharashtra and Bihar, and above 6% in both Madhya Pradesh (M.P.) & West Bengal (WB)<sup>11</sup>.

#### Categorization of Hijras (Transgenders) on the basis of Work:

According to debates, there are primarily three types of hijras<sup>12</sup>:

1. The Hijras at the top are involved in “*Toil Badhai*”, a traditional manner of bestowing blessings on important events such as weddings, childbirth, and the start-up of a new company, among others. They perform and sing with their classic music and the dholak (musical instrument), as well as other stringed instruments performed by the other individuals, on such events.

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<sup>9</sup> Akhand Sharma, “*Identity Crisis for Transgender in India: A Case-Study from Madhya Pradesh*”, The Journal of UGC- HRDC Nanital, Volume (12), Issue II, July 18, (2018), PP- (157-167)

<sup>10</sup> Serna N, “*The Hijras of India, Journal of Homosexuality*”, Volume (11), No. 3-4, (1986), PP- (35-54)

<sup>11</sup> Census of India 2011

<sup>12</sup> Georgina M & Geraldine M, “*A Qualitative Exploration of Transgender Identity Affirmation at the Personal, Interpersonal, and Sociocultural Levels*”, International Journal of Transgenderism, Volume (14), No.3, (2013), PP- (14-154)

2. Hijras who rely on sex work for a living are the next in line. Under different socioeconomic categories of consumers, this includes anything from home-based sexual activity to sidewalk sexual activity. They either stand on the roads, at bus stations, or at “*Chalti-Phirti Dagars*”, which are mobile sites where consumers come to bargain with Hijras who are grouped together, and then they drive them away or move to another area. Many Hijras have entered organized lobbies such as clubs, bars, discotheques, and other similar establishments

3. Those Hijras who rely on begging as a source of income are the very last group of hijras. The most popular locations are traffic lights, often known as “*Laal-Batti*” (red light) zones, or buses and trains. They act as though they are beggars and engage in begging behaviours.

The moral requirements and perceptions of community are frequently used to construct a person's character. Individuals who strive to oppose them with their identities, sexual orientations, & preferences, on the other hand, are frequently rejected, discarded, and labeled as ‘the other’. We exist in a community that is heavily influenced by sexuality and gender. Our community is pervaded by the classification of persons as ‘masculine’ or ‘feminine’. Gender variety, on the other hand, disrupts gender binary-based sexual preference classifications. Gender variation challenges the sexual binary in a variety of forms, including transsexual, third or some other sexes, gender mobility, orientations beyond the sexuality, gender queer, and so forth. This standardization of gender boundaries is also contested by persons who identify as “transgender”.

Over centuries, transsexual persons have served an essential segment in ancient Indian society. They were portrayed in popular Hindu spiritual texts including the Ramayana & the Mahabharata. Transgenders were assigned crucial duties in Mughal rulers' royal palaces. Their demise came only with the establishment of British control in the 18th century, since they were placed on a blacklist & branded as criminals. In 2014, Apex Court of India issued a major judgement proclaiming that transgender individuals must have equivalent exposure to opportunities in community. Despite this legal acknowledgment, transgender people in India have now been compelled to survive on the periphery of modern community. In modern India, all participants of these subsets encounter extreme oppression and intimidation throughout all areas, and they are exposed to inhumane treatment such as abusive language, sexual exploitation; false prosecutions; exclusion of share in intestate succession, facilities, and endorsement to academic institutions; and stigmatization in a variety of contexts such as

household, academic institutions, and workplaces. They are frequently left with no further alternative for subsistence than soliciting or performing at ceremonies, having been abandoned by their family and ostracized by adverse taboos. Despite their exposure to intimidation and assault, their suffering goes mostly unrecognized. This just serves to highlight the population's impotence and degradation. Despite the fact that the Constitution of India offers grandiose commitments to prevent all forms of prejudice, there is controversy about the idea of sexuality and also the implications of such a restriction on third-gender liberties.

For almost two millennia, transgender people have been denied sociocultural engagement. Even now, they have restricted recourse to education, medical services, and government services. To make situations miserable, they are officially recognized as nonentities, that is an infringement of Indian Constitution. Transgender people in India are progressively becoming legal citizens, but transsexual will not be allowed to exert their constitutional privileges in matrimony, adoption/raising children, or accessing financial assistance including such complimentary and funded medical services, surgeries, as well as healthcare medications unless community as a whole makes significant endeavours.

#### **STATEMENT OF THE PROBLEM-**

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Transgender people have a long history of being ostracized owing to the dangerous architecture of post-colonial practices and laws. The Transgender Rights Bill, (2014) expressed optimism that the court's decision will be accompanied by legislative resolution. However, what proceeded was a transparent repudiation of the assertions made, as well as promises.

A number of bills, starting with the one introduced in 2016 and ending with the one introduced in 2018, were nothing more than a death knell for the population's expectations. The most recent letdown is the Transgender Persons [Protection of Rights] Bill, [2019]. Despite its claims to be a reasoned follow-up to the Nalsa Verdict, it falls short of protecting the rights to self-identification. The method for official gender identification, which transgender persons can use to update their certificates to represent their personality, is certainly the most fundamental problem in the current legislation.

The 2019 Bill undermines the population on a number of levels like numerous definitions prescribed by the bill are quite superfluous with reference to society concerns; while there is a distinct description for “intersex people”, it appears to have been made solely to appease worldwide organizations seeking a distinct description for intersex people; the chapter prohibiting discriminatory treatment does cover prejudice against transgender individuals on a variety of occasions, including the constraint of motion with reference to transsexuals in isolating from their families & enabling an individual to go out exclusively via an instruction of the “competent court”.

The right to marriage is essential for preserving human liberty and living a purposeful life, as a result, Indian judiciary have construed Article 21 of the Indian Constitution to incorporate marriage as a fundamental right. Is it ethical to stigmatize people solely because they do not comply with a stereotypical binary gender distinction when matrimony is such an important civic privilege that is crucial to everybody of the nation? Unfortunately, despite the fact that the freedom to marry according to one's own preferences has been acknowledged as a constitutional right, the current societal situation wherein third gender individuals find themselves deprives them of this privilege. The third gender is not included in “The Hindu Marriage Act” or even “The Special Marriage Act”. Despite the fact that the SC had already acknowledged their right to fairness under Article 14, the vagueness in Hindu personal statute, as well as the inadequacy of laws acknowledging third-sex person's matrimonial and succession rights, expose them to prolonged segregation.

Despite this lawful acknowledgment, transgender people in India have still compelled to survive on the periphery of community. The community is both patriarchal and homophobic. People continue to act abnormally in their presence despite certain improvements, making them feel disgraced and undeserving of life. They have been excluded not just from community, as well as from their entitlements and benefits. Our culture is progressing in many ways, however when it pertains to transsexual persons, community is still hesitant to embrace them as residents of the population. Transsexual people are frequently exposed to disparaging remarks & condemnation, and they are frequently shunned from their families. They are unable to exercise essential liberties including such academic rights, and they are unable to purchase standard subsistence requirements owing to unemployment, an absence of medical facilities, and limited exposure to public areas. They are also unable to obtain a driver's license [DV], Permanent Account Number [PAN Card], even Ration cards, which are required to access government benefits. In incarceration, transgender individuals are confined



in cells alongside individuals who do not share their gender identity, subjecting them to assault and sexual exploitation. Statutory rights do not always imply social and cultural appreciation, nor do they always imply acknowledgment by the various branches of the government.

### **Research Hypothesis-**

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The hypothesis of the present study rest on the presumption that:

- a. The mere legal recognition is not sufficient many more changes are needed both socially and legally to safeguard the interest of the transsexual population
- b. The transgender people are still subjected to exploitation and not have access to other fundamental rights such as education, health or employment, even after the judgment.
- c. The transgender bill fails the society on numerous aspects.

### **RESEARCH QUESTIONS-**

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- a. Is the Nalsa Judgment really path breaking?
- b. What are the implications of the Transgender Person's [Protection of Rights] Bill [2019]?
- c. Is just legal recognition sufficient to protect the status of transgender in the society?
- d. Why the transgender community is still struggling for their fundamental rights in spite of the Nalsa Judgment?
- e. What beyond legal recognition needs to be addressed?

### **AIMS & OBJECTIVE OF THE STUDY-**

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The primary objective of this research is to examine the consequences of Nalsa judgment on the lives of the transgender community and an attempt to bring into consideration that in spite of legal recognition many more changes are needed both socially and legally.

### **RESEARCH METHODOLOGY-**

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The research methodology is descriptive, analytical and doctrinal in nature. To collect information and data for the purpose of drawing conclusion and for the understanding of the existing legal framework, both primary and secondary source of research has been used.

Primary sources will include legislative bill and statutes. Secondary sources namely books, articles, journals and reports of various organization and authorities will be used to ascertain whether the legal recognition is sufficient to protect the status of transgender in the society.

## **LITERATURE REVIEW-**

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### **1. *“Living on the Societal Edge: India’s Transgender Realities”***

**Author(s) – Govindasamy Agoramoorthy & Minna J. Hsu**

**Source- Journal of Religion and Health, volume 54, No. 4, August, (2015), PP-1451-1453**

**Published by- Springer**

The past triumphs, current struggles, and future objectives of transsexual people in the world's largest democracies are examined in this article. Whenever it pertains to the acceptance of transsexuality or homosexuals in social system, the Hindu culture has far surpassed other worldwide faiths. Hindu believers strive to embrace lord as a masculine, feminine, or sometimes gender-neutral being without bias. Families in Indian modern society are mostly unconcerned about the humanitarian requirements of trans-gender youngsters. They do not conform to community’s two-gender paradigm, thus parents are sometimes hesitant to care for them with empathy and respect. As a result, they have developed an undesirable and unaccepted creature in community, who have been subjected to humiliation, persecution, and bullying since they were children. Because they are commonly discarded by their parents, they fall out on academic possibilities that would normally be open to all teenagers. They eventually wind up on the sidewalk, powerless, starving and trafficking in order to make ends meet. Transgender people in India are progressively becoming acknowledged as legal citizens, but they continue to struggle to meet their fundamental necessities. Above everything, society's wider populace must be genuinely understanding and caring towards the nation's transsexual individuals, treating them as equivalent citizens, ensuring that the formerly repressed minority sexuality can finally be liberated.

### **2. *“Decriminalizing Homosexuality in India”***

**Author(s) – Geetanjali Misra**

**Source- Reproductive Health Matters, Volume [17], No. [34], November, [2009], PP- [20-28]**

**Published by - Taylor and Francis, Limited**

This paper explores the victorious struggle over Section 377 of the Indian Penal Code [IPC], which made private consensual intercourse amongst people of the similar sexuality illegal. This rule resulted in severe prejudice towards homosexuals, who were exposed to regular physical abuse and extortion attempts by cops who threatened them with imprisonment. NGOs that operate with homosexual people have also been threatened and prosecuted under Section 377 on several occasions. The legislation is probably to have hampered the fight against HIV by marginalizing homosexuals and frightening gay individuals with imprisonment. After an inventive and continuous public media effort by campaigners, the clause was repealed in July, 2009. The Voices against Section 377 alliance brought together initially disadvantaged sexuality & LGBT entities with communities operating in places including such rights of children as well as women's activists, demonstrating widespread assistance for non-discrimination towards homosexual people. For LGBT people to achieve complete recognition and fairness in Indian community, more legislative and sociological improvements are necessary. Nevertheless, the decision went beyond the LGBT subject, implying security for all minority groups and introducing the concept of sexual identification for the very first instance in South Asia.

**3. *“Recognition of Foreign Same-Sex Marriage in India”***

**Author(s) – Stellina Jolly & Ritika Vohra**

**Source- Journal of Indian Law Institute [ILI] , Volume [59], No. [3], July-September, [2017], PP- [302-326]**

**Published by- Indian Law Institute**

The study examines the legal ramifications of international same-sex marriages conducted beyond India. The article also looks into the lawful status of same-gender unions in India. Despite the fact that section 377 does not mention same-sex wedding, the SC judgment renders it impossible to claim in favor of its acknowledgment, because decriminalization of homosexual behavior occurs before complete marital rights are granted to same-sex individuals. India has essentially incorporated the civic notion of matrimony via the

enactment of The Special Marriage Act, and that there is an increasing widespread clamour in India to allow same-sex marriages. Nevertheless, unless suitable statutory actions are made to allow national same-sex marriages, it makes lawful, sociological, and political context to acknowledge overseas same-sex union, which the administration has not done as of now. Recognition of same-sex relationship between Indians and foreigners would have no detrimental impact on Indian community. Same-sex relationships are supported by internal & external demand, and also human rights reasons, thus India may certainly strive to protect its worldwide prestige by advancing same-sex relationship laws at the federal stage. The approach to marital legalization in India will be determined in part by how this domestic & international demand develops as a hot topic of discussion. The existing legal situation in India prohibits same-sex unions, therefore legal modifications are required to allow same-sex relationships.

**4. “Global Recognition of Human rights for Lesbian, Gay, Bisexual and Transgender People”**

**Author(s) – Suzanne M. Marks**

**Source- Health & Human rights, Volume [9], no. [1], [2006], PP- [33-42]**

**Published by- The President & Fellows of Harvard College on behalf of Harvard School of Public Health/ Francois-Xavier Bagnoud Centre for Health and Human Rights**

This article investigates that Human rights, irrespective of cultural or societal standards, are indeed the basic rights of each and every individual. Fighting for the acknowledgment of LGBT civil liberties entails not only guaranteeing access to medical care but also coming up and taking action to guarantee LGBT person's presence, comprehending LGBT concerns, & also being informed of the variety of human rights infringements that happens. To be acknowledged as human beings worthy of all civil liberties, norms must be incorporated into legislation and regulations, both worldwide and domestic, and biases must be fought so that everyone accept LGBT persons as living beings capable of all civil liberties.

Exclusion of civil liberties for any class of people is a repudiation of their existence, which has serious consequences for their wellbeing. It may contribute in prejudice in accommodation and employment (influencing the potential to purchase meals, shelter, and medical services); limited benefits (impacting the capacity to pay for medical services and

economic stability); bullying and pressure (influencing psychological state and/or triggering substance abuse, tobacco, obesity, or suicidal thoughts); solitude (contributing to mental illness); sexual risk-taking (which can expose oneself and others to sexually healthcare concerns, such as HIV); physical assault and wounds; and/or suffering and deaths. If healthcare institutions use a rights-based perspective to LGBT medical care, clearly acknowledging their presence and tailoring health treatments to their requirements, it may reduce prejudice fears and improve healthcare results.

5. ***“Vacillating between empathy & contempt: The Indian Judiciary & LGBT Rights”***

**Chapter Author(s) – Arvind Narrain**

**Book Title- Envisioning Global LGBT Human Rights**

**Book Editor(s) - Nancy Nicol, Adrian Jjuuko, Richard Lusimbo, Nick J. Mule, Susan Ursel, Amar Wahab and Phyllis Waugh**

**Published by- University of London Press, Institute of Commonwealth studies**

By examining five famous situations, this chapter depicted the fluctuation amongst empathy and disdain. 2 of them deal with the plight of Lgbt individuals in British India, while the other three are about present time. They cover the years “1884 to 2014”, & the narratives interspersed throughout demonstrate how the legislation restricts LGBT individuals in terrible and devastating manner, as well as how they fight those constraints in exciting aspects. The experiences of Khairati & Nowshirwan demonstrate a legal incapacity to appreciate what Khairati & Nowshirwan went through due to an absence of empathetic terminology. Regrettably, this deficiency persists in contemporary India. The Naz ruling, which came out in 2009, was the first to break this legislative barrier. The restricted legal notion that LGBT lifestyles only pose criminal legislation difficulties underlying Section 377 was overturned in the judgement. It was a disappointment when the 2009 ruling was reversed in Suresh Kumar Koushal in 2013, denying LGBT people their fundamental freedom. The recognition of the transsexual population's prejudice and the reality that its members are equal citizens with privileges in NALSA helped to reclaim much of everything that was destroyed as a result of Koushal verdict. The SC should decide the conflict among both Koushal & NALSA in favor of a larger & more inclusive view of LGBTQ community as equal living beings subject to every human and civil rights. However the actual concern is: “How far will a ruling that strikes against such a ground-level principle endure to hold?”

6. ***“The Socio-Legal Exploitation of the Third Gender in India”***

**Author- Prof. Shilpa Khatri Babbar**

**Source- IOSR Journal of Humanities & Social science [IOSR-JHSS], Volume [21], Issue [5], & Ver. 4. May [2016], PP- [12-18], [e-ISSN- 2279-0837], [p: ISSN- 2279-0845].**

The article aims to switch the vision of the social equality discussion from allocation or reallocation to a respectable acknowledgement, focusing on the inequalities affiliated with sexual orientation, both of which are noticed as socio-cultural as well as deeply embedded in social structures of expression, perception, and interaction by the author. The article sheds emphasis on the plight of transsexual people in India, regardless of the fact that the judiciary have recognised the tragedy of their presence and have been unwilling to provide them with a decent livelihood while being compassionate to the point of even granting them acknowledgment. The author stated than the journey to formal acknowledgement of transsexual people as a third sex has been and remains to be lengthy and challenging. It's critical to use judicial activism to modify constitutional interpretation instead of proposing an amendment, and even to avoid seeing the judiciary as a representative democratic authority.

7. ***“Recognizing the Right of the Third Gender to Marriage and Inheritance under Hindu Personal Law in India”***

**Author – Atmaja Tripathy & Dipayan Chowdhary**

**Source- BRICS Law Journal, Volume 3, Issue 3, (2016)**

The numerous issues confronting the third gender group in terms of matrimony and many other privileges require a plethora of answers and measures, which must be represented in regulations and legislation, as well as the administration's and the common populace's attitudes. Matrimony, guardianship, succession, and several other welfare legislations in India solely acknowledge the binary sexes of men and women, which have been determined by an individual's sex ascribed at birth. This, therefore, is a problematic perspective, especially in today's world, wherein third-gender privileges have been acknowledged both internationally and locally. The idea of incorporation that is at the heart of India's global commitments requires lawmakers to pass legislation to put acknowledged worldwide norms into practice, as far as they did not conflict with national legislation.

## **CHAPTERISATION-**

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1. Introduction
2. Mythology and History
3. Twists and Turns on the road to triumph : From Naz to Nalsa
4. Was Nalsa Judgment a Path breaking?
5. Observation and Conclusion

## CHAPTER-II

### MYTHOLOGY AND HISTORY

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#### TRANSGENDERISM IN ANCIENT SOCIETY-

Indian mythology provides glimpses of truth at occasions, and a quick glance back into the past reveals that transgender people were previously revered and admired to a considerable extent. The notion of third gender has its origins in Hindu folklore which has several stories of deities changing sex, emerging as an Avatar of the opposite gender, and so on. Gods were frequently shown as both masculine & feminine at different times & in different manifestations. *Ardhanarishvara*, for instance, is popularly worshipped after combining Lord Shiva and his spouse, Parvati. The *Ramayana and Mahabharata* were rich troves of transgender allusions. *Shikhandi* seems to be the most prominent transgender character in Hindu mythology, according to the Mahabharata. *Aravan or Iravan*, child of Arjuna, is a minor but important transsexual figure who is said to have established the genealogy through which transsexual people are sprung. Another event in the Mahabharata wherein third genders are present is when Arjuna is exiled. He took on the persona of *Brihandala*, a eunuch, and conducted ceremonies at marriages and birth trauma there. The Ramayana is yet another element of formation for transgender individuals. Rama invited his disciples to come back to the city after 14 years in the jungle, referring them as ‘men and women’. The hijras, for example, did not feel obligated by the edict and chose to remain with him. Rama was so moved by their devotion that he granted them abilities to bestow blessings on special events.

Hinduism is the world's oldest religion, dating back to 5000 BC<sup>13</sup>. Hinduism is practiced by about 900 million people across the globe. They adore the Hindu pantheon's over 330 million lords and goddesses. The Hindu triangle of gods, on the other hand, depicts *Brahma* [The Inventor], *Vishnu* [The Guardian], & *Shiva* [The Destroyer]<sup>14</sup>. Vishnu has various incarnations, including fish and boar-like animals & even mortal warriors represented in the Ramayana & Mahabharata<sup>15</sup>. As per Hindu legend, a prince named *Iravan* (sometimes spelled Aravan) was supposed to marry Mohini preceding his death due to the goddess

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<sup>13</sup> Bhaskarananda, S., “*The Essentials of Hinduism: A Comprehensive overview of the World’s Religion*”, Delhi: Viveka Press, (2002).

<sup>14</sup> Agoramoorthy, G., “*Spirituality and Climate Change: Easing Crisis by Changing Attitudes*”, Berlin: Lambert Academic Publishing, (2011).

<sup>15</sup> Dutt, R.C., “*The Ramayana and Mahabharata*”, Santa Cruz: Evinity Publishing Incorporation, (2009).



Kali's blessing<sup>16</sup>. Krishna (version of Vishnu & chieftain of legendary Swordsman Arjuna in the Mahabharata tale) transformed into Mohini, wedded Iravan, & spent a night with him just to accomplish the vow, because no other woman ventured to become a widow over night. Mohini wept for Iravan's demise after the sacrifice by destroying her bangles & pounding her chest in the Hindu ritual. After then, she reverted to her original form as Krishna. Each year, the transgender [hijra] population in India holds a grand celebration to commemorate their change<sup>17</sup>.

*Arjuna*, too, had a transsexual persona<sup>18</sup>. Legend has it that when Arjuna was in banishment, he encountered a lovely princess named Urvashi who was eager to marry him. Arjuna, however, refused, & the enraged fairy doomed him to become transsexual. When Arjuna grew perplexed about the approaching curse, Lord Vishnu arrived & persuaded him that a transsexual transformation would provide a preferable cover for him to continue his banishment from his country. Arjuna then complied, assuming a different identity (Brihannala), spending a year in a distant empire, and eventually regaining his manhood<sup>19</sup>. In many Hindu shrines, one of Lord Shiva's forms is a half-woman split down in the middle. Another well-known Ayyappa was born from a gay relationship.

