

## TRANSGENDER RIGHTS – AN ONGOING WRANGLE

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### *Abstract*

*In the theatre of life, without possession of the attribute of identity with dignity, an entity may be allowed entry to the centre stage but would be characterised as a spineless entity or, for that matter, projected as a ruling king without the sceptre. The transgender community not only faces discrimination on the basis of gender, but also on the basis of class and social order, making it a long-spurned issue in Indian society. There has been a long ongoing battle to give transgender persons recognition and bring them at par with the society. This paper will scrutinise the Transgender Persons (Protection of Rights) Act, 2019 (“Act”) and give a glimpse of the horrendous variants of violence and discrimination faced by transgender persons. This paper will further discuss how gender identity and manifestation of that identity is a basic human right and no one, neither society nor the State has any right to interfere with that identity. Recognition of one’s gender*

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*expression lies at the core of the fundamental right to dignity. The Act has glaring contradictions with regard to the socio-political environment where the ‘third gender’ is situated and it blatantly violates the NALSA judgment which was a watershed moment for this marginalised community. The paper will further discuss how the Act fails in providing adequate opportunities and representation in the sphere of education and public employment. In addition, the paper also delves into the different social challenges to effective implementation of reservation from within and outside the transgender community. Lastly, the paper will scrutinise how the State has yet again escaped from its duty to provide transgender people civic rights like marriage and inheritance rights.*

## I. INTRODUCTION

The Ministry of Social Justice and Empowerment notified the Transgender Persons (Protection of Rights) Act, 2019 (“**Act**”) on January 10, 2020 which was passed by the upper house on November 26, 2019 and given Presidential assent on Dec 5, 2019. Although the Act is a step towards safeguarding the interests of the transgender community by assuring that they are equal citizens of this country, it fails to redress many of its concerns. The *National Legal Services Authority v. Union of India*<sup>1</sup> (“*NALSA*”) was a watershed moment as the Supreme Court recognised the right to gender identity which is

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<sup>1</sup>(2014) 5 SCC 438.

intrinsic to one's right to life, dignity and autonomy. The legal and constitutional battle from "trauma, agony and pain" suffered by the "members of transgender community", to this unscientific and regressive<sup>2</sup> piece of legislation is still incomplete and there exists a huge obligation on lawmakers and on society to complete this unfinished work to show what a liberal, democratic, transformative and progressive constitution stands for. The Preamble to the Constitution portrays the foundational principles: justice, liberty, equality and fraternity. While recognising and protecting individual liberty, the Preamble acknowledges the importance of equality, both in terms of status and opportunity. It mandates the promotion of fraternity among citizens without which unity will remain a distant dream.<sup>3</sup>

This paper will critically analyse the new legislation in the post *K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.* ("*Puttaswamy*")<sup>4</sup> era where the Supreme Court has elevated the right to privacy and gender identity to the zenith of individual dignity. It is divided into four parts starting with an introduction to transgender persons and the historical importance they hold in our society. Next, this paper will try to answer why we have to reconsider and rethink the binary code of gender and move towards multiple gender identity to fulfil the constitutional mandate of equality and fraternity. The second part will largely deal with autonomy of an individual and the manifestation of one's identity; why one should reject the State identification process and move towards self-identification to rectify the historic injustice that was meted out to the community. The third part will deal with affirmative action of the State and will lay out a

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<sup>2</sup>Revathi Krishnan, *Unscientific & Regressive' — Why Transgenders Bill tabled in Rajya Sabha is contentious THE PRINT (Jan. 20, 2020)* <https://theprint.in/theprint-essential/unscientific-regressive-why-transgenders-bill-tabled-in-rajya-sabha-is-contentious/323859/>.

<sup>3</sup>Subramaniam Swamy v. Union of India (2016) 7 SCC 221.

<sup>4</sup>*K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.* (2017) 10 SCC 1.

plan to provide reservation within the existing constitutional scheme which will help uplift transgender people socially, educationally, culturally and economically. Lastly, the author will discuss how different personal laws should be amended to include transgender persons, recognising the existence of their legal status and uphold the dignity of life.

## II. UNDERSTANDING TRANSGENDER/THIRD GENDER

Typically, a transgender person is someone whose sense of gender is distinct from their physical characteristics or the sex assigned to him at the time of birth.<sup>5</sup>

The coinage and familiarisation of the term ‘transgender’ in the 1990s grew partly from the perception that there are multitudinous forms of gender variance, and many people may not want surgical intervention or follow linear ‘male-to-female’ or ‘female-to-male’ ambits of transition.<sup>6</sup> In India, the United Nations Development Programme (“UNDP”) supported the first regional deliberation on transgender and ‘Hijra’ issues in 2009, and ‘transgender’ was defined as an ‘umbrella’ term that manifests the reality of various communities and identities of people who are disempowered for their gender expression and/or identity.<sup>7</sup>

The transgender community consists of ‘Hijras’, eunuchs, ‘Kothis’, ‘Aravanis’, ‘Jogappas’, ‘Shiv-Shakthis’, etc., and they, as a group,

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<sup>5</sup>Govindasamy Agoramoorthy and Minna J. Hsu, *Living on the Societal Edge: India's Transgender Realities*, 54 JOURNAL OF RELIGION AND HEALTH 1451.

<sup>6</sup>Aniruddha Dutta, *Contradictory Tendencies: The Supreme Court's NALSA Judgment on Transgender Recognition and Rights*, 5 JOURNAL OF INDIAN LAW AND SOCIETY 225.

