

**AN ANALYSIS OF THE RIGHTS OF TRANSGENDER PERSONS
UNDER TRANSGENDER PERSONS (PROTECTION OF RIGHTS)
ACT, 2019: GAPS AND CHALLENGES**

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ABSTRACT

The journey from 'no' law to have 'special' law viz. Transgender Persons (Protection of Rights) Act, 2019 recognizing the existence of transgender persons as human beings and conferring them legal rights has been full of challenges and obstacles. The manner in which the law was enacted so hastily without considering the concerns raised by activists opens up the debate if the rights conferred under the Act are adequate enough ensuring transgender persons to live their life with respect and dignity at par with cisgender.. With this question in mind, the authors analyses the gaps and challenges in legal rights guaranteed to binary genders but neither denied nor conferred to transgender persons such as right of inheritance, right to marriage, right to adoption etc. under the Act,2019.

KEYWORDS: *Transgender, NALSA, Marriage, Adoption, Inheritance.*

1. INTRODUCTION

Gender inequality has always been a crucial issue in Indian society. The impact of gender inequality cannot be seen only on binary genders (male/female) but it also extends to transgender persons. Indian history shows us that society has advanced gradually over time since Independence and conjointly, government has taken various initiatives by enacting different laws and policies guaranteeing equal rights to weaker and marginalised sections of the society. Unfortunately, transgender community is one of the most marginalised communities that since Independence, it took more than six decades to the government to recognize their identity and guarantee them human rights. Before the verdict of *National Legal Services Authority v. Union of India*¹ (popularly called as NALSA Judgment), the Indian society failed to give due recognition to their identity due to which they suffered not only social oppression but physical violence also. It was after the verdict and revolutionary movements from different NGO's and protests by transgender community demanding legal recognition and protection of their basic rights, that Transgender Persons (Protection of Rights) Act, 2019 was legislated. Lamentably, the Act is progressive but it overlooks the various civil rights of transgender community.

1.1 OBJECTIVES OF STUDY

The objective of study is to understand the meaning and historical background of transgender persons and to analyse the various rights guaranteed to them under the Act, 2019 and the Constitution of India, 1950. Another objective is to identify the gaps and challenges in legal rights guaranteed to binary genders but

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¹ *National Legal Services Authority v. Union of India*, (2014) 5 S.C.C. 438 (India).

neither denied nor conferred to transgender persons such as right of inheritance, right to marriage, right to adoption etc. under the Act, 2019 and give suggestions to fulfil the gap.

2. RESEARCH METHODOLOGY

The research paper is based on Doctrinal legal research methodology thereby analysing the legal provisions of Statute and case laws as primary sources and books, research articles, journals, newspapers, reports as its secondary sources.

3. TRANSGENDER: MEANING AND ORIGIN

The term ‘Transgender’ gained worldwide popularity in 1990’s and is used as a generic term for the persons who own a different gender identity, gender expression or gender behaviour from the stereotypical gender norms.² The word ‘trans’ is a *latin* word which means beyond or across. Therefore, the word ‘transgenders’ refers to those persons who are beyond the normal classification of binary genders. Virginia Prince, an American transgender activist is often credited with coining the term in 1969 but research shows that a psychiatrist, John F. Oliven from Colombia University had coined the term ‘transgenderism’ for the first time in his medical text ‘*Sexual Hygiene and Pathology*’ published in 1965.³ According to Oliven, the term *transsexualism* as previously coined by the Germans was misleading and *transgenderism* is more appropriate because in medical sense, it indicates an ‘urge for gender (sex) change’.⁴

However, the Act of 2019 defines the term ‘transgender’ as:

*“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.”*⁵

Therefore, the Act defines the term in a broader sense encompassing many gender identities and expressions including transsexual, genderqueer etc.

² *Transgender People, Gender Identity and Gender Expression*, (Nov. 20, 2023, 11:10 PM), <https://www.apa.org/topics/lgbtq/transgender>.

