

## **Trans- Rights Are Human Rights: An Evaluation of Law on the Protection of Transgender Rights in India**

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### **Abstract:**

*2014 is a year to be remembered in the history of India in terms of Transgender Rights, followed by its fruit in the year 2019. The Judiciary in recognizing the status of Transgender Persons in the country, identified them as the 'third gender' in the NALSA Judgment (2014). Following cue, the Indian Parliament passed The Transgender Persons (Protection of Rights) Act, 2019. At the international level too, the efforts of respecting, safeguarding, protecting and fulfilling the rights of Transgender has been witnessed constantly through strong recommendations and comments of the United Nations Charter and Treaty based bodies. The promulgation of the Act of 2019 in India was a celebrated event as many believed, that it marked an end to the age long marginalization and discrimination faced by the Transgender Community. A cursory glance at the legislation would give many, hopes in that regard. However, it was and is still met with opposition from the Transgender Activists leading to the struggle of the community to continue. What makes this legislation an issue of debate? It is questioned on the basis of the very definition of the term 'Transgender'. It rejects some of the most important points of the NALSA guidelines. It is almost completely silent on civil and political rights and most importantly it lacks the voice of Trans-genders themselves for whom the law is made. This however does not mean that it is a failed legislation. It is certainly an effort worth appreciating as it opened doors for prohibition of discrimination and providing social welfare measures for the community. This paper, seeks to address some of the limitations and gaps of the legislation. In doing so, it also tries to understand the concept of trans-genders, the historical background in India, forms of discrimination faced by the community, international human rights laws provisions on their rights and the role of judiciary in promoting the rights of the community.*

**Keywords:** *Trans-genders, Transgender Persons (Protection of Rights) Act, 2019, United Nations, human rights, discrimination, identity.*

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## I. Introduction

“I respect culture, tradition and religion, but they can never justify the denial of basic rights. My promise to the lesbian, homosexual, bisexual and transgender members of the human family is this: I’m with you.”

-Former UN Secretary General Ban Ki-moon

The statement made by the then United Nations Secretary General in the year 2013, was an event that left a mark on the history of Gender Justice within the International legal sphere. It recognized, *inter alia*, that Trans-genders’ rights are human rights. In the absence of a separate treaty for the rights of the LGBT Community<sup>3</sup>, the efforts of the charter and treaty based bodies evidenced by various reports and commentaries, revealed the will of the United Nations in respecting, safeguarding, protecting and fulfilling the rights of the Transgender Persons. Despite the presence of a large population of Trans-genders today and the cultural, religious and social history highlighting the existence of the community, facts shows that they are one of the most marginalized section of the society facing an immense challenge to merge within the general category of Gender. Transphobia and Homophobia is very much prevalent across the world leading to discriminatory and derogatory actions and laws against community. It is surprising to see that although the United Nations through its monitoring and enforcing mechanisms have time and again recommended the state parties to repeal or reform national discriminatory criminal laws, and yet a large number of states, 69 to be precise, are far from fulfilling it, leading to, in many occasions state-sponsored violence against them.

Understanding the fact that the community experience discrimination in every sphere and one of the major reason being the lack of identity, India in the year 2014 took a huge leap towards protecting the rights of trans-genders by

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<sup>3</sup> In fact, the term gender was seldom used even in the basic principle provision of non-discrimination. The term used was Sex, thereby negating any scope for the non-binary. For example, the Universal Declaration of Human Rights (UDHR) under Article 2 provides for non-discrimination on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Similar is the case under the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic Social and Cultural Rights (ICESCR). The term gender does not find place in these core human rights treaties.

recognizing them as ‘third gender’. NALSA Judgment<sup>4</sup> was certainly path breaking. In India, prior to 2019, rights of the community emanate not only from the Indian Constitution but also from the core human rights legal instruments such as the Universal Declaration of Human Rights (hereinafter, UDHR), International Covenant on Civil and Political Rights (hereinafter, ICCPR), International Covenant on Economic Social and Cultural Rights (hereinafter, ICESCR) etc. However, considering the unique features and issues experienced by the community, a special legislation to protect their rights was necessary.

One of the many fruits of the NALSA Judgment was the immediate proposal of a bill on Transgender Rights, which after long history became a reality in the year 2019 as “Transgender Persons (Protection of Rights) Act”. It is an enabling and empowering legislation but not free from criticisms. From the very moment the right came into existence, there were criticisms by the Transgender Community themselves. This paper seeks to evaluate the law by also studying and understanding the vulnerability of the community and existing legal protection other than the legislation.

## **II. Who are Trans-genders?**

The term transgender, in its legal and formal sense is relatively new. This however does not mean that they were non-existent in the Indian society & culture. The discussion on transgender in Indian history (in the paper itself) will reveal the fact that they have always been in existence with different names such as hijras, Kinnars, Jogappa etc.