<sup>7</sup>SAATHII: Bhubaneswar, SAATHII.ORG (2020), [http://www.saathii.org/orissapages/tg\\_hijra\\_issues\\_consultation%20.html](http://www.saathii.org/orissapages/tg_hijra_issues_consultation%20.html) (Feb 4, 2020).

have got a strong historical presence in our country in Hindu mythology and other religious texts. We have often come across terms like 'Napunsaka' or 'Tritiya Prakriti' in our Vedic and Puranic literature and these terms have been used to denote absence of procreative capability.

According to Hindu mythology, Lord Rama, in the epic Ramayana, while going towards the forest after being exiled from the kingdom for 14 years, asked all his followers, 'men and women', to return to the city. The transgenders refused as they were not bound by this direction because they neither fell in the category of men nor women, so they decided to stay. Dazzled by their devotion, Lord Rama gave them the power to bestow their blessings on auspicious occasions. In South India, especially in Tamil Nadu, another folklore of Aravan, son of Arjuna and Nagakanya in the epic battle of Kurukshetra was supposed to be sacrificed to endure the victory of Pandavas. Since no woman was willing to marry the one who was doomed to be killed, Krishna took the form of a winsome woman named Mohini and agreed to marry him. The Hijras of Tamil Nadu consider Aravan as their progenitor.<sup>8</sup> Since time immemorial, this small section of people has existed and celebrated their gender identity through many ways. Therefore, it is evident that stories involving various religious deities have been accepted by millions of Hindu devotees, thus, accepting transgenderism far ahead of other world religions.

Even though transgenders had a prominent role in earlier periods, there was a change in scenario during the British rule. During this period a legislation called The Criminal Tribes Act of 1871<sup>9</sup> was enacted that applied specifically to Eunuchs. This Act was enacted on the assumption that some communities are more likely to commit a

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<sup>8</sup>Naresh Kumar Vats & Megha Purohit, *Right to Education and Employment: A Step towards Empowering Transgender Community*, 5 KATHMANDU SCH. L. REV. 113 (2017).

<sup>9</sup>Criminal Tribes Act, 1871, Act No. XXVII of 1871 modified in 1897.

crime and transgenders were one of them. In 1951, the Nehru Government annulled this legislation and while giving a speech in Nellore, he remarked<sup>10</sup> - “*I am aware of the monstrous provisions of the Criminal Tribes Act which constitute a negation of civil liberty... An attempt should be made to have the Act removed from the statutebook. No tribe can be classed as criminal as such and the whole principle is out of consonance with all civilized principles of criminal justice and treatment of offenders.*”<sup>11</sup>

Even though the Criminal Tribes Act was repealed, the transgender continued to face social stigma and harassment in the post-colonial period and getting social recognition continued to be a challenge for them. The National AIDS Control Organization (“NACO”) Report scrutinises the term ‘trans-gender’ as the symbolic representation of crossing the boundaries, that has been derived from the two different languages; the Latin word ‘trans’ and the English word ‘gender’.<sup>12</sup> The NALSA Judgment contains a more liberal definition of the term ‘transgender.’ It states: ‘transgender’ is generally described as an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to their biological sex. It was further observed that those who do not identify with their sex assigned at birth, or who intend to undergo sex reassignment surgery (“SRS”) or have undergone SRS to align their biological sex with their gender identity, who are later called as transsexual persons, as well as those who tend not to identify themselves with their sex assigned at birth,

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<sup>10</sup>Siddharth Narrain, *Crystallising Queer Politics - The Naz Foundation Case and Its Implications for India's Transgender Communities*, 2 NUJS L. REV. 455 (2009).

<sup>11</sup>The Hindu, *From ‘perversion’ to right to life with dignity*, THE HINDU (2009), <https://www.thehindu.com/todays-paper/tp-opinion/From-Isquoperversionrsquo-to-right-to-life-with-dignity/article16549137.ece> (Jan 29, 2020).

<sup>12</sup>Laxmi Bai & J Mishra, *Transgender - Hijra strategy Draft version: 1.0*, [http://naco.gov.in/sites/default/files/4.%20TG\\_paper\\_NACO%20shortversion.pdf](http://naco.gov.in/sites/default/files/4.%20TG_paper_NACO%20shortversion.pdf) (Feb 2, 2020).

including Hijras or eunuchs shall be covered under the ambit of the said definition.

Whereas, Section 2(k) of the Transgender Persons Act 2019 defines ‘Transgender Person’ as, “*a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman..., person with intersex variations, genderqueer and person having such socio- cultural identities as Kinner, Hijra, Aravani, and Jogta.*”

However, the Act includes all persons with inter-sex variation within the meaning of transgender persons and impose upon them a “*process of gender identification*” which is unjust as a person with intersex variation may be content with the gender assigned at the time of the birth, or it is their discretion if they choose to be a transgender. Due to this, these people have to suffer the tedious process of gender identification as laid down in Section 7 of the Act for anyone that comes within the definition of a transgender person. According to this section, the District Magistrate will issue a certificate, which will act as evidence certifying that the concerned person belongs to the transgender community. This violates the ‘right to life’ under Article 21 of the Constitution of India as it takes away the right to self-gender determination of these people.