A notion termed as “*Tritiya Prakriti*” or “*Napunsaka*” was employed in Puranic writings to indicate a male that had no procreative potential, and this concept was a key component of Vedas and Puranic philosophy<sup>20</sup>. A vast audience assembled to witness Lord Rama, his spouse Sita, and sibling Lakshman leaving for the jungle after being exiled from the realm for 14 years, as depicted in the classic Ramayana. Lord Rama requested that the “males and females” of the realm retire to their homes during that meeting. There were some disciples who thought that Lord Rama's direct appeal of “males and females” did not extend to them since they simply doesn't fit into any of the categories he specified. As a result, those followers followed Lord Rama to the jungle and lived with him. These people, later on, came to be known as the ‘Hijras’ community, which impressed Lord Rama dearly. After being so impressed by the Hijra community, Lord Rama gave the community blessings that on pious moments like childbirth and marriage, and occasions which mark a new beginning of the

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<sup>16</sup> Pattanaik, “*The Man who was a Woman and Other Queer tales of Hindu Lord*”, New York: Routledge, (2001)

<sup>17</sup> Hildebeitel, A., “*Dying before the Mahabharata War: Marital & Transsexual bodybuilding for Aravan*”, *Journal of Asian Studies*, (1995), PP- (447-473)

<sup>18</sup> Dutt, R. C., “*The Ramayana and Mahabharata*”, Santa Cruz: Evinity Publishing Inc., (2009)

<sup>19</sup> Menon, R., “*The Mahabharata: The Modern Rendering*”, New York: iUniversic Inc., (2006)

<sup>20</sup> Preeti Sharma, “*Historical Background and Legal status of Third Gender in Indian Society*”, UPRES, Volume Edited- (2), December 12, (2012)

venture, it will be considered as a great blessing when Hijras will sing dance and confer blessing to these people to make their relationships or business flourishing. As a consequence, those disciples went to the forest to reside with Lord Rama. These individuals were recognized as the “Hijras” society, which thoroughly impressed Lord Rama. While being so pleased by the Hijra society Lord Rama bestowed good wishes on the society, saying that on holy events such as childbirth and wedding, as well as activities that indicate the start of a new endeavor, it will be considered the greatest sacrament when Hijras sing, dance and bestow graces on these persons to help their partnerships or businesses blossom<sup>21</sup>.

The Hindu worshippers in the tales above are transgender. Even in Jain writings, there is a description to a “*Psychological Gender*” that is distinct from men & women sex and is thought to be a connection to the Transgender population. As a result, when it comes to gender in society, it may be compared to other global faiths. Hindu worshippers continue to worship without discrimination, regardless of gender<sup>22</sup>.

### **MUGHAL PERIOD-**

Hijras/Kinnars/Eunuchs have also served a noteworthy part in the Imperial Courts of the *Mughal Rulers*, exceptionally under the Ottoman Kingdom & throughout Mughal control in mediaeval India<sup>23</sup>. During those times, the transgender population was utilized as dependable bodyguards or faithful slaves who served inside the ruler's Harems. Hijras were also recognized for holding roles in Royal Courts as diplomatic advisers, bureaucrats, generals, and harem keepers. The hijras also had important roles in Islamic religious organizations, particularly in protecting the holy sites of Mecca & Medina, the trust of people<sup>24</sup>. They were able to impact governmental judgments and were compensated well for being close to kings and queens. As a result, the transgender population was acknowledged, and they had their own part to play in society without even being stigmatized for who they were.

### **TRANSGENDER: NO LONGER REVERED IN INDIA - HISTORICAL EVOLUTION**

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<sup>21</sup> Siddarth Narrain, “*Being A Eunuch*”, October 14, (2003)

<sup>22</sup> Akhand Sharma, “*Identity Crisis for Transgender in India: A Case-Study from Madhya Pradesh*”, The Journal of UGC- HRDC Nanital, Volume (12), Issue II, July 18, (2018), PP- (157-167\_

<sup>23</sup> Faruqui, M.D., “*The Princes of the Mughal Empire*”, Cambridge: Cambridge University Press, (2012)

<sup>24</sup> M. Michel Raj, “*Historical Evolution of Transgender Community in India*”, 4 Asian Review of Social sciences, (2015), PP- (17-19)

If India's past is so rich in evidence of tolerance, acceptance, and inclusion, so when did this country begin to approach the Transgender population with mistrust and stereotypes? The transgender society was dealt a social setback and stigmatization with the arrival of the East India Corporation & the British occupation of India<sup>25</sup>. Early European explorers reported being repelled by the sight of Hijras and being perplexed as to why they were treated with such reverence in imperial court and other organizations. During this era, the transgender community began to lose their composure<sup>26</sup>. The Victorian era was known for its patriarchal and rigid cultures. When the British came to India, they were not aware of the Indians' social relationships and sexual roles. Integrating Indian tradition with the British ethnicities meant contaminating their naturalist lifestyle, which was Jesus' instruction. Hijra used to take safeguards and advantages from various Indian governments in the early British rule in the Indian sub - continent by joining the hijra society. Moreover, the advantages included land, food rights, and a lesser proportion of revenue from agricultural households in the precise region, which were eventually abolished by British rule because the estate was not passed via blood ties. Since then, the British have been working to alter society's values by enacting laws that are- 'gender/sexuality aberrant'. Then there were the pejorative names, such as "*Chhakka*", which refers to the "Third Gender". Transgender people become well-known and despised for their rebellious gender/sexual characteristics and for crossing the line between traditionally acceptable gender standards.

### **CRIMINALIZATION UNDER THE COLONIAL RULE-**

The British colonial authority worked hard in the second part of the nineteenth century to penalize the hijra population and deny them human liberties. The colonial authorities regarded Hijras to be a distinct caste or tribe in several areas of India. The Indian Penal Code of 1860<sup>27</sup> proclaimed transsexual persons to be offenders, things got much worst. It was in operation for 149 years before being withdrawn in 2009<sup>28</sup>. The *Criminal Tribes Act, (1871)*<sup>29</sup> was another piece of legislation that helped to promote the message that transgender people are not entitled to human and civil rights or other rights since they are underneath it. The act incorporated all Hijra involved in kidnapping and mutilating minors, as well as those who disguised up as females and danced in public areas. Such behavior was punishable by up to 2

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Indian Penal Code, (Act No. 45 of 1860), October 6, (1860)

<sup>28</sup> Naz Foundation vs Government of National Capital Territory of Delhi, WP (C) No. 7455/2001, Delhi High Court, Decision on 2<sup>nd</sup> July 2009

<sup>29</sup> The Criminal Tribes Act, (Act no. 27 of 1871), October 12, (1871)

two years in jail and compensation, or both. With their severely delinquent behavior of dressing ladylike garments and dancing to please men for gay sex, the British labeled people who belong to this society as perpetual “Criminals”. They were on the periphery of Indian population and experienced prejudice in the workforce, at employment, in public areas, and in amenities such as healthcare and educational. They were constantly subjected to hostile personality as members of the disadvantaged and socially isolated sector. Because of the public's rejection of them, their societal accomplishments were restricted, resulting in poor self-esteem and self-respect, isolating transsexual from community. The deplorable situation of transgender individuals was exacerbated by society's perception and treatment of them as ‘Strange’ people who could not fit into the imposed sanctimonious limits. Because of their sexual orientation, they were forced to rely on begging and prostitution as their sole means of subsistence<sup>30</sup>. Certain rights were given to them to ameliorate their position, but their execution was beset by insurmountable obstacles owing to the dominant binary gender notion of men or women. For instance, transgender people were granted right to vote in 1994, but the job of providing them voter identification cards became mired in the debate about whether they should be men or women. Several of them have been denied cards in their preferred sexual classification<sup>31</sup>. Despite the fact that the Criminal Tribes Act, (1871) was overturned in 1949<sup>32</sup> & the differentiation was abolished after independence, distrust and the concept of the "other" persisted in people's thoughts.

### **CRIMINALIZATION & MARGINALIZATION DURING POST-INDEPENDENCE ERA-**

Other laws that utilized similar wording to prosecute and compel monitoring and control over transgender people existed. These regulations, known as the ‘*Andhra Pradesh [Telangana Area] Eunuchs Act, [1329F]*<sup>33</sup>’, also known as the ‘*Telangana Eunuchs Act*’, were adopted in [1919]<sup>34</sup> and were similar to the Criminal Tribes Act's provision on ‘eunuchs’. For just being caught in feminine clothes or exhibiting in a public space, transgender people might be apprehended without even a warrant per Section 4 of the Telangana Eunuchs Act<sup>35</sup>. In

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<sup>30</sup> Akanksha Mishra, “*Third Gender Rights: The Battle for Equality*”, Christ University Law Journal, (2016), PP- (9-21)

<sup>31</sup> Manoj K. Jha, “*Transgender Rights in India*”, IAS Score, October 27, (2014)

<sup>32</sup> Repealed in Madras Province in August, (1949), after a long protest led by communist leaders such as P. Ramamurthi and P. Jeevanandham, and Forward Bloc Leader U. Muthuramalingam Thevar

<sup>33</sup> The Telangana Eunuchs Act, (1329F), (Act no. XVI of 1329 F)

<sup>34</sup> Telangana Eunuchs Act, (1919)

<sup>35</sup> Section 4 of The Telangana Eunuchs Act, (1329F) (“Registered Eunuch found in Female Clothes”)

Karnataka, ‘Section 36A<sup>36</sup> of the *Karnataka Police Act, (1963)*<sup>37</sup> had comparable powers for monitoring and inference of crime of ‘Eunuchs’. These laws were remarkably identical to municipal ordinances passed in the U.S. beginning in the 1850s that rendered it unlawful for anyone to exhibit in society ‘in a clothing not appropriate to his or her gender’.

During this era, the word has come to be associated with persons born as males who had the tiniest hint of feminine conduct, both inside (feelings) as well as outside (presentation and behavior). As a result, Victorian values sowed a seed of skepticism in the public's mind about transsexual individuals, which has persisted until the twenty-first century.

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<sup>36</sup> Inserted by (Act 26 of 2011) w.e.f. April 26, 2011

<sup>37</sup> The Karnataka Police Act, (1963) [Received the assent of the President on January 18, 1964]

## CHAPTER-III

### TWISTS AND TURNS ON THE ROAD TO TRIUMPH: FROM NAZ TO NALSA

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#### HISTORICAL BACKGROUND: SECTION 377 IPC, 1860-

In 1967, Britain decriminalized homosexuality, having written the Indian Penal Code (IPC) & Section 377 during the colonial era.

In 1860, “Lord Macaulay”, the “President of the Indian Law Commission [ILC]”, drafted Section 377 of the Indian Penal Code [IPC] as a component of Britain's attempts to enforce Victorian ideals on its largest province (similar rules were implemented on many of Britain's provinces, including the U. S.). The following is the full text of the document:

“Section 377: *Unnatural offences-*

*Whoever willingly engages in carnal intercourse contrary the course of nature with any male, female, or animals shall be sentenced by life imprisonment, or by prison sentences of either description for a period not exceeding 10 years, and shall also be subjected to penalty’.*

*Explanation: Insertion is enough to establish the carnal intercourse required for the offence stated in this provision<sup>38</sup>”.*

Although not specifically described, Indian courts have interpreted “*Carnal intercourse contrary the course of nature*” to encompass anal sex, oral sex, & in certain circumstances other non-procreative sexual activities, which including mutual masturbation, in the ensuing years<sup>39</sup>. Although heterosexual people participate in these behaviors as well, the emphasis of the legislation has fallen on homosexual intercourse over the years<sup>40</sup>. Even if the intercourse is consenting, the law’s “*voluntary*” component makes it unlawful.

In India because it is strenuous to prove that “Carnal Intercourse contrary the Course of Nature” takes place in solitude, the legislation has only been enforced in a few court cases. It is necessary to capture two persons doing the sexual act, which is generally done in secret, in order to obtain a conviction. Adults enjoying same-sex consensual intercourse have been

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<sup>38</sup> Section 377 of the Indian Penal Code, (1860)

<sup>39</sup> Gupta A., “*Section 377 & the dignity of Indian Homosexuals*”, Economic and Political Weekly, November 18, (2006)

<sup>40</sup> Bhardwaj K., “*Reforming Macaulay*”, The Asian Age, July 5, (2009)

prosecuted only once since 1930<sup>41</sup>. 30% of the 50 documented rulings under Section 377 have been incidence of alleged violence or harassment of juveniles, with the rest engaging without assent intercourse between adolescents<sup>42</sup>. However, this evaluation only covered documented decisions of the Court of Appeal; there might be other incidence that went to trial but were not evaluated because they were not appealed. Despite the fact that less incidence involving consenting adults have proceeded to prosecution, the persistence of Section 377 & the fear of incarceration has permitted officials to segregate against homosexuals and organizations that deal with them. As a result, Section 377 has had a noteworthy dangerous influence on the lives of a large number of people.

### **THE IMPACT OF SECTION 377 IN INDIA-**

While Section 377 criminalizes homosexual acts, people who practice them have had to live on the edges of community, keeping their sexual inclinations and behaviors hidden from their relatives, neighbourhoods, and the government, for threat of extortion or punishment. As a consequence of Section 377, a number of instances have exposed the vulnerabilities of gays, bisexual, and transsexual Indians. The police frequently coerce and extort homosexually oriented males who socialize in gardens and other public areas, threatening them with penalties under Section 377.

Law enforcement has frequently exploited Section 377 to intimidate and abuse gays and transgender people. In the past few years, a number of similar cases have been brought to light. Pandian, a transsexual woman, was detained by the officers on theft allegations in the matter of "*Jayalakshmi vs St. Of T.N.*"<sup>43</sup>. He was physically molested at the police station, leading him to self-immolate on the grounds of the police station. Meanwhile, in Bangalore, authorities arrested *Narayana*, a transgender man, on an accusation of stealing without alerting him of the charges or providing him with the chance to protect him. His journal was taken away by the cops, and he was blackmailed with grave repercussions if he didn't help in

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<sup>41</sup> Khanna S., "*Gay Rights In Humjinsi: A Resource Book on Lesbian, Gay, and Bisexual Rights in India*", Fernandez B, Mumbai: Indian Centre for Human Rights and Law, (2002), PP- (55-65); Bhaskaran S., "*Queering India*", Delhi: Routledge, (2002)

<sup>42</sup> Gupta A., "*Section 377 & the dignity of Indian Homosexuals*", Economic and Political Weekly, November 18, (2006)

<sup>43</sup> (2007) 4 MLJ 849

identifying other transgender people he knew<sup>44</sup>. Authorities have also extorted money from homosexuals in return for keeping their identities hidden from society<sup>45</sup>.

### **THE FIGHT AGAINST CRIMINALIZATION-**

Even in the lack of successful convictions, the legislation has allowed extensive, institutionally sanctioned prejudice against people with sexual inclinations that differ from the mainstream, as the following cases demonstrate:

The non-governmental organization ‘*AIDS Bhedbhawe Virodhi Andolan (ABVA)*’ organized the very 1<sup>st</sup> protest rally outside the Delhi Police Headquarters in August 1994 in reaction to the arrest of males at Connaught Place Park in New Delhi. ‘*Less Than Goy*’, the first documentary to officially advocate homosexual rights in India was released in 1991, prompting this rally. *Fire* was launched in prominent Indian regions in December 1999. It was the debut Hindi film to focus on a lesbian partnership in a significant way. Despite the fact that the National Picture Censor Board approved it, thugs loyal to the Hindu extremist Shiv Sena vandalized theatres, attacked viewers, and demanded, in futile, that the movie be prohibited<sup>46</sup>. The Shiv Sena, as per Ramasubban<sup>47</sup>, condemned the video for being obscene and breaching Indian cultural standards.

Many non-governmental organizations (NGOs) that work with people who are sexually marginalized have also been assaulted. ‘*Sangama*’, a non-governmental organization that works with gender minorities, was the target of continuous oppression in Bangalore in 2002, when the police banned persons seeking its assistance from entering its premises and compelled it to arrange meetings with clients outside the town<sup>48</sup>.

In 2001, 4 campaigners from ‘*The Bharosa Trust*’ & ‘*Naz Foundation International*’, both of which work on HIV/AIDS in Lucknow, were prosecuted under Section 377 with organizing a gay “Sex Club”<sup>49</sup>. The campaigners were giving condoms and informational booklets to homosexual men on behalf of their employers, who were recognized by the

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<sup>44</sup> Peoples’ Union for Civil Liberties (PUCL) Report on “*Rampant Violation of rights of Sexual Minorities*”, (2000), PP-14

<sup>45</sup> Ibid.

<sup>46</sup> Ramasubban R., “*Political Intersections between HIV/ AIDS, sexuality and Human rights: A History of Resistance to the Anti-sodomy Law in India*”, Global Public Health, (2008), PP- (22-38)

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Arvind Narrain, “*The Articulation of rights around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva*”, Health and Human Rights 153, (2004)



government AIDS control organization. Following widespread demonstrations, they were freed after 47 days in prison. *“The Lucknow instances demonstrate that the mere presence of Section 377, though it cannot and thus cannot be implemented in convicting sexual intercourse in personal, contributes a certain crime to the everyday routines of gay men and places them under the legislation and a constant fear of ethical violence”*<sup>50</sup>. “The concept that certain kinds of sexuality are personal, socially accepted, and performed legally inside the household is reflected in the prosecution of various behaviors, such as assault, adultery, & bigamy, and also the non-criminalization of others, such as the assault of a female by her spouse<sup>51</sup>”. As a result, sodomy and homosexual acts fall outside the bounds of what may be lawfully practiced, rendering homosexuality unlawful in the eyes of the court.

### **SECTION 377 AND ITS IMPACT ON HIV/AIDS-**

Section 377 is expected to have had a negative influence on India's HIV/AIDS response. Criminalizing homosexuality raises the taboo associated with it and, as a result, the perpetrator. Social stigma, along with the possibility of 10 years in jail for homosexuality, contributes to the epidemic's clandestine nature and increases the chance of transmission, since gay men are less likely to seek out testing, preventive programs, and treatment, for fear of being discovered. In 1994, a team of physicians suggested that condoms be provided in a Delhi jail with high prevalence rate of gay intercourse as a demonstration of Section 377's negative impact on HIV/AIDS prevention. The jail officials refused since homosexual intercourse is illegal under Section 377, & distributing condoms would be seen endorsing a penal conduct<sup>52</sup>. The failure of the jail officials to provide security for the convicts may have substantially raised the danger of disease among the detainees. In the meanwhile, HIV prevention organizations are finding it more difficult to reach out to people who are marginalized by their gender and provide them with knowledge and other assistance. The fear of conviction, as seen in the Lucknow instance, exacerbates the problem. In a 2002 study, *‘Human Rights Watch’* pointed out, *“The inconsistency between the Indian government's HIV/AIDS policy and the criminalization of homosexuality, as well as the persecution of organizations who deal with gay people”*.

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<sup>50</sup> Gupta A., *“Section 377 & the dignity of Indian Homosexuals”*, Economic and Political Weekly, November 18, (2006)

<sup>51</sup> Kapur R., *“Erotic Justice”*, New Delhi: Permanent Black, (2005)

<sup>52</sup> Agoramoorthy, G., & Hsu, M. J., *“India’s homosexual discrimination and AIDS”*, Revista de Saude Publica, (2007), PP- (657-660)

Although the administration acknowledged the need of reaching out to marginalize populations in public pronouncements, it nevertheless depended on NGOs to deliver these assistances, which were previously targeted by police officers<sup>53</sup>. The roles played by various NGOs are as follows:

**ABVA (AIDS BHEDBHAV VIRODHI ANDOLAN)**-An early petition against Section 377 was brought in the Delhi HC in 1994 in reaction to the 1994 Delhi jail issue. ABVA (AIDS Bhedbhav Virodhi Andolan), a Delhi-based Organization, filed a PIL seeking for the abolition of Section 377, claiming that it infringed on the “right to privacy” enshrined in the Constitution<sup>54</sup>. Nevertheless, the matter died out since the petition was not heard until 2001. ABVA really do not have such a comprehensive lawyer keeping a record of the matter because it was a non-funded organization operated exclusively by unpaid workers so when it actually showed up, ABVA failed to demonstrate and the matter was dropped without their awareness.

**NAZ FOUNDATION TRUST & LAWYERS COLLECTIVE-**

With the arrival of the modern era the activism towards the authoritarian and unjust nature of Section 377 of IPC rose dramatically, culminating in ‘*Naz Foundation vs Government of National Capital Territory of Delhi*<sup>55</sup>’, in which the HC of Delhi viewed the archaic system attached with the Section 377 and construed it to disqualify sexual encounters between consensually adolescents effectively decriminalizing homosexuality. The “Naz Foundation India Trust”, centered in Delhi, partnered with the “Lawyers Collective”, a legal support organization dedicated to the interests of persons living with HIV & AIDS, after its personnel were harassed by policemen while HIV prevention projects in minority populations. They asked the Delhi HC to construe “Section 377” down to eliminate intimate voluntary intercourse involving adults, rather than repealing it entirely. Children's welfare organizations resisted the removal of the complete statute since it is the exclusive legislation that allows certain sorts of physical maltreatment of juveniles to be penalized.

The petition argued that Section 377 violated 4 fundamental freedoms secured by the Constitution of India: the right to fairness and equality [*Article 14*], because Section 377 incites hatred against specific individuals; the right to freedom from sex oppression [*Article*

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<sup>53</sup> Chatterjee P., “*AIDS in India: Police Powers and Public Health*”, Lancet, (2006), PP- (367)

<sup>54</sup> Ruth Vanita, “*Queering India*”, (2002)

<sup>55</sup> WP (C) No. 7455/2001, Delhi High Court, Decision on 2<sup>nd</sup> July 2009

15], because the legislation predominantly affects homosexual intimate relations; the right to fundamental liberties [Article 19]; & the right to personal liberty & privacy [Article 21], because Section 377 endangers lives by obstructing HIV prevention efforts & intruding on individuals' private consenting sex.

