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Disparities in the Rights of Trans Community

ANJALI BISHT¹ AND VAIDURYA²

ABSTRACT

This research paper reviews the various facets of Human Rights violation amongst the trans- community. This community has been facing considerable opprobrium and intolerance in the hands of the society. It is notable that countries like Netherlands, Sweden, Spain, South Africa, Canada, Mexican and American cities have allowed the same-sex marriage and made laws in relation to family formation but the cumulative evidences suggest that the position of this community is still vulnerable. However, beginning with the Indian Legislature, though a new act has been enacted to protect the interests of the community but it fails to cover the topics of family formation due to the reluctance of the society to offer hands to this community. A deep conceptualization of the concept of 'sexual orientation' expands to include this community along with the case analysis of some members of the community. The people of this community have existed throughout but, unfortunately, are not much talked about and their association with the society is more than often rejected. They face frequent objections, denied dignity and respect and looked upon as 'sub-humans and abnormal'. Their struggle to find their ideal-selves, surviving the harsh environment they are put into ever since being born - goes unnoticed to such an extent that gets them into depression and face emotional trauma as well as stress. Depriving someone from opportunities and challenging their bare survival, questions the substantiality of 'Human Rights Dogma' and proper and thorough moral ambition.

At a minimum, this research paper explores the loopholes in the Transgender Persons (Protection of Rights) Act, 2019, hardship, social exclusion, psyche of the transgendered people, violation of human rights; transition in the position of their status along with inclusion to make efforts to embrace their identity which have been forgotten by the human civilization. More ambitiously, aims to ground a new jurisprudence of Trans Rights that better reflects the social goals and needs in contemporary Indian Law.

Keywords: *Transgender Persons (Protection of Rights) Act, 2019, Human Rights, violation, trans- community, emotional trauma.*

¹ Author is an Advocate at District Court Compound, Dehradun and High Court of Uttarakhand, Nainital, India.

² MBA (Marketing & Business Analytics).

I. INTRODUCTION

The terminologies such as ‘Sexual Orientation’ and ‘Sexual Identity’ tend to decide the fate or existence of people in the community. Belonging to a gender varying from the biological norms as ‘male’ or ‘female’ is a curse in the country. Such gender variations are designated as *Queer*, *Eunuch*, *Hijras*, etc. and categorized as LGBTQ. So far, this community has been stigmatized and abused by the citizens of its own country. Been born in a country does not entitle them the rights and throughout their life they face various disparities, which continues to be a global issue. As adverse consequences, they are left with severe choices such as committing suicide or taking sex work as the means of their livelihood.

Definition Clause

Before, delving into the hidden aspects of the trans- community rights, it is important to highlight certain definitions which often create confusion amongst the public. They are discussed below:

- **Transgender**

Genetic and environment factors testify to only two sexes of people as ‘male’ or ‘female’ and occasionally sex determination happens to depend upon the distinct reproductive organs. Medically, it is proven that formation of reproductive part of the humans depends upon the actions of genes and interaction with the embryo, as well as other embryo in the uterus and the entire maternal environment. In case, this formation is disturbed then there arises a genetic disorder leading to deviation in the reproductive organs. However, the society has confusion with this process and they refer to this genetic disorder as ‘transgendered people’. This specific deviation in the sex determination category other than ‘male’ or ‘female’ is termed as ‘*transgender*’.³ Not only in India, but globally these trans are known by various local names such as ‘*Hijras*’ in South Asia, ‘*Berdache*’ in North America, ‘*Xanith*’ in Arabian Peninsula, ‘*Female husbands*’ in West Africa, ‘*Sambia boys*’ in Papua New Guinea, ‘*afafine*’ in Polynesia, ‘*Sworn virgins*’ in Balkans and ‘*Katoey*’ (lady boys) in Thailand.⁴ Even referring to the Hindu mythos and other sacred beliefs in India, they have a very strong historical background and known by many local names such as *Hijras*, *Chakkas*, *Kothis*, *Aravanis*, *Jogappas*, *Shiv-shakthis*, *Kinnar* etc. and they as a group are commonly known as

³ G.H. Herdt, *Third sex, third gender: Beyond sexual dimorphism in culture and history*, New York: Zone Books (1996).