### **III. ‘STATE IDENTIFICATION’ V. ‘SELF-IDENTIFICATION’**

*“Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilization or*

*hormonal therapy, as a requirement for legal recognition of their gender identity.*”<sup>13</sup>

Historically, the Indian state policy has constantly refused to acknowledge gender identity different from the binary code of gender which resulted in the classification of transgender individuals as legal non-persons. Article 15 of the Indian Constitution prohibits discrimination of Indian Citizens on basis of religion, race, caste, sex, or place of birth. Discrimination on the basis of sex includes not only biological sex but gender identity also which has a deeper meaning than traditionally identified sex distinction.<sup>14</sup> Section 4 and 5 of the Act<sup>15</sup> clearly discriminate against the transgender person as they prerequisite the transgender community to obtain a certificate of self-identity for legal recognition. There are many impediments in obtaining the certificate as it has many layers and procedures. The whole process of ‘self-identification’ has turned into ‘State-identification’ which grossly violates the privacy of an individual.

Section 7 of the Act states that where a transgender person undergoes a gender affirming surgery is required to be certified by a Medical Officer in addition to the District Magistrate which again violates Article 15(1) of the Indian Constitution. These criteria bring about a number of questions. To what extent is the government guardian of one’s self being? On what basis will the District Magistrate give the ‘transgender certificate’?<sup>16</sup> Also, how will the State ensure that the District Magistrate is representing the transgender people of varied castes who lives in distinct geographic locations? Such a complex self-identification procedure could mitigate the individuality of those persons who don’t want to undergo a surgery but still identify as

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<sup>13</sup>National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

<sup>14</sup>*Id.*

<sup>15</sup> The Transgender Persons (Protection of Rights) Act, 2019.

<sup>16</sup>Sayan Bhattacharya, *The Transgender Nation and its Margins: The Many Lives of the Law*, SAMAJ (2019).



transgender or just want to be referred to as male or female. An individual born into the biological sex they comply with, need no such certification for hormonal therapy or a mastectomy. It is the transgender community alone that needs such a seal of approval from a Chief medical officer. A transgender person visiting an office are usually regarded with wariness and in some cases, this antagonism transcends into unmitigated harassment at the hands of state officers. The process of certification fails to pursue the legitimate state aim of giving effect to the right to self-identification and further contributes in making transgender persons easy targets of stigmatisation and discrimination.

There are many instances where transgender persons are denied equal rights. One such instance being the case of SabiGiri, a naval officer, who was terminated of her services due to her sex reassignment surgery.<sup>17</sup> Similarly in another instance, a transgender woman named Sameera, who is also a doctor, was asked to present a ‘surgery certificate’ by the passport authorities when she applied to the passport office to get her name and gender markers changed, which stands in clear violation of the Supreme Court’s directions. The *NALSA*<sup>18</sup> judgement clarified that a person could have their self-identified gender identity without mandating SRS stating, “*any insistence for SRS for declaring one’s gender is immoral and illegal.*” In yet another case, Vihaan Peethambar, a transgender activist from Kerala was asked to strip in front of the doctor and was asked various discomfiting questions about his genitalia when he went to change his

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<sup>17</sup>Prasad Nichenametla, *2 years after sacking transgender sailor, Navy goes back on promise to give her fresh chance*, THE PRINT Feb 2, 2020), <https://theprint.in/india/2-yrs-after-sacking-transgender-sailor-navy-goes-back-on-promise-to-give-her-fresh-chance/310235/>.

<sup>18</sup>(2014) 5 SCC 438.

gender markers on his identity documents. This happened despite Vihaan having his documents and undergoing surgery.<sup>19</sup>

Moreover, most transgenders can't afford to pay for their sex change surgery in private hospitals and with government hospitals not providing the same, the transgender take recourse to unqualified medical practitioners for this operation. Seldom, some transgender even resort to doing the castration themselves and as a result develop postoperative complications, especially urological problems due to bad surgical procedures. These complications would have been done away with if free or affordable SRS had been offered at government hospitals.<sup>20</sup>

Transgender persons being subjected to both systemic and individual discrimination gives birth to transphobia. Transphobia is “*the ignorance, fear, dislike, and/or hatred of trans people, which may be expressed through name-calling, disparaging jokes, exclusion, rejection, harassment, violence, and many forms of discrimination.*”<sup>21</sup> Article 19(1) of the Constitution of India provides for freedom of speech and expression including the right to express self-identified gender, freedom to trade and profession, freedom to move freely and reside and settle in any part of India. Self-identified gender is often expressed through dress, words, action or behavior or other forms and no restriction should be there on the same, subject to the restrictions contained in Article 19(2) of the Constitution. Thus, this violates their fundamental rights and due to social stigma, they are unable to enforce their fundamental rights. The Court in a series of judgements

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<sup>19</sup>*Supra* note 12.

<sup>20</sup>Venkatesan Chakrapani, *Hijras in sex work face discrimination in the Indian health-care system*, ETHICAL ISSUES, [https://www.indianlgbthealth.info/Authors/Downloads/Hijras\\_Discrimination\\_JSW\\_Chakrapani.pdf](https://www.indianlgbthealth.info/Authors/Downloads/Hijras_Discrimination_JSW_Chakrapani.pdf).

<sup>21</sup>Ashleigh C. Rousseau, *Transgender Beneficiaries: In Becoming Who You Are, Do You Lose the Benefits Attached to Who You Were*, 47HOFSTRA L. REV., 813 (2018).

including *S. Khushboo v. Kanniammal & Anr.*<sup>22</sup> held that the law should not be used in such a manner that it has a chilling effect on the freedom of speech and expression.