³ *A Brief History of the Word ‘Transgender*, (Nov. 9, 2023, 11:20 PM), <https://gayety.co/history-of-the-word-transgender>.

⁴ *Id.*

⁵ The Transgender Persons (Protection of Rights) Act, 2019, No 40 of 2019, Acts of Parliament, 2019 (India), §2(k).

3.1 EVOLUTION OF TRANSGENDERS: INDIAN CONTEXT

In India, the presence of transgender community can be witnessed in various ancient texts, scriptures, art, poetry etc. According to Vedas, individuals belong to one of three separate categories according to one's nature.⁶ The ancient Sanskrit literature, Kamasutra mentions the same fact and further gives reference of *gandharva vivah* that acknowledges homosexual marriage and cohabitation without the approval of parents. The presence of transgender community has been spelled out in other texts also as *pumsprakrtistri-prakrti* (female-nature) and *tritya-prakrti* (third-nature).⁷ *Manu Smriti* explains the biological origin of the three sexes. *Tolkappiyam*, the Tamil grammar also gives reference of hermaphrodites as a third "neuter" gender.⁸ Even in the texts of Jainism, the concept of 'psychological sex' has been mentioned which emphasizes on the psychological mind set of an individual distinct from his sexual characteristics.⁹

Significant role played by transgenders have also been cited in Hindu epics viz. *Ramayana* and *Mahabharata*. When Lord Rama was leaving for the forest on being exiled for 14 years, he turned to his followers and asked all the 'men and women' to go back to the city. Among his followers, *hijras* were the only ones who did not feel bound to follow his command and decided to go with him. Impressed with their affection, Lord Rama blessed them with the power to give their blessings to people on auspicious occasions such as marriage and birth of the child.¹⁰ In another epic *Mahabharata*, Aravan, the son of great warrior Arjun and Nagkanya was offered to be sacrificed to goddess *Kali* to ensure the victory of Pandavas in Kurukshetra war. But before the sacrifice, his only condition was to spend the last night in marriage. When none of the women showed her willingness to get married to him, then it was *Krishna* who transfigured himself into a beautiful woman called Mohini and fulfilled Aravan's last desire.¹¹ In fact, the *Hijra* community of the state of Tamil Nadu regard *Aravan* as their originator and call themselves *Aravanis*.¹²

Even in the Islamic world, *Hijras* community was regarded as influential people and believed to play a crucial role as political advisors, administrators etc. in empire building of Mughals. They were considered to be loyal and trustworthy, thus, appointed as guardians of harems.¹³ Not only in harems, but

⁶ M.Michelraj, *Historical Evolution of Transgender Community in India*, 4(1) ASIAN REVIEW OF SOCIAL SCIENCES 17 (2015).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

they were also given the huge responsibility to guard holy places of Mecca and Madina.¹⁴ In addition to social status, their financial status was also found to be sound as they used to receive handsome rewards from the kings and queens for their loyal services.¹⁵

After the decline of Mughal Empire, the *hijras* were given protection and benefits by some Indian states in the early period of the British rule.¹⁶ The benefits included distribution of land, food and small amount of money but gradually all the benefits were taken away through British legislation claiming that land was not inherited through blood relations.¹⁷ In the later period of British Rule i.e. around 19th century, the British administration tyrannically passed a law criminalizing *hijra* community and denying them their civil rights.¹⁸ The Criminal Tribes Act, 1871 was the draconian law that targeted *hijras* in particular and limited their civil rights such as right to food, right to inherit property etc.¹⁹ The main aim of the Act was to eliminate *hijra* community and to make them invisible from public space. The Act prescribed imprisonment and fine, if any of the suspicious *hijra* found engaging in traditional *hijra* activities such as public dancing or dressing in women's clothes or kidnapping and castrating of children.²⁰ It was because of this draconian law (Act, 1871) that the *Hijra* community which at one point of time was given due regard and high status in the society was stigmatized to lead a miserable life. Although the Act was repealed in 1952 but the legacy of treating the transgender with prejudicial and discriminatory attitude still continues.

