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# **LEGAL OR IMPRACTICABLE? THE UNANSWERED QUESTIONS OF MARRIAGE AND ADOPTION LAWS FOR THE TRANSGENDER COMMUNITY IN INDIA**

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## **ABSTRACT**

The right to start a family constitutes an essential part of the right to live with a meaningful existence. India's LGBT community has been subject to scores of extreme discrimination and violence in addition to lack of opportunities in public life since the colonial era. The contrariety and profundity of familial, societal, and cultural relations in the institution of marriage often poses difficulties with respect to transgender individuals and their civil rights. The conservative notion of marriage often overlooks several interrelated aspects, and the benefits one derives of it, particularly with regard to companionship and support. Additionally, adoption is yet another sphere wherein neither the Hindu laws nor the Juvenile Justice Act, 2015 provide a clear-cut solution. The Transgender Persons (Protection of Rights) Act, 2019 despite being aimed at the community, has completely disregarded the vast array of civil rights, and focuses on identification and social inclusion. Present day laws neither expressly recognise nor bar such civil rights, instead it subtly excludes the community by focussing on the binary genders. This has resulted in a state of confusion as the fate of such rights are often subjected to the discretion of concerned officials. The paper explores the current laws and instances of a transgender individual's right to marriage and adoption, and the interplay of the transgenderism movement with respect to their civil rights. It additionally looks into the various societal barriers while addressing how a piece of legislation alone would not suffice for the cause.

**Keywords:** Marriage, adoption, transgenderism, personal laws, Juvenile Justice (Care and Protection of Children) Act, 2015, Transgender Act, 2019.

## Introduction

The law that criminalised same-sex relationships in India in 1861 was a lamentable result of colonisation. Ancient Indian scriptures have long embedded the notions of gender fluidity and homosexual relationships. Transgender individuals have also been mentioned several times in famous epics such as the Mahabharata and the Ramayana. However, this thought is now being eclipsed under the garb of ‘Indian societal and cultural values’.

Decriminalization of homosexuality opened the gateway for the recognition of basic human rights for members of the LGBT community. Nonetheless, the judgement in *Navtej Singh Johar v. Union of India*<sup>1</sup> touched upon just a minute portion i.e., right to gender identity and right to choose a partner in comparison to the plethora of problems faced by the community. The transgender population in India has been subject to decades of social ostracization and exclusion from the most basic social and public opportunities. This is predominantly due to societal stigma which has antagonized the community on the whole by imputing pre-conceived notions founded on patriarchy and colonialism. Their exclusion from most basic opportunities begins from the nascent stages as a majority of application forms do not accommodate anything beyond the binary notion of gender.<sup>2</sup> This forces them to associate themselves to a particular binary gender in order to avail services, hence swerving against the basic principle laid down in *NALSA v. Union of India*.<sup>3</sup> When advocating inclusion within the society for various matters, what is expected on the minimum is at least the inclusion of a third category such as “Others” as sexual orientation differs from gender identity.

Discrimination of a person based on his or her gender identity or sexual orientation violates an individual’s right to equality.<sup>4</sup> Article 14 states that no person shall be denied equality before law, which, undoubtedly, includes the transgender community as well. Article 14 of the European Convention on Human Rights states that the enjoyment of rights and freedoms outlined in the Convention ‘shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political, or other opinion, national or social origin, association with a national minority, property, birth, or other status’.<sup>5</sup> While the terms gender or transgender are not explicitly mentioned, the term ‘sex’ has been interpreted by the European

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<sup>1</sup> (2018) 10 SCC 1.

<sup>2</sup> Agoramoorthy, Govindasamy & Minna J. Hsu, *Living on the Societal Edge: India's Transgender Realities*, 54 Journal of Religion and Health 1451, 1454 (2015).

<sup>3</sup> (2014) 5 SCC 438.

<sup>4</sup> India Const. art. 14.

<sup>5</sup> European Convention on Human Rights, art. 14., Nov 4, 1950.