As defined by the United Nations Free and Equal, which is a United Nations campaign launched by the Office of the High Commissioner for Human Rights (hereinafter, OHCHR) in 2013 with the aim of promoting equal rights and fair treatment of LGBTQ people:

“Transgender (sometimes shortened to “trans”) is an umbrella term used to describe a wide range of identities whose appearance and characteristics are perceived as gender atypical—including

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<sup>4</sup> National Legal Services Authority versus Union of India and others, AIR 2014 SC 1863

transsexual people, cross-dressers (sometimes referred to as “transvestites”), and people who identify as third gender. Transwomen identify as women but were classified as males when they were born, transmen identify as men but were classified female when they were born, while other trans people don’t identify with the gender-binary at all. Some transgender people seek surgery or take hormones to bring their body into alignment with their gender identity; others do not.”<sup>5</sup>

The term is explained in the simplest form by the National Centre for Transgender Equality of the United States of America as:

“a transgender girl or woman is a girl or woman whose sex assigned at birth was male, but who understands herself as female. A transgender boy or man is a boy or man whose sex assigned at birth was female, but who understands himself to be male. Some transgender people identify as neither male nor female, or as a combination of/among a spectrum of male and female. There are many terms that people who do not identify as male or female use to describe their gender identity, like androgynous, non-binary or genderqueer. The opposite of ‘transgender’ is ‘cisgender’, which describes people whose gender identity matches their assigned sex at birth.”<sup>6</sup>

Diverting from the term in discussion, there are two terms that needs to be noted, Gender and Sex. Sex is related to the reproducing organ of the individual whereas Gender can be a self-identification and is often understood as a social construct. The UNESCO Gender Mainstreaming Implementation Framework, 2003 defines Gender as:

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<sup>5</sup> *Free & Equal United Nations, Definitions* (Dec. 12, 2022, 06:05pm) <https://www.unfe.org/definitions/>.

<sup>6</sup> *Legal Information Institute, Transgender*, (Dec. 8, 2022, 08:45pm) <https://www.law.cornell.edu/wex/transgender>; *See also, Frequently Asked Questions About Transgender People*, (Dec. 10, 2022, 3:36pm) <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>

“Gender refers to the roles and responsibilities of men and women that are created in our families, our societies and our cultures. The concept of gender also includes the expectations held about the characteristics, aptitudes and likely behaviours of both women and men (femininity and masculinity). Gender roles and expectations are learned. They can change over time and they vary within and between cultures. Systems of social differentiation such as political status, class, ethnicity, physical and mental disability, age and more, modify gender roles. The concept of gender is vital because, applied to social analysis, it reveals how women’s subordination (or men’s domination) is socially constructed. As such, the subordination can be changed or ended. It is not biologically predetermined nor is it fixed forever.”<sup>7</sup>

In India, for the purpose of the enforcement of the legislation<sup>8</sup>, the term transgender includes “intersex, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta”<sup>9</sup> which will be analysed at a later stage.

Hence, Trans-genders differ from cis gender who identify themselves with the gender assigned at birth as male or female.

### III. Trans-genders in History

In India, the Trans-genders have had a long past known by different names<sup>10</sup> depending on the society they belong to. Stories of Hijras are witnessed also in

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<sup>7</sup> *Unesco’s Gender Mainstreaming Implementation Framework (Gmif) For 2002-2007*, 17, (Jan. 16, 2022, 5:16pm) <https://tinyurl.com/yck7bbwf>

<sup>8</sup> The Transgender Persons (Protection of Rights) Act, 2019, No. 24, Acts of Parliament, 1949 (India)

<sup>9</sup> *Id.* §2 (k): “Transgender person means “a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio- cultural identities as kinner, hijra, aravani and jogta.”

<sup>10</sup> shiv-shaktis, Aravani, Jogappa, hijra, Aruvani, kinnar or kinner etc.

ancient epics such as the Ramayana<sup>11</sup>, Mahabharata, Jain texts etc. Although facts show that the community are discriminated in contemporary times, a look at the ancient India reflects a more tolerance and respectful position for the members of the community.

In NALSA judgment<sup>12</sup> too, the Apex Court reiterated the existence and better position of the community in ancient times. It was observed that during the Mughal period, the community worked even in the commanding judicatures of the Ottoman empires prevalent in the Islamic world and during the period along with high ranks in the Islamic religious institutions. They also held good positions such as political advisors, administrators etc.<sup>13</sup>

It is during the British period, that the status of the trans-genders deteriorated. Some of the prevalent situation during the period that lead to such a conclusion are the fact that they were recognized as criminal caste<sup>14</sup> and denied their civil rights. The Indian Penal Code, 1860, also came into effect during the period which introduced Section 377 that deals with unnatural offences. Such status of discrimination of the trans-genders continued even in the independent India.

In modern India, the community is discriminated, harassed, disrespected and marginalized. A landmark judgment by the Supreme Court in the year 2014<sup>15</sup> is what ushered the civil and political rights of the transgender community represented by K.S. Radhakrishnan J and Dr. A.K. Sikri J. It was through this judgment that the community is now accepted as the “Third Gender.” From here, there was no turning back in terms of recognition of the rights of the community by the judiciary. The Supreme Court’s decision in the Puttuswamy case<sup>16</sup> and Navtej Singh Johar<sup>17</sup> case are evidence to this. The Transgender Act,

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<sup>11</sup> the story of the Hijras not returning to the city and the decision to stay with Lord Rama while they were leaving for “Banwas” is a famous incident upon which Ram sanctioned them with power to confer blessings on childbirth, marriage etc.

<sup>12</sup> *Supra note* at 4.

<sup>13</sup> M. Michelraj, *Historical Evolution of Transgender Community in India*, 4(1) ARSS. 17-19.

<sup>14</sup> criminalized by passing the Criminal Tribes Act, 1871, Act No. XXVII of 1871 (India) (later repealed) under which certain acts of the members of the community were criminalized.