⁴ S. Aldous & P. Sereemongkonpol, *Ladyboys: The secret world of Thailand's third gender*, Dunboyne: Maverick House (2008).

Transgender people. Most often all these terms are used interchangeably in the common parlance and reference is made to this minority.

- **Cisgender**

‘Cis-gender’ is the term used to differentiate a non-trans community member from the trans-community ones and inextricably presumes to highlight the binary structure of the society.⁵ It is a latin prefix connoting the meaning ‘on the same side’. It refers to any individual whose gender, body and personal identity match with the sex assigned at the time of birth.⁶ As such, the cultural belief of the theory of ‘hetero-normativity’ potentially debilitates the relationship between the trans-community and the non-trans community.

- **Sexual Orientation**

‘Sexual Orientation’ is an acknowledgment and encompassing the pattern of attraction in the form of sexual, emotional or romantic manner and a disclosure to the others.⁷ In addition, this sexual fluid includes attraction in various forms which though cannot be in any form of definable categories but some have been discussed below:⁸

- ✓ **Heterosexual:** An individual communication of sexual attraction only to the ‘other’ gender.
- ✓ **Homosexual:** An individual who is sexually or romantically attracted only to the same gender, i.e. gays, lesbians.
- ✓ **Bisexual:** An individual who experiences attraction towards both the genders.
- ✓ **Pansexual/ Omni sexual:** An individual’s attraction to any gender.
- ✓ **Asexual:** An individual who discloses sexual orientation with no gender.

- **Gender Identity**

‘Gender Identity’ refers to the hormonal and psychological sense of an individual being a male, female or neither of the two.⁹ For the trans-community their internal identity is not

⁵ Julia Serano, *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity Summer*, *Transgender Studies and Feminism: Theory, Politics, and Gendered Realities*, Vol. 24, No. 3, pp. 200-205, (Summer, 2009).

⁶ Kristen Schilt and Laurel Westbrook, *Doing Gender, Doing Heteronormativity: "Gender Normals," Transgender People, and the Social Maintenance of Heterosexuality*, *Gender and Society*, Vol. 23, No. 4, Heteronormativity and Sexualities (August 2009), pp. 440-464,

⁷ *Sexual Orientations and Gender Identity Definitions, Human Right Campaign*, <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions>, last accessed on: 29 August, 2020.

⁸ F. Klein, *The bisexual option* (2nd Ed.). New York, NY: Harrington Park Press, (1993).

⁹ Sexual Orientation, British Columbia, (HealthLinkBC 11-04-2019), <https://www.healthlinkbc.ca/health-topics/abj9152>, last accessed on: 29 August, 2020.

congruent with the sex assigned to them at the time of birth.¹⁰ It is the perception which one bears internally about its own gender.

- **Gender Expression**

‘Gender Expression’ is the external manifestation or the communication of an individual with the external world, for example, in terms of dressing, behavior, voice and haircut.¹¹ The characteristics portrayed by an individual can differ from the typical societal norms of being masculine and feminine and might differ from his/ her gender identity.¹²

- **Gender Transition**

‘Gender Transition’ is the process of outwardly presenting with the aligned internal gender identity. This may take place either in the form of Sex-reassignment surgeries or Hormonal therapy or adopting other medical procedures.¹³

- **Gender Dysphoria**

‘Gender Dysphoria’ is a war between the physical gender assigned to a person at birth and the gender with which the individual is identified.¹⁴ People with this form of mental-disorder might feel uncomfortable and live a distressed life. In order to diagnose this mental disorder, the American Psychiatric Association came up with the model named as “*Diagnostic and Statistical Manual of Mental Disorders-V*”, in order to properly characterize the affected adults, children and adolescents.¹⁵ Under this model new criteria have been formulated to diagnose the affected individuals and the term gender identity disorder has been replaced by ‘Gender Dysphoria’.