Court of Justice as to include transgender individuals intending to undergo, undergoing, or having undergone gender reassignment.<sup>6</sup> Strikingly, despite emphasizing on gender identity and dignity, the *NALSA* verdict used the word “eunuch” to refer to the third gender, a rather stigmatic term used to generalize the entire community.<sup>7</sup>

### **The Paradox of Transgenderism and the Indian Family**

The subject matter of the sex-determination system has not been inferential in its entirety. The interplay between genetic and environmental factors is yet to be fully understood especially with regard to the development of sexual characteristics in biological organisms. The term ‘third gender’ as used in society, refers to any person who does not fall under the categories of male or female.<sup>8</sup> In the South Asian context, they are commonly known as *hijras*. However, this term is mainly looked down upon, as something of a derogatory nature. Even with the increase in the awareness of this community in society, often, it is seen that mayhem is created with regard to their rights and recognition, leading to social exclusion, hardships, and threats to their lives. The exact population of the transgender community is not fully known as data collection agencies have outrightly ignored them. However, many estimate their numbers to reach up to four million in India itself.<sup>9</sup>

The harmonisation of the values and notion of families with science has resulted in breakthroughs for the transgender community. Medical procedures such as hormonal treatment, surgical procedures, alteration of the natal sex etc. have enabled the reassignment of one’s physical sexual features to their sense of gender identity. The augmentation of this interconnectivity has two consequences. Firstly, it allows for the transgender community to embrace familial and relational constructs, thereby promulgating a sense of inclusiveness. On the other hand, it tends to put forth a series of social and legal complications, especially keeping in mind the Indian ideology of a family. This can arise in the identification of the relationships i.e., the determination of the husband or father, or the wife or mother in the relationship in addition to assignment of gender-roles. Moreover, formulating the legal recognition for such

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<sup>6</sup> Sarah Margaret Richards v. Secretary of State for Work and Pension Case, C-423/04 (2006) ECR I-3585.

<sup>7</sup> Gee Imaan Semmalar, *Unpacking Solidarities of the Oppressed: Notes on Trans Struggles in India*, 42 no. 3/4 *Women's Studies Quarterly* 286, 288 (2014).

<sup>8</sup> Nanda S., *Neither Man nor Woman: The Hijras of India* 13 (Belmont Wadsworth Publishing Company 2<sup>nd</sup> ed. 1999).

<sup>9</sup> *Welfare of Transgenders*, Ministry of Social Justice and Empowerment, (Jun. 25, 2019) <https://pib.gov.in/PressReleasePage.aspx?PRID=1575534>.

relationships primarily based on and derived from scientific facts also poses a dilemma as to its extent.

The transgender population of India is slowly gaining recognition; however, their efforts still seem futile. Their ability to exercise democratic rights in marriage and adoption cannot be fully recognised until active efforts are pushed in this direction. This also includes the ability to use a financial support system, free and subsidised healthcare, surgeries, and medical treatments, and overall acceptance from society at large.<sup>10</sup> Moreover, transgender individuals must be given sufficient time and space to understand their true identity and not be compelled to undergo a bureaucratic procedure in order to avail rights.

### **Transgender Individuals' Right to Marriage**

The recognition of one's identity flows from the values of the Constitution. The right to choose one's identity is an indispensable right under Article 21, which cannot be brushed aside or ignored. It espouses a life of dignity to each member of the community, thereby guaranteeing individual autonomy and acceptance. The *NALSA* judgement in 2014, stated that gender identity is the core of personal identity, gender expression and presentation and hence, falls under the ambit of Section 19(1)(a).<sup>11</sup> Moreover, the State cannot interfere in this aspect of an individual as it takes away their autonomy, privacy, and the basic essence of humanity. It stated that:

*“Gender identification becomes a very essential component which is required for enjoying civil rights by this community. It is only with this recognition that many rights attached to the sexual recognition as 'third gender' would be available to this community more meaningfully viz. the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's license, the right to education, employment, health so on.”*

Through the recognition of the third gender, the Court not only ensured the natural and constitutional rights of the transgender community, which they had previously been deprived of, but it also irrevocably provided the much-needed justice and their rightful acceptance.

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<sup>10</sup> *Supra* note 2 at 1454.

<sup>11</sup> *National Legal Service Authority v. Union of India*, (2014) 5 SCC 438.