<sup>15</sup> *Supra note*, 4

<sup>16</sup> K.S. Puttuswamy v. Union of India, (2017) 10 SCC 1

2019 is now the landmark event that will remain in the discussion of transgender rights in the country, that has been passed which recognizes certain rights of the community.

#### **IV. A Look at the Vulnerabilities**

Before we dwell into the discussion of discrimination against the community, it is important to note that the 2011 Census for the very first time officially included 'other' in collecting the data on sex of an individual. This revealed that the total population of Trans-genders in the country is around 4.88 Lakhs.<sup>18</sup> Despite such a large number of population, there are a lot many forms of human rights violations that the community faces in their day to day lives. A few of which are discussed in brief. Various charter based and treaty based bodies<sup>19</sup> have recognized the marginalization, discrimination and violence faced by the community in the society. This community, for example have faced a lot of aggressive abuse, psychological bullying in schools and at workplaces also leading to, more often than not, physical assault, beatings, torture, kidnapping and in many occasions it can be as fatal as targeted killings.

One of the form of violation of rights of the community is the existence of discriminatory criminal laws that are seen in many countries.<sup>20</sup> Despite constant recommendation of the Human Rights Committee and Human Rights Council on reforming and repealing Criminal laws in this regard, many countries still practice criminalization of the community or certain activities, of the community. These discriminatory laws are what we can term as state sponsored discrimination against the community. They are used to harass and punish the members of the communities. It includes laws criminalizing consensual same sex relationships or laws that violate the right to privacy of such community or laws that violate their freedoms. Although it is heartening to see that many

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<sup>17</sup> Navtej Singh Johar v. Union of India, AIR 2018 SC 4321

<sup>18</sup> *Transgender in India* (Dec. 20, 2022, 11:18am) <https://tinyurl.com/5bwwdmav>.

<sup>19</sup> Such as Human Rights Council, Human Rights Committee, the OHCHR etc.

<sup>20</sup> A recent BBC News report provides for a starking number of 69 countries that still criminalises homosexuality., *Homosexuality: The Countries Where It Is Illegal To Be Gay* (Dec. 28, 2021 02:25pm) <https://www.bbc.com/news/world-43822234>

members of the LGBT Community holds respectable position today<sup>21</sup> they however, also face discrimination in employment. There are still many employment opportunities in which they face discrimination. In fact, a study by the National Human Rights Commission on the human rights of Trans-genders in 2018<sup>22</sup> shows that 92% of the Transgender persons are deprived of their rights to work and participate in any form of economic activity despite having the skills and required qualification to do so. Further, in Education, what is commonly seen is psychological bullying. The environment in the school is not sensitive enough to the rights and identity of the community. The same NHRC report shows that “52% trans-genders were harassed by their classmates and 15% by even teachers, a reason due to which they don’t continue their study.”<sup>23</sup>

With regard to Marriage, despite the Decriminalisation of consensual same sex relationship in India as well as the promulgation of a special law for the protection of rights of the trans-genders, the non-reforming of the existing personal laws and the non-existence of provisions for civil and political rights under the new legislation has led to a lot many discriminations against the members of the community. If we truly want to progressively realize the rights of the community, then it is not just the criminal law that has to witness transformation. We still find many legislations using common gender terms such as ‘He’ or ‘She’ or ‘Man’ or ‘Woman’.

The impact of above mentioned forms of discrimination is that it leads to school-dropouts, homelessness, isolation, have low self-esteem leading to suicide,<sup>24</sup> fear to come-out, cyber-bullying, rejection from religion, migration

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<sup>21</sup> Some examples are: Joyita Mondal of West Bengal who is the “first Bengali Transwoman member of a Judicial panel of a civil court”, Padmini Prakash an Assistant Professor at a college in Coimbatore, Monica Das who was a presiding Officer of a polling station in Bihar in the year 2020 and many more.

<sup>22</sup> Neeraj Chauhan, “Left alone: Just 2% of trans people stay with parents”, *Times of India*, (August 13, 2018), (Dec. 12, 2021 01:15am) <https://timesofindia.indiatimes.com/india/left-alone-just-2-of-trans-people-stay-with-parents/articleshow/65380226.cms>.

<sup>23</sup> *Id.*

<sup>24</sup> Studies in America in the year 2015 and 2018 reveals a great number of surveyed transgender person who have thought of suicide or attempt to commit suicide. *New Study Reveals Shocking Rates of Attempted Suicide Among Trans Adolescent* (Jan. 05, 2022 3:35pm) <https://www.hrc.org/news/new-study-reveals-shocking-rates-of->

for acceptance.

As mentioned earlier, comments of various treaty bodies also recognize targeted killings and non-fatal attacks against the members of the community. For example, the concluding observations of the Human Rights Committee on El Salvador<sup>25</sup> in the year 2003, The Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions in the year 2000,<sup>26</sup> Report of the Special Representative of the Secretary-General on human rights defenders,<sup>27</sup> and many more.