- **Sex**

It is the biological status of the person being assigned at the time of birth as a male, female or intersex. The detection of the biological sex can be either through reproductive organs, presence of sexual chromosomes or external genitalia.¹⁶

¹⁰ K. A. Gainor, *Including transgender issues in lesbian, gay and bisexual psychology: Implications for clinical practice and training*, Psychological Perspective on lesbians and gay issues, Vol. 5, pp. 131-160, (2000).

¹¹ *ibid.*

¹² Report of the APA Task Force on Gender Identity and Gender Variance, American Psychological Association (2008), Available at: <https://www.apa.org/pi/lgbt/resources/policy/gender-identity-report.pdf>, last accessed on: 29 August, 2020.

¹³ *Supra no. 5.*

¹⁴ *What is gender dysphoria*, American Psychiatric Association, Available at: <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>, last accessed on: 29 August, 2020.

¹⁵ *ibid.*

¹⁶ *Guidelines for psychological practice with lesbian, gay and bisexual clients*, American Psychological Association, Am. Psychol. 67, 10-42. DOI 10.1037/a0024659, (2013), Available at: <https://www.apa.org/pubs/journals/features/amp-a0024659.pdf>, last accessed on: 29 August, 2020.

- **Gender**

It refers to the socially and culturally constructive norms to differentiate an individual and categorize them as a male or a female. Behavior which matches the cultural aspect is termed as ‘gender normative’ and the rest which differs are gender non-conformity.¹⁷

II. THE PAST AND THE PRESENT: THEIR PLIGHT CONTINUES

Transgender community has never been a novice in existence in India – they have a proven presence all through the history with registered significance of roles played by them in the society, especially in the Mughal era where they were advisors and consultants, considered closest to the Kings and Queens and guards to harem of Kings.¹⁸ Even before this, they had a great significance in the Hindu Mythology under the *vedic* and *puranic* literatures. Wherein the instances of Ramayana and Mahabharata are commonly known to the public whereby Lord Rama bestowed them with the almighty power to bless the people on celestial occasions like birth and marriage as they were the ones who decided to stay with Lord Rama when he was banished from the Kingdom.¹⁹

It was only until the British/Colonial period where society started to exclude the trans people through compulsion of several policies and laws on them irrespective of their will and consent. They were considered as ‘ungovernable’ by British officers; Commentators said they evoked images of “filth, disease, contagion and contamination”.²⁰ During rule of British India, even legislation was passed known as Criminal Tribes Act, 1871, labeling the hijras as criminal committing, a non-bailable offence.²¹ This oppression continued until the constitutional validity of Section 377 of Indian Penal Code was challenged in *Suresh Kumar Koushal and Anr. v NAZ Foundation and Ors.*,²² and it was held by the Hon’ble Court that consensual homosexual sex between adults is more a crime and any such act amounts to the violation of Fundamental Rights enshrined in the Indian Constitution of homosexual people. However, this hatred for this community stays uninterrupted as they still face issues of discrimination, rejection and are called ‘abnormal’, even by their own parents. In India, only 2% of the transgender people live with their parents while the rest have to leave at an early

¹⁷ *ibid.*

¹⁸ M. Michelraj, *Historical Evolution of Transgender Community in India*, Asian Review of Social Sciences, Vol no.4. Pp. 17-19,(2015), Available at: <https://www.trp.org.in/wp-content/uploads/2015/10/ARSS-Vol.4-No.1-Jan-June-2015-pp.17-19.pdf>

¹⁹ Gayatri Reddy, *With respect to sex: Negotiating Hijra Identity in South India*: , Yoda Press (2006),

²⁰ Soutik Biswas, How Britain Tries to ‘erase’ India’s third gender, *BBC News*, 31 May, 2019, Available at: <https://www.bbc.com/news/world-asia-india-48442934>, last accessed on: 29 August, 2020

²¹ *National Legal Authority v Union of India & Ors.*, AIR 2014 SC 1983.