The institution of marriage is considered a sacred bond in India and finds great significance in being governed under various personal laws. As per Section 5 of the Hindu Marriage Act, a marriage is possible between any two individuals.<sup>12</sup> The Act does not explicitly specify that a marriage, in order for it to be solemnized, has to be between a man and a woman. It, however, mentions the minimum age of the bridegroom and the bride.<sup>13</sup> Similarly, the Special Marriage Act does not provide for the specificity of the marriage to be between a man and woman.<sup>14</sup> As the purpose of most Acts related to marriage in India is the legalisation of sexual intercourse and procreation, a barricade is formed for transgender individuals. Moreover, the registration of a marriage which includes a transgender individual as a party seems fairly impossible. This is due to the fact that the discretion to register a marriage lies with the Registrar of Marriage who may simply refuse to do so on the ground of an individual being transgender.

However, in an unusual yet remarkable decision, the Madras High Court in 2020 affirmed the right to marriage for transgender persons under Article 21 of the Constitution in *Arun Kumar and Anr. v. The Inspector General of Registration and Ors.* Shri Arun Kumar married Ms. Srija, following Hindu rites and rituals.<sup>15</sup> Ms. Srija was born as an intersex individual and was assigned the female sex at birth. Subsequent to this, the school records registered her as a male with a male name. She has been mentioned as a transgender in her Aadhar card. Despite fulfilling religious customs, the Joint Registrar refused to register the same, stating that Ms. Srija did not fall under the definition of 'bride' provided under the Hindu Marriage Act, as she was a transgender.<sup>16</sup> The issue before the Court, was whether the term 'bride' was only confined to a female, or included transgender persons who identified themselves as a woman. The Court held that as her identity was that of the third gender, she had a right of choice and was fully entitled to identify herself as male or female. It stated that a bride, as defined under Section 5, also includes a transwoman or an intersex person/transgender person who identifies herself as a woman. The definition is now to be interpreted in a wide sense and must adapt to the dynamic circumstances and perceptions of marriage. Moreover, the right to marry and the right of choice is a fundamental right under Article 21.<sup>17</sup>

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<sup>12</sup> Hindu Marriage Act, No. 25 of 1955, §5.

<sup>13</sup> Hindu Marriage Act, No. 25 of 1955, §5 (iii).

<sup>14</sup> Special Marriage Act, No. 43 of 1954, §4.

<sup>15</sup> WP (MD) No. 4125 of 2019 and WMP (MD) No. 3220 of 2019.

<sup>16</sup> Hindu Marriage Act, No. 25 of 1955, §5.

<sup>17</sup> Shafin Jahan v. Asokan K.M. and Ors., (2018) 16 SCC 368.

The U.S. Court in *Obergefell v. Hodges* took down the requirement of the identification of one's sex before the solemnisation of a marriage i.e., whether someone is biologically a man or a woman, as it allowed same-sex marriage.<sup>18</sup> By doing so, it throws light on the importance of recognising the universal right to marriage, which remains valid until death, divorce, or annulment, irrespective of the gender of the spouse, and whether they undergo transition after marriage. However, another question arises with respect to those who are genderqueer or gender nonconforming. Individuals in the transgender community need not necessarily identify themselves and thus, this creates a complication. Even with their recognition, the unwillingness on part of the State to allow a legally binding marriage to such parties is seen as a hindrance to the advancement in the community. In an Australian court decision, the High Court noted that not all persons necessarily identify themselves as a particular sex. Following this, the Court noted that the traditional categories of male and female are accepted as stable categories, and those individuals who do not identify themselves, can simply state their sex as 'indeterminate or non-specific'.<sup>19</sup>

A suggested requisite concerning the Indian law is that both parties be aware of the identities of their partners before the marriage. Prior to the *Obergefell* decision, legal practitioners in the U.S. advised their clients to have backup documents in case of a marriage being determined as void in the future. This included a power of attorney, health care directives, living wills, guardian/custody agreements, prenuptial agreements, including awareness of the other parties' gender identity, and documents supporting the parties' gender identities.<sup>20</sup> This prerequisite would assist the parties in identifying the actual intent and eliminate any unforeseen obstacles in the process of marriage or divorce. The rationale underlying this is that a person who wishes to enter into a marriage agreement has sufficient knowledge of his or her partner and can make an informed decision. By knowing the full truth, an individual can provide his/her full consent, without being under any false impression or a mistake of fact. This should be clearly indicated in agreements or documents showing the identity of each partner. This requirement is especially important as it removes the hurdles of fraud wherein a partner could claim that he or she was unaware of his or her partner's identity. This problem may also arise in cases where the other partner may find his or her procreative needs not met after marriage.