4. RIGHTS OF TRANSGENDERS VIS A VIS RIGHT TO EQUALITY: AN ANALYSIS

Constitution of India, the supreme law of the land lays down the principle of equality²¹ forbidding discrimination against any citizen on the ground of religion, race, caste, sex, or place of birth.²² The provision implies that Right to

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Criminal Tribes Act*, (May 30, 2023, 05:00 PM), https://en.wikipedia.org/wiki/Criminal_Tribes_Act.

²⁰ *Id.*

²¹ INDIA CONST. art. 14, The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

²² INDIA CONST. art. 15, Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth -

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

Equality is a basic human right and every human being has right to enjoy this basic right irrespective of his/her gender identity or sexual orientation. Transgenders are different because of their sexual orientation but that does not mean they are not human beings, therefore, they are also entitled to the basic human rights guaranteed under the Indian Constitution. The question that arises is that since Independence what laws have been passed guaranteeing them rights at par with binary genders?

Beginning with the analysis of constitutional rights, there is no single Article in the Constitution that empowers the State government to make special provisions for the transgenders. Although Constitution provides that State shall not discriminate against any citizen on the ground of sex but like Article 15(1)²³, it does not empower the State government to make special laws for the protection and upliftment of the marginalized section of transgenders.

Article 16 of the Indian Constitution provides for equality of opportunity in public employment. The provision empowers the State Governments to reserve seats in the public employment for socially and economically backward classes. In 2014, the Apex Court analysed the issue in detail and accordingly directed the Central and State Governments to treat transgender community as socially and economically backward class and to grant them the benefit of reservation in educational institutions and public employment.²⁴ But, till date no such benefit has been extended to them by the government thereby denying them right to equality.²⁵ Even the present law on rights of transgender i.e. the Act, 2019 is silent on the issue.

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- (a) access to shops, public restaurants, hotels and places of public entertainment; or
 - (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
 - (3) Nothing in this article shall prevent the State from making any special provision for women and children.
 - (4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.
 - (5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

²³ *Id.*

²⁴ National Legal Services Authority, *supra* note 1.

²⁵ However, in 2021, State of Karnataka has become the first State of India to notify 1% reservation to transgender community by amending Rule 9 of Karnataka Civil Services (General Recruitment) Rules, 1977. It provides for reservation of 1% to any service or post to be filled through direct recruitment in all the available categories viz. General, Scheduled Caste, Scheduled Tribe and Other Backward Classes.

As a matter of fact, in the initial draft of Transgender Persons Bill, 2019, the Central Government had recommended reservation of the transgender community in Higher Educational System and National Commission for Other Backward Classes also recommended to include the community for reservation under OBC quota but in the final draft, the provision was removed.²⁶ Even in the Private Member's Bill of 2014²⁷ which was the first attempt to end discrimination against transgender people and guarantee them the constitutional rights through legislation contained a provision for *Horizontal Reservation* in government employment and government educational institutions.²⁸ The Bill was passed by Rajya Sabha in 2015 but could not pass in Lok Sabha.²⁹ In 2016, the Madras High Court also, specifically directed the state government to provide horizontal reservation to transgender people in education and employment on a percentage or post basis.³⁰

4.1 OTHER CONSTITUTIONAL RIGHTS

The Constitution of India guarantees right to life and liberty to every individual.³¹ By guaranteeing this right it does not mean merely animal existence but ensures right to live with respect and dignity. Such respect and dignity of the individuals can be ensured when they are entitled to enjoy all the human rights and are protected through rule of law. But, in the case of transgender community who are compelled to live a miserable life, this right seems to hold no value for them. Earlier (before 2019), no special law was enacted confirming them the right to live with respect and dignity and now, in 2019, when the Transgender Persons (Protection of Rights) Act, 2019 was enacted giving hope to the community, it was passed in such a hasty manner that instead of ensuring them right to live with dignity, it violated the same. The Act, 2019 provides that a transgender person has right to be recognized as 'transgender' but only in accordance to the provisions of Act.³² The other