²² (2014) 1 SCC 1.

age to find livelihood on their own.²³

Soon after the stringent rules were framed against the trans in the British period, their freedom and dignity suffered a major setback as they were denied of any significance to be included in the society and were portrayed as criminals²⁴ and ‘unnatural prostitutes’ who would put the public morals into severe danger. In fact, even male individuals medically proved as impotent and on acceptance of so were criminalized under the specific practices prevalent at that time.²⁵ The impact still persists as even after decades, the social stigma and shame has not left the community yet. The so-called ‘third gender’ is frequently equated with a doubtful character and looked down at as if they were ‘sub-humans’ and deserve to be treated inferiorly. They were not allowed to carry on with ‘cross-dressings’ and perform in public, thereby, acutely affecting their economic conditions. And it is not any different even today as it is quite visible that how this community has been facing that economic crisis all through the years and are still not able to fulfill their financial needs. They are deprived of education because they are not able to pay the fees and the ones who are, encounter bullying and ill-treatment at schools which forces them to quit. They unwillingly choose sex-work or begging as the end-most way for the bare sake of survival. After so much struggle when they had the hope that after the *National Legal Service Authority v Union of India*²⁶ (hereinafter referred to as ‘NALSAR’) judgment their conditions will improve, the Trans-act proved to a complete failure for them and believed to the murder of their rights inspite of protecting them.

The society should eliminate the barriers which oppose the inclusion of trans community. After putting them through so much of hardships, it owes to plan a better environment and future for them which the current act fails to serve. Just the way in Mughal era, it is seen that how gender does not get to decide the significance of roles one can play or contribute to, today’s society should no more reject to be associated with this community and give them a chance to live a better life with uncompromised respect and dignity. The criticism of the act has been discussed in the later parts.

²³ Neeraj Chauhan, Left alone: Just 2% trans people stay with parents, *The Times of India*, 13 August, 2018, Available at: <https://timesofindia.indiatimes.com/india/left-alone-just-2-of-trans-people-stay-with-parents/article-show/65380226.cms>, last accessed on: 29 August, 2020.

²⁴ Jessica Hinchy, *The long history of criminalizing Hijras*, *Himal Southasian*, 02 July, 2019, Available at: <https://www.himalmag.com/long-history-criminalising-hijras-india-jessica-hinchy-2019/>, last accessed on: 29 August, 2020.

²⁵ Mahwish Gul, *History of a marginalized community*, *Development and Cooperation*, 16 October, 2018, Available at: <https://www.dandc.eu/en/article/british-introduced-discrimination-transgender-persons-south-asia>, last accessed on: 29 August, 2020.

²⁶ *Supra note 19*.

III. UNITED STATES

History of gender discrimination in the United States is prevalent at the time of 1620s where, individuals like Thomas Hall and Billy Tipton were always under the fear of being identified as trans by the society.²⁷ Both of them died having something common which was they both rejected to be treated by the doctor as they believed that their identity might be disclosed which was quite different from the one assigned at birth. The people including their family, close relatives or friends were shocked to know their identity after their death. In previous times, the trans people have always faced insecurity, especially in Europe and European-America as there were laws and punishments against acts of cross-dressings and gender non-conformity. However, the ones who did not, even after being outed by the media like Christine Jorgensen set a milestone as becoming an advocate their entire life spreading awareness about how it is about what one associate themselves with. A feminist and social theorist in the early explained in her book, *The Second Sex (1949)* that a gender is something we become rather than something fundamental we are. The conventional gender roles were also challenged by an American psychologist, Sandra Bem, demonstrating that the unwavering beliefs of 'masculine' and 'feminine' in the society is not psychologically healthy.²⁸

There have been several cases of 'Hate Crimes' in the US against the people of trans community and still counting. Cases such as brutal assault and murder of *Brandon Teena* in the year 1993 show the extent of injustice and disapproval this community has been subjected to by the society. Even today, these instances are still counting and in fact the number keeps on increasing at times.