The application was rejected, however, since the Naz Foundation had no '*locus standi*' in the matter because it was not adversely harmed by Section 377. As a result, the Naz Foundation and Lawyers Collective petitioned the Indian SC to reconsider the petition's rejection. The Court ruled that the justifications for rejection were invalid, and that the issue should be heard by the HC of Delhi

A network of NGOs representing diverse societal groups working on human rights violations signed the petition to bolster the claim and give testimony from those who had been directly harmed by Section 377. Established in 2003, it gathered together a diverse collection of NGOs fighting to improve gay, bisexual, & transsexual protection as well as child rights campaigners and feminist organizations, to speak out against Section 377<sup>56</sup>.

The group was able to give reports of individuals whose livelihood had been ruined by officials and others who wanted to take benefit of the discriminatory legislation such as risk of arrest and extortion. These testimonies were used in the final judgment to shed light on the darkness of these marginalized people's existence. Finally, in July 2009<sup>57</sup>, a judge ruled that Section 377 of the Code, [1860] must be construed down to exclude consenting adult intercourse. The judges further ruled that "*the statute breached Articles 14, 15 & 21 of the Indian Constitution, insofar as it criminalizes voluntary sexual activities of adults in solitude*<sup>58</sup>". In situations of penile non-vaginal intercourse with minors, the legislation would remain in effect.

The climate in which the Naz Foundation and Lawyers Collective functioned had altered drastically, from the moment they originally filed their PIL in 2001 until the day of the verdict. The initial Naz petition placed a strong emphasis on the wellbeing dangers caused by Section 377 because it was anticipated that building a claim on the civil rights of sexuality minority would repel rather than influence the court. Consequently, by 2009, the social and political atmosphere had changed so drastically that civil liberties had become a focal point of the appeal.

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<sup>56</sup> Voices Against 377, (2008)

<sup>57</sup> Naz Foundation vs Government of National Capital Territory of Delhi WP (C) No. 7455/2001, Delhi High Court, Decision on 2<sup>nd</sup> July (2009)

<sup>58</sup> Id.

## **VOICES AGAINST 377**

The *Voices against 377* alliances played a key role in this shift. “*CREA, Talking about Reproductive & Sexual Health Issues [TARSH]*”, “*Nirantar*”, the “*Nigah Media Collective, & Prism*”<sup>59</sup>, all Delhi-based NGOs, which had all been fighting on sexuality and human rights problems for some years, are amongst the coalition's initial founders, bringing in more organizations as the case advanced. *Voices against 377* was also the first continuous alliance of LGBT and non-LGBT entities in India (and one of the first globally), demonstrating that advocacy for sexuality liberties was not restricted to conventional LGBT associations. This was a rebuttal to the Indian administration’s prior claim that Indians were unconcerned about homosexuality & when they were, they were opposed to it.

The petition against Section 377 served as a catalyst for previously secluded and hesitant people to step out into the forefront and campaign for their freedoms. *Voices against 377* members organized large-scale educational programs to raise awareness about the issue amongst the general population, the journalists, health care professionals, and students. Among the activities were, rallies, press briefings, & a “*Million Voices*” initiative accumulated tens of thousands of signatories against Section 377, notably many from those who were personally harmed by the legislation. The Lawyers Collective convened conferences with local organizations in key cities, numbering more than 70 by the moment the verdict was handed down<sup>60</sup>. *Voices against 377* submitted a petition in favor of the Naz Foundation's PIL in 2006.

The contemporary LGBT campaign predates the Naz incident by over a century, and Indians have probably never been quiet on LGBT matters. For at least two decades, the Indian press, both publish and voice, has been outspoken on the problems, as well as several Indians have written meaningful fiction and non-fiction, resulting in the publication of countless books and other publications<sup>61</sup> that emphasize the impact of comprehending sexual identity as an universal human right. Beyond the LGBT revolution, sex predators in India have demonstrated extraordinary organization and action in changing gender views, encouraging variation among the position of representatives of the “*Durbar Mahila Samanwaya*

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<sup>59</sup> CERA, TARSHI, and Prism work on Sexual Rights issues of minority groups including LGBT, sex workers, and Dalits. Nirantar Works towards empowering women through education. Nigah Media Collective uses media for progressive debates around issues of gender & sexuality.

<sup>60</sup> Ramasubban R., “Political Intersections between HIV/ AIDS, sexuality and Human rights: A History of Resistance to the Anti-sodomy Law in India”, *Global Public Health*, (2008), PP- (22-38)

<sup>61</sup> Bombay Dost (1990 to the present) Mumbai; ABVA, *Less than Gay: A Citizen’s Report on the Status of Homosexuality in India*, New Delhi (1991); Geetanjali Misra and Radhika Chandrimani, *Sexuality, Gender and rights: Exploring Theory and Practice in South Asia*, Sage Publication, New Delhi, (2005); Nivedita Menon, *Outing Heteronormativity: Nation, Citizen, Feminist Disruptions*, Delhi: Women Unlimited, (2007), PP- (33-51)

*Committee*” (India's largest sex workers' union). For more than a decade, organizations such as CREA and TARSHI have been educating protesters on sexuality, sexual orientation, and human rights concerns.

In the last eight years, this legacy of sexual rights campaigning has helped strengthen agitation surrounding Section 377, allowing LGBT organisations in India to become highly prominent and vociferous. The spread of HIV and AIDS has fueled this uptick in action. “Throughout 1990 and 2005, foreign financing for HIV/AIDS prevention programs increased from US\$19 million to \$608 million<sup>62</sup>”. Global funders supported sexual rights learning & outreach to previously marginalized class, & the flood of cash prompted the establishment of several NGOs. “The biggest amount of gay -lesbian-AIDS NGOs was ever signed up in the collective memory of the Indian subcontinent<sup>63</sup>”.

The effects of this higher growth may currently be seen in India. For the very first time, prominent Movies have evolved to embrace homosexual themes. Queer film festivals have grown in popularity. LGBT issues have received more favorable media coverage in recent years, resulting in more public conversation and debate. Thousands of people march in LGBT pride events every year in places like Delhi and Calcutta.

These initiatives increased the chances of a Section 377 approach which included LGBT organizations and highlighted prejudice against them succeeding. Since the Naz Foundation & Voices against 377 concentrated on the adulthood & consensual parts of the legislation, and also the medical reasons, they were managed to gather together marginalized groups to overturn a discriminating statute without leaving portions of society, such as minors, vulnerable. As a result, the court stated that “*Section 377 IPC, as far because it explicitly prohibits consensual sexual encounters of adolescents in secret is contrary to the provisions of Articles 14, 15, & 21 of the Indian Constitution*”.

### **THE NAZ FOUNDATION VERDICT: A RAY OF HOPE-**

Although many aspects of the ruling will have far-reaching implications for India's Homosexual rights, the court's focus on the principle of equality is especially commendable, for at least two factors. First and foremost, the decision should be commended for its thoroughness. The HC has left little room for the judgement to be reversed on the reasons of misunderstanding or misappropriation of the legislation after conducting a thorough and exhaustive study of Indian legislation against discriminatory practices on the account of

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<sup>62</sup> Kole SK., “*Globalizing Queer? AIDS, Homophobia, and the Politics of Sexual Identity in India*”, Globalization and Health, (2007)

<sup>63</sup> Id.

sexual preference. Furthermore, the court's implementation of the greatest international norms on fairness to the Indian perspective created a good precedent that should encourage legal decision-making in nations where same-sex activity is now illegal.

The HC started its Article 14 examination by stating that every differentiation or categorization must be founded on an understandable differentia that is rationally related to the goal desired and is not unreasonable. According to the court, Section 377 doesn't really discriminate between open and personal actions, or between consenting and non-consensual conduct, and so ignores significant elements such as age, assent, and the form of the conduct, as well as the lack of damage. As a result, such criminalization looked discretionary and irrational in the lack of proof of harm.

When analyzing the constitutional legal standards required by Article 14, '*The Equal Rights Trust's Declaration of Rules on Equality*' was cited by the court as, '*The Contemporary worldwide interpretation of Principles on Equality*'. The Declaration's Principles (1) right to equity, (2) fair conduct, and (5) definition of prejudice, as well as significant reasoning from Canadian, South African, and American courts, are all cited in detail. The court emphasized the necessity of incorporating sexual preference as a recognized basis of prejudice, as well as incorporating implicit discrimination and bullying into any discussion of the equality rights. In response to the MHA's proposition that Section 377 was unbiased, the HC noted that while the clause on its face was unbiased since it targeted actions rather than people, in practice it deliberately maligned a specific group, resulting in all homosexual people being considered criminals, and thus it breached Article 14.

Proceeding on to if the word '*Sex*' in Article 15 must be understood to include sexual inclination, on the assumption that prejudice predicated on the latter is founded on sexist standards of behaviour - as the Naz Foundation claimed, the court cited the Human Rights Committee's ruling in '*Toonen vs Australia*<sup>64</sup>', which found that criminalizing sexual acts amongst males violated '*Article 2 of the ICCPR*<sup>65</sup>', whereby "sex" was interpreted to include sexual inclination. On the light of an examination of Domestic and multinational human rights law, Section 377 was found illegal by the HC based on Article 15:

*'We believe that sexual inclination is a similar criterion to gender, & that prejudice rationale on sexual inclination is restricted underneath the Article 15. Furthermore, the*

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<sup>64</sup> No. 488/1992 CCPR/C/50/D/488/1992, March 31, 1994

<sup>65</sup> Article 2 of ICCPR, (1996) (ensures that rights recognized in the ICCPR will be respected and be available to everyone within the territory of those states who have ratified the Covenant (State Party)).

*concept of horizontal implementation of rights is included in Article 15 clause (2). In simple terms, discrimination against one individual by another in terms of entry to public areas is prohibited. Prejudice on the rationale of sexual inclination is, in our opinion, illegal, even when the right established in Article 15 is applied horizontally’.*

Importantly, the petition did not address affairs of “*Moral Values*” or what represents “*Organic Intercourse*”; rather, by emphasizing the importance of assent, the petitioners drew attention to the inconsistencies among Section 377 and the Indian Constitution's assurances of privacy, freedom, & non-discrimination. The HC, while summarizing its decision, emphasized the significance of preserving Indian society's ideals of justice, compassion, and inclusion, saying:

*“If there is one fundamental concept that can be considered to be the Indian Constitution's core principle, it is 'inclusiveness.' This Court finds that the Indian Constitution represents a deeply established principle in Indian culture that has been passed down through centuries. The inclusivity that Indian culture has always exhibited, practically in every facet of life, is seen in the recognition of a place for everyone in community. Those who are seen as 'deviants' or 'different' by the mainstream are not rejected or stigmatized on that basis”.*

### **SOME IMPLICATIONS-**

For the time being, the verdict of the Delhi HC has rendered the criminalization of consenting same-sex behavior between adults illegal throughout India. The decision is applicable across India because the writ petition concerned a constitutional issue. Adults, on the other hand, are the only ones who can be judged.

As a result, “*Section 377 will proceed to apply towards non-consensual penile non-vaginal intercourse as well as non-consensual penile non-vaginal intercourse with juveniles*”.

According to reports, the federal administration has chosen not to appeal the judgment. During the same period, “At least nine additional cases have been submitted in the Supreme Court, the most well-known of which is the one of Baba Ramdev, the Ayurvedic and Pranayama Yoga, brand representative. The contentions are determined by a variety of grounds, ranging from claims that homosexuality is a treatable condition to statements of concern about the decision's impact on cultural heritage. The majority of the arguments claim that homosexuality is linked to the West's excessive promiscuous, that is centered on hedonism and satisfaction that aren't visible in our hereditary cultural make-up<sup>66</sup>”.

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<sup>66</sup> Kapur R., “*Out of the Colonial Closet, but still thinking ‘Inside the Box’: Regulating ‘Perversion’ and the Role of Tolerance in De-radicalizing the Rights Claims of Sexual Subalterns*”, NUJS LAW Review, Volume II, No. 3, July-September (2009), PP- (382).

The Hon'ble SC is anticipated to take several years to reach a judgment. However, during the course of Section 377's existence, the number of penal convictions was quite modest. In exercise, the real threat of Section 377 is that it has allowed and encouraged police departments and other authorities to intimidate, victimize, and persecute LGBT community, to the point where LGBT individuals have been subjected to serious infringements of their civil liberties and are unwilling to lead their lives in the same self respect as everyone else in Indian community. Harassment and prejudice of this nature will not go overnight. Law enforcement authorities and the general public will continue to persecute and discriminate LGBT individuals, albeit this will now be plainly illegal. Additionally, the decision would take awhile to 'bed-in' and campaigners have already claimed the news that homosexual behavior is therefore no longer a punishable crime.

The SC in '*Kusum Ingots vs UOI*<sup>67</sup>', observed that:

*"An order issued on a writ petition challenging the legality of a Parliamentary Act, whether intermediate or permanent, would have force across the territory of the nation, pursuant to the Act's validity, according to Article 226 (2) of the Indian Constitution"*.

As a result, it is clear that, in context of the aforesaid decision, the ramifications of the High Court's verdict in Naz Foundation v. Government of the NCT of Delhi are not confined to the citizens of Delhi, but also to the country's sexual communities.

### **Suresh Kumar Koushal & Another vs Naz Foundation & others-**

This decision sparked jubilation across the nation and acted as a stimulus for progress in the country's acceptance of Gender equality. This joy, on the other hand, was fleeting. Many parties appealed the decision to the Apex Court, and in a major defeat for the Lgbt population, the Supreme Court reversed the HC's decision in '*Suresh Kumar Koushal & Another vs Naz Foundation & others*<sup>68</sup>' in (2013). The SC ruled that,

*"Section 377 cannot be repealed, and therefore it was up to Government to determine whether homosexuality should be decriminalized"*.

The case was decided by a bench of two SC judges, who accepted the appeal and reversed the HC's prior ruling, declaring it 'Legally Unsustainable'. The court eventually decided that

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<sup>67</sup> Kusum Ingots vs Union of India, (2004) 6 SCC 254

<sup>68</sup> Suresh Kumar Koushal & Another vs Naz Foundation & Others, [Civil Appeal No. 10972 of 2013]



Section 377 IPC did not infringe the Constitution and quashed the Respondents' writ application.

In terms of its ability to judge on legislation's legality, the SC accepted that it and the HC's had the authority to pronounce any statute unconstitutional, whether it was passed before or after the Constitution, was established. It was emphasized, however, that all legislation, even pre-constitutional legislation, are presumed to be constitutional since Parliament is considered to operate for the wellbeing of the society. The Court explained that the "*Doctrine of Severability*<sup>69</sup>" intends to allow unconstitutional sections of legislation to be separated from the constitutional components of the legislation in issue while the remaining portion is preserved, and that; conversely, the Court can 'read down' a legislation to preclude it from becoming unconstitutional, while preserving the law's essential nature. In the case of Section 377, the court stated that while it and the HC could evaluate the legislation's lawfulness and vote it down to the degree of its ambiguity with the Indian Constitution, the evaluation must be followed by the *Presumption of Constitutionality*<sup>70</sup>, and the judiciary must act responsibly. The court ruled that it lacked the authority to strike down the statute until a significant constitutional breach was established.

The SC made reference to the Indian Penal Code's enormous amount of modifications, which have totalled about 30, since its introduction in 1860. The court pointed out that Section 377, like the rest of the legislation, was adopted in 1860. The court cited several section 377-related instances going back to the 19<sup>th</sup> century in illustrating the evolution of Section 377. The court pointed out that the prior instances all involved non-consensual scenarios, and that no consistent criteria could be derived from them to categorize actions as falling under Section 377. Instead, the court held that actions may only be judged based on the action itself as well as the conditions in which it is carried out. However, the court noted that, given the legislative record of Section 377, it would continue to enforce to same-sex individuals of whatever age and assent. Despite this, the Court stated that,

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<sup>69</sup> The Doctrine of Severability means that when some particular provision of a statute offends or is against a constitution limitation, but that provision is severable from the rest of the statute, only that offending provision will be declared *void* by the court and not the entire statute.

<sup>70</sup> In Constitution Law, the Presumption of Constitutionality is the legal principle that the judiciary should presume statutes enacted by the legislature to be constitutional, unless the law is clearly unconstitutional or a fundamental right is implicated.

*“Section 377 does not criminalize a certain group of individuals, personality, or orientation. It simply lists specific actions that, if carried out, would result in criminal charges. This type of restriction governs sexual behavior irrespective of gender identification or orientation”<sup>71</sup>”.*

In evaluating whether Article 14 applied to the validity of Section 377, the SC cited **“Re: Special Courts Bill, (1987)**, which defined the extent of Article 14, incorporating the idea that “all individuals equally situated shall be considered equal in both advantages bestowed and obligations imposed”, given the fact that law need not consider all persons precisely the equivalent. Furthermore, the States had “the right to determine who should be considered as a category for the interests of law and in connection to legislation passed on a specific topic”, so long as the categorization was not “ambiguous” and included the following criteria:

*“Logical, in the sense that it should not only be predicated on certain traits or attributes that are shared by all individuals gathered together and not by those who are excluded, but also those traits or attributes having a reasonable relationship to the legislative element”<sup>72</sup>”.*

The court decided, after little deliberation, that:

*“Those who engage in carnal sex in the regular process and those who engage in carnal sex beyond the natural order of things belong to distinct groups, and those in the latter cannot contend that Section 377 originates from the fault of subjectivity and illogical categorization”<sup>73</sup>”.*

In analyzing the High Court's interpretation of Section 377, the SC noted that the HC had completely ignored the reality that *“a small proportion of the nation's population constitutes homosexuals, gays, bisexuals, or transgenders’ and also that very few than 200 people have been brought to trial under Section 377 during last 150 years”*.

*“This cannot be formed a reasonable foundation for determining that provision contravening the principles of Articles 14, 15, and 21 of the Indian Constitution”*, the court concluded.

The court also ruled that the prejudicial treatment alleged off by the Naz Foundation as an outcome of Section 377 was nonetheless permitted nor sanctioned by the clause, and also that the simple reality that the officers and others misused Section 377 was not really a

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<sup>71</sup> Suresh Kumar Koushal & Another vs Naz Foundation & Others, [Civil Appeal No. 10972 of 2013]

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

manifestation of the provision's vires, but rather an appropriate aspect for Parliament to recognize before deciding whether to overturn it.

The SC declared with regards to the application of Article 21 that the legislation must be properly legislated while also being just, equitable, and rational, which eventually leads to ideas of valid state concern and the norm of proportionality. The freedom to live with respect has been recognized as a component of Article 21, as per the court. The SC placed less emphasis analyzing the implementation of Article 21 to Section 377 of the Code, (1860), in evaluating the HC's decision that Section 377 infringed the privacy rights, personal freedom, and integrity, instead criticizing the HC for putting too much emphasis on decisions from other areas of law in its discomfort to defend the '*so-called liberties of Lgbt people*'. It said flatly that 'Section 377 does not incur from the sin of illegitimacy', without going into further. While the court determined that Section 377 was not illegal, the justices emphasized that the parliament was still entitled to examine the appropriateness and legality of repealing or modifying the law.

### **CRITICAL ANALYSIS: GAPS IN THE JUDGEMENT-**

This is a landmark judgement by the Hon'ble Supreme Court. It's noteworthy not about what it succeeded, but because of what it didn't. In reversing the HC's judgment in "Naz Foundation vs Government of NCT of Delhi", the court not just opted to question the rationality of the HC's judicial reasoning, but also overlooked a slew of new evidence presented to it during the proceedings.

The principles of Articles 14, 15, and 21 have been defined extremely narrowly by the Supreme Court. It fails to take into consideration the global developments and increased acceptance of various sexual preferences. However, unlike the Delhi HC, it has not taken into account the historical context and norms of Indian society, where homosexuality is evident.

The documentation of unequal treatment, bullying, and violence confronted by LGBT people that was presented to it in the manner of FIRs, individual testimonies, fact-finding articles, official data, peer-reviewed publications, and noted verdicts was not appreciated by the Court. However, the Court found that the defendants failed miserably to provide the specific details of incidences of hostile attitude displayed by State authorities toward homosexual people and resultant denial of fundamental human liberties to them.

Section 377 is irrational since private consensual interactions are guaranteed by Article 21 , and that there is no compelling governmental concern to justify the restriction of a basic right. It is clear that Section 377 infringes Article 14 on two reasons: Firstly, since criminalizing non-procreative sexual contact was unrealistic, illogical, and unjust. Secondly, also because parliamentary primary objective of penalizing ‘unnatural’ behaviors seemed to have no valid percentage with the categorization of procreative & non-procreative sexual activities, as a result, section 377 deprives a homosexual of his or her claim to whole identity, which is fundamental to the concept of life. The Supreme Court stated in *Maneka Gandhi vs UOI*<sup>74</sup> that the word “personal liberty” has ‘the broadest scope and encompasses a wide scope of liberties that prompt to construct an individual’s personal liberty’. As it has been claimed that approving the statement would have a negative impact on India's social structure and marital foundations, it is significant to mark that the Constitution of India is not really a rigorous document, and it is entirely in the soul of it to safeguard the sanctity & quality of livelihood of every society and individual.

It's worth noting that some people and organizations asserted that they were interested in preserving and guarding old Indian society 's ethical, cultural, and moral beliefs; conversely, followers for the Respondents, made up of people and organizations, contended that Section 377 harmed the LGBTQ society in general and homosexual men especially. The SC, on the other hand, argued that Section 377 does not criminalize a certain group of individuals, identification, or orientation; rather, it defines specific conduct that, if performed, would result in criminal charges. However, this suggests that the Supreme Court is also not concerned about protecting the so-called "minority" of the Lgbt people nor in treating them equally to the rest of humanity. It is distressing to note that the ultimate defender of basic rights undermines and ignores the very basic rights of this not-insignificant segment of society.

Koushal has essentially re-criminalized the activities and personalities of thousands of LGBT citizens, thereby reversing the HC’s four-and-a-half year’s landmark nationality affirmation and three decades of LGBT campaign victories in the country. The legislation now directly contradicts the lived reality of LGBT People, many of whom openly declare as homosexuals.