In one of the most important judgements of this decade, the *Puttaswamy* judgement, a nine-judge bench of the Supreme Court unanimously declared the right to privacy as a fundamental right which includes the right to make choices as well as the freedom to express oneself; the State has no right to interfere in the matter. There has been a violation of Article 21 of the Constitution of India as “*right to life with human dignity*” of the transgender community is being violated. The definition of dignity includes the freedom of identity and expression and ‘expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow human beings.’<sup>23</sup> Gender is an integral part of a person’s identity and legal recognition of the same is ensured under our Constitution.<sup>24</sup>

However, the Act<sup>25</sup> blatantly ignores the ‘right to self-determination of gender’ and lays down a series of long and tedious processes for a transgender person to gain recognition. By laying down a procedure where a person first has to submit an application to the District Magistrate<sup>26</sup> and it shall be upon their recommendation that a certificate shall be issued as a ‘proof of recognition’ of the identity of the transgender person,<sup>27</sup> the Act makes the State as opposed to the individual, the final arbiter on an individual’s gender identity. This runs against the rights of ‘self-expression’ and ‘personal autonomy’ that the Constitution confers on its citizens.

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<sup>22</sup>(2010) 5 SCC 600.

<sup>23</sup>*Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608.

<sup>24</sup>*Id.* at 14.

<sup>25</sup>*Supra* note 16.

<sup>26</sup>The Transgender Persons (Protection of Rights) Act, 2019 § 5.

<sup>27</sup>*Id.* at § 6(3).

The ‘right of privacy’ is defined as ‘right to be left alone; the right of a person to be free from any unwarranted publicity; the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned.’<sup>28</sup> The examinations not only violate the ‘right of self-determination of gender’ but also put the transgender community in a place where they are further susceptible to physical as well as mental harassment. Natural rights are not bestowed by the State. They are inherent in human beings because they are human. They exist equally in the individual irrespective of class or strata, caste, gender or orientation.

The medical examinations of transgender persons for gender identity cannot be further justified by the “*intelligible differentia*” as the main aim of the State should be social inclusion of the transgender community in the smoothest manner possible rather than subjugating them to a series of medical examinations which are not applicable to any other community in society. The Supreme Court on similar grounds held 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.”*<sup>29</sup>

Thus, the procedure to get identity certificates and any ‘tests’ for the ‘purpose of the recognition transgender persons’ is violative of the ‘right to privacy’. In the same judgment the Court also held that no physical/medical assessment or procedure as a prerequisite is required for transgender identification. Therefore, the clause mandating the recommendation of the District Magistrate is an intrusion of the ‘right to privacy’ of an individual and is discriminatory to the already marginalised community.

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<sup>28</sup>Chinmaya Kumar Mohapatra, Hiranmaya Nanda, *Right of Privacy: Issues and Challenges*, 4 INDIAN JOURNAL OF RESEARCH 344 (2015).

<sup>29</sup>*Supra* note 15.

Moreover, Section 18 of the Act<sup>30</sup> specifies the penalties for the offences committed against transgender persons which include physical, economic, verbal, and sexual abuse and permits imprisonment for a term which is as little as six months and can be extended to two years. All these harms or abuses are not defined in the act and discriminates against transgender persons on the basis of their gender. The punishment for offences such as rape against women are punishable with life imprisonment under the Indian Penal Code but the said act prescribes a miniscule punishment of at most two years against sexual abuse. The provision violates the right to life of transgender persons by prescribing such an inadequate punishment. It differentiates the nature of offence on the basis of gender and hence does not confirm with the constitutional principles of equality.<sup>31</sup>

In *Maneka Gandhi v. Union of India & Anr.*,<sup>32</sup> the legendary Krishna Iyer, J. observed that life is a terrestrial opportunity for unfolding personality, and it has to be borne in mind that the dignity of all is a sacrosanct human right and sans dignity, human life loses its substantial meaning. Thus, in order to move towards a truly holistic model, we must ignite a new energy to the existing socio-legal framework on an all-pervasive level to weed out various criminal legislations and family laws that sustain the systemic oppression of the non-conforming gender identities.

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<sup>30</sup>The Transgender Persons (Protection of Rights) Act, 2019 § 18.

<sup>31</sup>Ashleigh C. Rousseau, *Transgender Beneficiaries: In Becoming Who You Are, Do You Lose the Benefits Attached to Who You Were*, 47HOFSTRA L. REV., 813 (2018).

<sup>32</sup>(1978) 1 SCC 248.

#### **IV. DETERMINING BACKWARDNESS - GENDER V. CLASS DEBATE**

India is a complex society having a number of groups and sub-groups based on religion, race, language, caste, ethnicity, backwardness such as Scheduled Castes (“SC”), Scheduled Tribes (“ST”), religious and linguistic minorities, and Other Backward Classes (“OBC”). The makers of the Constitution of India envisaged an inclusive nation built on tolerance, acceptance and mutual respect among its people. Immediately after the Constitution came into force, the first amendment in 1951 inserted Article 15(4) which provided for a positive obligation on the State to make special provisions for advancement of socially and educationally backward class (“SEBCs”) to bring the marginalised and vulnerable people into mainstream society. While gender has stirred its share of controversy and conflict in India, the nation has failed to discuss how best to tackle those people that fall victim to both gender and class issues. The transgender community serves a peculiar aspect of society because they not only face discrimination on the basis of gender, but also on the basis of class and social order, making it a long-spurned issue in Indian society.