According to the findings by the **National Center for Transgender Equality** on public restrooms counter the message of mainly conservative politicians and religious leaders that transgender people are the antagonists preying on others. It was found that within the previous year, *12 percent of trans were verbally harassed in public restrooms, 1 percent were physically attacked and 1 percent were sexually assaulted. 9 percent said that they were denied of access to bathroom by someone.*²⁹

²⁷ Laura Erickson-Schroth, *Transgender History in the United States, Trans Bodies, Trans Life*, (ed.), Available at: https://www.umass.edu/stonewall/sites/default/files/Infoforandabout/transpeople/genny_beemyn_transgender_history_in_the_united_states.pdf, last accessed on: 29 August, 2020.

²⁸ Jamie Aldridge and Angela Mascola, *Transformative: The UK's Trans History*, 11 October, 2018, Available at: <http://exposure.org.uk/2018/10/transformative-the-uks-trans-history/>, last accessed on: 29 August, 2020.

²⁹ Daniel Trotta, *U.S transgender people harassed in public restrooms: landmark survey*, Reuters, 8 December, 2016, Available at: <https://www.reuters.com/article/us-usa-lgbt-survey/u-s-transgender-people-harassed-in-public-restrooms-landmark-survey-idUSKBN13X0BK>, last accessed on: 29 August, 2020.

In fact, the worst 'hate crime' considered in the US, the mass shootout at club *Pulse* at Orlando in the US during LGBY Pride Weekend on 12 June 2016 which killed at least 49 people died and another 50 injured. But, this incident did receive a caring support from all over the world and the violence perpetrators were blamed unlike previously where the victims were blamed if anything wrong happened to them.³⁰ There has been a rise in attacks against transgender people in 2018 which is highest in level in the last 16 years. Yet, an increased level of social acceptance and inclusion is agreed upon by the transgender people. In a recent survey, 9 out of 10 of LGBT people said that they feel more accepted by society than 10 years from now.³¹

Also, the US is somewhat more liberalized as the transgender people out-there express themselves. Many trans celebrities come out and speak about being a trans which of course helps changing the attitude of the public in a better way.³² Even though, the trans exist all over the world, it is mostly in the west that is America and Europe that they come out and actually decides to undergo a change. In other continents like Africa and Middle East, transgender do exist but hesitant to disclose their identity amongst the general public due to religious atrocities, social, legislative penal laws and medical failure.³³

However, the country also stands good in terms of acceptance today. The social inclusion of transgender people in the country have raised over the years.

Latterly, by 20th century, the position of trans rights was consolidated in the form of legislation. In *Obergefell v Hodges*, the Hon'ble Supreme Court of United States held that same sex marriage is a constitutional right which is guaranteed under the 14th Amendment of the Constitution of United States. Also the gay marriage was made the law of the land of every state.³⁴ Until recently in June 2020, there was another judgment *Bostock v Clayton County*, Georgia, passed favouring the trans right, clearly stating that Civil Rights Act, 1964, protects the gay and trans community from being discriminated at the work places. Before, this there were many countries discriminating the trans community at work places but this precedence

³⁰ Bonnie J Morris, *History of Lesbian, Gay, Bisexual and Transgender Social Movements*, American Psychological Association, 2009, Available at: <https://www.apa.org/pi/lgbt/resources/history>, last accessed on: 29 August, 2020.

³¹ *A Survey of LGBT Americans*, Pew Research Center, 13 June, 2013, Available at: <https://www.pewsocialtrends.org/2013/06/13/chapter-2-social-acceptance/>, last accessed on: 29 August, 2020.

³² Jackson Taylor McLaren, "Recognize Me": An Analysis of Transgender Media Representation, *Majorpapers45*, 2018, Available at: <https://scholar.uwindsor.ca/cgi/viewcontent.cgi?article=1049&context=major-papers>, last accessed on: 29 August, 2020.