We conclude the discussion on Discrimination with a statement by the Special Representative of the Secretary- General on human rights defenders<sup>28</sup> in the year 2007

“In numerous cases from all regions, police or government officials are the alleged perpetrators of violence and threats against defenders of [lesbian, gay, bisexual, transgender and intersex (LGBTI)] rights. In several of these cases, the authorities have prohibited demonstrations, conferences and meetings, denied registration of organizations working for LGBTI rights and police officers have, allegedly, beaten up or even sexually abused these defenders of LGBTI rights. The authorities have generally attempted to justify action against these defenders by arguing that ‘the public’ does not want these demonstrations to take place, or these organizations to be registered, or that ‘the people’ do not

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attempted-suicide-among-trans-adolescen\_& Suicide Thoughts And Attempts Among Transgender Adults, (Jan. 05, 2022 4:10pm) <https://williamsinstitute.law.ucla.edu/publications/suicidality-transgender-adults/>.

<sup>25</sup> Concluding Observations of the Human Rights Committee, El Salvador, CCPR/CO/78/SLV Para 16, August 22, 2003.

<sup>26</sup> Report of the special rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 1999/35, E/CN.4/2000/3 Para 116, January 25, 2000.

<sup>27</sup> Report submitted by the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, A/HRC/4/37 Para. 96, January 24, 2007.

<sup>28</sup> *Report of The Special Representative of The Secretary-General On The Situation Of Human Rights Defenders* (Jan. 05, 2022 4:35pm) <https://digitallibrary.un.org/record/618197?ln=en>.

want LGBTI people in their community. The Special Representative recalls articles 2 and 12 of the Declaration on Human Rights Defenders to remind States of their responsibility for protecting defenders against violence and threats.”

## V. International Human Rights Laws and Trans-genders

The terms “sexual orientation” and “gender identity” were rarely used in formal meetings. The same is true also in casual conversations let alone formal discussions. It is only recently that debates are unfolding in the United Nations Charter or treaty based bodies. The Human Rights Council (hereinafter, HRC) today have focused discussions on discriminatory laws and practices at the national level and on the obligations of states under international human rights laws to address these through legislative and other measures. One of the landmark event on recognizing the community and on issue of human rights, sexual orientation and gender identity was on June 2011 when the HRC adopted a resolution which received quite a support from the members of the Council. It is considered that this resolution was what paved the way for the first official united nations report<sup>29</sup> on the subject prepared by the OHCHR. The report included a set of recommendations addressed to the states for strengthening protection of human rights of the LGBT Community. The findings of the report formed the basis of panel discussion that took place at the Council on 7<sup>th</sup> March 2012.<sup>30</sup>

The then UN Secretary stated that violence and discrimination against the members of the community is a “monumental tragedy for those concerned and a stain on our collective conscience”. He also stated that such violence and

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<sup>29</sup> Human rights, sexual orientation and gender identity, Resolution adopted by the Human Rights Council, A/HRC/RES/17/19, July 14, 2011. Thereafter, the Human Rights Council came up with many more resolutions on the issue such as on 19 July 2019- A/HRC/RES/41/18, 21 March 2019) - A/HRC/RES/40/5, 30 June 2016) - A/HRC/RES/32/2 and 26 September 2014) - A/HRC/RES/27/32.

<sup>30</sup> *Historic UN Panel on Sexual Orientation and Gender Identity (March 2012)* (Dec. 19, 2021, 10:55 am) <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/historic-un-panel-sexual-orientation-and-gender-identity-march-2012>.

discrimination is also against the existing international human rights law.<sup>31</sup>

Despite the absence of special treaty on the subject, the responsibility of protecting, preventing, repealing, safeguarding and prohibiting is well founded within the very existing international legal norms.

One of the core principle under any International human rights instruments is the principle of non-discrimination through which the community cannot be discriminated in their enjoyment of rights set out in the treaties, because of their gender identity.

A glance at the recommendations of the OHCHR and HRC reveals that the states must ensure the above mentioned five responsibilities for the protection of rights of the community.

Firstly, the states are to protect the Trans-genders from homophobic and transphobic violence. This can be ensured by for example, including sexual orientation and gender identity as protected characteristics in hate crime laws; establishing effective remedial measures for recording and reporting such violence; ensuring effective investigation and prosecution of perpetrators of such violence; recognizing persecution on account of sexual orientation or gender identity as a valid basis for an asylum claim. When it comes to protecting, we can turn our attention towards right to life, liberty and security of person under Article 3<sup>32</sup> of the UDHR and Article 6<sup>33</sup> & 9<sup>34</sup> of the ICCPR. The principle of non-refoulment under Article 33(1)<sup>35</sup> of the Convention relating to

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<sup>31</sup> *BORN FREE AND EQUAL Sexual Orientation and Gender Identity in International Human Rights Law*, UN OHCHR, HR/PUB/12/06, 10, (Jan. 12, 2022 8:15pm) [https://www.ohchr.org/sites/default/files/Documents/Publications/Born\\_Free\\_and\\_Equal\\_WEB.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/Born_Free_and_Equal_WEB.pdf).

<sup>32</sup> "Everyone has the right to life, liberty and the security of person."

<sup>33</sup> art. 6(1) "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

<sup>34</sup> art. 9(1) "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

<sup>35</sup> "No Contracting State shall expel or return ("refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

the status of refugees, 1950 may also be considered.