The patriarchal nature of Indian society has made life difficult for women, but more so for those that push the conventional definition of being a man or a woman, or, identify as neither. Falling into that category, transgenders/ hijras are often victim to discrimination on the basis of gender, which further stratifies their place in society.<sup>33</sup> In the battle against caste, class, gender and heterosexuality and further due to lack of resources, political disorganisation and blatant exclusion in the existing societal structure, the transgender community face

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<sup>33</sup>Gee Imaan Semmalar, *Unpacking Solidarities of the Oppressed. Notes on Trans Struggles in India*, 42 WOMEN'S STUD. Q. 286 (2014).

exclusion of such enormous proportions that most of them agonise for a decent living. The constant harassment in public toilets, buses, railway stations, community gatherings makes their life miserable. The only distinction between Hijras and the untouchables is that there exists neither the reservation system to benefit Hijras nor any affirmative action scheme promoting the inclusion of Hijras.<sup>34</sup> The primary reason, among many, for this exclusion is, the political ignorance from the nation's political and administrative landscape. Instead of being invited into the folds of major society, transgender individuals are viewed as a genesis of bad luck who are “*ignored by most, tolerated by some, and misunderstood by all.*”

In the 21<sup>st</sup> century the welfare state cannot turn a blind eye to the existence of other forms and instances of backwardness. The State has to use all its resources and instrumentalities to find backwardness in all aspects of life which may include gender identity, religious and linguistic minorities, orphans, daily wage workers etc.<sup>35</sup> Their rights are not ‘so-called’ as stated in *Suresh Kumar Koushal v. Naz Foundation*<sup>36</sup> but are real rights founded on the sound constitutional doctrine of equality. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. In view of the systematic and institutional injustice that prevent this minority community from realising equal rights, they are forced to live as second-class citizens in their own countries. Further they also face socio-economic disadvantages due to low level of education and miniscule access to employment opportunities. To rectify this situation while delivering the *NALSA* judgement the highest court of the land made the landmark ruling that –

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<sup>34</sup>Sapna Khatri, *Hijras: The 21st Century Untouchables*, 16 WASH. U. GLOBAL STUD. L. REV., 387 (2017).

<sup>35</sup>National Commission for Backward Class, Report 2014-15.

<sup>36</sup>(2014) 1 SCC 1.

*“We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.”<sup>37</sup>*

The present legislation has no statutory provision for advancement of the transgender community in educational institutions or public employment. Although after the much-celebrated verdict, different state governments<sup>38</sup> made various changes in their transgender policy recognising their freedom of expression and providing a more dignified life. But due to the apathy of a central legislation, their constitutional right of equality and freedom of gender expression are still lacking. As reservation is a facet of equality, the State has a constitutional obligation to ensure their social, economic and educational upliftment in the societal fabric of the country.

Even after the historic *NALSA* judgement, almost every state failed in adopting a holistic approach to extend the benefits to such people who were considered as ‘inappropriate’ by society.<sup>39</sup> The Madras High Court<sup>40</sup> directed the state of Tamil Nadu to provide post based reservation to transgender persons in public employment and educational institutions.<sup>41</sup> The state of Kerala issued an order directing two additional seats to be reserved in various courses in universities and affiliated arts and science colleges for the transgender

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<sup>37</sup>(2014) 5 SCC 438.

<sup>38</sup>*Aslam Pasha Urf Chandini v. State of Karnataka*, Writ Petition No. 11610 of 2013.

<sup>39</sup>Dipika Jain, Gauri Pillai, Surabhi Shukla & Justin Jos, *Bureaucratization of Transgender Rights: Perspective from the Ground*, 14SOCIO-LEGAL REV. 98 (2018).

<sup>40</sup>*Swapna & Ors. v. The Chief Secretary*, W.P. No. 31091 of 2013.

<sup>41</sup>*S. Tharika Banu (Transwomen) v. The Secretary to Government* Writ Petition. No. 26628 of 2017.



community.<sup>42</sup> The Uttarakhand High Court<sup>43</sup> acknowledged the transgender persons' right to work and ordered the government to make a comprehensive policy on transgender persons regarding their inclusion in the reservation system within the constitutional framework. The Calcutta High Court ordered a public sector bank to include members of the transgender community in its selection procedure.<sup>44</sup> In *Shivani Bhat v State of NCT of Delhi*,<sup>45</sup> the High Court recognised the rights of a 19-year-old transgender man facing illegal confinement and continuous harassment by his family.

According to Article 14 of the Constitution of India, the State cannot deny “any person” equality before the law or the equal protection of the laws within the territory of India. The basis for providing affirmative actions like reservation lies in Article 15 and Article 16 of the Constitution. These provisions help the State to prohibit discrimination on the basis on religion, race, caste, sex and place of birth. Unlike sexuality, which is a private affair that an individual chooses to reveal as per their willingness, gender is a public concept. The gender identity is the outward manifestation of a person's physical appearance of their body. Radhakrishna J. while delivering the landmark judgment in *NALSA v. Union of India*<sup>46</sup> held that –

*“Articles 15 and 16 sought to prohibit discrimination on the basis of ‘sex’, recognizing that sex discrimination is a historical fact and needs to be addressed. Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to*

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<sup>42</sup>HT Correspondent, *Kerala announces reservation for transgender students in colleges Hindustan Times*, *HINDUSTAN TIMES* (Jan 22, 2020), <https://www.hindustantimes.com/education/kerala-announces-reservation-for-transgender-students-in-colleges/story-qHixW6XIPTEXuXkCrrv45K.html>.

<sup>43</sup>Rano & Ors. v. State of Uttarakhand and Ors., W.P. Criminal Nos. 1794 and 1785 of 2018.

<sup>44</sup>Atrikar v. Union of India, 2017 SCC OnLine Cal 3196.

<sup>45</sup>(2015) 223 DLT 391.

<sup>46</sup>(2014) 5 SCC 438.

*prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders. Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character. The 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 nor female."*

Transgender persons in India are forced to rely on many wrongful activities like sex and drug trafficking which contributes further to the social ostracism that they face. The lack of education and job opportunities compel many transgender individuals to enter into sex work in their day-to-day life for survival. In the public sphere, the Hijra community is only visible either in the act of begging or doing menial jobs as a result of which they have to face discrimination on the basis of physical and sexual abuse. Society treats them as secondary citizens whose influence will bring bad luck and misfortune in their lives. Therefore, in securing rights, one needs to begin with economic rights, which can ensure that transgender persons are able to live a life of dignity even when abandoned by their own.<sup>47</sup>

Further, Article 15(2) extends this prohibition to non-State actors in places of public accommodation, forbidding denial of access to shops, public restaurants, wells, tanks, bathing ghats, roads, hotels and places

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<sup>47</sup>Mousumi Padhi and Purnima Anjali Mohanty, *Securing Transgender Rights through Capability Development*, 54 ECONOMIC AND POLITICAL WEEKLY (2019).

of public entertainment dedicated to the use of the general public. Article 15 thus, has not just a vertical effect (protecting the citizens from discrimination by the State) but also to a limited extent a horizontal effect (protecting against private discrimination).

Article 15(4) and Article 16(4) lay the foundation of this acquiescence to include the people who are most deserving and require the attention of the society which has been prejudiced on different lines. The court while quashing the order of including the Jat community in the Other Backward Class (“OBC”) list observed that – “*new practices, methods and yardsticks have to be continuously evolved moving away from caste centric definitions of backwardness. This alone can enable recognition of newly emerging groups in society which would require palliative action.*”<sup>48</sup>

## V. RESERVATION - HORIZONTAL OR VERTICAL

The jurisprudential development of Article 15(4) dates back to *M.R. Balaji v. State of Mysore*<sup>49</sup> where the Supreme Court of India categorically stated that, determination of backwardness is the function of the State as there are many sociological and economic considerations that come into play in solving this complex problem.<sup>50</sup> After the ruling of the famous *Mandal Commission case*,<sup>51</sup> the Supreme Court directed to setup a permanent body which will determine backwardness, advising the respective governments on the requests for inclusion and complaints of over inclusion or under inclusion in the lists of Backward Classes. It also directed that the advice tendered by such body shall ordinarily be binding<sup>52</sup> upon the

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<sup>48</sup>Ram Singh v. Union of India, (2015) 4 SCC 697.

<sup>49</sup>1963 AIR SC 649.

<sup>50</sup>*Id.*

<sup>51</sup>*Indra Sawhney v. Union of India*, 1992 (3) SCC 217.

<sup>52</sup>National Commission for Backward Classes Act, 1993 § 9(2).

concerned government. The National Commission for Backward Classes (“NCBC”) after a comprehensive study on the issue and in tune with the above-mentioned statutory powers tendered its advice to consider ‘transgender’ as socially and educationally backward class (SEBCs) in 2014.<sup>53</sup>

Article 15(4) and Article 16(4) are provisions which are gender neutral and reservation on the basis of gender will be constitutionally questionable. These provisions presuppose a class of people who have historically been discriminated against by caste centric dynamics in the society. Black’s Law Dictionary defines class as, ‘a group of persons or things, taken collectively, having certain qualities in common.’ Gender and class are two similar but yet overlapping concepts. The Supreme Court through its various judgements recognised that a social class is “*an identifiable section of society which may be internally homogeneous (based on caste, occupation or residence)*.”<sup>54</sup> Hence, homogeneity is a prerequisite for a class and their social and educational backwardness is essential while declaring them as SEBCs.<sup>55</sup> A significant question which lies here is, can a heterogeneous group of individuals (transgender/third gender) constitute a class? Of course, an individual of a certain gender will definitely belong to some class, however it would be incorrect to say that all individuals of a certain gender would belong to the same class.<sup>56</sup> The concept of constitutional morality<sup>57</sup> urges the organs of the State, including the Judiciary, to preserve the heterogeneous

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<sup>53</sup>National Backward Class Commission, NCBC Advice No.1/All India/2014 dated May 15, 2014.

<sup>54</sup>*Supra* note 49.

<sup>55</sup>Triloki Nath v. State of Jammu & Kashmir, (1969) 1 SCR 103, State of Uttar Pradesh v. Pradip Tandon, 1975 SCR (2) 761.

<sup>56</sup>Sakshi Parashar, *Inclusion of Transgender Community within Socially and Educationally Backward Classes: Examining the Deeper Concerns*, 2 Indian Law Institute Law Review (2017).

<sup>57</sup>Naz Foundation v. State (NCT of Delhi), (2016) 15 SCC 619.

nature of the society and to curb any attempt by the majority to usurp the rights and freedoms of a smaller or minuscule section of the populace.<sup>58</sup> The Hon'ble Court noted that the term 'sex' in Articles 15 and 16 of the Constitution includes gender as a distinct component.

In *Indra Sawhney*,<sup>59</sup> the Supreme Court dealt the whole reservation policy at length. It stated that reservation can be granted under two categories, i.e., horizontal reservation and vertical reservation. The vertical reservation flows from Article 16(4) in favour of ST, SC and OBCs. This pool of reservation is also known as social reservation as it comes from the discrimination faced by a homogenous class due to social backwardness in the society. Educational and economic backwardness may contribute to social backwardness. But social backwardness is a distinct concept having its own connotations.<sup>60</sup> Whereas horizontal reservation flows from Article 16(1) in favour of women, persons with disabilities, freedom fighters, project displaced persons etc. This reservation is considered as a special reservation which cuts across the category of vertical reservation resulting in inter-locking reservation. In simple words, under the existing category of social reservation (vertical reservation), a special reservation (horizontal reservation) is provided to recognise the intersection of multiple identities and resulting vulnerabilities.