²⁶ *Transgenders in India may soon get reservation in education under OBC quota*, (Sep. 23, 2023, 11:10 PM), https://wap.business-standard.com/article-amp/current-affairs/transgenders-in-india-may-soon-get-reservation-in-education-under-obc-quota-120111900334_1.html.

²⁷ The Rights of Transgender Persons Bill, 2014.

²⁸ The Bill was introduced in Rajya Sabha by DMK leader Tiruchi Siva as a Private Member's Bill.

²⁹ Dhirti Mankatalia, *Don't Have Just One Identity': Transgender People Urge Govt to Rethink Quota Under OBC Category*, THE WIRE (Sep. 23, 2023, 11:15 PM), <https://m.the-wire.in/article/rights/dont-have-just-one-identity-transgender-people-urge-govt-to-rethink-quota-under-obc-category/amp>.

³⁰ Swapna v. The Chief Secretary, Writ Petition No. 31091 of 2013 decided on 5 July 2016 (India).

³¹ INDIA CONST. art. 21, Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law.

³² *Supra* note 5, §4, Recognition of identity of transgender person.—

provisions of the Act state that a transgender person may obtain a certificate of identity as a transgender person by making an application to District Magistrate.³³ The District Magistrate shall issue the certificate of identity on the basis of application accompanied with affidavit and report of psychologist.³⁴ Making the report of psychologist a pre-requisite for the issuance of certificate of identity is an absolute violation of right to live with human dignity guaranteed under the Indian Constitution. Such provision has not only dehumanized the transgender community but is also an outright violation of the NALSA judgment. The Indian Judiciary which plays a pro-active role in widening the scope of Article 21 through its interpretation has specifically mentioned in its judgment that “*Gender identity as already indicated forms the core of one’s personal self, based on self-identification, not on surgical or medical procedure.*”³⁵ Even in the international sphere, the Yogyakarta Principles which address a broad range of human rights standards and its application to sexual orientation and gender identity accords that “*No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity.*”³⁶ Therefore, it can be concluded that any procedure for the identification of transgender persons’ which goes beyond self-identification would violate transgender persons’ rights under Article 21 of the Constitution.

Apart from guaranteeing right to life and right to equality to individuals, the framers of Indian Constitution also expunged the then prevailing foul practices of exploitation, ill-treatment and slavery by incorporating the right against exploitation.³⁷ Article 23 of the Constitution prohibits trafficking of human beings, forced labour and other similar form of activities. Any act done in

(1) A transgender person shall have a right to be recognised as such, in accordance with the provisions of this Act.

(2) A person recognised as transgender under sub-section (1) shall have a right to self-perceived gender identity.

³³ *Supra* note 5, §5, Application for certificate of identity.—

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

³⁴ The Transgender Persons (Protection of Rights) Rules, 2020, Rule 4, Procedure for issue of certificate of identity (section 6):

(1) The District Magistrate shall, based on the application, the affidavit attached therewith and the report of psychologist, without any medical examination, issue the certificate of identity.

(2) The said certificate of identity shall be issued within 30 days of receipt of duly filled in application along with the affidavit and the report of psychologist.

³⁵ National Legal Services Authority, *supra* note 1, at Para 76.

³⁶ *The Yogyakarta Principles*, Principle 18.