Secondly, the states are to prevent torture and cruel, inhuman and degrading treatment of the members of the community during detention. This can be achieved by prohibiting and punishing such acts and ensuring redressal in case of violation; effectively investigating all such state sponsored violation of their rights; providing appropriate training the criminal justice functionaries and proper monitoring of such detention places. The existing provisions on this are Article 5<sup>36</sup> of the UDHR, Article 7<sup>37</sup> of the ICCPR and several provisions under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

Thirdly, states are to repeal laws criminalizing homosexuality ensuring that persons are not arrested on the basis of sexual orientation or gender identity and are not subjected to baseless and degrading examinations intended to determine their sexual orientation. Human Rights Committee also in several occasions revealed its seriousness on the issue. For example, in its concluding observation on Togo,<sup>38</sup> the committee recommended decriminalizing consensual sexual relations between adults and asked the state to take necessary steps to end such stigmatization and prejudices. In one case in the year 1994, which is considered to be the first case relating to homosexuality, the Human Rights Committee found that it was “undisputed that adult consensual sexual activity in private is covered by the concept of ‘privacy’ under Article 17 of the ICCPR. Hence the mere existence of criminal law making it an offence continuously and directly interfered with the author’s privacy.”<sup>39</sup> Since then, there was no turning back and UN Human Rights Treaty Bodies repeatedly urged states to repeal laws criminalizing homosexuality.

Fourthly, states are to prohibit discrimination on the basis of sexual orientation

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<sup>36</sup> “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

<sup>37</sup> “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

<sup>38</sup> Concluding observations of the Human Rights Committee, CCPR/C/TGO/CO/4, Para 14, April 18, 2011.

<sup>39</sup> Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)

and gender identity. This can be done by making sure the laws in place includes expressly sexual orientation and gender identity as prohibited grounds of discrimination. As far as prohibiting is concerned, we can turn to Article 2<sup>40</sup> & 7<sup>41</sup> of the UDHR, Article 2 (1)<sup>42</sup> and Article 26<sup>43</sup> of the ICCPR, Article 2<sup>44</sup> of the ICESCR and Article 2 of the Convention on the Rights of Child (CRC).

Fifthly, states are to Safeguard freedoms of the community, which includes freedom of expression, association and peacefully with of course with permitted limitations which are not arbitrarily used against the community.

The existing core human rights treaties also speak of right to be recognized as a person before the law, which is relevant in this discourse. This is provided under Article 6<sup>45</sup> of the UDHR and Article 16<sup>46</sup> and 17<sup>47</sup> of the ICCPR.

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<sup>40</sup> “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”

<sup>41</sup> “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

<sup>42</sup> “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>43</sup> “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>44</sup> art. 2(2): “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>45</sup> “Everyone has the right to recognition everywhere as a person before the law.”

Other than the above, while giving its observation in NALSA Judgment, the court was also influenced by the Yogyakarta principles.<sup>48</sup>

Hence, it can be seen that the United Nations have always taken active role in protecting the rights of minorities including the third genders. Over the years, we witness several treaties that protect the interests of vulnerable section of the society. As India is a party to most of the core human rights treaties, it has an obligation in respecting and fulfilling the principles set forth which has certainly contributed in the progress and development of the community.

## VI. From the Lens of Judiciary

With legalization of homosexuality or consensual sex between adults through the Navtej Singh Johar case<sup>49</sup>, there arise changes to their legal status and to their rights. Other than India, many countries have legalized homosexuality.<sup>50</sup> Around 69 countries has however, not decriminalized homosexuality as yet.<sup>51</sup> Section 377 of the Indian Penal Code (IPC) is what created an impediment for the full enjoyment of basic human rights of the members of LGBT community and hence the above mentioned judgment is a landmark in the history of gender justice. The journey of such a progressive realization in India has however started long before 2018. Apart from sexual orientation, the gender identity of the third gender has also been recognized by the Judiciary leading to the legislation of 2019 that is in place today.

The start of the journey dates back to the year 1994 when AIDS Bhedbhav

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<sup>46</sup> “Everyone shall have the right to recognition everywhere as a person before the law.”

<sup>47</sup> art. 17 (2): “Everyone has the right to the protection of the law against such interference or attacks.”

<sup>48</sup> *Principles on the application of international human rights law in relation to sexual orientation and gender identity* (Dec. 18, 2021 3:21pm) <https://www.refworld.org/pdfid/48244e602.pdf>

<sup>49</sup> *Supra note 17*

<sup>50</sup> Anuradha Parasar, *Homosexuality in India – The invisible conflict* (Oct. 29, 2021 2:00pm)

<http://www.delhihighcourt.nic.in/library/articles/legal%20education/Homosexuality%20in%20India%20%20The%20invisible%20conflict.pdf>

<sup>51</sup> Ananya Das, *Analysis of LGBT rights in India*, 1 *IJERND* 10-13 (2018)

Virodhi Andolan filed a petition questioning Section 377 of the Indian Penal Code (IPC).<sup>52</sup> The matter was triggered when the police authorities' prohibited condom distribution in prison. The petition was however dismissed.