Even within the horizontal category, there are two methods by which seats can be distributed, i.e., compartmentalised or overall reservation. This can be understood with an example. If there is a transgender person selected under the SC category, then she will be adjusted to the SC reserved seat. This is known as compartmentalised reservation. In overall reservation, the total seats for special category are met irrespective of its distribution across vertical reservation. Thus, if there are not enough transgender candidates belonging in SC

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<sup>58</sup>Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

<sup>59</sup>1992 Supp (3) SCC 217.

<sup>60</sup>*Supra* note 49.

and ST categories then those seats will be transferred to open category.

The benefit of having horizontal reservations is that it allows reservation not merely on the basis of one identity, i.e., gender or disability but enables the State to identify multiple identities like gender and caste, disability and caste at the same time, within the contours of the equality principle and include them in the reservation policy. Backwardness is a manifestation caused by the presence of several independent circumstances which may be social, cultural, economic, educational or even political.<sup>61</sup> The Supreme Court in *Rajesh Kumar Daria v. Rajasthan Public Service Commission*,<sup>62</sup> stated that “*special provision for women made under Article 15(3), in respect of employment, is a special reservation as contrasted from the social reservation under Article 16(4).*” Another problem which may arise is that while granting reservation under Article 15(4) it will be necessary to apply the creamy layer concept, which will again be problematic and will negate the object of granting reservation. Further, Dalit transgender individuals will lose out again on the benefits of the SC/ST category if they come under the OBC category. Similarly, upper caste transgenders will not wish to be recognised under the OBC reservation.<sup>63</sup>

Although the Supreme Court did recognise the discrimination in the *NALSA* judgement and directed the State to treat them as SEBCs, but it erred in making them a separate class. Unlike vertical reservations that are implemented in the form of a “set aside,” horizontal reservations are implemented in the form of a “minimum guarantee.” If reservation is provided to such individuals as social reservation in

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

<sup>62</sup>(2007) 8 SCC 785.

<sup>63</sup>Aniruddha Dutta, *Contradictory Tendencies: The Supreme Court's NALSA Judgment on Transgender Recognition and Rights*, 5 JOURNAL OF INDIAN LAW AND SOCIETY 225 (2014).

the vertical category, it will negate the gender discrimination which is one of the fundamental causes of harassment to this community. The vertical reservation contemplated in Articles 15(4) and 16(4) is broadly based on historical discrimination faced by a class of people that too majorly on the basis of caste, but the transgender community consists of a heterogeneous class which faced gender discrimination due to their gender identity and hence they should be provided horizontal reservation within Article 15(1), Article 16(1) and Article 15(3).

Our Constitution is a social, organic and living document which has revolutionary characteristics to reform a hierarchical society into a modern, egalitarian society.<sup>64</sup> Its aim is to develop a constitutional culture and to protect the fundamental rights of every individual. The transgender has long lived on the fringes of society and suffered violence and harassment not just by the police but also by educated people of society.<sup>65</sup>

## **VI. A LONG BATTLE AHEAD - INHERITANCE AND MARRIAGE RIGHTS**

Transgender persons had a prominent role in the history of our nation until the arrival of Britishers and enactment of the Criminal Tribes Act, 1871 which severely brought them under the ambit of criminals. This worsened their status not just in society but their own families too. The *NALSA* judgement recognised the gender expression of a transgender person and gave them legal status. The current Act gives the above- mentioned status but it lacks in giving them further rights

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<sup>64</sup>State of Kerala and Anr. v. N.M. Thomas and Ors., AIR 1976 SC 490.

<sup>65</sup>Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

which arise as a consequence of this legal status, i.e., marriage and inheritance of property.

Inheritance laws are basically governed by personal laws of every religion in India. Their laws only recognise binary codes of gender i.e., male and female.<sup>66</sup> A transgender person has to choose between these two categories in order to come within the framework of the inheritance laws. The Hindu Succession Act, 1956 governs the inheritance of separate and joint property and recognises only male and female as the subject-matter of property rights. The terms used in the provisions are male, female, son and daughter. The right of inheritance under Hindu law is based on the coparcenary model of succession and inheritance where the right of the child starts once they are born. In addition, the Hindu Succession Act, 1956 even lays down the procedure as to how the law will be applied differently in respect of a male and female coparcener.<sup>67</sup> The current position for a transgender person is that they recognise themselves as male or female according to the gender assigned to them in their birth certificate. As the *NALSA* judgement clearly established, ‘sex’ include multiple gender identities and discrimination on the basis of sex is violative of constitutional rights.<sup>68</sup>

Muslims are governed by their personal law namely Sharia law for the purpose of succession. Muslim law also only recognises binary gender which is clearly inferred from the list of sharers and residuary in Shia and Sunni law of inheritance. The Christian inheritance of property is governed by the India Succession Act, 1925. In 2014, the Christian community has approved the amendment of Section 44 of the said act to include transgender persons within the framework for inheritance rights over ancestral property. The Delhi Minority

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<sup>66</sup>Rupal Sharma, *Inheritance Rights of Transgender-A Cry of Humanity*, 1 INTERNATIONAL JOURNAL OF LAW MANAGEMENT AND HUMANITIES (2018).

<sup>67</sup>Hindu Succession Act, 1956 § 10, 16.