³⁷ INDIA CONST. arts. 23, 24.

contravention of such provision has been made punishable under different laws. Such as The Immoral Traffic (Prevention) Act, 1956 provides penalty for trafficking of persons for commercial sexual exploitation. To prohibit and penalize forced and bonded labour, Bonded Labour System (Abolition) Act, 1976 and Child Labour (Prohibition and Abolition) Act, 1976 have been enacted. Indian Penal Code, 1860 also penalizes an act of selling, hiring or disposing of any minor person for prostitution purposes.³⁸ Of all the laws mentioned herein, there is no single legislation that specifically protects and penalizes transgender persons' right against exploitation.

The present law i.e. Act, 2019 is the first legislation that penalizes a person who compels or entices a transgender person to involve in the act of forced or bonded labour with minimum six months imprisonment but which may extend to two years with fine.³⁹ Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021 is the draft bill that expressly includes transgender persons' as victim of trafficking along with women and children. Although the Bill is a progressive step ensuring protection to transgender person's against

³⁸ Indian Penal Code, 1860, No. 45, 1860 (India), §372, Selling minor for purposes of prostitution, etc.—

Whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation I.—When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation II.—For the purposes of this section “illicit intercourse” means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi marital relation.

³⁹ *Supra* note 5, §18, Offences and penalties — Whoever,—

(a) compels or entices a transgender person to indulge in the act of forced or bonded labour other than any compulsory service for public purposes imposed by Government;

(b) denies a transgender person the right of passage to a public place or obstructs such person from using or having access to a public place to which other members have access to or a right to use;

(c) forces or causes a transgender person to leave household, village or other place of residence; and

(d) harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.

exploitation but it still leaves some gaps which need to be fulfilled such as it does not extend the relief to victims beyond shelter homes.

The Directive Principles which are regarded as supplementary to Fundamental Rights confers a duty on the State to formulate a policy securing that the citizens, men and women equally, have right to an adequate means of livelihood.⁴⁰ Lamentably, neither the framers of Indian Constitution included transgender persons' at the time of drafting Constitution nor after 75 years of Independence; any legislator has taken the pain to amend the supreme law of land. As discussed in the historical background, it was because of the draconian law that transgender persons were forced to live a miserable life by adopting those means of livelihood which are not chosen by them voluntarily and denies them the right to dignity and till date, they are compelled to continue the same means so as to earn their livelihood. The Supreme law of the land confers no duty on the state to formulate any policies for the upliftment of transgender persons'. However, Act, 2019 provides that the appropriate government shall make and facilitate such welfare schemes that protect the rights and interests of transgender persons'.⁴¹ The appropriate government shall also formulate the welfare schemes and programmes that support livelihood for transgender persons'.⁴² In pursuance of the above provisions, the Ministry of Social Justice and Empowerment formulated a National level umbrella scheme viz. "*SMILE – Support for Marginalized Individuals for Livelihood and Enterprise*"⁴³ which comprises two sub-schemes viz. '*Comprehensive Rehabilitation for Welfare of Transgender Persons*' and '*Comprehensive Rehabilitation of persons engaged*

⁴⁰ INDIA CONST. art. 39, The State shall, in particular, direct its policy towards securing—
(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;

⁴¹ *Supra* note 5, §8, Obligation of appropriate Government.—
(1) The appropriate Government shall take steps to secure full and effective participation of transgender persons and their inclusion in society.
(2) The appropriate Government shall take such welfare measures as may be prescribed to protect the rights and interests of transgender persons, and facilitate their access to welfare schemes framed by that Government.
(3) The appropriate Government shall formulate welfare schemes and programmes which are transgender sensitive, non-stigmatising and non-discriminatory.
(4) The appropriate Government shall take steps for the rescue, protection and rehabilitation of transgender persons to address the needs of such persons.
(5) The appropriate Government shall take appropriate measures to promote and protect the right of transgender persons to participate in cultural and recreational activities.

⁴² *Supra* note 5, §14, Vocational training and self-employment.—
The appropriate Government shall formulate welfare schemes and programmes to facilitate and support livelihood for transgender persons including their vocational training and self-employment.