³³ Ann P. Hass et., *Suicide and Suicide Risk in Lesbian, gay, Bisexual, and Transgender Populations: Review and Recommendations*, *Journal of Homosexuality*, 58:1, 10-51, (2010).

³⁴ *Obergefell Et Al v Hodges, Director, Ohio Department of Health, Et Al*, Supreme Court of The United States, No- 14-556, Available at: https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf.

intended to add an end to the struggles of the trans.³⁵

IV. UNITED KINGDOM

There are registered instances of people interchanging genders throughout the English history that resonate for Trans and gender queer identities today. Gender mixing people are visible in court records, newspapers etc. and were tried and punished for offences like fraud or theft rather than mix dressing. Men who were arrested for passing as women were often supposed to be prostitutes.³⁶

It was not until 2000s that legal rights of trans people begun to settle more seriously in the United Kingdom Law. However, in the eyes of the society, even today, they remain to be confined in an imposed environment where they are not allowed to fully embrace their identity which they relate to identify themselves with. In a survey conducted by The Fundamental Right Agency's in 2012, two-thirds of trans individuals in Britain faced harassment and discrimination for belonging to a trans community.³⁷

Various countries have accepted the gender identity concept of the trans-community and also asserted their right under the matrimonial relationship. Mostly, legislations are passed validating the marriage of same sex before the surgery or once the surgery has been operated. One of such country is United Kingdom which has undergone a history in the transformation of the life of trans-community and presently, up with a legislation to regulate the marriage of trans.

The area under consideration is that though United Kingdom's struggle for trans right started in 1951 when Roberta Cowell underwent a gender-reassignment surgery and later on it gained spotlight during the 20th century.³⁸ The precedence was established in *Corbett v Corbett*³⁹, whereby the Hon'ble UK court added to their struggle by stating that person's biological sex constitution is fixed at birth which cannot be changed later on. Thus, this precedence unable the trans to express their gender identity in the UK. Later on, when more cases were seen of injustice upon the trans community by the UK court, then in Christine

³⁵ *Bostock v Clayton County, Georgia*, Supreme Court of The United States, No-17-1618, Available at: https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf.

³⁶ Trans and gender crossing history, *Historic England*, Available at: <https://historicengland.org.uk/research/inclusive-heritage/lgbtq-heritage-project/trans-and-gender-crossing-histories/>, last accessed on: 29 August, 2020.

³⁷ Is Britain Fairer? Key facts and findings of transgender people, Available at: https://www.equalityhumanrights.com/sites/default/files/key_facts_and_findings_transgender_0.pdf, last accessed on: 29 August, 2020.

³⁸ Sophie Nevrkla, *The history of transgender rights in the UK*, 12 November, 2018, Available at: <https://www.allaboutlaw.co.uk/commercial-awareness/legal-spotlight/the-history-of-transgender-rights-in-the-uk->, last accessed on: 29 August, 2020.

³⁹ (1970) 2 All ER 33.

*Goodwill v United Kingdom*⁴⁰, the European Court of Human Right upheld the rights of trans and this was a landmark case changing the life of the trans community in UK. It lead to the enactment of Gender Recognition Act, 2004⁴¹ and Equality Act, 2010⁴².

Over time, the solemnization laws in England have been evolving. At one time, the Churches of England were the authority to regulate the ceremonies of marriage but at a later phase the power was also vested to the religious denominations. Sooner, transsexual right was recognized and in the year 2004, the Courts of England granted civil partnerships to same sex couples which was very similar to the civil marriage by passing a legislation known as Civil Partnership Act, 2004. Later on, Marriage (Same Sex Couples) Act, 2013⁴³ was passed wherein the civil marriages between the same sex have been duly recognized by the courts of England and Wales.⁴⁴