<sup>68</sup>*Supra* note 14.



Commission recommended this proposal to the Law Commission of India to implement this provision across all personal laws.<sup>69</sup> This act was considered as one of the progressive moves made to enable transgender persons to live and earn a livelihood without depending on others.

The right to marry is a constitutional right within the right to life and personal liberty which permits persons to make the choice of spouse according to their own free will, and this right cannot be infringed by the State.<sup>70</sup> The right to choose a partner is a feature of dignity and is therefore protected under Articles 19 and 21 of the Constitution.<sup>71</sup> In Hindu customary law, marriage being of a divine origin is perceived as a sacred union between two individuals. One of the forms of marriage in the Vedic scriptures was the Gandharva marriage, the only stipulation of which was the mutual love and attraction between the two individuals. This marriage supports the queer marriage as love and affection sees no gender. In earlier Vedic society, transgender people were given all those rights and liberties which were assured to non-trans people and this included marriage too. One of the most eminent examples<sup>72</sup> of queer marriage in Hindu literature is the instance of Princess Sikhandini that was written into the epic Mahabharata where Princess Sikhandini married her lady love, and subsequently she was transformed into the physical sex of a man and the validity of marriage was not affected.

If we talk about the Hindu Marriage, the customary Hindu laws were codified in the mid-20th century which governed the Hindu marriages. In 1955, The Hindu Marriage Act was enacted which was

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<sup>69</sup>Maria Akram, *Christian Transgender to have Equal Right on Ancestral Property*, THE HINDU (Jan 27, 2020), <https://www.thehindu.com/news/cities/Delhi/christian-transgenders-to-have-equal-right-on-ancestral-property/article8592360.ece>.

<sup>70</sup>Shakti Vahini v. Union of India and others, (2018) 7 SCC 192.

<sup>71</sup>Shafin Jahan v. Asokan K.M., AIR 2018 SC 1933.

<sup>72</sup>Dipayan Chowdhury, *Recognizing the Right of the Third gender to Marriage and Inheritance under Hindu Personal Law in India*, 3 BRICS LAW JOURNAL(2016).

to be the parent legislation in governing such marriages. Surprisingly, the requisite conditions as required for a valid Hindu marriage under Section 5 of the Hindu Marriage Act<sup>73</sup> have by no means restricted the meaning as being that which is made only between a man and a woman. Section 2(1) (a),<sup>74</sup> instead, defines marriage as being applicable “to ‘any person’ who is a Hindu by religion in any of its forms or developments.” The General Clauses Act, 1897 defines ‘person’ as any company or association or body of individuals, whether incorporated or not. Thus, transgenders can be included under this definition of ‘person’. On similar grounds, recently, the Madras High Court in the case of *Arunkumar and Anr. v. The Inspector General of Registration and Ors.*<sup>75</sup> affirmed the right to marry of trans persons to individuals of their own choice and held 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.” This shows that any marriage ceremony, when performed with customary rites and rituals where either of the parties belongs to a non-binary gender sphere or both, will still have its sanctity or force by law. Thereby, laying down a base for third gender marriages in India.

## VII. CONCLUSION

India has, evidently, taken a step forward to recognise the transgender rights. This recognition, however, is not enough to improve the present situation of the community and the ongoing centuries old social stigma. The Transgender Persons (Protection of Rights) Act 2019, which was ostensibly drafted to finally bring about an end to

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<sup>73</sup>The Hindu Marriage Act, 1955 § 5.

<sup>74</sup>*Id.* at § 2(1)a.

<sup>75</sup>WP (MD) No. 4125 of 2019 and WMP (MD) No. 3220 of 2019.

this tragic status quo, brought more criticism than acceptance. The transgender community itself termed the Act as draconian and murder of gender justice. The definition of transgender provided in the Act is problematic as it includes intersex persons within the ambit of transgender as they have a distinct meaning and bringing them under this definition will only limit the scope of their rights. Further, the act lays down a typical procedure for a transgender person to get an identification certificate. This would mean that one's gender expression is dependent on the watchful eye of the bureaucracy which never misses a chance to dehumanise members of the transgender community.

The provision of giving only two years of maximum punishment in case of any type of abuse again violates the equality principle enshrined in the constitution. Sexual abuse and rape of a woman are punishable with imprisonment of at least seven years of punishment. The inadequate amount of punishment is a sign that the State classifies the offence not on the basis of severity of the crime but on the basis of the person who is being subjected to such crime. The purpose of reservation is not merely to correct historic injustice and discriminatory treatment but to ensure that transgender persons are provided with the means to actively participate in the social life in the future and further that there is greater diversity and representation in our educational institution and public employment.

Moreover, the inheritance and marriage rights, as explained earlier, are based more on personal laws of different religions in India and thus, demands more flexibility in such laws to bring the transgender individuals at par with the non-trans individual who enjoy such rights. Inheritance and marriage rights are more of a natural right, the enjoyment of which should not be subject to the gender of a person. India being a secular country should chalk out a better way of giving recognition to the transgender community.

Our Constitution has often been described as a transformative document. One of the most important purposes of this transformation is to ensure the fundamental socio-economic rights of the disadvantaged. When guided by transformative constitutionalism, the society is dissuaded from indulging in any form of discrimination so that the nation is guided towards a resplendent future. In its transformational role, the Constitution directs our attention to resolving the polarities of sex and binaries of gender. It accepts myriad views, plurality of identities, multitude of cultures and a scientific temperament among its people. Our ability to survive as a free society will depend upon whether constitutional values can prevail over the impulses of the time.