Later, in the year 2001, Naz Foundation filed a PIL challenging Section 377 of the IPC again at the Delhi High Court.<sup>53</sup> The organization questioned the constitutional validity of the Section claiming that the section was in violation of fundamental rights under Part III of the Indian Constitution, particularly Articles 14, 15, 19 and 21. "The petitioners also limited their plea stating that Sec 377 of IPC can be entertained only to penile non-vaginismus intercourse without consent and gavel non-vaginismus intercourse where minors are involved but should not apply to consenting adults."<sup>54</sup> Amongst other things, while interpreting Article 15 of the Constitution, the court observed that not only does it forbid discrimination on the basis of caste, creed, race etc. but also sex within the purview of which oppression on the basis of sex is also prohibited, thus showing the wider interpretation of the term 'sex'. The Court also reminded that societal perception should not be the justification for treating the community differently or isolating or boycotting the community. The Delhi High Court therefore held in the year 2009 that "Section 377 IPC, insofar it criminalizes consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution."<sup>55</sup>

The above judgment was superseded in the year 2013 through an appeal in *Suresh Kumar Koushal v. Naz Foundation*<sup>56</sup> by the Apex Court. The argument was that Section 377 is not violative of right to privacy and dignity set forth under Article 21 and that right to privacy does not allow a person to do anything in private which is an offence as stated under Sec 377 or any other section.<sup>57</sup> The case was dealt by a division bench of the Supreme Court. The appeal was allowed by the bench and it declared the decision of Delhi High

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<sup>52</sup> Dr. Janak Raj Jai. *Landmark Judgment on Homosexuality* (Jan. 23, 2022 7:15 pm) <https://www.aironline.in/legal-articles/Landmark%20Judgment%20on%20Homosexuality>

<sup>53</sup> 160 Delhi Law Times, 277

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Civil Appeal No 10972 of 2013

<sup>57</sup> *Id.*

Court legally unsustainable.<sup>58</sup> The Supreme Court left the decision with the legislature whether to keep it in the law book or to alter the same to authorize permissible sensual venture between homophile in private.<sup>59</sup> After analyzing all arguments, the judgment was given in favor of the appellant superseding the judgment given by the Delhi HC in Naz Foundation case.

Recognition of the Transgender as a third gender that was a landmark decision in the history of gender discourse was through National Legal Services Authority vs. Union of India and others<sup>60</sup> in the year 2014. In this case the apex court did not deal with the constitutional validity of Sec 377 as it was already settled in the Suresh Koushal case. As mentioned earlier, in dealing with the case, the court referred to the Yogyakarta principles.<sup>61</sup> The court referred to the various principles such as “omnipresent benefit of Human Rights, impartiality, anti-discriminatory, identification before the law, the right to life etc. and various other International Conventions.” The court held that India should follow those conventions and principles complying with the various fundamental rights as provided under the Constitution. This judgment was a turning point and a ray of hope for the members of the community as through it, certain upcoming probability arose for community as the bench held in various points that on the reason of sensuous inclination as well as gender recognition no discrimination shall be made to anyone as it would be violative of fundamental rights enshrined under the constitution. The bench once again just as in the case of Naz Foundation observed that, “discrimination on the ground of ‘sex’ under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression ‘sex’ used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female.”<sup>62</sup> Referring to Art 19(1) (a) of the Constitution, the court also held that all citizens shall have freedom of raising their voice and articulation which includes within its ambit

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<sup>58</sup> *Id.*

<sup>59</sup> Oindrilla Mukherjee, *Suresh Kumar Kaushal vs. Naz Foundation: A Critical Analysis* (Nov. 8, 2021 11:25pm)

<https://www.lawctopus.com/academike/suresh-kumar-koushal-vs-naz-foundation-critical-analysis/>

<sup>60</sup> *Supra note*, 4

<sup>61</sup> *Supra note*, 48

<sup>62</sup> *Supra note* at 4.

the pronouncement of self-recognized gender.<sup>63</sup>

Although the entire judgment focused only on the trans-genders, the announcement that no discrimination should be done on the reason of sexual orientation and gender identity paved way for the entire LGBT community.<sup>64</sup> A paragraph of the judgment on this, is worth noting-

“107. At the outset, it may be clarified that the term ‘transgender’ is used in a wider sense, in the present age. Even Gays, Lesbians, bisexuals are included by the descriptor ‘transgender’. Etymologically, the term ‘transgender’ is derived from two words, namely ‘trans’ and ‘gender’. Former is a Latin word which means ‘across’ or ‘beyond’. The grammatical meaning of ‘transgender’, therefore, is across or beyond gender. This has come to be known as umbrella term which includes Gay men, Lesbians, bisexuals, and cross dressers within its scope. However, while dealing with the present issue we are not concerned with this aforesaid wider meaning of the expression transgender.”

Remarkably, the apex court in this case upheld that the right to one’s gender specification and sexual orientation is included under the rights to life under Article 21 of the Constitution of India. The judgment of this case was therefore a turning point for the members of the community, especially the trans-genders who by this judgment are recognized as the ‘third gender’ in India.

The right to privacy as a fundamental right of the individuals of the community was re-confirmed by the nine-judge bench in the year 2017 in *K.S. Puttuswamy v. Union of India*.<sup>65</sup> In this case, Right to Privacy was held to include the right to have intimate relations with own individual preference. It was stated as follows:

“Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation,

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<sup>63</sup> *Id.*

<sup>64</sup> Danish Sheikh, The Supreme Court judgement on Transgender Rights (*NALSA v. Union of India*), (Nov. 16, 2021 6:35pm) [orinam.net/content/wp-content/uploads/2014/04/nalsa\\_summary\\_danish.pdf](http://orinam.net/content/wp-content/uploads/2014/04/nalsa_summary_danish.pdf).

<sup>65</sup> *Supra note 16.*

the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognizes the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognizes the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.”<sup>66</sup>

This judgment overruled its previous judgments in the cases of *M.P. Sharma v Satish Chandra, District Magistrate Delhi* (1954) and *Kharak Singh v State of Uttar Pradesh* (1962). It was also observed that the right to privacy also includes the right of sensuous inclination as well as gender recognition and it’s a natural inalienable right.