⁴³ Standing Finance Committee approved the scheme on 30.11.2021.

in the act of Begging'.⁴⁴ The umbrella scheme intends to provide welfare measures for both transgender persons and the persons who are engaged in the act of begging. For transgender persons', the focus of sub-scheme i.e. '*Comprehensive Rehabilitation for Welfare of Transgender Persons*' is to extend the facilities of rehabilitation, counselling, education, skill development, medical facilities, economic linkages etc. to community with the support of State Governments, Union Territories, Local Bodies, Voluntary Organizations and other institutions.⁴⁵ In addition to this, skill development training is also imparted to transgender beneficiaries under the scheme of PM – DAKSH.⁴⁶ Ministry has also initiated to set up pilot shelter homes viz. '*Garima Greh*' with the purpose of providing safe and secure shelter to transgender persons' in need.⁴⁷

In 2020, the government of Assam formulated a draft policy for transgender persons' living in the state of Assam seeking to identify the factors that result in social vulnerabilities of the community in the state and attempting to create an environment for them to live their life with full dignity.⁴⁸ The objectives of the policy include access to educational facilities through reservation of seats and providing scholarships to transgender students, promoting income-generating activities along with other genders, providing specific health schemes, ensuring minimum standard of living and generating large scale sensitization to recognize transgender persons' not as an aberration but an integral part of the society.⁴⁹

4.2 LEGAL RIGHTS

The objective of guaranteeing rights to human beings is to let them live their life free from harassment, fear and discrimination and live a dignified life in the society. Apart from the Constitutional rights, legal rights are also bestowed on the citizens of country which are statutory in nature. These rights are in the nature of privileges that are provided only to the citizens of country by their respective governments. Since Independence, Parliament of India has passed several legislations protecting the dignity and assuring the well-being of vulnerable sections of society, such as Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989; Juvenile Justice (Care and Protection of

⁴⁴ *Support For Marginalized Individuals For Livelihood & Enterprise*, DEPARTMENT OF SOCIAL JUSTICE AND EMPOWERMENT (Sep. 29, 2022, 10:10 PM), <https://transgender.dosje.gov.in/>.

⁴⁵ *Id.*

⁴⁶ *Schemes for Transgenders*, MINISTRY OF SOCIAL JUSTICE & EMPOWERMENT (Sep. 29, 2023, 11:10 PM), <https://pib.gov.in/PressReleasePage.aspx?PRID=1784245>.

⁴⁷ *Id.*

⁴⁸ *Assam Policy for Transgenders, 2020*, SOUTH ASIAN TRANSLAW DATABASE (Sep. 30, 2023, 11:30 PM), <https://translaw.clpr.org.in/legislation/assam-policy-for-transgenders-2020/>.

⁴⁹ *Id.*

Children) Act, 2000; Protection of Women from Domestic Violence Act, 2005 etc. When it comes to transgender persons', it is after seven decades of Independence that Parliament took an initiative to pass a law safeguarding their rights and giving them legal protection. Restricting the scope of paper only to the legal rights conferred under the Act to transgender persons', it appears that the Act was passed in haste as it is silent on various civil rights of transgender persons' such as right to marry, right to adoption, right to succession etc. which cisgender people are entitled to under personal laws.

4.2.1 RIGHT TO MARRIAGE

Marriage is a significant institution of society which permits two individuals to live together without losing their status in community. Article 16 of Universal Declaration of Human Rights to which India is signatory recognises this social institution of marriage and provides that Right to marry is a Human right.⁵⁰ With respect to right to marriage, previously, the Apex Court had developed a progressive approach where in the case of *Shakti Vahini v. Union of India*⁵¹ it held that consensually choosing life partners is a manifestation of their freedom of choice guaranteed under Articles 19 and 21 of the Constitution. Subsequently, in *Shafin Jahan v. Asokan K.M.*⁵², the Apex Court reiterated that Right to marry a person of one's choice is integral to Article 21 of the Constitution which cannot be curtailed except through a law which is just and unreasonable.