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<sup>74</sup> Maneka Gandhi vs Union of India, AIR (1978) SC 597

### **National Legal Services Authority vs UOI (NALSA)-**

In 2014, everything changed. In April 2014, a SC panel led by “Justices K.S. Radhakrishnan & A.K. Sikri” issued a decision in ‘*National Legal Services Authority vs UOI (NALSA)*<sup>75</sup>, ruling that transsexual people have the fundamental liberty to self-identify as men, women, or transgender, without even clinical re-assignment, as well as the freedom to demonstrate their gender identification. The SC ruled in NALSA that, ‘*the right to life & personal, liberty, and independence included the right to sexual identification and gender preference*’.

NALSA sparked a lot of interest and provided the Trans rights revolution in India a boost. Homosexuals have been stigmatized, prejudiced against, and denied educational and career opportunities. Mostly because of their sexual choices, they have experienced sexual and bodily harassment as well as death. Perhaps, for the first time, NALSA publicly acknowledged the brutality and prejudice faced by India's transgender community, and proclaimed unambiguously that they are entitled to constitutional fundamental human rights. With the court's decision in NALSA, the battle for equality for individuals who do not conform to traditional sexual acts gained popularity<sup>76</sup>. The decision served as a key spur for the development of the nation's Trans campaign. This verdict prompted numerous government bodies to incorporate a gender choice labeled ‘TG’ or ‘Other’ to official papers like as passport, driving licences, and PAN cards, and was perhaps the start of India's structured transgender rights activism.

The NALSA decision should be applauded for denouncing gender inequality and providing optimism and guarantee to a group that has long been outdoors of the judicial system. The courts have granted a legal identity to all people whose anatomies do not meet the established gender criteria at birth, with strong beliefs and foresight. One innovative element of the decision has enormous implications for present laws governing marriage, adoption, labor regulations, and succession, which will henceforth have to change apart from the binary classification of men and women in order to accommodate transgender people's legal rights. It's also hard to overlook the irony that the decision came just a few months following the SC confirmed the legality of Section 377 in the matter of Suresh Kumar Koushal vs NAZ Foundation<sup>77</sup>. Acknowledging that Section 377 is biased towards transgender individuals, the

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<sup>75</sup> National Legal Services Authority vs Union of India, (2014) 5 SCC 438

<sup>76</sup> Jos, Justin, “*Limiting Gender Variance: Critical Reflections on the Transgender Persons Bill*”, Economic and Political Weekly, (2017)

<sup>77</sup> Suresh Kumar Koushal & Another vs Naz Foundation & Others, [Civil Appeal No. 10972 of 2013]

court highlighted that the verdict left the Koushal case unaffected, allowing it to concentrate purely on the official status of the transgender individuals. The inclusion of basic rights straight from the Indian Constitution, particularly the implementation of Article 19, is among the most creative turns in the verdict, functioning as a strong reason in recognising the freedoms of a transsexual individual.

### **POST VERDICT SCENARIO-**

The solutions that the Court grants are also quite intriguing. For now though, three directives have been listed: hijras are presently regarded as the third sex, bisexual have the choice of being masculine, woman, or having a position with the third sex, & bisexual are to be entitled to reward that are subsequently made available under public policies concerning marginalized groups, because they would be eligible as a “*socially impoverished, backward community*”. The judiciary then goes on to issue a slew of various instructions, including certain specific ones (such as providing wheelchair-accessible restrooms and HIV medication for transgender people), certain broad ones (such as directing that they be provided with medical treatment in all doctor's offices, that diverse social development plans be developed for their progress, and that public awareness be raised to ensure their societal acceptance), as well as some that are unsure (for example, the perspective of really addressing their concerns and taking steps to provide a meaningful position for them in society and cultural life).

The decision has caused a great deal of consternation. Even though the ubiquitous media and civic society praised the decision, many transgender individuals pointed out its inherent flaws and contradictions. *Orinam* has compiled a comprehensive collection of comments from observers and cooperatives<sup>78</sup>. Under one of the, *Gee Imaan Semmalar* provides an in-depth analytical examination of the substance of the decision, as well as its potential consequences<sup>79</sup>. He claims that the ruling is ‘complicated and perplexing’ since it combines diverse transgender identities, such as labeling to all Hijras as “Third Gender” although there are distinctions amongst the two.

The paper even points out that the jury is split amongst wide & limited definitions of the word ‘*transgender*’ & among both self-determination of personality & its physiological needs. “*Justice Radhakrishnan's*” broader view of ‘*transgender*’ was restricted even more by

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<sup>78</sup> “*Supreme Court ruling on Transgender Rights*”, *Orinam* (Last visited on July 7, 2021)

<sup>79</sup> *Gee Imaan Semmalar*, “*Gender Outlawed: The Supreme Court Judgment on Third Gender & its Implications*”, *Round Table India*, April 19, (2014)

“Justice Sikri's” part of the description which expressly excludes LGB individuals from the purview of ‘transgender’. Justice Sikri's formulation is plainly in conflict with portions of the ruling, which say that LGB individuals are included in the category of sexual variant individuals. Proceeding on to the nine crucial directions issued by the court in the ruling, these instructions appeared to conflate the terms ‘Transgender’ and ‘Hijra’ at times, especially in the 4<sup>th</sup> and 5<sup>th</sup> instructions, by constantly employing the term transgender/hijra. As a result, the decision was seen as simply related to the identification of ‘Hijras’ as ‘Third Sex’, obviating the need to recognize the umbrella word, which encompasses all gender variations.

One of the most serious problems in the decision is that the whole basis upon which the Suresh Koushal vs Naz decision was based crumbled with the NALSA ruling. When it comes to sexual orientation, a person's identity is meaningless if he is unable to communicate it. A legislation or regulation that focuses on behaviour, which is the essential manifestation of personality, is effectively focusing on the personality itself. As a result, when Sec. 377 forbids homosexual people from indulging in same-sex cohabitation, it does more than just make a set of activities unlawful; it explicitly prohibits sexuality and hence identification itself, by forbidding the most fundamental manifestation of one's gender. Furthermore, the decision is ambiguous, if not conflicting, when it comes to the necessity of medical transformation operations for self-identification of transgender. Initially, Justice Radha krishnan grounded his decision on an Argentinean version of gender identification that does not need any type of medical treatment, but later on, he proposed "psychological testing" for transsexual people's self-identity. Because of these competing proclivities, the explication and implementation of the decision might be unpredictable and inconsistent, limiting its affirmative activity.

The decision was unquestionably a positive move toward humanizing the legal process, as well as a significant move toward redressing the injustices meted out to over 5 million individuals who were fleeing from one location to next without a name. The court's decision functioned as a declaration of fundamental human liberties and person's integrity, ultimately giving the right to life & liberty provided by Article 21 of the Constitution, their actual significance.

This slew of petitions, applications, and counter-petitions reflects the reality that Section 377 isn't just a legal problem. It is indeed an element of the larger nation-building agenda of the

Hinduism right's that includes, along with other things, counter-normative sexes and sexual orientations. When one considers the conventional arguments made in courts against the elimination of Section 377, one gets the impression that Indian culture does not condone homosexuality. Similarly, one of the Government's arguments against the removal is based on majoritarian morality, stating, *'The laws do not function independently from population. It merely reflects societal beliefs. Although the public has showed acceptance for a novel sexuality behavior or gender orientation, it is not widely accepted'*. Apparently, the orthodox attitude and ideologies on Section 377 are motivated by a desire to build a Hindu state based on 'traditional' ideas of sexuality and gender, where tradition is associated with "Natural". The situation is made more complex by the notion that mainstream philosophy is based not just on hetero-normative behaviors and beliefs, but also on nationalistic sentiment that views homosexuality, and much more broadly, queer existences, as alien to Indian heritage and culture. In reality, one of Hinduism Right's primary arguments is that India must be protected from "Western" impacts, and homosexuality is portrayed as a product of colonization as well as current modern global activities and influences. Furthermore, the vision of a heterosexual and patriarchal India, that is at the heart of 'Authentic Hindu identity' of patriotic examples, appears to be a backlash to the colonial effort of Orientalism's disparaging creation of the 'effeminate other' who commits the crime of sodomy. As a result, national identification and citizenship are linked with hetero-normativity, well within patriotic ambition of establishing a 'Hindu' India, as a result, the political and judicial turbulence surrounding initiatives to abolish Section 377 of the Code must not seem as a shock. Therefore, while the court's historic judgment marks the beginning of a conceptual shift, gay individuals in India yet have a long way to go before they can be fully integrated into society.



## CHAPTER-IV

### **WAS NALSA JUDGEMENT A PATH BREAKING?**

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With the decriminalization of Section 377 of the Code, (1860), is that really the pinnacle of India's progress toward gender equality? Not very much, moreover, it signifies the beginning of a fresh period in India towards the acceptance of transsexual rights.

The decriminalization era was just the first phase towards transsexual freedom. We have effectively completed the initial step, through the decriminalization of Section 377, the suspension of the 'Telangana Eunuchs Act' by the HC of Andhra Pradesh<sup>80</sup>, and the amendment of 'Section 36A of the Karnataka Police Act'<sup>81</sup>. Following that, in 2017, the Hon'ble SC issued another landmark decision on the privacy rights in '*Puttaswamy vs UOI*<sup>82</sup>'. The court ruled in this case that the right to existence, equality, and basic freedoms all include a fundamental "Right to Privacy". The court goes on to explain that the privacy right encompasses the freedom to choose one's own personal relationships, as well as the right to gender and sexuality. *Justice Chandrachud* proceeded further to say that the court's rationale in *Suresh Koushal*, that only a small percentage of people were impacted, was incorrect, and that:

*"Lesbians, homosexuals, bisexuals, and transgender people make up a tiny percentage of the community, which is insufficient to justify denial of the right to confidentiality. The goal of raising some rights to the status of secured basic rights is to protect their implementation against legislative or public disapproval. Constitutional rights are guaranteed regardless of whether or not their application is viewed favorably by a majority of people. The public acceptability test does not provide a solid foundation for disregarding rights that have been bestowed with the sacredness of constitutional safeguard. For the sheer basis that their opinions, values, or mode of living differ from the "mainstream," distinctive and isolated minorities are at risk of prejudice. Nonetheless, in a democratic Constitution governed by the principle of 'Rule of law', their freedoms are just as sacrosanct as those bestowed on other people to safeguard their rights and interests<sup>83</sup>".*

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<sup>80</sup> Order dated 18.9.2018, passed in W.P. (PIL) No. 44 of 2018, by the High Court of Judicature at Hyderabad for the St. Of Telangana & A.P.

<sup>81</sup> Order dated 06.02.2017 in W.P. No. 1397 of 2015

<sup>82</sup> *Puttaswamy vs Union of India*, (2017) 10 SCC 1

<sup>83</sup> (2017) 10 SCC 1

More applications and appeals challenging Section 377 were filed in the aftermath of the Puttaswamy verdict. It was evident at this moment that gates were shut on Section 377.

The NALSA decision also provided fresh bases and, more importantly, new direction for the Section 377 petition to be revived. In 2016, two new complaints invoking Article 32 of the Indian Constitution were submitted. Navtej Johar and others signed the very first complaint, while Dr Akkai Padmashali, Umi, and Sana, 3 transsexual protesters from Karnataka, signed the latter. Following this, a slew of further applications were submitted by lesbian and homosexual campaigners. Each of these petitions requested the SC to reconsider Section 377's legality in light of NALSA. It was probably the first occasion that SC listened from transgender individuals.

On September 6, 2018, at a point when the Bisexual and transgender actions had acquired widespread social acknowledgement and the society was hoping for a court ruling, the Hon'ble Supreme Court unilaterally affirmed in '*Navtej Singh Johar vs UOI*<sup>84</sup>' that 'Section 377 was unlawful to the significant degree that it criminalized consensual sex'. The Navtej judgment has had an extreme influence. J. Chandrachud acknowledged:

*"Section 377 had marginalized a segment of the population and harmed their personalities, and ruled that gays, homosexual, lesbian, and transgender individuals had basic freedoms to fair and effective citizenship as well as preservation of all basic rights".*

The most significant accomplishment is the clarification of the constitutional right to non-differentiation on the rationale of sexuality, which is protected in Article 15. The court Ruled that "inequality construct on sexual orientation &gender falls into the definition of "sex" within Articles 15 of the Indian Constitution". It even proceeded so far as to declare that prejudice on the principle of "sex" includes prejudice based on gender inclination or sex preconceptions. This means that being sexually hetero normative or not following to community's 'standards' of sexual stereotypes, whether in the manner you dress, sound, or act, cannot be used as a basis for prejudice. The fact that Trans people do not adhere to society's sexual norms is indeed one of the main causes for aggression towards them. This addition of sex categorizing discrimination would go a considerable way toward deconstructing sexual preconceptions in India, not merely for the LGBT population and also for females. Ladies who might not adhere to communities standards in respect of how they

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<sup>84</sup> Navtej Singh Johar vs Union of India, AIR (2018) SC 4321

look, behave, perform, married, and lead their lives according to their chosen conditions have been penalized and mistreated and there has been no legitimate redress up to this point.

In his distinct decisions, *Chief Justice Misra*, formed particular references to transgender people equality, emphasizing that:

*“Hateful and transphobic behaviours stigmatize transgenders by refusing them their self respect, personal identity, and, above anything, their fundamental human freedoms’ and that, ‘This taboo, subjugation, and discrimination must be eliminated, and transgender people must evolve from their cramped spaces of basic sustenance in concealing with their solitude and anxieties to appreciating the vibrancy of surviving out of the darkness with correct understanding of their prospective and equal possibilities in all areas of life<sup>85</sup>”.*

In declaring Section 377 illegal, the SC acknowledges the basic human rights of transgender people, & “Chief Justice Misra” expresses unequivocally that:

*“The right to life and respect encompasses the dual elements of one's identification and gender preference”.*

In this manner, the Court's decision in Navtej Johar goes much above the anti-sodomy rulings from throughout the globe which were submitted to it. The Court respects the concerns of the most marginalized sexual small group inside the Lgbt population by acknowledging these dual characteristics of sexual identity and gender preference and asserts that the constitution guarantees all rights. The court ordered the Ministry of Social Justice & Empowerment [MSJE] to form an Expert Panel to carry out an extensive assessment of all the challenges confronting by the transgender society, offer solutions, and present the assessment, along with ideas and opinions, within three months of its formation<sup>86</sup>.

The second step of gender justice would be for transgender individuals to assert positive rights. Well with campaign for a distinct Transgender Persons Bill, much of this action has already begun.

#### **IV.1 TRANSGENDER PERSONS BILL-**

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<sup>85</sup> (2017) 10 SCC 1

<sup>86</sup> “Comments on the Transgender Persons (Protection of Rights) Bill, (2016)”, Vidhi Centre for Legal Policy , November, 2016)

*Tiruchi Siva*, a Member of Parliament [MOP], proposed a private member's bill in the Upper House of the Parliament<sup>87</sup>. Some members of the Bharatiya Janata Party sought to persuade Siva to remove the bill, citing inconsistencies and unworkable features. Some sections of the law, according to *Thawar Chand Gehlot* (MSJE), are unrealistic and overly complex. While urging that the Bill be removed, he pledged future legislation that would assist transgender individuals<sup>88</sup>. Siva, on the other hand, refused to remove the bill. He claimed that transsexual rights were protected by legislation in 29 countries. He claimed that there have been 450,000 transsexual persons in India, but that the true figure might be closer to 20,000. They possessed the voting rights, but they were discriminated against on a daily basis. The representatives of the ruling party voted no in the original voice vote. Siva was obliged to ask for a house division as a result of this. *Arun Jaitley*, the Finance Minister, has spoken out against it<sup>89</sup>.

The bill was approved overwhelmingly in the Upper House of the Parliament on April 24, 2015<sup>90</sup>, with the opponents having the plurality and also receiving cooperation from the Treasury Bench. *Simran Shaikh & Gopi Shankar Madurai*, both LGBT activists, applauded the decision.

The bill is significant since it is the only private member's bill approved by any house of the Parliament in 36 years, so by the Upper House in 45 years<sup>91</sup>. Following a discussion and reaction from the administration, the legislation is generally dropped. Throughout 1947, there have only been 14 private member's bills enacted<sup>92</sup>. Despite the fact that the bill grants transsexual persons OBC designation, affirmative treatment is still a big question mark. Additionally, because trans-people might be classified as dalits, the bill does not specifically state how reserves will be distributed. As a result, it was unclear whether they would get two series of reservations or otherwise. Further contentious feature of the law is that there is no reserve for education, despite the fact that there is one for occupation. The concern now is how someone may obtain job without first completing a formal school program. As a result, it is believed that the intended change in the legislation has not been effectively realized, and

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<sup>87</sup> Jatin Gandhi & Smriti Kak Ramachandran, "RS Passes Bill on Transgender Rights", *The Hindu*, May 04, (2016)

<sup>88</sup> "Rajya Sabha passes Historic Private Bill to Promote Transgender Rights", *The Indian Express*, April 25, (2015)

<sup>89</sup> *Ibid.*

<sup>90</sup> The Rights of Transgender Persons Bill, (2014), Private Member Bill, August 24, (2015)

<sup>91</sup> "Rajya Sabha Passes Private Member's Bill on Transgender Rights: First time in 45 Years", *Current News*, April 24, (2015)

<sup>92</sup> "Lok Sabha Takes up the Bill to End Transgender Discrimination", *NDTV*, February 27, (2016)

that the statute has not been sufficiently sensitized among the administrators. While the fact that the NALSA decision recognizes transgender persons, society remains homophobic and patriarchal. It should be the responsibility of the administration to properly educate the public; else, such individuals would have a difficult time getting goods. At every stage, reinforcement is necessary.

The upper house approved a bill with numerous progressive provisions, such as the establishment of central and provincial commissions for transgender individuals, and also transgender rights court system. So when legislature created '*The Rights of Transgender Persons Bill' in (2015)*, these anti-discrimination provisions were repealed. Notwithstanding these noteworthy exclusions, the draft Bill's skeleton architecture was substantially influenced by its predecessors. The 2015 draft Bill was given to the Ministry of Law upon discussion with legal professionals and transgender protesters. Considering extensive revisions to the 2015 proposal, it was presented in the Lower House in August 2016<sup>93</sup>. According to the ICJ report, 'The form and content of the Bill borrows substantially from the NALSA verdict. The wide description of transgender in the bill is based on the court's demand for inclusivity. The Bill recognizes and protects a variety of rights, including the right to fairness, existence, free expression, solidarity, dignity, and household, & also the right to be free from cruelty & other forms of harassment'. The Lok Sabha has still yet to approve Siva's bill.

The MSJE then released a draft law with the exact title on its webpage in late 2015, which activists claim has a number of questionable modifications.

*"The ministry facilitates and institutionalizes the gate keeping of transsexual identification in its bill",* says Dutta<sup>94</sup>, pointing to a clause that stipulates a state-level body will provide a certificate confirming an individual is transgender.

For example, *"let's say a transgender individual chooses to file a lawsuit against serious crime, violence, or harassment: will they have to initially get a certification from the authorities establishing their gender identity? Is this certification still required if one previously possesses additional ID cards that mention 'other' or 'trans'? What would occur if*

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<sup>93</sup> Lok Sabha Discusses Transgender Rights, September 12, (2016)

<sup>94</sup> Aniruddha Dutta (an Academic and Transgender Rights Activist ), *"Over 2 Years after Landmark Judgement, Transgender People are Still struggling"*, The Wire, May 15, (2016)

*a transgender individual desired a man or women ID card rather than one that labels them as third sex, this way of regulating identity is highly limiting”<sup>95</sup>.*

The Telangana Hijra Intersex Samiti addresses this problem specifically in their submission to the draft bill, requesting that the bill be changed to explicitly designate 2% reserves for transgender individual in all public institutions. *“When it regards to quotas, we as a society would prefer a clearly delineated interior reservation quotas based on sex — either inside the SC/STs or OBC groups, depends as to whether the transgender/intersex people was born SC/ST or not’, the condition indicates”<sup>96</sup>.* Protesters have also criticized the MSJE's drafting of the law, claiming that the procedure was primarily undemocratic and opaque.

▪ **Transgender Persons {Protection of Rights} Bill, [2016]-**

The *Transgender Persons {Protection of Rights} Bill, [2016]* was presented in the Lower House of the Parliament in 2016, following the verdict in the issue of NALSA vs UOI.

The Bill is split into parts that address the different liberties that transgender people should be allowed in order to combat prejudice. The definitions referenced in the Bill are found in *Section 2 of [Chapter 1]*, “An individual who is neither entirely feminine nor entirely masculine, or a blend of women and men, or neither woman nor men, and those whose perception of gender differs from the gender given to them at birth and also incorporates transgender males and transgender females, individuals with congenital variants and gender-queers, is considered as *transgender*”. Furthermore, an ‘*Establishment*’ is described as anyone or entity created by or within the jurisdiction of a State or Central Statute or by the govt, as well as any corporation, body corporate, organization, or group of individuals, or municipal agency which encompasses the private sphere. Inequality in education, profession, medical facilities, freedom to travel, right to receive commodities, right to dwell, unequal conduct, and the acquisition of government official are all prohibited under *Chapter 2 [Section 3]*. The acknowledgment of transsexual identity is addressed in *Chapter 3 [Sections 4-8]*. It establishes a framework through which transgender people can exercise their right to self-perceived sexual identification. This can all be accomplished by requesting a documentation of identification as a transsexual from the District Magistrate. This document will serve as evidence of his identification. It also includes a procedure for changing a

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<sup>95</sup> Ibid.