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<sup>18</sup> James Obergefell et al., v. Richard Hodges, Director, Ohio Department of Health et al., 576 U.S. 644.

<sup>19</sup> New South Wales Registrar of Birth, Deaths and Marriages v Norrie, 2014 HCA 11 (Australia).

<sup>20</sup> Kylar W. Broadus, *The Legal Status of Transgender Relationships*, 34 GPSolo, 22, 24-25 (2017).

However, this could also be met with negative responses. Firstly, disclosing gender history could prove a violation of one's right to privacy. By doing so, it violates the bodily integrity of the individual. Facts such as a person's body, its parts, sexual history, surgical alteration etc. is undoubtedly violative of their bodily autonomy. Privacy is the essence and foundation of a relationship, undoubtedly accompanied by love and friendship. Secondly, by asking to disclose their identity, it singles out their gender as a separate fact of the individual, thereby forming a sense of discrimination, which is not applicable to all individuals who intend to marry. It will only be applicable to transgender persons as a class, thereby creating a division.

The inability to allow transgender marriage stems from an irrational and unsubstantial view of transgender individuals as being harmful and a source of danger. Disgust, distress, or revulsion are inadequate forms of harm to justify state intervention against a minority group.<sup>21</sup> The legal anxiety formed around the institution of marriage portrays the limited understanding of transgender persons, their bodily integrity, identities, and desires. However, many transgender individuals feel that focussing solely on marriage issues tends to deviate from the actual problems of the community such as access to education, healthcare, insurance, employment etc.<sup>22</sup> In a survey conducted by the National Centre for Transgender Equality and National Gay and Lesbian Task Force, the transgender individuals stated that they were more inclined towards prioritising issues of employment, hiring discrimination, health insurance coverage, hate crime legislation, competent healthcare, and housing discrimination over issues of rights of marriage.<sup>23</sup>

Decriminalisation of homosexuality has often been mistaken to be the final step in the recognition of rights of the LGBT community. However, decriminalisation is only an antecedent to the catena of rights that are to spring from its recognition. Nonetheless, the general stand has not been in favour of the community. In October, 2019, a review petition filed seeking recognition of marriage and adoptions was dismissed on the grounds that the subject matter of homosexuality had been dealt in *Navtej* (supra).<sup>24</sup> This view is in stark contrast to the decision in *Navtej* which expressly stated that it would not delve into the matters of adoption,

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<sup>21</sup> S. Wilkinson, *Why Lying is Worse than Merely Misleading*, 13 *Philos Today* 6, 7 (2000).

<sup>22</sup> Jackson Wright Shultz, & Kristopher Shultz., *Queer and Trans After Obergefell v. Hodges: An Autoethnographic Oral History*, 38 *Humboldt Journal of Social Relations* 46, 50 (2016).

<sup>23</sup> Grant, Jaime M. et al. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Washington DC: National Centre for Transgender Equality and National Gay and Lesbian Task Force (2011).

<sup>24</sup> *SC dismisses review plea seeking marriage, adoption, surrogacy for LGBTQ*, *Business Standard* (Aug. 12, 2019, 3:55 PM) [https://www.business-standard.com/article/pti-stories/sc-dismisses-review-plea-seeking-same-sex-marriage-adoption-surrogacy-for-lgbtq-119081200515\\_1.html](https://www.business-standard.com/article/pti-stories/sc-dismisses-review-plea-seeking-same-sex-marriage-adoption-surrogacy-for-lgbtq-119081200515_1.html).

marriage etc. as they constituted a different subject matter for consideration.<sup>25</sup> When an attempt was made in February, 2021 the Central Government in its affidavit filed before the Delhi High Court submitted that same-sex marriages ran contrary to Indian “ethos” which recognized only the union between a biological man and a biological woman.<sup>26</sup> Such a view runs astray to the basic principles laid down in *NALSA* and *Navtej* and seem outright discriminatory. Denial of the right to marriage further lessens the scope to have a child using assisted reproductive technologies in light of the pending Assistive Reproductive Technology (Regulation) Bill of 2020 which has specifically categorized its application to marriages which are “legal in India”.<sup>27</sup>