However, recently, in the case of *Supriyo Chakraborty v. Union of India*⁵³, Supreme Court held that Right to marry is not a fundamental right for queer persons, although, it reiterated that transgender persons have rights in heterosexual relationships to marry within the current framework of codified or personal laws which was held in the case of *Arunkumar v. The Inspector General of Registration*⁵⁴. It was stated that "A marriage solemnized between a male and a transwoman, both professing Hindu religion, is a valid marriage in terms of Section 5 of the Hindu Marriage Act, 1955 and the Registrar of Marriages is bound to register the same." The Court further stated that the

⁵⁰ Universal Declaration of Human Rights, art. 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

⁵¹ AIR 2018 SC 1601 (India).

⁵² *Shafin Jahan v. Asokan K.M.*, (2018) 16 S.C.C. 409 (India).

⁵³ W.P. © No. 1011/2022 decided on 17th October 2023.

⁵⁴ *Arunkumar v. The Inspector General of Registration*, WP (MD) No. 4125 of 2019 dated 22-04-2019 (India).

second petitioner i.e. transgender has chosen to express her gender identity as woman which in consonance with the dicta made by Supreme Court in *NALSA v. Union of India*⁵⁵ i.e. “*Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India*”⁵⁶ and reiterated in *K.S.Puttaswamy v. Union of India*.⁵⁷ With its recent ruling, the Apex Court made a narrow distinction between Right to marry and Right to choose one’s partner.

It was argued in the case of *Supriyo Chakraborty* that opposite-sex couples living together do not enjoy the same status as opposite-sex married couples. It is noteworthy to mention here that opposite sex couples living together have right to enter into a sacramental relationship of marriage which they do not exercise by choice but in case of transgender persons, they have not been conferred with this right which they could exercise. It is unfortunate that there is a special law for gender community but no personal rights have been conferred by that law. A Private Member’s Bill⁵⁸ was introduced in Lok Sabha in 2022 to amend Special Marriage Act, 1954 seeking to legalize same-sex marriage in India⁵⁹. But, the scope of this amendment is also limited as it proposes to recognize the same sex-marriages for the binary genders only and does not mention about the marriages of non-binary genders.

4.2.2 RIGHT TO ADOPTION

Every person has right to become a parent and one can chose to become parent either in natural way or through adoption of a child. In India, adoption is governed by Hindu Adoption and Maintenance Act, 1956 and the Juvenile Justice (Care and Protection of Children) Act, 2015. The Hindu Adoption and Maintenance Act, 1956 entitles only a Hindu male and female to take a child in adoption and thereby excludes transgender persons from right to adoption. Whereas, the Juvenile Justice (Care and Protection of Children) Act, 2015 does not prohibit adoption based on sexual orientation but transgender persons can adopt the child only as a single parent under the Act. The Act, 2015 does not confer any right of adoption on transgender couples until their union of marriage gets legalised in India. Denying this valuable right to transgender persons again make them victim of discrimination piling on their agony. As a

⁵⁵ National Legal Services Authority, *supra* note 1.

⁵⁶ *Id.*

⁵⁷ *K.S.Puttaswamy v Union of India*, (2017) 10 S.C.C. 1 (India).

⁵⁸ Bill No. 67 of 2022 introduced by MP Supriya Sule.

⁵⁹ *Id.*, § 4A - Notwithstanding anything contained in this Act or any other law for the time being in force, a marriage between any two persons of same sex may be solemnized under this Act, if at the time of marriage,—

(a) in case both the parties are male, each has completed twenty-one years of age; or

(b) in case both the parties are female, each has completed eighteen years of age.”

matter of fact, in Southern parts of India, illegal adoptions are common among transgender persons and have turned out to be beneficial also.