V. SCANTNESS IN THE INDIAN TRANSGENDER ACT

Since the landmark NALSAR judgment⁴⁵ in the year 2014, the government was directed to act and pass legislation in the interest of the trans-community. Pertinently, the Hon'ble Supreme Court of India in the said case recognized the trans-community as a 'third gender', *iter-alia*, safeguarding their rights under Part III of the Indian Constitution. The Hon'ble Apex Court of India was further pleased to issue directions to the Law Commission to enact legislation in favour of the trans-community and treat them as socially and educationally backward classes of citizens.⁴⁶ Assuring that the legislation will be as per the guidelines set-forth in the NALSAR judgment, the government has vehemently neglected to safeguard the trans-community by passing the Transgender Persons (Protection of Rights) Act, 2019 (hereinafter referred to as 'the said Act'). Following the constant protest against the 2016 and 2018, the bill received the assent of the President neglecting the interest of the trans-community finally on 5th December, 2019.⁴⁷

Prior to this, the Expert Committee soon after the judgment on 27 January, 2014, submitted a

⁴⁰ Application No. 17488/90.

⁴¹ Gender Recognition Act, 2004, Available at: <https://www.legislation.gov.uk/ukpga/2004/7/contents>.

⁴² Equality Act, 2010, Available at: <https://www.legislation.gov.uk/ukpga/2010/15/contents>.

⁴³ Marriage (Same Sex Couples) Act, 2013, Available at: <https://www.legislation.gov.uk/ukpga/2013/30/contents/enacted>.

⁴⁴ *The law of marriage*, UK Parliament, Available at: <https://www.parliament.uk/about/living-heritage/transforming-society/private-lives/relationships/overview/law-of-marriage/>, last accessed on: 29 August, 2020.

⁴⁵ *Supra note 24*.

⁴⁶ *Ibid*.

⁴⁷ Abhishek Goyal, *Transgender Persons (Protection of Rights) Act, 2019. Enduring Struggle for Gender Rights Recognition*, *The SCC Online Blog*, 25 June, 2020. Available at: <https://www.sconline.com/blog/post/2020/06/25/transgender-persons-protection-of-rights-act-2019-enduring-struggle-for-gender-rights-recognition/>, last accessed on: 29 August, 2020.

report relating to the oppressions suffered by this community and recommended to formulate schemes in their interest. Sooner after this, the struggle for the enactment of the contentious Trans Bill was first started on 2 August, 2016 when the Trans Persons (Protection of Rights) Bill, 2016 was placed before the Lok Sabha by Thawar Chand Gehlot, The Minister for Social Justice and Empowerment and referred to the Standing Committee.⁴⁸ Though the bill was an appreciable measure taken up by the government but that could not take the form of any statutory law due to some reasons or the other. Then again, the bill was introduced and approved by the Lok Sabha on 17 December, 2018 claiming to protect the interest of the trans-community and for their welfare.⁴⁹ However, the bill received a lot of criticism from all sphere including doctors, lawyers and the trans themselves.⁵⁰ Many also argued that the bill instead of protecting the rights, dignity and freedoms of the trans tends to murder their rights.⁵¹ Prima facie, it is a complete failure of the policy makers to understand the life of trans as whole. At the same time, the enactment of the act is onerous, cumbersome and gives the government agencies wide and arbitrary power to control the trans-community.⁵² This act speaks a volume about how the law makers have failed in integrating this marginalized community into mainstream society.

After all the hue and cry raised by the trans community, the bill finally was passed in a hasty manner without any debates and passed amidst the chaos due to the abrogation of article 370 of the Indian Constitution in the state of Jammu and Kashmir.⁵³ The Bill was sanctioned from the Lok Sabha on 5 August, 2019. Further adding to the misery to the trans, the Trans Rules, 2020 have been passed. The trans-community has fought a long battle in the history and till now facing the same. Instead of prejudicing their rights, a holistic development approach should be taken by the government to improve their status in the country. Therefore the act

This section explores the lacunas in the said Act along with the constitutional violation of the

⁴⁸ Rohan Abraham , *All you need to know about the Transgender Bill, 2016*, 30 November, 2017, *The Hindu*, <https://www.thehindu.com/news/national/all-you-need-to-know-about-the-transgender-persons-bill-2016/article21226710.ece>, last accessed on: 29 August, 2020.