Finally, through the *Navtej Singh Johar vs Union of India*,<sup>67</sup> the constitutional validity of Sec 377 was once again questioned. The Section is violative of Art. 14, Art.15(1), Art. 19(1)(a) and Art.21 of the Indian Constitution, it was argued. It was highlighted by the petitioners that the LGBT Community comprises of around 7 to 8% of the Indian population and hence requires protection and safeguarding of their rights, recognizing the discrimination against the community. The five judge constitutional bench observed the opinion of the court in *Puttaswamy* case. It was declared that the Section is unconstitutional as even consensual sexual activities of adults in private is being criminalized. It also observed that the members of the community deserve respect of their fundamental human rights like every other individual. The judgment given in *Suresh Koushal Case*<sup>68</sup> thus was overruled by the judgment in the aforesaid case. The Section however will continue to govern activities of lustful lovemaking against minors and every activities of flagitiousness will be

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<sup>66</sup> *Id.*

<sup>67</sup> *Supra note* at 17.

<sup>68</sup> *Supra note* at 56.

covered.<sup>69</sup>

Despite consensual sexual activities being legalized in the country, we certainly have a long way to go as their status and legal rights under various other laws is yet not certain. In the absence of a special law for the community other than the Trans-genders, there is a lack of clarity on their legal status. Today, there are diverse opinion on whether there is a need for a special legislation of the other minority communities relating to sexual orientation or the existing legal protection<sup>70</sup> is broad enough or with minor amendments able, to include the individuals identifying themselves as part of such a community.

### **VII. The Becoming of an Act that Changed the Discourse on Transgender Rights**

The concerns of the trans-genders is different from that of the lesbians, Gay and Bisexual. Hence, not intermixing the issue was a deliberate act while preparing the Bill. While the Trans-genders suffer from the issue of lack of one's identification, the problems of the Lesbians, Gays and Bisexuals are basically related to the acceptance of their sexual orientation by the social and legal community.<sup>71</sup> To address the issue of social exclusion, discrimination and marginalization of the trans-genders, The Transgender Peoples (Protection of Rights) Act, 2019 was introduced.

This legislation had its own ups and downs before we could have it in the form that we have today (although the legislation till date is not free from loopholes). Prior to passing and receiving the President's assent, it was criticized and amended from time to time. It took almost 5years for final passing of the Act.

Chronologically, it was on the 17<sup>th</sup> of December 2014, after the NALSA Judgment that the Bill was introduced. Then, it was known as "The Rights of Transgender Persons Bill, 2014." Some of the lacunas and loopholes that the Bill had was that it comprehensively reflect the existing literature over the rights of transgender, the Bill also didn't included the intersex people, no

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<sup>69</sup> *Supra note* at 17.

<sup>70</sup> Especially under the Constitution of India.

<sup>71</sup> Rebecca Furtado, *Overview and Critical Analysis of the Transgender Persons Bill, 2014*, (June 1, 2021 4:30pm) <https://blog.ipleaders.in/overview-critical-analysis-transgender-persons-bill-2014/>.

separate chapter on healthcare etc.<sup>72</sup> Hence, in the year 2016, it was re-introduced as the Transgender Persons (Protection of Rights) Bill, 2016. This Bill however, apart from many other problems, did not include within the reservation provision as recommended by the Supreme Court in the NALSA judgment. Also, there was no mechanism of grievance redressal specified etc. Hence, it was later re-introduced and moved by the 17<sup>th</sup> Lok Sabha on 5th August, 2019 and later it was moved by the Rajya Sabha on 26th November, 2019.

### **VIII. The Transgender Persons (Protection of Rights) Act, 2019: A Critique**

The Act aims at protecting the basic rights of the Trans community. As mentioned earlier, the statement of objects and reasons for the promulgation of the law projects the marginalization and the problems faced by the community in the society. This is experienced despite the community being protected under Articles 14, 15, 16 and 19 of the Indian Constitution. Hence it tries to resolve all issues faced by the members of the community.

The Act defines<sup>73</sup> important terms such as inclusive education, person with intersex variations, Transgender Persons etc. It deals with prohibition against discrimination<sup>74</sup> which includes discrimination by person or establishments, the grounds for which are also mentioned within the provision. The individuals have a right to self-perceived gender identity<sup>75</sup> under the Act. However, for certificate of identity, the transgender person is to apply to the District Magistrate<sup>76</sup> for issuing of such a certificate.<sup>77</sup> The procedure for change in

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<sup>72</sup> *Id.*

<sup>73</sup> The Transgender Persons (Protection of Rights) Act, 2019, §2, No. 24, Acts of Parliament, 1949 (India).

<sup>74</sup> The Transgender Persons (Protection of Rights) Act, 2019, §3, No. 24, Acts of Parliament, 1949 (India).

<sup>75</sup> The Transgender Persons (Protection of Rights) Act, 2019, §4, No. 24, Acts of Parliament, 1949 (India).

<sup>76</sup> The Transgender Persons (Protection of Rights) Act, 2019, §5, No. 24, Acts of Parliament, 1949 (India).