### Present Laws Governing Adoption

The current system for adoption is predominantly governed under the Hindu Adoptions and Maintenance Act, 1956 (HAMA) and the secular Juvenile Justice Act, 2015 (hereinafter referred to as the JJ Act, 2015). HAMA, 1956 is a personal law, which by itself reduces the extent of application to transgender individuals who are Hindus by religion. Moreover, the lack of recognition of same-sex marriages under present day Hindu Marriage law requires adoption in personal capacity and not collectively as a couple. This signifies that the legal rights over the adopted child are vested solely with the parent under whose name adoption is made.<sup>28</sup> Sections 7 and 8 which lay down the capacity to take in adoption also act as additional barriers due to limited recognition of the binary genders. This causes a prospective transgender parent to associate oneself to either the male or female gender.

The JJ Act, 2015 relies on the Central Adoption Resource Authority (CARA) to oversee all matters pertaining to in-country and intercountry adoptions. Though CARA has stated that adoption by transgender individuals is not barred, the view is that adoption by the transgender community will be extremely difficult due to society.<sup>29</sup> It is not the general perceived barriers of lack of income and education that pose the greatest threat in the process of realizing

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<sup>25</sup>Shivam Garg, *Legal Recognition of Same-Sex Marriage Rights in India*, CNLU LJ (9)158, 159 (2020).

<sup>26</sup> Apoorva Mandhani, *Gay marriage not a fundamental right, wedding a bond between man, woman — Centre to Delhi HC*, The Print (Feb. 25, 2021, 4:40 PM) <https://theprint.in/judiciary/gay-marriage-not-a-fundamental-right-wedding-a-bond-between-man-woman-centre-to-delhi-hc/611698/>

<sup>27</sup> Nidhisha Garg, *Improving the Prospects of Adoption Under the Juvenile Justice Act, 2015*, 5 JRC 40, 48 (2020).

<sup>28</sup> Astha & Aryaman, *Is Decriminalisation of Homosexuality Enough*, 2020 SCC OnLine Blog OpEd 132.

<sup>29</sup> Yashdeep Chahal & Smridhi Sharma, *Decriminalizing the Act: Projecting Individuals as Kings Without Sceptre to Rule?* 9.1 NLIU LR 115, 132 (2020).



transgender individuals' right to adopt, rather the societal stigma. Presently, adoption by a transgender individual heavily relies on the discretion of officials as adoption is neither expressly barred nor recognized/endorsed. Neither the Act nor the Regulations of 2017 provide any scope to include the third gender. For example, all the prerequisite factors under the Home Study Report can be selected only against two options, namely, male and female.<sup>30</sup> It even requires couples to be in a stable marital relationship for at least two years, a criterion that cannot be availed by transgender couples due to the lack of recognition of such marriages. An aspiring parent is hence forced to forego the dignity of gender identity, associate to a binary gender and adopt in the name of oneself regardless of relations. This is further exacerbated by statements from CARA helpline numbers that there is "no provision" for transgender/same-sex couples to adopt under CARA despite official statements refuting the same.<sup>31</sup>

Social rejection coupled with issues faced by the community in general such as low economic status, inaccessibility to housing and possession of even basic documents causes an array of problems.<sup>32</sup> For instance, adoptions under the JJ Act, 2017 require the satisfaction of proof of last year's income. Though the regulation is aimed at securing the best interests of a child by ensuring financial stability, it has a rather negative impact as majority of the transgender community is unable to secure jobs or earn a stable income (According to the 2018 survey, a majority of the transgender earned between Rs. 5000-15000 per month and 94% were engaged in informal sectors).<sup>33</sup>

The current adoption rates under the JJ Act, 2015 have even been witnessing a declining trend despite census statistics showing a much greater number of childless couples in comparison to children available for adoption.<sup>34</sup> Furthermore, transgender children are often harassed and abused by their families and communities seek care within the transgender community as there is a sense of acceptance.<sup>35</sup> It is not expected from the law to accommodate adoptions and other related matters into personal law due to the sensitive fabric of society.<sup>36</sup> What is expected instead is inclusion under the JJ Act, 2015 or the creation of a distinct law which cannot be

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<sup>30</sup> See Schedule VII of Adoption Regulations, 2017, [http://cara.nic.in/PDF/Regulation\\_english.pdf](http://cara.nic.in/PDF/Regulation_english.pdf).