<sup>96</sup> “*Telangana Hijra Intersex Transgender Samiti responds to MSJE Transgender Rights bill (2015)*” by Telangana Hijra intersex Transgender Samiti, The Orinam Blog, January 18, (2016)

transgender's certification if the transgender's sexuality changes. Governmental measures are outlined in *Section 9 of [Chapter 4]*. These actions are in place to preserve the liberties and benefits of transgender people in community, and which incorporate actions to be executed to ensure their full involvement and acknowledgement. Transgender people are also rescued, protected, and rehabilitated. *Chapter 5 [Section 10-13]* specifies the duties of establishments as well as other individuals just like professional non-discrimination, the freedom to settle without unreasonable intervention, rehabilitation, and a complaint resolution system in a workplace of a hundred or even more employees. *Chapter 6 [Sections 14-16]*, focuses with transgender academic, social assistance, and medical problems. It safeguards basic rights to education, equality, benefit programs to encourage and promote survival, and the right to wellbeing, which includes separate HIV Sero-Surveillance Clinics, healthcare such as sex change operations, insurance policies to protect healthcare expenditures and increased proficiency and mentoring for health professionals to answer particular concerns. The National Council for Transgender is discussed in *Chapter 7 [Sections 17-18]*. The role of the council is to assist the national government on policy formation, analyze and assess the effectiveness of policies, and examine and regulate transgender-related operations across all government bodies. Anyone who entices or forces a transsexual to solicit or perform modern slavery, obstructs the right of access to a public area, forces a transsexual to leave their home, or damages or devastates the survival of a transgender is punishable by six to two months in detention and a fine under *Chapter 8 [Section 19]*. *Chapter 9 [Sections 20-24]* concerns with miscellaneous clauses such as donations by the central govt and immense power provided to the appropriate government to create regulations, protective measures of the authorities or any local council from any arrests for acts committed in due diligence, and the authority of the central government to eliminate complications for regulations that are contrary with provisos.

The bill does not include a description of 'discrimination' like the 2014 bill did. It defined discrimination as a differentiation, rejection, or constraint based on sexual identity and affirmation that has the primary aim of impeding or negating the acknowledgement, satisfaction, or practice, on an equivalent footing with one another, of all human liberties and basic rights in the polity, monetary, sociocultural, or any other sector, and it encompasses all kinds of discrimination. Since there is no universal meaning of discrimination, many acts may constitute as discriminatory on the account of societal, religious, or other factors, but transgender people will be unable to defend their rights under this broad definition.

The Bill's description of '*transgenders*' encompasses a large group of persons. Individuals who do not correspond to their biological gender in terms of sexual orientation, sexual orientation, or conduct are referred to as 'Transgender'. Transgenders are people who do not connect with their gender designated at birth as well as who did not consider as either men or women. It specifies that transgender people are those who plan to undertake or have had Gender Re-Assignment Operation to reconcile their biological gender with their sexual identification in attempt to turn men/women. They are commonly referred to as transsexuals. Moreover, Transvestites are persons who dressed in the other gender's clothes. Intersex and transgender people are both treated equally in this approach. As per the verdict, Sexual identity, on the contrary side, is described as an individual's self-identification as a male, female, transsexual, or any other recognized classification, according to the judgment. The word "transgender" was given a broad meaning in the verdict, allowing transgender people to select their genders. The Law, on the other hand, lacks to guarantee the freedom of self-identification.

The bill's description of establishment excludes the private sphere. It also excludes the unregulated industry. As a result, whenever transgender people's rights are violated in the commercial or unregulated sector, transgender individuals will be unable to vindicate their rights.

Establishment duties ensure that there is no inequality as well as a grievance system for establishments employing more than a hundred people. Nevertheless, there is no grievance system in place for establishments with less than 100 employees, so aggrieved transgender people will have to take the more costly and time option of resorting to the authorities or the courts to enforce their rights. Perhaps small-scale organizations should implement complaint mechanisms, or a commission should be established to handle complaints from these individuals according to territorial boundaries. These commissions should work as quickly as possible. The Transgenders Rights Court was included in the 2014 Bill; however it was removed from current Bill. Such courts will aid in the administration of fairness to transgender people.

Because the District Screening Committee is in command of transgender identification, transgenders must reveal their private areas to them in order for their status to be verified. Having both a woman and a man physician, present for such disclosures should be declared necessary. In addition to sexual identity, these individuals should be examined for any sexual



transmission illnesses. Because these people have a greater risk of suffering mental illness, the doctor should screen them for it. After then, they should be treated appropriately.

Furthermore, unlike the 2014 law, which allowed for transgender medical facilities and reimbursements, the present bill does not allow for distinct healthcare facilities and no incentives are offered for them. It allows for medical expenditure protection through an extensive insurance plan that is not specified in the law. When transgender people are registered for gender identity, they should be offered an insurance plan. This will have a dual function. For starters, it will provide an incentive for transgender people to register as such. Second, transgender people will be allowed to utilize this insurance plan while undergoing assessment and therapy. Provincial governments should be allowed the freedom to create any plans they see fit in their own states.

The bill's offenses and punishments include harming or injuring transgender people's lives, security, healthcare, or well-being. Highly offensive remarks, mockery, desertion, alienation, and deportation from the household or marital home are all common experiences for transgender people. To reinforce the legislation and establish stricter penalties for violations of transgender rights, additional laws, such as the Indian Penal Code, must be amended to make sexual harassment of transgender people a crime. *Section 354 of the IPC* should be changed to Assault, unlawful force against any individual with the purpose to offend his dignity. Section 375 must be gender-neutral, having the term "female" being substituted with "any human", in light of the prevalence of transgender people and even masculine rapes.

The 2014 bill had a system for disseminating the law to raise public understanding and encourage government efforts; nonetheless, the present bill does not really have a framework. This bill also ignores the 2014 bill's provision of occupational preference for transgender people. Sensitization initiatives, awareness projects, conferences, lectures, and rewards for profession and societal integration will all assist to reduce discriminatory practices and other violations of transgender people's human rights. To accomplish this, government initiatives should be implemented, and non-governmental groups that seek to improve the lives of transgender people should be encouraged. Furthermore, this bill doesn't seem to include gender identification requirements in bars. The similar gender should look for transgender people. Transgender people should also have cells assigned to them based on their needs rather than their sexual organs. In the United States, the Bureau of Justice, '*Prison Rape Elimination Act*' (PREA) prohibits mistreatment of transgender people and also allows them

to be housed in cells without regard for their sexual organs. Despite the fact that the Lok Sabha's law mentions transgender people's right to residency, it does not include their inheritance rights. Considering their gender identification, they are neither awarded the position of coparcener in the Joint Hindu Family, nor as a legitimate successor to their parents' independent estate. The bill requires a lot of improvements since transgender people are Indian citizens who should be acknowledged as third gender in all laws pertaining to their civil and legal rights.

- **Transgender Persons {Protection of Rights} Act, [2019]-**

The Parliament enacted the '*Transgender Persons (Protection of Rights) Act, [2019]*' with the goal of improving the general wellbeing of transsexual individuals in India. On July 19, 2019<sup>97</sup>, the *Ministry of Social Justice & Empowerment (MSJE)* presented the Bill in the Lok Sabha. The Upper House of the Parliament ratified it on *November 26, 2019*. The bill gained presidential consent on December 5, 2019, and also the Ministry of Law & Justice (MoL & J) issued it in the Indian Gazette with '*Act No. 40 of 2019*'. The "*Transgender Persons {Protection of Rights} Act, [2019]*"<sup>98</sup> (*hereafter known to as the "Act"*) is in force from '*Jan 10, 2020*'<sup>99</sup>, following the Ministry of Social Justice & Empowerment's [MSJE] notice in the Gazette.

The Transgender Persons [Protection of Rights] Act, (2019), has the essential key characteristics:

1. The act describes a trans-person as somebody whose sexual identity does not resemble that designated at birth, and it comprises trans male, trans female, people with congenital variants, gender-queers, as well as those with socio-cultural orientations like kinnars and hijra.
2. It bans discriminatory practices in the workplace, education, homes, medi-care, and other amenities towards them.
3. It enables for self-perception of sexual identity, but it requires that every individual be acknowledged as 'transgender' from a District Magistrate based on a certification of identification.

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<sup>97</sup> "*Cabinet approves Transgender Bill*", The Business Line, July 10, (2019)

<sup>98</sup> The Transgender Persons (Protection of Rights) Act, (Act No. 40 of 2019), December 5, 2019

<sup>99</sup> Devika, "*The Transgender Persons (Protection of Rights) Act, 2019*", The SCC Online Blog, January 10, (2020)

4. It places a significant emphasis on transgender females and hijras, as well as criminalizing begging.
5. Each transgender individual has the right to live in his or her own home and be a part of his or her family. On the instructions of a relevant court, if the transgender individual's close family is unwilling to look for them, they may be transferred in a rehabilitation centre.
6. A transgender individual may apply to the District Magistrate [DM] for a documentation of identification with the sex "Transgender" written on it. In addition, an updated certification may only be issued if the person has operation to alter their identity to either men or women.
7. A "*National Commission for Transgender People*" [NCT] will be formed to provide advice to the federal government and to assess the consequences of regulations, laws, and initiatives. First and foremost, the stated Draft Rules outline the method for transsexual people to request for a Certification of Identity as well as the way in which that kind a certificate would be given on transgender people.

There are numerous issues with the legislation that the government must resolve. The Act is controversial since it was enacted in the Upper House just after 3 days of deliberation and conversation, with no amendments or enhancements. It disregards the NALSA<sup>100</sup> verdict's freedom to self-determination of identification<sup>101</sup>.

Firstly, Intersex individuals are included in the category of '*transgender people*', which is controversial because an intersexual individual may or may not recognize as a transgender people. "*Intersex person's particular requirements are either hidden or subordinate when they represent just some other subgroup of transgender*" according to the survey.<sup>102</sup> The Standing Committee<sup>103</sup> assessment explains that perhaps the 2016 Bill does not per se encompass, represent, or safeguard the interests of intersex people since transgender and intersex people have distinct issues. As a result, the Bill was renamed '*The Transgender & Intersex Persons {Protection of Rights} Bill, [2016]*'. However, the Ministry was told that rephrasing the Bill's title would be pointless because the Bill includes '*Transgender*' as a broad definition<sup>104</sup>.

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<sup>100</sup> National Legal Services authority vs Union of India, (2014) 5 SCC 438

<sup>101</sup> "*Critical Analysis of the Transgender Persons Bill, (2019)*", Jatin Verma, November 29, 2019.

<sup>102</sup> "*Understanding Intersex and Transgender Communities*", InterAct Advocates for Intersex Youth

<sup>103</sup> "*Activists oppose Bill on Transgender Rights*", The Hindu, December 16, (2015)

<sup>104</sup> Ibid.

Gender identity must be medicalized before it can be recognized legally. The necessity for psychological or clinical validation is based on the assumption that Trans people suffers from mental illnesses that necessitate medical treatment. The (2016) Bill was criticized for proposing to create ‘*Screening Committees*’ to detect transgender persons<sup>105</sup>. The 2019 Act does not really include any screening committees; however it does require transgender individuals to request to the Magistrate for issue of a certification<sup>106</sup>. “*Upon executing such method and in such format and mode, at such duration, as may be authorized identifying the sexuality*<sup>107</sup>,” the District Magistrate would do accordingly. The ‘*process*’ is not explained in this document. However, it is reasonable to assume that when giving the certification, the Magistrate will depend on a healthcare practitioner. Furthermore, the Act stipulates that a transgender individual who receives sex-change operations must submit to the District Magistrate for a ‘updated certification’. The candidate must acquire a certification making reference to the operation from the Health Superintendent and otherwise Chief Medical Official of the institute where the operation conducted in addition to getting the updated certificate. However once the Magistrate is convinced that the Chief Medical Official's certification is genuine will he grant a new certification<sup>108</sup>. As a result, the Act establishes an ‘*implicit and indirect*’ screening mechanism for transgender persons seeking a certification.

In the NALSA decision, The SC has ordered the federal and regional governments to regard transsexual persons as ‘culturally and academically disadvantaged classes’ of people, and also to expand all forms of reservation in academic institutions and governmental positions. The Expert Committee further suggested that the government give scholarships, fee waivers, free textbooks, and free hostels, among other things<sup>109</sup>. However, the Act merely states that academic institutions must offer comprehensive education and opportunity for transgender people to participate in athletics, recreational, and leisure pursuits without prejudice<sup>110</sup>. It cites a ‘universal education structure<sup>111</sup>’ but says nothing about how to integrate transgender youngsters in educational institutions.

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<sup>105</sup> The Transgender Persons (Protection of Rights) Bill, (2016)

<sup>106</sup> Section 5 of the Transgender Persons (Protection of Rights) Act, (2019)

<sup>107</sup> Section 6(1) of the Transgender Persons (Protection of Rights) Act, (2019)

<sup>108</sup> Section 7 of the Transgender Persons (Protection of Rights) Act, (2019)

<sup>109</sup> “*Report of Expert Committee on the Issues relating to Transgender Persons*”, Ministry of Social Justice and Welfare

<sup>110</sup> Section 13 of the Transgender Persons (Protection of Rights) Act, (2019)

<sup>111</sup> Section 2 (d) of the Transgender Persons (Protection of Rights) Act, (2019)

According to the Experts Committee's findings, a helpline for profession counseling, promotion, and digital recruitment assistance should be established<sup>112</sup>. A similar proposal was made in the Standing Committee's assessment. It endorsed creating a separate clause to provide directives to take particular actions like counseling, career coaching, and so on<sup>113</sup>. However, the Act is mute on these issues. It only specifies the 'racially discriminatory norm' with relation to recruiting, advancement, and other aspects of service. Nonetheless, it does not put any explicit duties on the government to offer job possibilities for transpersons.

In its assessment, the Standing Committee stated that any concept of '*Universal Education*' must take into consideration the unique issues of bullying and abuse experienced by gender non-conforming children. Beating, singling out, and some other types of mistreatment are not tolerated, and the training and studying system is appropriately tailored to accommodate the learning requirements of such children. Although this Act requires that each establishment assign a complaint officer<sup>114</sup>, it disregards the Committee's recommendation that the Complaint Official's obligations be specifically mentioned, as well as the kinds of grievances he can investigate and solutions he can provide, along the boundaries of the *Sexual Harassment of Women at Workplace [Prevention, Prohibition and Redressal] Act, [2013]*<sup>115</sup>.

The statute's most serious flaw is that, in comparison to the IPC, it shortens the sentence for rape and violence against individuals of the transgender population. When a transgender individual is sexually assaulted, the penalty is vastly different than when a cisgender individual is sexually assaulted. According to a 2012 research by the National Coalition of Violence Group, transsexuals are twice as likely to be victimized and assaulted in personal relationships.

The Act stipulates that:

*“Anybody found guilty of inciting or inflicting sexual assault of a transgender individual will face 'confinement for a time not lesser than six months but not more than two years, as well as a fine'<sup>116</sup>”.*

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<sup>112</sup> “*Report of Expert Committee on the Issues relating to Transgender Persons*”, Ministry of Social Justice and Welfare

<sup>113</sup> “*43<sup>rd</sup> Report, Standing Committee on Social Justice and Empowerment: The Transgender Persons (Protection of Rights) Bill (2016-17)*”, Ministry of Social justice and Empowerment, Lok Sabha

<sup>114</sup> Section 11 of the Transgender Persons (Protection of Rights) Act, (2019)

<sup>115</sup> “*43<sup>rd</sup> Report, Standing Committee on Social Justice and Empowerment: The Transgender Persons (Protection of Rights) Bill (2016-17)*”, Ministry of Social justice and Empowerment, Lok Sabha

<sup>116</sup> Section 18 of the Transgender Persons (Protection of Rights) Act, (2019)

Sexual offenses against cis-women, on the other hand, are subject to harsher sanctions, which might include life imprisonment<sup>117</sup>. Difference in treatment of binaries and non-binary individuals is a breach of Article 14 of the Indian Constitution<sup>118</sup>.

The Expert Commission & Standing Committee's medical suggestions are mainly incorporated into the Act<sup>119</sup>. However, it solely covers sex change operations and hormonal treatment when it comes to counseling<sup>120</sup>. Mental and psychological illness counseling is not provided. It also ignores the recommendation of the Standing Committee to provide insurance scheme.

The Expert Committee proposed a set of welfare schemes to accomplish the objectives of the Act. The following were listed:

1. For the development of transgender individuals, an overarching framework may be constructed.
2. Crisis Counseling Services, patterned after Rape and Crisis Management Centers, to help people deal with stress and abuse.
3. Make accommodation and rehabilitation a priority via housing aid programs with the support of concerned ministries.
4. Extending the scope of any of the organizations to provide financial assistance to the transgender group.
5. Establishing strong links with commercial and government-run vocational training centres to provide vocational education to this population.
6. A Federal Committee for Transgender People, comparable to the Federal Councils for Elderly People, might be established.

The Act, on the other hand, has failed to meet expectations on many occasions. The administration should undertake welfare programs and steps to accommodate transgender people in the public realm, as per (Chapter 4)<sup>121</sup>. Besides the provisions for the establishment of a Federal Committee for Transgender People, the Act does not give any guidance on what

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<sup>117</sup> Section 354, 354A, 354B, 376 of the Indian Penal Code, (1860)

<sup>118</sup> State of West Bengal vs Anwar Ali Sarkar, AIR (1952) SC 75

<sup>119</sup> Section 15 of the Transgender Persons (Protection of Rights) Act, (2019)

<sup>120</sup> Section 15 (3) of the Transgender Persons (Protection of Rights) Act, (2019)

<sup>121</sup> Section 8 of the Transgender Persons (Protection of Rights) Act, (2019)

actions the administration should take, nor does it refer to the regions where welfare operations should be conducted. Furthermore, the Act deviates from the NALSA decision by eliminating the sections establishing Central and Provincial Transgender Wellbeing Commissions and replacing them with the Federal Committee for Transgendered People. The Council is said to be a huge bureaucratic entity with little enforcement powers<sup>122</sup>.

The federal and provincial governments should take a comprehensive strategy to transgender individuals so they feel accepted in society and are not viewed as outcasts. Numerous procedures to sensitize individuals on the transgender problem were suggested by the Committees for this aim, including:

1. To make use of established platforms such as Anganwadi Centres as well as Self-Help Associations to provide knowledge to families of gender non-conforming adolescents and the broader public.
2. To take steps to raise knowledge of transsexual people's issues in places including schools and universities, government and commercial workplaces, police departments and so forth.

According to the rule of law, legislation should not impose excessive intellectual or psychological constraints on citizens. It should be sustainable and responsive to societal expectations. The legislation should be uniform and resolve any legal inconsistencies that may occur. The current legislation for transgender rights overlooks their requirements and imposes excessive command since it is not based on community needs and requests.

- **Draft Transgender Persons {Protection of Rights} Rules, [2020]-**

A series of complex problems arose, reflecting public, civil society, and judicial specialists' worries. In support of this, the Federal Government released the draft '*Transgender Persons {Protection of Rights} Rules, [2020]*<sup>123</sup>, dated July 13, which intends to issue notifications underneath the *Transgender Persons {Protection of Rights} Act, [2019]*<sup>124</sup>. On 16, April 2020, the administration released the Draft Rules to the Act for general comment after the announcement of the Act. The submission focuses on incorporating the transgender society's feedback and making suggestions to the provincial government to improve the law. The bill concentrates on delving into each provision individually.

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<sup>122</sup> Anuvinda P & Tiruchi Siva, "A Story of Two Bills", The Indian Express, October 28, 2016

<sup>123</sup> The Transgender Persons (Protection of Rights ) Rules, (2020)

<sup>124</sup> The Transgender Persons (Protection of Rights) Act, (2019) (Act No. 40 of 2019)

The devastating coronavirus epidemic has had a negative impact on the global market. That not just the lower-income segment in India has been affected, but the transgender community has also been affected. This segment of the nation emerges as perhaps the most vulnerable, powerless, and worst-affected<sup>125</sup>.

The objective of redrafting the regulations for transgender individuals is to:

- Standardizing and easing the procedure of the District Magistrate issuing a certification of identification.
- It also attempts to provide recognition by granting the freedom to self-identify as a woman or a man.
- Defining welfare programs that will result in a socioeconomic shift in Indian culture.
- Providing possibilities while attempting to make accommodations suitable with the intersex community.
- Strives to eliminate discrimination against them in the workplace, medical care, and educational.
- Ensure that commodities and public spaces are accessible and enjoyable.

Regretfully, the 2020 Draft has once again fallen short of the transsexual community's aspirations. The group was outraged since they only had 13 days to submit their feedback<sup>126</sup>. Furthermore, the bill's wording is lacking in humanity and has been labeled as “Unreasonable” & “Unsympathetic”. It does not adhere to the idea of self-determination.

*“It is truly our darkest fear turn into reality because the bill solely deals about control and re-regulation of transgender individual’s anatomy and nothing to do with their freedoms. Transgender people are viewed as passive receivers of the state's goodwill<sup>127</sup>”,* remarked by one of the Transsexual.

The bill has been criticized for the several reasons. First and foremost, the stated Draft Rules outline the method for transsexual people to request for a ‘*Certification of Identification*’ as

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<sup>125</sup> Chahat Rana, “*Hit Hard by Lockdown: Transgender Community stands isolated with no Financial Resources*”, The Indian Express, April 27, (2020)

<sup>126</sup> Geetika Mantri, “*Ill-timed, insensitive: Govt’s Trans Act Rules in the Middle of a Lockdown draw flak*”, The News Minute, April 22, (2020)

<sup>127</sup> Revathi Krishnan, “*Even the Definition is off the mark- why transgenders are upset with Modi Govt Bill*”, The Print, August 24, (2020)



well as the way in which that kind a certificate would be given. Next, the District Magistrate will award it, and a request for the Certification of Identification must contain an attestation, an application document, & a psychologist's assessment. Finally, if the claimant has been resident in a District Magistrate's domain for one year since the date of application, then he/she may only grant a Certification of Identity.