<sup>77</sup> The Transgender Persons (Protection of Rights) Act, 2019, §6, No. 24, Acts of Parliament, 1949 (India).

gender in the certificate is detailed out in the Act.<sup>78</sup> The appropriate government has an obligation under Section 8 of the Act. Section 9-12 deals with obligations of establishments.<sup>79</sup> Section 13-15 deals with education, social security and health of transgender person. The Act establishes a monitoring and enforcement mechanisms in the form of National Council of Transgender Persons under Section 16. This is a positive step seen within the Act wherein five members of the Transgender community are to be part of the council. Plus, experts on the issue of transgender is also included to fulfill the power and functions set forth under Section 17 of the Act. If we browse through the official website of the Ministry of Social Justice and Welfare also, we will see that efforts have been made to make the process of application easier as well as measures such as scholarship for education accessible. Finally, the Act recognizes certain offences against transgender persons and provides for its punishment under Section 18.

After an analysis of the Act, it is found that the rights recognized under the legislation are what are generally available to all persons or citizens under the Indian Constitution. Such as, Right against discrimination, Right to Residence, Right against denial of service, Right against unfair treatment, Right to Education, Right against discrimination in Employment or occupation, Right to medical and healthcare facilities, Right to purchase, inhabit, hire or to live in any property, Right to movement, Right of Opportunities to work in public or private office, Right to have access to enjoyment of good, facilities and other opportunities and Right to have access to Government as well as private establishment.

A cursory glance of the above salient feature would lead to appreciation of the law. Instead, it was and is met with opposition from the Transgender Activists. The problem started right at the initial stage of the drafting of the law due to the lack of enough representation of the members of the community. The following points can be highlighted in critically analyzing the law:

#### **A. The Absence of Civil and Political Rights**

Although Section 13-15 provides for basic economic, social and cultural rights

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<sup>78</sup> The Transgender Persons (Protection of Rights) Act, 2019, §7, No. 24, Acts of Parliament, 1949 (India).

<sup>79</sup> Such as non-discrimination in employment, grievance redressal mechanism, right of residence etc.

of the community that too in very narrowly, the Act is almost completely silent on civil and political rights such as marriage, adoption, reservation in public education and jobs. Hence neglecting the guidelines of NALSA Judgment. These rights, as is understood, is necessary for the personal development of an individual as well as recognizing the relevance of choice.

### **B. The Problematic Definition of Transgender**

An all-inclusive definition such as what is seen under Section 2 (k)<sup>80</sup> of the Act is problematic. It includes within its ambit terms such as trans-woman, trans-man, person with intersex variation, gender-queer. Not just that, social-cultural identities such as hijras, kinner, aravani and jogta is also included under the definition which has history, issues and context of its own. Other than intersex, the other terms mentioned above is not exclusively defined leading to ambiguity in the application of law. Also, intersex may not necessarily identify themselves as a transgender but as a cis gender. Hence, the issues faced by each of these persons may differ from each other.

### **C. Certification by the District Magistrate**

As mentioned earlier, on the one hand a provision recognizes self-perceived gender identity, while the other provides for applying for certificate of identity, making the former a vague principle. The latter provision is also silent on the kind of documents needed for such certification hence giving broad discretion to the District Magistrate. There are also no guidelines on how the District Magistrate would judge the correctness of the application and decide whether to issue the gender certificate or not.

### **D. Appropriate Welfare Measures by Government**

While Section 8 lists out on the various obligations of the government on rehabilitation, rescue, protection, involvement in cultural and recreational activities etc. for the improvement of the status of the Transgender community, but it is silent on Reservation for the community in employment or education. This is a necessary measure given the fact the members of the community have since for long experienced discrimination and marginalization due to societal prejudices and opinions.

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<sup>80</sup> *Supra note at 9.*

### **E. Criminalising Certain Acts and Penalties**

The Act makes certain acts or omission punishable under Section 18. Some examples of offences are forced or bonded labour, denial of use of public places and right to use, removal from household forcefully and from village, and abuse such as bodily, sensual, hectoring, psychic etc. The penalty for such offences, as mentioned under the law is between six months and two years' imprisonment, along with fine. Relatively, sexual offences against a woman under the IPC deserves much harsher punishment than the same act committed against an individual belonging to an LGBT community, which may go to the extent of life imprisonment or even death penalty after the recent amendments.

### **IX. Conclusion and Way Forward**

In light of the above study, it can be concluded, that similar to many other human rights issues, the Indian Judiciary has always been a flag bearer of progressive realization of basic human rights of the vulnerable section of the society. The Guidelines set forth by the Supreme Court in NALSA Judgment is also relatively accepted positively when compared to the Act of 2019. This new law, that is too recent to be studied in terms of enforcement and implementation, is without a doubt worthy of applaud. This however does not mean that we become naïve of the fact that there are gaps and lacunas in the legislation that requires immediate addressing. There is certainly a need to harmonize the law with other personal laws, social welfare legislations including maternity benefits, law on surrogacy and criminal laws if it is to achieve the goal of full enjoyment of basic rights by the community. This will make sure that the gaps in protecting the civil and political rights that is silent in the legislation will be dealt with. There is a need of sensitizing the members of the community on the existence of such rights set forth in the law and the social welfare measures that the appropriate government is obligated to provide under the Act. Sensitization and training is also required to be given to the District Magistrate who has been given one of the most important and questionable power of issuing certificate identifying the gender of Transgender persons. It is true that one of the major criticisms against the law has been that the LGBT Movement should have been involved closely in the drafting process of the legal instrument. Hence, the possibility of making sure that the community has enough representation in decision making that directly impact their lives in the future must be considered.