<sup>31</sup> Tarini Mehta, *Where are India's queer parents? Having a family is not even an option for many Indians*, The Print (Feb. 21, 2021, 8:30 PM), <https://theprint.in/opinion/where-are-indias-queer-parents/608267/>.

<sup>32</sup> *Study on Human Rights of Transgender as a Third Gender*, (Feb. 10, 2017), [https://nhrc.nic.in/sites/default/files/Study\\_HR\\_transgender\\_03082018.pdf](https://nhrc.nic.in/sites/default/files/Study_HR_transgender_03082018.pdf).

<sup>33</sup> *Id.* at 29, 32.

<sup>34</sup> Nidhisha Garg, *Supra* note 27 at 41.

<sup>35</sup> Konina Mandal & Anwesha Panigrahi, *Children Beyond Gender - Relocating the Rights and Status of Transgender Children in the Context of Juvenile Justice System of India*, 5 JRC 28, 36 (2020).

<sup>36</sup> Shivam Garg, *Supra* note 25 at 169.

denied on the grounds that it does not match the ideologies of family founded on colonialism and patriarchy.

### **Transgender Persons (Protection of Rights) Act, 2019 and the Forgotten Civil Rights**

The Transgender Persons (Protection of Rights) Act, 2019 came into being as a legislative consequence to the order laid down in *NALSA* (supra).<sup>37</sup> However, it fails to accommodate any other matters essential for enshrining basic rights for the community apart from seeking to end discrimination with little efforts. The Act incorporated an unnecessarily complicated bureaucratic hurdle<sup>38</sup> which contravened the central theme of self-identification. Section 6(3) has been drafted in such a manner that the already limited rights conferred by the Act arise as a result of a “Certificate of Identity” issued by the District Magistrate on an application made under Section 5. This is highly problematic as it sends out the notion that the certificate plays a central role in availing rights.

Moreover, obligations of the appropriate government tend to revolve around “social and cultural inclusion” rather than focusing on ensuring other civil rights. In fact, the Act makes little to no effort to step beyond the areas of education, inclusion health and employment. A 2017 Committee report chaired by Shri Ramesh Bais had even highlighted the silent nature of the then Bill of 2016 with regard to civil rights such as marriage and adoption but the same failed to materialize. This paucity has only furthered the need for a more robust legislation that deals with all civil rights or amendment to existing legislations to include them.

### **Importing Yogyakarta Principles**

The Yogyakarta Principles, 2006 which operates as a cornerstone on gender identity and rights of the LGBT community confers rights on an international level by stating that every person has the right to start a family. The 24<sup>th</sup> Principle enshrines the right of every individual to start a family and live free from discrimination. It expects the States to take all necessary measures to enable adoption and assisted procreation for all individuals. Furthermore, the 2015 verdict in *NALSA* ruled that in the absence of any municipal law negating a certain sphere,

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<sup>37</sup> Abhishek Goyal, *Transgender Persons (Protection of Rights) Act, 2019: Enduring Struggle for Gender Rights Recognition*, 2020 SCC OnLine Blog OpEd 87.

<sup>38</sup> Sangita Laha, *Journey From Marginal to Mainstream - The Woes of Transgender in India*, 11 RMLNLJ 18, 31 (2019).

international covenants and rules had to be respected. Despite this, it cannot be brought into effect regardless of Articles 253 and 51 of the Indian Constitution in light of the decision in *Navtej* which remarked the Principles, 2006 to be not legally binding. Nonetheless, two crucial principles can be culled out from the Supreme Court's verdict in *Navtej*; first, society had to shift from *bigotry to tolerance* and become an inclusive one. Secondly, recusing from conferring any rights to members of the LGBT community merely because they are a small part of the population is unconstitutional and violative of Article 14.