Moreover, there are several concerns with the aforementioned Draft Rules, such as the need that applications for a Certification of Identification contain a psychologist's assessment. Citizens have the freedom to self-perceive their sexual orientation, as stated in Section 4 clause (2) of the Act<sup>128</sup>, implying that an individual's sexual orientation cannot be decided by anybody other than oneself<sup>129</sup>. However, it is questionable why a psychologist's assessment is required as part of a request for a certification as a trans-person under the Draft Rules. The Magistrate is not required to "assess" the person's sexuality under the Act. Rather, he is responsible for issuing a certification to anybody who self-identifies as transsexual. It is odd why such a psychologist's evaluation is needed in the documentation procedure since an assessment is not needed for issuance of a Certificate. Consider that the Standing Committee on MSJE (2016)<sup>130</sup>, which evaluated the Bill when it was first presented in Parliament, found that having healthcare practitioners on the board assessing an individual's transgender certificate raises the chances of the candidate's gender identity being evaluated on clinical, genetic, or psychological grounds.

The substance of the psychologist's assessment that must be presented when seeking for a certification is not specified in the Draft Rules. It seems to be uncertain what extra details will be included in the psychologist's assessment if an individual may proclaim themselves as transsexual in the declaration presented with their application. In addition, as per the "National Human Rights Commission (NHRC)<sup>131</sup>", there are 898 psychotherapists working in public & commercial institutions as of 2019, despite a requirement for medical psychologists of 20,250, and even an overall population of transsexual people in India of about 4.9 lakhs<sup>132</sup>, as a result, obtaining psychological reports while seeking for certification would be challenging for transgender individuals. Practitioners who have the legal power to

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<sup>128</sup> Transgender Persons (Protection of Rights ) Act, (2019)

<sup>129</sup> National Legal Services Authority & Others vs Union of India, (2014) 5 SCC 438

<sup>130</sup> "43<sup>rd</sup> Report, Standing Committee on Social Justice and Empowerment: The Transgender Persons (Protection of Rights) Bill (2016-17)", Ministry of Social justice and Empowerment, Lok Sabha

<sup>131</sup> Mr. Justice H.L. Dattu, "Despite efforts huge gap remains between the requirements and availability of facilities in the mental healthcare sector", Ministry of Home Affairs, august 7, (2019)

<sup>132</sup> Census of 2011, Ministry of Home Affairs, Government of India

issue certifications are usually licensed and controlled by governmental agencies. Practicing physicians, for example, are controlled by the *Medical Council of India* (MCI)<sup>133</sup>, while dentists, C.A., and builders are governed by equivalent organisations. There are no legislative bodies that certify or supervise psychologists. As a result, there may be discrepancies throughout public hospitals as to who is eligible to submit reports for the aim of acquiring a Certification of Identification.

A Magistrate should only provide a certification of identification to a claimant who has lived in the region under his authority for one year since the date of the request, according to the Draft Rules. However, the transgender population confronts discrimination, poverty, and unstable housing<sup>134</sup>, making it impossible for them to develop grounds for minimum a year prior to filing an application. It might also be claimed that this clause makes applying for a Certification of Identification more difficult for transgender people. A one-year residence criterion is not required for a number of other licenses and certifications. At least one of the spouses to the marriage must have lived in the region for at least a month before filing the civil marriage registration<sup>135</sup>. In addition, there is no need that a person stays in the region for a certain amount of time before seeking for a driver's license from a Road Transport Organization<sup>136</sup>.

Furthermore, it is uncertain why details like as academic qualifications, school or university affiliation, and source of wealth, are included in the form for transgender certificate. It's questionable why such data is necessary for an individual's transgender certificate. Furthermore, the application form stipulates that all information supplied by candidates be kept private and communicated exclusively with federal or local security authorities. The reason for which the details will be disclosed is not stated. It also doesn't say which security authorities such data can be communicated with.

In the instance that a fraudulent submission for a Certification of Identification as a transsexual is made, the Draft Rules need not offer a criterion for determining its validity, and also the Act does not define a punishment for filing such an application. The Draft Rules do, however, include a punishment for those who apply for a certification with the aim of falsely obtaining the status as a transgender individual. Because people have the freedom to decide

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<sup>133</sup> The National Medical Commission Act, (2019) , (No. 30 of 2019)

<sup>134</sup> “*Report of Expert Committee on the Issues relating to Transgender Persons*”, Ministry of Social Justice and Empowerment, January 27, (2014)

<sup>135</sup> The Special Marriage Act, (1954)

<sup>136</sup> The Motor Vehicles Act, (1988)

their own gender identity, it's uncertain how authorities can tell whether someone is presenting a fraudulent application.

Furthermore, the court in the NALSA decision stated:

*“The non-acknowledgment of Hijras’ status in numerous laws restricts them equivalent treatment of the laws and they are subjected to extensive prejudice<sup>137</sup>”.*

The Draft Rules provide the Magistrate broad authority to deny a request for Certificate of Identification, which goes against the NALSA ruling, which authorized for self-identity of sexes.

Transsexual individuals who have sex-reassignment operation can request for a new Certification of Identification and declare as men or women under the Law. The Draft Rules outline the process for an individual who has had surgery to request for an updated Certification. This entails submitting a medical certificate as well as an application document. Moreover, the application forms for an updated Certification contained in the Draft Rules merely enables the candidate to pick “transgender” as their sexual preference, not ‘men’ or ‘woman’. The updated identification card produced on the grounds of such an application identifies the individual’s sex as ‘man’/ ‘woman’. This appears to be a drafting mistake.

Additionally, numerous transgender people have had operations years earlier, and the Draft Rules make no mention of them because those who have had operations in the past may not be able to present paperwork at this time. As a result of this fundamental difficulty, many transgender people may be unable to take use of the legislation and programmes that are provided to them.

The Act says that welfare facilities to safeguard transgender people's rights and liberties, as well as to make it easier for them to receive assistance programs, may be specified in the Rules. According to the Draft Rules, the competent authority must: i) evaluate current benefit programs to incorporate transgender people, ii) make sure that welfare initiatives, programs, and subordinate legislation do not discriminate against transgender people, iii) start taking reasonable steps to prevent discriminatory practices against transgender people, and iv) start educating transgender people about the rewards offered to them. The Draft Rules does not include this information at the moment.

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<sup>137</sup> National Legal Services Authority & Others vs Union of India, (2014) 5 SCC 438

In terms of transgender welfare policies, the Draft Rules urge public agencies to evaluate current programs and welfare policies to safeguard transgender people's liberties and concerns although such measures have yet to be properly specified. So because Draft Rules notably specify that during two years of the rules' publication, the relevant authorities must install distinct restrooms in establishments. Nevertheless, because the phrase 'establishment' covers union and provincial government-sponsored or administered entities, a union of persons, company, organization, or even institutions, it is not practicable for the relevant government to offer separated restrooms for transgender people.

In these conditions, the *Arunkumar & Sreeja vs Inspector General of Registration & ors*<sup>138</sup>, decision is important since it gave the transgender population legal rights. In this matter, the Madras HC ruled that a duly formally recognized marriage in between man and a trans-female is lawful under the Hindu Marriage Act, [1955], & also that the Registrar of weddings must record it. It made it possible for the LGBTQ people to obtain civil rights like as marriage and inheritance. This decision broadens the scope of the transgender population's rights, which had been disregarded for millennia.

This ruling adds a new dimension to our concept of biological gender in a community where we are taught to conceive of biological gender as a binary of 'men and women'. Irrespective of these achievements, it is evident that equal treatment for people of the transsexual and intersex communities in India, are still a long way off. Developing laws must be changed to fully understand the demands and wants of various segments of society.

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<sup>138</sup> Arunkumar & Sreeja vs Inspector General of Registration & Others, WP (MD) No. 4125 of (2019)

## IV.2 TRANSGENDER RIGHTS UNDER HINDU PERSONAL LAWS-

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### ▪ MARRIAGE-

Marriage is considered to be one of the most crucial components of a particular personality, both socioeconomically and politically. The concept of marriage, which is an enshrined in law and legitimately recognizable relationship between two parties, has enormous public relevance because it establishes a strong foundation for the rights and responsibilities that follow from the consummation of a marital relationship, particularly in the areas of estate, succession, inheritance, and other relevant provisions<sup>139</sup>.

Marriage is now acknowledged as a civil right<sup>140</sup> which pertains to every person or citizen of the country, as well as a notion with regional and global acceptability<sup>141</sup>. On this basis, it is reasonable to conclude that the state must uphold marriage as a person's right especially in relation to all legislation and rules that emerge from it and govern the interpersonal realm of marriage.

The freedom to marry, which is now a fundamental right in India, allows people to choose a partner of their very own independent choice, and the authorities cannot restrict this freedom<sup>142</sup>. In the Indian scenario, the right to personal liberty endorsed by Article 21 of the Indian Constitution, entails the presence of a quality and purposeful human existence, not only a physical presence<sup>143</sup>. The guaranteeing of rights under Article 21 requires the acknowledgment of intrinsic human dignity<sup>144</sup>. Since the right to marry is so important for maintaining one's integrity and living a worthwhile presence, Courts in India have viewed marriage as a fundamental right underlying Article 21<sup>145</sup>.

When marriage is really an important civic right that is vital to all resident of the nation, is it fair to stigmatize individuals just because they do not adhere to a stereotypical distinction of binary genders? Unfortunately, despite the fact that the freedom to marry according to one's

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<sup>139</sup> Indra Sarma vs V.K.V. Sarma, (2013) 14 SCALE 448 ("Marriage as an institution has great legal significance and various obligations and duties flow out of marital relationship, as per law, in the matter of inheritance of property, successionship, etc.")

<sup>140</sup> Skinner vs Oklahoma, (1942) 316 U.S. 535

<sup>141</sup> Article 23 of International Covenant on Civil & Political Rights; Article 16 of Universal Declaration of Human Rights; Article 10 of International Covenant on Economic, Social and Cultural Rights; and Article 12 of European Convention on Human Rights.

<sup>142</sup> Loving,(388) US

<sup>143</sup> Olga Tellis & Others vs Bombay Municipal Corporation & Others, (1985) 3 SCC 545

<sup>144</sup> Maneka Gandhi vs Union of India, AIR (1978) SC 597; Francis Coralie vs Union Territory of Delhi, (1981) 1 SCC 608

<sup>145</sup> Mr. X vs Hospital Z, AIR (1999) SC 495

own preferences has been acknowledged as a basic human right, the current societal situation in which third gender individuals find themselves deprived of this essential right. The personal legislation that recognizes Hindu marriage, as well as law enforcement authorities, makes no attempt to protect third gender people's fundamental freedom to marry whoever they want.

Marriage has a sacred foundation in Hindu jurisprudence and it is primarily considered to signify a holy union of two persons for the purpose of performing religious responsibilities<sup>146</sup>. According to Vedic texts, marriage can have eight distinct forms: *Brahma, Asura, Daiva, Arsha, Prajapatya, Paisaca, Rakshasa, & Gandharva*<sup>147</sup>. *Gandharva vivah* is perhaps the most holy and frequently utilized marriage ceremony, as it is grounded on shared love and feelings of attraction amongst two people. This style of marriage encourages third-gender marriages because the only requirement for ceremony is shared love and attraction<sup>148</sup> amongst the married persons, as well as the execution of appropriate rites and traditions<sup>149</sup>. The interchange of flowers and an incantation in front of the holy fire designated as '*Saptapadi*' are the two common traditional Hindu rites. Even within Hindu marriage regulations, these rites play a vital role, since their exclusion will result in the marriage not being solemnized in the real sense<sup>150</sup>. Gandharva marriages are generally done with mutual assent among the parties involved, and so do not demand witnesses, a ceremonial authority, or parental approval. The 4th-century classic masterwork *Kamasutra* recognizes Gandharva vivah as the finest type of marriage since it is based on shared desire or anuraga, notwithstanding its contested position as an acceptable type of marriage in Hindu holy books<sup>151</sup>.

Marriage is an important need for the contentment of one's particular "Dharma", according to Hindu mythology, and anybody with an intrinsic urge to love other human can do so regardless of sexuality. Individuals, regardless of their sexual orientation, should always have the freedom to express such desires in the shape of marriage, if they so want, and if this

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<sup>146</sup> Swarajya Lakshmi vs G.G. Padma Rao, AIR (1974) SC 165

<sup>147</sup> Rajbali Pandey, "*Hindu Samakaras: Socio-Religious Study of the Hindu Sacraments*", Delhi: Motilal Banarasidass Publishers, 2<sup>nd</sup> Edition, (1969).

<sup>148</sup> Sir Dinshaw Fardunji Mulla, "*Mulla Hindu Law*" (605), Lexis Nexis, 12<sup>th</sup> Edition, (1960)

<sup>149</sup> See, e.g., Bhaurao Shankar Lokhande & Another vs St. of Maharashtra & Another, AIR (1965) SC 1564 ("The two ceremonies essential to the validity of a Hindu Marriage, i.e. invocation before the sacred fire and Saptapadi, are also a requisite part of a 'Gandharva Marriage', unless it is shown that some modification of these ceremonies has been introduced by custom in any particular community or caste").

<sup>150</sup> Section 7 of the Hindu Marriage Act, (1955)

<sup>151</sup> Ruth Vanita, "*Love's Rite: Same-Sex Marriage in India and the West*", New Delhi: Penguin Books, (2005).

relationship with the people of their preference is not permitted, it will obstruct their accomplishment of ‘*Moksha or Eternal release*’.

In light of history, Hindu weddings have never really been done uniformly, but rather according to the norms of various schools that folks wish to emulate<sup>152</sup>. In ancient Vedic culture, third gender individuals were granted all of the same privileges and basic freedoms as everyone else, including the freedom to marry<sup>153</sup>. The Kamasutra later acknowledged the presence of third-sex individuals and marriages<sup>154</sup>.

In fact, Hindu legal system has not expressly forbidden queer marriages; in real sense, such non-binary sex weddings are outlined in many of the significant Hindu scriptures that are preceded<sup>155</sup>, even though has also been elaborated over the decades by a variety of prominent figures, priestly intellectuals, and spiritual educators who have professed their corresponding views on this subject, based on their understanding of the subject<sup>156</sup>. These differing viewpoints were concurrently documented in the form of several treatises, which are now available for our examination<sup>157</sup>. The tale of Princess Sikhandini, which was put into the classic Mahabharata, is amongst the most prominent case of gay marriage in Hindu mythology. *Princess Sikhandini* married a lady she loved, and as a result, she was turned into a man's bodily gender. Despite the fact that she did not marry the lady she loved again, this moment as a male, the marriage stayed legitimate<sup>158</sup>.

The *Hindu Marriage Act of 1955* was enacted by parliamentarians in order to give validity to the Hindu law's cultures and beliefs<sup>159</sup>. One important aspect to keep in mind is that Hindu legislation has always been recognized to be accommodating of a wide range of gender and sexual inclinations<sup>160</sup>. So, as a symbolic progression from this viewpoint, the court must adjust duties and requirements within its meaning of marriage to meet the true goal of Hindu law, and that is the divine bond between two souls, not reproduction, through progressive

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<sup>152</sup> M.P. Jain, “*Indian Legal History*”, Lulu Press Incorporation, (2014)

<sup>153</sup> Amara Das Wilhelm, “*Tritiya- Prakriti: People of the Third Sex: Understanding Homosexuality, Transgender Identity, & intersex Conditions Through Hinduism*”, Philadelphia: Xlibris Corporation, (2004)

<sup>154</sup> Marvin Mahan Ellison & Judith Plaskow, “*Heterosexism in Contemporary World Religion: Problem and Prospect 219*”, Cleveland: Pilgrim, (2007)

<sup>155</sup> Mark Philip Strasser et al., “*Defending Same-Sex Marriage: Volume 2 of our Family Values Same-Sex Marriage and Religion*”, Westport, CT: Praeger, (2007)

<sup>156</sup> Id.

<sup>157</sup> Id.

<sup>158</sup> Kanhu Charan Mishra, “*Studies in the Mahabharata*”, Bhubaneswar: Institute of Orissan Culture, (1989)

<sup>159</sup> “*59<sup>th</sup> Report on Hindu Marriage Act, (1955) & Special Marriage Act, (1954)*”, Law Commission of India, March (1974)

<sup>160</sup> Preeti Sharma, “*Historical Background and Legal status of Third Gender in Indian Society*”, 2(12), URESS 64, (2012)

interpretation of law<sup>161</sup>. The legal categorization of sexuality clearly distinguishes two distinct groups, each with its own set of rights: a male who can lawfully marry a female & a female who can lawfully marry a male. Despite the apparent linearity of segmentation and the rights assigned as a result, there is no unambiguous legal condition that might really allow such segmentation to function<sup>162</sup>. It is an individual's basic right to marriage, and would be a severe matter of discrimination, if a complete community or section of population were denied the freedom to matrimony merely as they didn't meet the categories of 'man' & 'woman', and any inevitable consequences. When faced with the task of determining the lawful legitimacy of a union depending on the sexuality or gender of the individuals involved, the judiciary must evaluate the legal gender of every person<sup>163</sup>. When it comes to identifying a person's legal gender, different situations in the legal environment need distinct approaches to the problem, which do not necessarily have to overlap<sup>164</sup>.

When a legislative statute's key phrases aren't specified, the obvious course of action is to evaluate their "Literal Interpretation"<sup>165</sup>. When their literal interpretation is used, nevertheless, it should be recognized that it does not distort the framework and aim of the statute provisions, in this case, the marriage law.

Marriage, for example, as the "realistic" & "forward-looking" aim of the legislation to establish legitimate ties between distinct categories of individuals, must be understood in particular. In this perspective, legitimate sex & gender classifications must be seen to be measured in such a manner as to be more adaptive of the deviations displayed by people in their corresponding sexuality realms, as well as to ameliorate the mental and emotional flagellations enforced on them by the organic presence of such deviations<sup>166</sup>. Furthermore, given that the rhetorical appraisal of sexuality has become an inherent and also a crucial element of the complete justice framework, it is necessary to infer that the gender/sex split has been already enshrined in a significant legal area, namely the Constitution<sup>167</sup>. As a result, the definition of sex-relevant terminology in the "Hindu Marriage Act" & other related

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<sup>161</sup> Reema Aggarwal vs Anupam & Others, (2014) 3 SCC 199

<sup>162</sup> Theodore Bennett, "Cuts and Criminality: Body Alteration in Legal Discourse" 167, Burlington, VT: Ashgate Publishing, (2015)

<sup>163</sup> Randi E. Frankle, "Does A Marriage Really Need Sex?: A Critical Analysis of the Gender Restriction on Marriage", 30(6), Fordham Urb.L.J. (2002)

<sup>164</sup> Theodore Bennett, "Cuts and Criminality: Body Alteration in Legal Discourse" 167, Burlington, VT: Ashgate Publishing, (2015)

<sup>165</sup> W vs Registrar of Marriages, (2012) 1 HKC 88

<sup>166</sup> Dean Spade, "Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law" 13, New York: South End Press, (2011)

<sup>167</sup> Critical Intersex M. Holmes, ed., Farnham: Ashgate Publishing, (2012)



legislation would effectively give force to the language of the India Constitution itself, that recognizes the presence of third sex inside the discrete “Sex” of Article 14. As a result, a third sex person may be legally allowed to take the status of ‘wife’ or ‘husband’ to a degree that the prerequisites of a legitimate Hindu marriage are satisfied.

*Corbett v. Corbett*<sup>168</sup> was the very first lawsuit to address sex change in marital relationship. In this matter, the Court decided that the defendant was indeed a man despite the gender reassignment, and therefore a marriage between men was illegitimate. Furthermore, in the matter of *R v. Tan*<sup>169</sup>, the same concept was applied, with the result that a male continues to stay a male by legislation after undergoing a gender reassignment. Upon further investigation, it is discovered that neither the ‘*Hindu Marriage Act*’ nor the ‘*Special Marriage Act*’ in India cover transsexual individuals. Because eunuchs are not members of the fairer gender, they are not regulated by the ‘*National Commission for Women (NCW)*’. Transgender people are not included under ‘Section 2 clause [c] of the *National Commission for Minorities*’ that classifies minority populations as Sikhs, Christians, Muslims & Buddhists. Surprisingly, many articles in the worldwide judicial system are silent on the subject of transgender people.

‘*Whilst the individuals of the United Nations have reconfirmed their respect for human liberties*’ in the value and respect of living beings & in the equal treatment of male & a female, and have ascertained to preamble societal advancement & improved qualities of livelihood in significantly bigger independence, interprets the preamble of the UDHR, the highly influential manuscript on Human Rights. This sexual identity has also been denied a position in the UN Charter<sup>170</sup>.

The non-authorization of third-sex marriage legislation might have a wide range of consequences. The guru-chela connection is especially important in a hijra gharana since there is a requirement for financial reliance as well as a display of social dominance<sup>171</sup>. In the restricted Hijra society, kinship is formed via connections and family relationships amongst gurus and chelas<sup>172</sup>. Furthermore, this connection comes at a price, which the chelas must reimburse by being submissive and accommodating to their gurus' wishes and instructions in attempt to satisfy the most basic needs of existence, that may be as simply as a regular food

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<sup>168</sup> Corbett vs Corbett, (1970) AII ER 33

<sup>169</sup> R vs Tan & Greaves, (1983) 2 AII ER 12

<sup>170</sup> Indrani Sen Gupta, “*Human Rights and Sexual Minorities: Transgender Human Rights*” Gyan Publishing House, (2005)

<sup>171</sup> Serena Nanda, “*Neither Man or Woman: The Hijras of India*”, Belmont, CA: Wardsworth Publishing Company, 2<sup>nd</sup> Edition, (1999)

<sup>172</sup> Id.

and a home to stay. Hijras cannot lead their lives entirely as they desire for fear of being shunned and abandoned by their own group<sup>173</sup>. Considering the hardships they suffer even inside the four walls of their group, these disadvantaged Hijras prefer to stay within the four walls of their society in exchange for security and restricted inheritance entitlements in the land of the hijra gharana. This highlights the importance of establishing and acknowledging matrimony and also third-sex person's succession rights. Acknowledging the Hijra group's freedom to marry will create the groundwork for providing transsexual the other Hindu personal law privileges like as inheritance, property, and adoption.