4.2.3 RIGHT TO SUCCESSION

Generally, a person acquires property either through inheritance or by his own resources. The Act, 2019 is progressive in an aspect that at the outset, it prohibits discrimination against a transgender person on the ground of denial or discontinuation of or unfair treatment with respect to right to reside, purchase, rent or otherwise occupy any property⁶⁰. The Act also guarantees right to residence to transgender person in a house where parent or immediate family members of that transgender resides and to enjoy and use the facilities of such household without any discrimination.⁶¹ It further entitles transgender not to be excluded from such household or any part thereof.⁶² Though the Act, 2019 have recognized the right of residence of transgender persons but it maintains silence on their inheritance rights. No provision of the Act, 2019 guarantees any right to transgender persons to acquire either ancestral property or self-acquired property of parents through inheritance.

In India, inheritance of property is governed by personal laws of an individual. The applicability of such inheritance laws is restricted only to binary genders thereby excluding transgender persons in establishing their coparcenary rights and right to succession. However, if a transgender person undergoes sex-change surgery, it leads to a state of confusion, whether that transgender is entitled to inherit property as per the rules applicable to gender born with (eg: 'A' born as male) or rules applicable to new gender attained after surgery (eg: 'A' transformed to female after surgery). Although the Supreme Court in *National Legal Services Authority v. Union of India* has observed that exclusion of transgender persons in inheritance and succession laws is against the principles of equality but it does not explicitly describe any rules governing their inheritance rights.

5. CONCLUSION AND SUGGESTIONS

The Constitution of India is an enduring instrument that consists of soul of the nation i.e. precious inalienable human rights but rights of transgender persons are seldom a reality. Although the Transgender Persons (Protection of Rights) Act, 2019 is efficacious and progressive but the rights, as discussed above

⁶⁰ *Supra* note 5, §3 (f).

⁶¹ *Supra* note 5, §12 Right of residence.—

(1) ...

(2) Every transgender person shall have—

(a) a right to reside in the household where parent or immediate family members reside;

(b) a right not to be excluded from such household or any part thereof; and

(c) a right to enjoy and use the facilities of such household in a non-discriminatory manner.

⁶² *Id.*

makes it very clear that the Act is silent on many issues and this marginalised section is still facing discrimination in the field of education, employment, marriage, adoption, property etc. An attempt must be made to bring them back from margin to mainstream and thus, following suggestions are given for the amendment in existing law and the upliftment of transgender persons:

1. First of all, the basic law of the land i.e. Constitution should be amended and State should be empowered to make special provisions for the upliftment of transgender community.
2. Right to marriage is available to every person and to be considered as one of the universal rights regardless of the gender of an individual. Thus, laws should be amended accordingly so as to give them right to marriage.
3. Laws relating to adoption must be amended so as to include transgender individual or transgender couple giving them right to adopt a child.
4. Inheritance rights of transgender persons must be recognized. Their inheritance rights can be ascertained on the basis of the provisions of Pakistan legislation⁶³ in this context. The latter prescribes that a person who is assigned female gender at time of birth but who later identifies as male, is entitled to inherit property as male and vice versa. It also prescribes inheritance rights with respect to non-binary genders stating that average of two separate distributions of man and woman can be passed in inheritance to non-binary gender.
5. Majority of transgender persons are engaged in begging or flesh trade etc. If a transgender gets a reputed job or starts business, he becomes a victim of discrimination or harassment at workplace. In 2018, a transgender police constable in Tamil Nadu attempted to commit suicide alleging harassment at workplace. Thus, effective training programme for sensitization towards gender equality should be organized at workplace for employers and employees so as to accept transgender at workplace and within the society.
6. The Act, 2019 should be amended so as to give reservation to them in educational institutions and job employments.
7. There should be facility of separate hostel accommodation and separate washrooms for transgender persons taking admission in educational institutions.

⁶³ The Transgender Persons (Protection of Rights) Act, 2018, Acts of National Assembly, 2018 (Pakistan).

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