### Overcoming Social Barriers

Adoption by transgender individuals or couples is still a big anathema in society as they are often deemed as unfit or unstable parents. This is an issue which has still not been addressed neither has it been sensitised. Transgender individuals are not allowed the right to adoption or custody of a child simply because of them being transgender. Though the Courts seem to have moved forward in the cases of lesbians, gays or bisexuals, the transgender community is still being neglected and overlooked to a much higher extent.

In an ideal world, adoption may be viewed as a private family decision disconnected from the rest of the society. However, such a view fails to materialize given the societal structure. The 2018 NHRC report showed that 99% of members from the transgender community faced social rejection.<sup>39</sup> Even a legal adoption made by a transwoman under the JJ Act and provisions of the HAMA was initially met with extreme discrimination and rejection as adoption centres projected their fears over the intention of such adoption.<sup>40</sup> Breaking past the legal and procedural challenges to adoption will only form the first part of the myriad of issues yet to follow.

The mere fact that enabling adoption shatters individuals' preconceived notions based on colonial ideas cannot act as a bar against the availing of such a right. With regard to adoptions, the more problematic factor is not how the child shall be raised but rather how society will exert its influence on this newfound family. Fears such as those of rejection, discrimination, transphobic behaviour, and violence may give cause to minority stress which can have an

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<sup>39</sup> *Supra* note 32 at 43.

<sup>40</sup> Shiba Kurian, *The struggles of a trans woman to legally adopt a child: Akkai's story*, The News Minute (Oct. 01, 2019, 12:19 PM), <https://www.thenewsminute.com/article/struggles-trans-woman-legally-adopt-child-akkai-s-story-109789>.

impact on the psychological well-being of children.<sup>41</sup> These are predominantly caused by societal factors and are not a by-product of the family unit. A 2020 study by Susan Emrie et al. demonstrated that the quality of parent-child relationship between trans-parents and cisgender parents showed negligible difference.<sup>42</sup>

Discrimination on grounds of the possibility of transgender individuals drawing children into prostitution and begging is highly unsubstantiated and lacks basis; an argument that can even be attributed to cisgender individuals. Such regressive thinking is no different than those held while enacting the Criminal Tribes Act, 1871 which assumed that the third gender was more prone to committing crimes.<sup>43</sup>

The Act, 2019 has a lacklustre approach with regard to civil rights and does not provide any confidence to the members of the community. Individuals' right to adoption is more likely to be crippled due to the narrow view of society which finds itself unable to accept an ideology that is not subscribed by the majority. The need of the hour is sensitization and awareness of the general public as held in the landmark *NALSA* verdict to bring an essential shift in thinking. Unless the general public is sensitised, adoptions, even if made legal will continue to be a challenge to most transgender individuals and their adopted children who will struggle to break past the relentless discrimination and violence.

## Conclusion

The society is not readily going to accept the notion of LGBT marriages or adoptions as the problem lies not only with the law, rather with the mindset. The root cause of most dilemmas is the orthodox and conservative temperament towards those who are considered different, as well as their disagreeability to accept them as one of their own. The sharp attitude shown towards the transgender community provides for an uneasy existence. The fundamental right of marriage and benefits under various acts legalising marriage should extend to transgender individuals as well. The present legal system for adoption by transgender individuals is operating in a rather grey area with no clear-cut procedure. The Transgender Act of 2019 also fails to provide any solution to multitude of civil rights of the LGBT community and requires

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<sup>41</sup> Susan Imrie et. Al., *Children with Trans Parents: Parent–Child Relationship Quality and Psychological Well-being*, *Parenting*, DOI: 10.1080/15295192.2020.1792194 (2020).

<sup>42</sup> *Id.*

<sup>43</sup> Indra Kumar Lahoti & Nitisha Agrawal, *Transgender Rights — An Ongoing Wrangle*, 9.2 NLIU LR 532, 536 (2020).

further developments. The community is also in urgent need for upliftment given their present employment and economic conditions which can stop the process of adoption in the first step due to the lack of financial well-being. Adopting children even in the aftermath of a robust law may continue to be a challenge but it is the duty of the State to ensure that such quintessential rights are not forsaken on mere assumptions coupled with former colonial ideologies.