▪ **INHERITANCE:**

In India, property succession is controlled by the personal rules of each faith and group. These rules classify people into two groups based on sex, 'men & women'. To fall inside the jurisdiction of the inheritance rights, a transgender individual must fall into one of these classifications. Only women and men are recognized as subjects of property ownership under the *Hindu Succession Act, [1956]*, that regulates Hindus for the intent of inheritance of the both combined & segregate property<sup>174</sup>.

Man, woman, daughter, son, and other words contained in the act are limited to conventional gender identification. The statute makes no mention of transgender people or people of various sexual orientations. Typically, such an individual is kicked out of their household and has no control over their own or their family's possessions. They had to sacrifice their sexual identification as transgenders in order to have the right of inheritance. In most cases, transgender persons identify as feminine and can inherit possessions as a "Daughter or a Son". Regarding inheritance purposes, the sexuality identification of such an individual is determined by the sex ascribed to them on their birth document. This prerequisite of receiving asset from relatives & family members is in violation of Article 15 n, which forbids gender inequality<sup>175</sup>.

The term "Sex" refers not only to biological sexes as men or women, and even to a human who does not identify as either men or women<sup>176</sup>. The justifications for an individual's incapacity are limited to 'Sections 24 to 26 of the Act, (1956), while being transgender is not

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<sup>173</sup> Reddy G., "With Respect to Sex: Negotiating Hijra Identity in South India", Chicago: University of Chicago Press, (2010)

<sup>174</sup> Hindu Succession Act, (1956)

<sup>175</sup> Article 15 of the Constitution of India

<sup>176</sup> Manjeet Kumar Sahu, "Case Comment on National Legal Services Authority vs Union of India & Others, AIR (2014) SC 1863: A Ray of Hope for the LGBT Community", Volume (III), Issue (2), BRICS Law Journal, (2016)

one of them<sup>177</sup>. Furthermore, in these provisions, the expression “person” has been used, which really is a broader word that is described in the *General Clause Act, [1897]* as ‘any corporation, organization, or group of persons, whether registered or not’<sup>178</sup>. As per the aforesaid description, the word person does not just apply to males and females, but also includes transgender people who are Indian citizens<sup>179</sup>. As a result, within Section (28) of the Act, rejecting transgender individuals on the rationale of their sexual identification is not justifiable<sup>180</sup>. While the most prevalent reasoning against that kind of contention is that the legislators intended the Law to incorporate only males and females.

The acknowledgment of the ‘*Hijra Gharanas*’ succession rights which has been acknowledged, is another less publicized component of the implementation of rights of the transgender group under Hindu laws. It is first necessary to draw attention to a remarkable parallel that appears between the Hijra society & a Hindu Undivided Family (HUF). In such a Hindu Joint Family (HJF), an individual with the lowest relationship level within the kinship requires the nourishment and safety of the individual with the higher relationship rank and will thus show due reverence and allegiance to the greater. The similar may be observed of a Hijra Gharana, in which the affectionate desire for having a bond is much stronger than it is amongst several Indian families nowadays, since the Hijra society survives and thrives as both as a family and a labor group<sup>181</sup>. Because a hijra gharana does have the identical organizational structure as a HJF, the constitutional legitimacy of identifying Hijra Gharanas following the grounds of a HJF should be recognized right away, despite the fact that current legitimate rules give little assistance in this respect. Nevertheless, throughout time, court interpretations of the terms ‘HUF’ & ‘HJF’ have shifted. The HJF’s composition has been restricted not just to the framework that supports a coparcenary form of inheritance, but rather to “a periphery of individuals “men and women”<sup>182</sup> that live beyond the boundaries of coparcenary”. It would be interesting to observe if, as a result of this shift in court interpretation of the phrase ‘HUF’, the notion of sapindaship might ultimately be expanded to include existing relationships between hijra gharana individuals. Take into account the

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<sup>177</sup> Section 24-26 of the Hindu Succession Act, (1956)

<sup>178</sup> Section 3 (39) of The General Clauses Act, (1897)

<sup>179</sup> Article 5 of the Constitution of India

<sup>180</sup> Section 28 of the Hindu Succession Act, (1956)

<sup>181</sup> Reddy G., “*With Respect to Sex: Negotiating Hijra Identity in South India*”, Chicago: University of Chicago Press, (2010)

<sup>182</sup> Surjit Lal Chhabda vs Commissioner of Income Tax, AIR (1976) SC 109

'Aravanis of Tamil Nadu', who get wedded to their local god by a cleric<sup>183</sup>. It is important to evaluate that whether wedding of these Aravanis to this god, who is anything else a "Juristic individual"<sup>184</sup> in the eyes of the statute could even be considered a legitimate marriage under Hindu personal law, especially in terms of provision 3 clause [a] of the Hindu Marriage Act, [1955]<sup>185</sup>, or even if this kind of a marriage, if it is proved to be true, might be considered to create a genuine sapinda connection between members of society who have dedicated themselves in commitment to such a wedding. Acknowledging this relationship has the effect of acknowledging their rights of succession as well as providing them with a stable existence in which they will be treated equally to other inhabitants.

For the intention of inheritance, Muslims are also controlled by their own law, known as Sharait Rules. Muslims in India are classified into two religious groups, '*Shia and Sunni*'. Each of these groups has their unique succession rules and gender-specific restrictions. In the same way that Hindu personal law acknowledges women and men as subjects of succession, Muslim law does as well. This is apparent from the words utilized in Shia and Sunni succession laws in the lists of holders and residuary. The *Indian Succession Act, (1925)*<sup>186</sup> regulates Christian's property succession, and it has a larger scope than Hindu and Muslim personal regulations. Notwithstanding Hindu or Muslim domestic law, it has been stated that the Christian population has endorsed the inclusion of transgender people under Section 44 of the Act, (1925), which governs succession entitlements over family properties.

The Delhi Minorities Board, upon receiving unanimous agreement from the Advisory Commission of Christians, presented this proposition to the Indian Law Commission<sup>187</sup>. Although no equivalent modification to the current legislation has been undertaken, this is among the key progressive trends in Indian culture. It was claimed that homosexual rights are a question of human liberties, not a societal or medical problem. According to the ruling, "*the Hijras/Eunuchs, who also fit within that category, claim legal recognition as a third gender including all statutory and fundamental guarantees*"<sup>188</sup>. They have rights to academic, profession, & property succession, among other things. The court also ruled that

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<sup>183</sup> Garry Ferrard & Susan Andreatta, "*Cultural Anthropology: An Applied Perspective*", Stamford, CT: Cengage Learning, 10<sup>th</sup> Edition, (2014)

<sup>184</sup> See, e.g., Vidya Varuthi Thirtha vs Balusami Ayyar, (1922) 24 BOMLR 629 ("Under the Hindu Law the image of a deity of the Hindu Pantheon is, as has been aptly called, a 'juristic entity', vested with the capacity of receiving gifts and holding property")

<sup>185</sup> Section 3 clause of Hindu Marriage Act, (1955)

<sup>186</sup> Indian Succession Act, (1925)

<sup>187</sup> Maria Akram, "*Christian Transgenders to have equal rights on Ancestral Property*", The Hindu, New Delhi, May 12, 2016

<sup>188</sup> National Legal Service Authority vs Union of India, AIR (2014) SC 1863

the court's decision in Suresh Kumar Koushal case<sup>189</sup>, had previously addressed the validity of Section 377 IPC, and that this decision deals with a distinct problem concerning the transsexual community's civil liberties.

A wider judicial interpretation can resolve the essential yet fascinating concerns of third-gender person's entitlement to marriages and succession, most critically, by enacting long-overdue legislative changes, following the NALSA's verdict to recognize the third gender. As previously stated, the deficiency of clarification in Hindu personal law, combined with the lack of laws and regulations acknowledging marital and succession rights of transgender individuals, subject them to prolonged segregation, despite the court's recognition of their right to equal treatment under Article 14 of the Constitution<sup>190</sup>.

Marriage, adoption, succession, and some other benefit legislation in India only accept the binary sexes of men and women, which are determined by a person's sex ascribed at birth<sup>191</sup>. This, although, is a faulty methodology, chiefly in today's world, when third-gender liberties have been acknowledged both internationally and locally. The theory of incorporation, which underpins India's international responsibilities, requires lawmakers to pass legislation to put accepted international norms into practice, as far as they do not conflict with local laws<sup>192</sup>. The *Yogyakarta Rules* deal with a wide variety of human rights issues and also how they apply to questions of gender identification and sexual inclination<sup>193</sup>. These rules also include a requirement for states to adopt interpretations and modifications to law to guarantee fairness and non-prejudice based on gender identification & sexual inclination<sup>194</sup>. In addition, the UN Special Rapporteur<sup>195</sup>, provincial human rights organizations, national courts, public sector committees and committees for human rights, and the European council, all have strongly supported these core values, as a human rights benchmark for defending & accomplishing the human liberties of every individuals irrespective of sexual orientation identity<sup>196</sup>. In light of this, Indian legislators must change the present Hindu personal laws, to

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<sup>189</sup> Suresh Kumar Koushal & Another vs Naz Foundation & Others, (2014) 1 SCC 1

<sup>190</sup> National Legal Services Authority vs Union of India & Others, AIR (2014) SC 1863, PP- 54, 75-77

<sup>191</sup> National Legal Services Authority vs Union of India & Others, AIR (2014) SC 1863, PP- 49

<sup>192</sup> Article 51 & 253 of the Constitution of India

<sup>193</sup> Routledge Handbook of International Human Rights Law (S. Sheeran & Sir N. Rodley, eds.), Abingdon: Routledge, (2013)

<sup>194</sup> The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation & Gender Identity, International Commission of Jurists, (2007)

<sup>195</sup> Vernor Munoz, "Report of the United Nations Special Rapporteur on the Right to Education" UN Doc.

<sup>196</sup> Douglas Sanders, "International: The Role of Yogyakarta Principles", OutRight Action international; National Legal Services Authority vs Union of India & Others, AIR (2014) SC 1863, PP-23

align it with India's global responsibilities and its responsibility to defend the basic rights of the transgender population.

### **IV.3 SOCIAL-CULTURAL RIGHTS OF TRANSGENDER PEOPLE-**

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Though the appearance of transgender persons is expanding in everyday life, they are nonetheless stigmatized, insulted and humiliated. One of the primary obstacles confronted by transgender persons is how to lead an authentic lifestyle in a community which upholds restrictive gender conventions and ideas. The SC in *National Legal Services Authority vs UOI & Others*<sup>197</sup> not just acknowledged transgender people as a “*Third-Gender*”, but further ordered the Union and province authorities to implement numerous social welfare plans and conduct public awareness initiatives to eliminate all social stigmas. People continue to act abnormally in their proximity despite certain improvements, making them feel humiliated and undeserving to exist. They have been excluded not just from community, but even from their benefits and protections. Our community is progressing in many ways, however when it relates to transgender persons, society is still hesitant to embrace them as members. The following are few of the significant issues they encounter and which the administration should address:

➤ **Discrimination of Transsexual Persons in Educational Institutions-**

The transgender population is a severely stigmatized and underprivileged group that lags behind in terms of human advancement, particularly in education. Since the mass of this population is illiterate or undereducated, they are unable to actively engage in societal, cultural, governmental, or commercial activities. In reality, academic institutes are a strongly gendered environment. The education department, which reflects the whole of population in upholding rigorously linear and patriarchal sexual standards, exacerbates the marginalisation of sexual nonconforming and transsexual youngsters and children. A survey of 50 queer recognized PAGFBs in Mumbai found that school uniforms, some sports, including a couple school topics-with gender specific choices, such as bakery or cuisine for ladies and woodwork for males, are all major causes of concern for many Trans-PAGFBs<sup>198</sup>. As per the *2011 National Census*<sup>199</sup>, there are approximately 4.9 lakhs transsexual people in the nation. According to Census data, only 46% of transsexual people are educated, contrast

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<sup>197</sup> National Legal Service Authority vs Union of India, AIR (2014) SC 1863

<sup>198</sup> Nevatia S., Raj Mahajan S., & Shah C., “*Bound by Norms and Out of Bounds: Experiences of PAGFB within the formal Education System*”, *Contemporary Education Dialogue*, 9(2), (2012) 173-96

<sup>199</sup> Census of India 2011

to 74% for the overall demographic. The Right to Education Act<sup>200</sup> categorizes this population as a ‘disadvantage classes. It signifies that these children will be entitled for a 25% quota for admissions underneath the Economically Weaker Section [EWS] as well as disadvantaged child categories<sup>201</sup>. The Swati Health Resource Centre undertook the survey which looked at the educational and living conditions of transgender persons in 3 states namely Maharashtra, Karnataka & Tamil Nadu. It was discovered that “30% of those surveyed haven’t acquired an education while 30% were residing independently, owing to alienation from their family<sup>202</sup>”. Education is among the most difficult challenges that transgender persons confront. Only about 1% to 2% of transsexual people were able to complete high school. The transgender population was unable to obtain public or private positions given the lack of qualifications, resulting in inequity. Their participation in the social, commercial, and financial spheres is restricted, leaving them with few alternatives for earning a living. Withdrawal from relatives, poverty, stigmatisation and prejudice, insensitive mentality of teaching staff, harassment and sexual assault are only a few of the causes that contribute to the lower educational attainment of the transgender population.

➤ **Homelessness-**

A shortage of accommodation & resources that address the distinct requirements of transsexual individuals who are homeless is one of the numerous challenges they confront. They are staying on the roads as they were evicted from their families due to their sexual orientation or fled an abusive circumstance. Homeless same-sex partners cannot find family accommodation in shelters around the nation. In the accommodation framework, transsexual individuals are not sanctioned to select which sex they like to live with. Under this system, assault and intimidation of transsexual homeless persons is common. Gay men and transsexuals are not welcome in many domestic abuse shelters. While there has been no systematic strategy for long-term accommodation for AIDS patients. Homeless transsexual youngsters lack financial assistance, are more likely to use drugs & engage in dangerous sexual activities, & are more likely to suffer psychological health complications. During their early years, homeless Transsexual youth are denied educational opportunities and social

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<sup>200</sup> The Right of Children to Free & Compulsory Education Act, [2009] [Act No. 35 of 2009]

<sup>201</sup> Dr. Rajkumar, “Education of Transgenders in India: Status and Challenges”, International Journal of Research in Economics and Social Sciences, Volume [6], Issue [11], November, [2016], PP- [15-24]

<sup>202</sup> Beresford Meka, “4 in 10 Transgender People in India subjected to violence before they reach 18 years old”, Pink News, January 7, (2017)

assistance; more than 50% of homeless Transsexual youngsters report facing harassment from peer group.

During a open proceeding in Tamil Nadu (T.N.) concerning human rights infringements confronted by the transsexual group, the records provided showed that although sexual non-conformity might be acceptable in youngsters, when variations in the sexual behaviour of a kid becomes apparent, which normally occurs with the beginning of puberty, guardians revert to regulating the child's sexuality & turn to harsh methods to enforce sexual compliance. A story was told about “a young kid whose guardians shocked his genitals with electricity in an endeavor to cure his love of girly attire. They believed that it would ‘wake up’ the guy within him”. In another example, “a teenage transwoman's guardians were obliged to compel her to consume male hormone medications”<sup>203</sup>.

Families are sometimes unprepared to handle with 'strange' family people. They may seem befuddled, inept, guilty, and enraged. Families face a variety of challenges, including an inadequate information and means to comprehend the problems, as well as often inadequate to defend themselves in contrary to demands from other relatives, neighbours, & community. Families are occasionally oblivious of the potential consequences of their behaviors on their kids. They may have the best of intentions, yet they nevertheless bring harm.

➤ **Violence & Victimization-**

Hate crimes and harassment against transgender individuals occur frequently. Throughout their lives, they face humiliation and prejudice, and they are victims of molestation, intimidation, and violent acts. Transgender populations have a significant role in problems of legal inequality. Abuse and harassment, often at the actions of police officers, predominantly afflict particular segments within the transgender population. In India, there've been numerous reported cases of police aggression targeted at transgender individuals in recent times. Various police agencies have been condemned for insensitivity, notably failing to respond adequately to abuse directed at transgender persons. According to a survey, the preponderance of hijras in Mumbai endure a variety of health issues, as well as harassment, illegal punishments, sexual assault, brutality, and denial of civil liberties. They primarily identified police being perpetrators of assault and harassment, especially traffic and transport officers. A further study, dealt with issues experienced by Hijras in Mumbai having Regard to

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<sup>203</sup> Neha Sood, “*Transgender People's Access to Sexual Health and Rights: A Study of Law and Policy in 12 Asian Countries*”, Kuala Lumpur: The Asian- Pacific Resource and Research Centre for Women [ARROW], (2009)



Their Healthcare and Assault by the Law enforcement officers, was conducted by the “Swati Health Resource Centre” which questioned 2,169 transsexual individuals from 3 states and discovered the startling data. *“Sexual assault can start as soon as 5 years of age, according to respondents, although those around 11 to 15 are the most susceptible. There were 2,811 unique incidences of assault recorded by 44 percent of respondents, bringing the average to 3 tragedies each individual. With 1,228 complaints, emotional brutality was by far the most prevalent, preceded by 802 allegations of physical harassment and 781 claims of sexual assault”<sup>204</sup>*.

According to a survey conducted by the “National Institute of Epidemiology” involving 60,000 transsexual persons in seventeen states, particularly Tamil Nadu (T.N.), cops and law enforcement officials were the most violent perpetrators of brutality towards transsexual persons<sup>205</sup>. As a result, one of the primary concerns of transsexual persons has been police brutality. They are frequently threatened by the police and forced to pay money. There were no FIRs found. In this situation, the policemen interrogate individuals and retain them in detention for periods ranging from a few hours to several days. They don't file a FIR and don't preserve any documentation of the incarceration. The males are frequently abused by the police, who use profane language, hit them, and sometimes even physically harass them.

➤ **Mental Depression-**

In their everyday life, transgender persons experience significant marginalization, abuse, and violence. The vast majority of transgender persons struggle to balance with this, especially when they had the assistance of relatives and acquaintances and are involved in Transgender institutions and social platforms. Nevertheless, many Transgender persons, especially young Transgenders, have had to deal with marginalization, prejudice, and harassment in the absence of assistance. Several were exceptionally bothered by events including increased rates of transphobic harassment in classrooms, & also physically & verbally violence. This harmed their mental state, resulting in considerable degrees of psychological anguish, self-harm, even suicidal thoughts. Since several transsexual teens will be discovering their gender preference or sexual identification without any assistance, they may feel extremely alienated. They can be especially sensitive as they navigate their way to adolescence, a key stage of interpersonal and psychological growth. In rural places, it is generally more challenging for

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<sup>204</sup> Beresford Meka, “4 in 10 Transgender People in India subjected to violence before they reach 18 years old”, Pink News, January 7, (2017)

<sup>205</sup> “Police harass transgenders most, says Study”, The times of India, April 17, [2016]

TG persons to get around. Metropolitan areas enables transsexual individuals to choose whatever aspects of their lives they want to be involved in or among whom they want to be out such as employment, with colleagues, relatives, neighbours, health treatment, and associative events. This is far more challenging in rural places, as being around in single sphere, such as at workplace, implies that one's neighborhood, relatives, and colleagues are most likely to be conscious that one is transsexual. Rural transgenders will be more probable than the mainstream populace to abandon the region of their origin or childhood. Extreme grief, worry, solitude, social awkwardness, and experiencing overwhelmed are examples of these sentiments. It's not just due of their sexuality. It is indeed so having sexually non-conforming in a patriarchal culture, entails a lot of pain. In addition, there is so much suffering that it could be diagnosed as a mental condition. A variety of variables may play a role, including residing in an frequently homophobic environment, enduring familial alienation, and being openly gay in part or all facets of existence Mental illnesses are not indications of sexual preference, but instead of prejudice and the threat of hostility. The transgender population has greater rates of depression, mood and chemical use illnesses, and suicide intentions among those aged 15 to 54, primarily owing to assault, social exclusion, and solitude<sup>206</sup>.

➤ **Issues of Homophobia-**

Because of their sexuality, transgender individuals are more vulnerable than heterosexuals to face intolerance, prejudice, abuse, and also the danger of assault. Homophobia is to blame. Ethical, spiritual, and political ideals of a majority party are among the reasons that may support homophobia on a bigger level. Because of the harsh emotions and implications of coming forward in a homophobic setting, several transgender individuals hide their orientation. Negative thoughts or perspectives concerning non-heterosexual conduct, status, relations, and society can culminate to homophobic conduct, which is at the foundation of harassment of several transgender persons. Physical assaults, workplace inequality and unfavourable media depiction are just a few examples of how homophobia displays itself. People's livelihoods can be severely disrupted and harmed by homophobia. Numerous transgender individuals, for instance, have turned homeless as a consequence of family rejection after disclosing their gender identity. Individuals that are homophobic are very

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<sup>206</sup> Roberts AL, M. Rosario, N Slopen, JP Calzo, SB Austin, “*Childhood gender non-conformity, bullying victimization, and depressive symptoms across adolescence and early adulthood: An 11-year Longitudinal Study*”, J Am Acad Child Adolesc Psychiatry, 52 [2], (2013),

adept at inferring about the circumstances of transgender people. They are unable to hide their thoughts of hostility and their refusal to acknowledge transgender people. As a result, they aggressively or violently humiliate transsexual people and subject them to harassment. Such perceptions lead to stress, discontent with where they reside, physical disturbance, solitude, and stigmatization for transgender people.

➤ **Social Exclusion-**

At the independent, institutional, and community stage, marginalization seems to be at the root of exclusion from satisfying and complete social existence. Individuals on the margins have limited command over their life as well as the means accessible to them; they might be ostracized and are frequently the target of adverse societal opinions. Their possibilities to contribute to society may be restricted, and they may acquire poor self-belief & self-respect, as well as become alienated. They might have minimal exposure to valuable social facilities like as schooling and medical facilities, accommodation, earnings, leisure pursuits, and job as a result of social norms and actions. Whatever the causes and mechanisms of marginalization, whether they are to be found in societal views (like those toward handicap, sexual orientation, race, and so forth) or societal environment, the repercussions of marginalization in contexts of societal exclusion are identical (for example, job losses, a lack of affordable accommodation, and so forth)<sup>207</sup>. TG people may face numerous sorts of marginalization, including racial prejudice, sexism, unemployment, and other problems, as well as homophobia & transphobia, all of which have a severe influence on psychological health. Most Transgender individuals are pushed to the outskirts of community due to the taboo linked to sexual inclination & gender identification or manifestation that differ from the assumed heterosexual, non-transgender standard. Transgender persons are frequently excluded from various support institutions, especially their own relatives, exposing them with limited recourse to health assistance, judicial and legal assistance, and academics that many others consider as normal. Transsexual persons are usually prevented recourse to crucial governmental amenities including as wellbeing care & accommodation due to stereotyping & bigotry surrounding sexuality preference & gender identification and representation, which adds to major health inequalities. Transsexual individuals are routinely ostracized by the families into which they have been birthed. The exclusion of Transsexual persons in their families stymies early preventive and educational initiatives, increases risky conduct that can

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<sup>207</sup> Dr. Subhrajit Chatterjee, “Problems Faced by Transgender Community in India: Some Recommendations”, International Journal of Creative Research and Thoughts [IJCRT], January 1, (2018)

contribute to HIV disease, and makes it difficult for Transgender adolescents surviving with HIV/AIDS to receive effective medical care and social assistance. Furthermore, due to a lack of alternative resources, several Transgender adolescents are compelled to resort to criminalized practices like sex work to make ends meet, pushing them farther out on the fringes of community and increasing their chance of contracting HIV.

➤ **Restricted Political Participation-**

Transgender people are frequently prohibited to utilize their voting rights since they are refused fundamental citizenship rights based on their sexual orientation. They are not mentioned in any party's policy. Contesting elections is difficult for them on several levels, including declaring their gender identification, earning social acceptance, comprehending the political process, and obtaining the funds needed to run for office. Voices and authority of the transgender people are limited by their incapacity to engage in the political system, as well as their exposure to legislative and related decision-making forums. Furthermore, gender are stereotyped and portrayed in the press as only engaging in “feminine” tasks such as combing their hairs or fluttering their lashes<sup>208</sup>.

Transgender people endure widespread prejudice in residence, the public domain, educational, livelihood, medical, and political engagement. The PUCL-K study on “Human rights infringement concerning Sexuality Minorities in India<sup>209</sup>”, addresses how majority of human rights organizations in the nation have yet to consider the matter of homosexuals, lesbians, bisexuals, transsexual people, and also other people who are repressed because of their sexual identity. Gender expression and sexuality are frequently regarded as a "personal concern." In general, concerns of poverty and inequality, as well as discrimination by race and caste, are considered more significant than sexuality.

*“Using a complicated rationale which arrogates to its own the capacity to gauge suffering, the violence faced by these oppressed sexually cultures is frequently rendered unnoticed, even by the revolutionary society. Class is first, followed by caste, gender, environment, and so forth. Sexuality, like a poor cabin lad, is incorporated if there would be*

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<sup>208</sup> Subha Chacko & Arvind Narrain, “Chapter 7- Transgenders Transcending the Binaries: Transgender Exclusions in Law and Policy”, Indian Exclusion Report, [2013-14]

<sup>209</sup> PUCL-K, “Human Rights violations Against Sexuality Minorities in India: A PUCL-K Fact-Finding Report about Bangalore”, Bangalore: PUCL-K, (2001)

*any place available on this ark of misery. In this modest legacy, there is no chance of the last becoming the first<sup>210</sup>.*

However, this misses the notion that sexuality is inextricably related to societal oppressive beliefs and systems like as patriarchal, capitalism, class, and spiritual fundamentalism. As a result, the fight for sexuality freedom is inextricably linked to the larger human rights fight for financial, governmental, and societal independence<sup>211</sup>.

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<sup>210</sup> Arvind Narrain, *“Queer People & The Law”*, Seminar Number 524, (2003)

<sup>211</sup> PUCL-K, *“Human Rights violations Against Sexuality Minorities in India: A PUCL-K Fact-Finding Report about Bangalore”*, Bangalore: PUCL-K, (2001)

## CHAPTER-V

### **OBSERVATIONS AND CONCLUSION**

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#### **1. NEED OF AMENDMENT IN THE DRAFT RULES OF THE ACT, (2020)-**

It should be mentioned that perhaps the Transgender Act, (2019) was questioned in the SC shortly after it was enacted, claiming that it violates the constitutional safeguards granted by the Hon'ble SC in the NALSA decision<sup>212</sup>. As a result, deferring the rule-making process until the court determines on the Act's constitutionality would be a wise decision.

The Draft Rules have further been printed in the Official Gazette by the Federal Government, although it would be a positive initiative if, in regards to the endeavours of the Federal Government, Provincial Governments would come forward according to their own guidelines, taking into account the concerns of transsexuals in their jurisdictions, because as Provincial Government is indeed permitted to enforce guidelines to implement the clauses according to the Act. As a result, such an approach would emphasize too much on the subject at the regional level, and because the circumstances may differ from province to province, such an approach will be more successful in achieving the goal of the Act.

Additionally, the need of a report from a psychologist from an approved public hospital must be eliminated from *Rule 4 (1)*. The rationale for this is because section 4 of the Act, (2019) guarantees the freedom to self-perceived sexual identity, which was acknowledged by the SC in the NALSA decision as component of the freedom to live with independence and respect endorsed by "Article 21 of the Constitution". As a result, requiring the psychologist's assessment violates the Hon'ble Court's ruling. Furthermore, *Rule 4 (2)*, allows the candidate to make an application with the District Magistrate in the region in which they have lived consistently for 1 year. Therefore, since the freedom of self determination is a fundamental right, such a restriction of continual residency should be eliminated. As a result, they should really be able to contact the District Magistrate of the region where they are now dwelling instead than one in which they have lived over a year.

Additionally, *Rule 6 (1)*, of such regulations mandates the candidate to submit an application in Form 1 of such regulations. However, Form 1 exclusively permits the candidate to demand

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<sup>212</sup> SC Issues Notice to the Centre on a Plea against "Transgender (Protection of Rights Act), (2019)", The Leaflet, January 27, [2020]

a modification to “Transgender”, not even to ‘men’/‘woman’ identity. To eliminate, any misunderstanding, it is proposed that a distinct Form be authorized for requests within Section 7 of the Act, (2019), and also that Form 1-A be created in this respect, which expressly allows for gender transition under Section 7 of the Act, [2019].

The District Magistrate [DM] is obligated to notify the candidate of the application's denial under *Rule 8*. However, the rule does not provide any basis for dismissing the application. As a result, it is recommended that candidates be briefed of strict parameters prior to actually applying for authorization of identification so there will be low opportunities of disapproval because the candidate will be informed of the requirements, and this process will also guarantee that the procedures is not arbitrarily conducted. Since the power to appeal is a fundamental freedom in the rules, the rules should explicitly designate the appellate body and not outsource this role to the appropriate authorities. Allowing it entirely at the choice of the appropriate authorities may result in discriminatory judgments that harm the candidates' rights.

Finally, since we all remember, the *World Health Organization* designated COVID-19 an epidemic on 11 March, 2019<sup>213</sup>, so in a dire scenario, livelihoods have been jeopardized, and so has the accessibility to several important services. Because the notion of social isolating as well as wellness actions to avoid this virus seems to have become a primary concern, carrying a general populace consultation during this COVID-19 epidemic is extremely unwise, as people of the homosexual society may not be eligible to wholly engage in such a procedure, vanquishing the process's very purpose. Consequently, discussions on the Rules must be extended as a result, and in the meanwhile, the Government should undertake an attempt to render the draft Rules more widely available in multiple local languages so that people of the transgender communities may participate meaningfully in the consultation procedure.

## **2. Gender-Specific Laws:**

Introducing gender-specific regulations violates Article 14 of the Constitution, which endorse the basic impartiality. Both of the judicial system & lawmakers have mostly disregarded gender-based discrimination centered on safety rights for genders apart from woman. The centuries-old taboo has proven to be more relevant in community than the reality that such offenses are committed by men as well. Within its preamble, the ‘Universal Declaration of Human Rights’ (UDHR) states,

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<sup>213</sup> WHO declares “*COVID-19 outbreak a Pandemic*”, [World Health Organization]

“The basis of independence, fairness, and harmony in the globe is acknowledgment of the intrinsic integrity and equitable and irreplaceable rights of all citizens of the entire household’. It also includes numerous articles that emphasize the need of enacting equal laws and providing equal chances to all individuals, regardless of sexuality<sup>214</sup>”.

The necessity for gender-neutral legislation cannot be sacrificed in order to elevate one social class. Without a doubt, females have been subjected to a variety of difficulties, but the liberties of certain other genders must not be overlooked in order to advance women's rights. In view of these considerations, the author wants to propose the following recommendations:

1. To begin, legislators should keep trying to establish a middle ground in this scenario. On the one side, the remedy must fulfill the interests of males, females, and the transgender population, while also contributing to the advancement of society's weaker members, namely females. The *Justice Verma Committee* made comprehensive suggestions that justified both goals. It would provide not only equitable security for male sufferers, transsexuals, and certain other sexually inclined persons, but also that fraudulent accusations would be avoided.
2. Several gender-neutral laws recognize the interests and necessity to safeguard male sufferers from dangerous crimes, such as the *Protection of Children from Sexual Offences Act, [2012] [POCSO Act]*<sup>215</sup>, chemical attacks, & others. Law makers in POCSO did not hesitate to tolerate crimes committed against males under the age-limit of 18. However, they were clearly unaware of the rising number of crimes committed by males over the age-limit of 18. Through implementing the idea underpinning gender-neutral legislation to gender-specific regulations, a positive shift in society might be achieved.
3. Women may be offenders, and no one should reject or be dismissive of this truth. The idea of females being sufferers is embedded in the terms of the ‘*Sexual Harassment of Women at Workplace [POSH] Act*<sup>216</sup>’. However, with the expansion of job options, males are becoming more exposed to these crimes. A suitable method to empower male victims to register accusations without fear of mockery is urgently required.
4. The man should not be considered as a criminal unless his culpability has been

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<sup>214</sup> Preamble of Universal Declaration of Human Rights [adopted on December, [1948] UNGA Res 217 A[3] (UDHR)]

<sup>215</sup> The Protection of Children from Sexual Offences Act, [Act No. 32 of 2012], (June 19<sup>th</sup>, 2012)

<sup>216</sup> The Sexual Harassment of Women At Workplace [Prevention, Prohibition, & Redressal] Act, [Act No. 14 of 2013], [April 2, 2013]



proven. Domestic abuse and Dowry homicide rules hold the husband entirely responsible unless he can establish his truth. Men should never be subjected to such pre-existing guilt. Aggression against transgender people must also be recognized. In India, the penal legislation regarding sexual assault continues to remain gender-specific. It solely acknowledges rape & sexual violence when the sufferer is a “Female”. As a result, transsexual people who are the victims of sexual assault have no legal recourse. Domestic violence prevention laws do not apply to Trans people, regardless of the fact that they are victims of household and intimate partner abuse. Every one of these laws needs to be updated to incorporate transgender people.

5. A comprehensive description of rape and sexual harassment is among the most critical improvements that must be made. Victims from the masculine and transgender communities should be recognized. This would bridge the gap caused by the male-female transsexual perspective. It would also help to break down society's conventional stigmas. We must also realize that the most difficult task confronting the society's most progressive members is ensuring that the benefits are accessible to every transgender individuals, not just those endowed by race, class, creed, or aptitude.

### **3. Social Integration of the Transgender Persons into the Mainstream:**

In the country, transsexual people face a variety of types of societal harassment and persecution. Even in elementary necessities like wellbeing, work, & academic, inequality is so widespread and pervasive that attaining social integration is a complicated endeavour. It is vital that measures be made to address the terrible condition & promote social integration for people of this cohort from both judicial & societal standpoint.

The NALSA verdict is a positive step forward in the acknowledgment of transgender people's liberties and their freedom to self. The difficulties, on the other hand, are found firmly within the verdict. The incorporation of transgender people in the OBC category, which entitles them to quota in school and employment, is a huge problem. According to the argument made in the paper, this goes against the Constitution's requirements. Because transgender is an umbrella phrase that encompasses gender diverse classifications, it is non-homogeneous & hence unable to fall within the conventional definition of “Class.” Moreover, gender-based discrimination is not covered by Articles 15 clause (4) and 16 clause (4) of the

Indian Constitution. As a result, transgender people, like physically handicapped people and women, can benefit from horizontal reservation under Article 15 clause (1) and 16 clause (1).

Furthermore, it is argued that while integrating transgender people in the OBC group may appear to be a step forward, it really deprives them of any real benefits in today's highly competitive environment. Additionally, the study believes that while reservation may assure minimal participation of transgender people in academic institutions and government agencies, societal stigma and prejudice may continue to impact them despite such policies since they are ingrained in the public consciousness. The topic of how to deal with it sparks a new discussion, including players from all sectors of India's complex socio-legal/socio-financial environment.

The paper goes on to say that recognizing the people who would benefit from such regulations and initiatives is critical to the transgender society's social integration. The uncertainty over whether the reservation applies exclusively to hijras or to all transgender people has to be clarified. The court's decision to exclude gay, lesbian, and bisexual (GLB) people from the definition of transgender people ignores the diverse but intersecting divisions within the transgender population. Even the bill's description of transgender is inadequate. As a result, a detailed research must be conducted to determine the prospective beneficiaries, taking into account the numerous forms and classifications of transgenders. A further point to consider is that the legislation should offer advantages to transgender people who hesitate to publicly reveal themselves or join any society because of societal prejudice<sup>217</sup>.

Additionally, the state must take proactive measures to prevent transgender students from dropping out of schools early owing to social discrimination, as is the situation in many areas. To guarantee transgender people's social integration, awareness and sensitization initiatives for both transgender people and community members must be implemented. Transgender social integration will undoubtedly be a slow procedure requiring collaboration at all levels of government, community, & people. But what necessary are measured moves in the appropriate direction to guarantee that legislation and policies, serve as a stimulant for their advancement rather than an impediment in the long term.

#### **4. Overall Upliftment:**

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<sup>217</sup> "Transgender facing Social, Familial Ostracism: Survey", The Hindu, August 2, (2017)

Transgender individuals in India endure hostility, shame, harassment, and violence every day, notwithstanding a pre-colonial past that acknowledged and embraced gender variety in religious artworks, literature, and spiritual discourses. Human rights abuses targeting transgender persons can be found in households, schools, businesses, law enforcement, medical care, the press, and public at general. To eliminate taboo and discrimination connected with the group, appropriate action is required. The steps listed below may assist in increasing access:

1. It is critical to raise awareness about gender variation and the requirement to protect transgender students from abusive educational surroundings. Schools and faculty education programs are critical places to discuss transgender problems and challenges. Educational institutions can employ the following guidelines and procedures to assist improve wellness and security amongst transgender adolescents:

- A separate school for transgender students should be developed, with complimentary schooling from grades 1 to 12. With the support of the federal and provincial governments scholarship programmes for higher education should really be efficient for transgender people.
- Empower all students to treat one another with respect and to refrain from bullying, intimidation, or aggression.
- Establish “*secure places*”, including such counselor’s desks, dedicated classrooms, or students clubs, where transgender students may sustain assistance from officials, professors, and other faculty members.
- Facilitate student-led as well as student-organized educational organizations that foster a friendly, inclusive, and secure learning atmosphere (for instance, gay-straight unions, that are educational group accessible to students of all gender preferences).
- Verify that HIV and other STD preventive knowledge that is essential to transgender adolescents is included in instructional resources, such as guaranteeing that curriculum or resources utilize neutral language or vocabulary. Further also incorporate a section on transsexual healthcare in the medical education for new breeds of physicians, as well as enlightenment for current healthcare officials, particularly paramedical personnel.
- Promote the school district and faculty to design and promote workshops on how to build secure & encouraging academic surroundings for all kids, irrespective of sexual inclination or gender identities & also to motivate employees to participate in these

workshops.

- To educate the wider population about transgender issues, a section on transgender might be incorporated in the school's teenage educational system. This might be a good way to combat stereotypes and prejudice at the school levels<sup>218</sup>.
- 2. The transgender society has a distinct tradition of dancing, folk music, and arts, among other things. It provides the society enormous confidence and a sense of belonging. These cultural and artistic manifestations are integral aspects of the society and should be linked with subsistence exercises to increase community participation. Measures should be taken, with sufficient funding, to act as a connection to job possibilities<sup>219</sup>.
- 3. Any pension system should encompass the transgender population so that they can receive any perks.
- 4. Police officers are being made more aware of the challenges and challenges that the transgender population faces. Dishonorable remarks and harassment, if any, shall be dealt with according to the legislation.
- 5. Addressing social concerns such as taboo and prejudice, which put transgender individuals at risk for health problems.
- 6. Ensure that they have equal constitutional and human privileges so that medical and related services may be provided to them.
- 7. Establishing an adequate climate until the upcoming Census counts the homosexual community.
- 8. Making the general public aware of their concerns. A public awareness campaign is required. Local governments, policymakers, universities, & families require greater instruction on how to embrace gender-variant adolescents, how to treat persons of diverse sexualities and gender identities equally, and how to implement legislation and initiatives in a “friendly” instead of aggressive way.
- 9. Transsexual human rights problems must be emphasized in the press & certain other discussion boards in order to raise public knowledge and empower transgender individuals to exercise their rights. The press's marginalizing portrayal must be curtailed.
- 10. Surgeons and other health professionals must be sensitive to the requirements of transgender people. To avoid psycho-social bullying and prejudice, awareness programs for psychologists, doctors, as well as other mental healthcare practitioners should be

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<sup>218</sup> Shinu Asmy V.S. and Nagaraj Dr. P., “Preliminary Problems Faced in Educating The Third Gender Community”, Asia Pacific Journal of Research, Volume [1], Issue [27], May, [2015]

<sup>219</sup> Ibid.

created. Transgenderism and intersexuality are issues that the *Indian Medical Council* as well as the *National Council for Medical Research* must address. Sexual Reassignment Surgery or additional treatments that hijras frequently seek, such as mammoplasty {breast implantation} body hair eradication, head hair regrowth, hormone supplements, and vocal change, require the development of appropriate rules and standards. Likewise, the IMC should create rules to guarantee that prejudice in healthcare of hijras, such as refusing to treat someone because of their gender identification, is considered professional misconduct. Furthermore, medical schools must alter their courses to move beyond viewing gender dysphoria as an illness and a deviant.

11. Parents need to be conscious of and informed about sex nonconforming and transsexual kids in order to assist them, completely disregarding their embarrassment and firmly held conventional beliefs. Parents and siblings must be aware of the possibility of their children being bullied or subjected to other forms of harassment outside the house – in the entire family, in campuses, or on the park – and provide appropriate assistance. They must also consider how a sexually nonconforming or transsexual child's anxiety levels rise as he or she enters puberty and suffers distress when secondary biological features conflict with his or her feeling of gendered identity.
12. Work environments in the government and commercial sectors must educate managers and workers on transgender problems in cooperation with community organizations and human administration experts with competence in the field of Multicultural and Inclusion. Nondiscrimination rules must be established and implemented in the recruiting, training, advancement, and employee compensation procedures. Transsexual people should be included in workplace harassment regulations.
13. Transgender inclusion must be included in regulation and organizational measures that permit access to public security programmes aimed at the impoverished as well as other at-risk populations.

Finally, safeguarding transgender persons from oppression and harassment does not need the introduction of a fresh collection of transgender-specific liberties or the application of additional worldwide Human Rights instruments. Governments' lawful duties to safeguard the fundamental freedoms of transgender persons are very well defined in international conventions, as per the “Declaration of Human Rights (UDHR)” & following “Global Human Rights Accords”. Regardless of gender, sexual preference, or sex identification, all citizens are subject to the safeguards offered by international human rights, such as the freedom to life, safety, & confidentiality, the freedom to be exempt from brutality, unreasonable

apprehend, and confinement, the right to be exempt from discriminatory practices and the right to free speech, organization, & peaceful assemblage.

## CONCLUSION

With the progress of civilization, the necessity to alter the framework of legislation and render them extra comprehensive and essential has grown. It will not simply be gender-neutral, but equally encourage female autonomy. It would alleviate society's burden and make fairness more accessible. Gender-neutral legislation would enable cultural views to be broken and deep-seated societal stigmas to be addressed.

There are certain groups, such as feminists, who are opposed to the notion of enacting gender-neutral legislation. Such resistance obstructs growth since they usually have no genuine motives for revolting. Their justifications are based on the assumption that if males, who now dominate community, are given greater authority, they will abuse it. They do not, however, explain why women abuse the privileges bestowed upon them by lawmakers. As a result, now is the moment to elevate above all of the snobbish debates and craft well-crafted legislation for the nation.

Legislation modification is deemed necessary to safeguard transgender people and provide their full citizenship status. We need comprehensive gender reassignment laws that would allow transgender people to readily alter their names and sexual identities, as well as have their legal papers updated to recognize their new identities. They would be eligible to work, pursue further studies, and use other facilities as a result of this. Transsexual people must be entitled to select their sexuality despite the need for medical intervention or certification, and they must be capable of changing their gender in all identification papers to man, woman, or third-sex. The society has been clamouring for this.

Aggression against transgender people must also be recognized. In India, the penal legislation regarding sexual assault continues to remain gender-specific. It only acknowledges molestation and physical violence when the sufferer is a "*female*". As a result, transsexual people who are the victims of sexual assault have no legal recourse. Domestic violence prevention laws do not apply to Trans people, regardless of the fact that they are victims of household and intimate partner abuse. Every one of these laws needs to be updated to incorporate transgender people. We must also realize that the most difficult task confronting the society's most progressive members is ensuring that the benefits are accessible to every transsexual individual, not just those endowed by race, class, creed, or aptitude.

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