⁴⁹ Maitreyi Gupta , *India: Parliament must Revise Problematic Transgender Problems (Protection of Rights) Bill, 2018*, *International Commission of Jurist*, 19 December, 2018, <https://www.icj.org/india-parliament-must-revise-problematic-transgender-persons-protection-of-rights-bill-2018/>, last accessed on: 29 August, 2020.

⁵⁰ Shreya Ila Anasuya , *Why the transgender community is angry over a Bill Meant to protect their rights*, *The Wire*, 19 December, 2018, Available at: <https://thewire.in/lgbtqia/why-the-transgender-community-is-angry-over-a-bill-meant-to-protect-their-rights>, last accessed on: 29 August, 2020.

⁵¹ *Supra note 5*.

⁵² Sushmita Pathak, *India just passed a Trans Rights Bill. Why are Trans Activist protesting it?*, *npr*, 4 December, 2019, Available at: <https://www.npr.org/sections/goatsandsoda/2019/12/04/784398783/india-just-passed-a-trans-rights-bill-why-are-trans-activists-protesting-it>, last accessed on: 29 August, 2020.

⁵³ *Controversial Transgender Bill passed in Rajya Sabha*, 26 November, 2019, *The New Indian Express*, <https://www.newindianexpress.com/nation/2019/nov/26/controversial-transgender-bill-passed-in-rajya-sabha-2067409.html>, last accessed on: 29 August, 2020.

rights of trans-community. In addition to this, the reasons for the non-acceptance of the act have also been explored.

VI. CUTTING LOOSE: THE VOICE OF TRANSGENDER

Needless, to say that every human right is valuable and entitled to protection in matters of education, healthcare, employment and many other public welfare aspects. But this trans-community since the British era has been struggling hard to make the ends of justice reach their door.⁵⁴ However, their voices are either left unheard or they are oppressed by the majority of the literate class of people.

The unveiling of new legislation for the protection of trans-community has again created turmoil in the community. The question which needs an answer is that does the act really protect the interest of the community or is it a mere set of rules framed to control the lives of the trans community?, as argued by many trans community members.⁵⁵ Furthermore, the act which was purportedly enacted to eliminate discrimination against the trans-community gives rise to many controversies which are discussed below:

- **Definition of Family:**

Under Section 2 (c) of the act, the word family has been interpreted in a very narrow sense which has been re-instated below for the kind perusal:

(c) "family" means a group of people related by blood or marriage or by adoption made in accordance with law;

This narrow interpretation of the word has excluded the other community members to fit within the definition of 'family'. The major culture forces and beliefs have deliberated this community to be the victims in the hands of their own family members. To this, the persistent harassment by the members related by blood has made the family the most unsafe place in their lives and they are more comfortable being surrounded by their own community members. Thus, understanding this continuous oppression by the family mandates the need to include their own community members within the definition of family.

Many instances of oppression by the family are easily traceable and one such instance is narrated by Gulshan (name of her choice) was eight when she realized that the male gender assigned by birth did not fit her. "She would pick lipsticks from her mother's cupboard and

⁵⁴ Sreoshi Sinha , *Social Exclusion of Transgender in the Civil Society: A case study of the status of the transgender in Kolkata*, *International Journal of Humanities and Social Science Studies (IJHSSS)*, Vol-III, Issue-II, , pg 178-190, (2016). Available at: <http://www.ijhsss.com>,

⁵⁵ G. Ram, Mohan, *halt Implementation of the Trans Act, 2019: Activist*, *The Wire*, 5 June, 2020. Available at: <https://thewire.in/lgbtqia/trans-act-2019-rules-feedback-activists>, last accessed on: 29 August, 2020.

wear them in front of the mirror. In 2015, her father caught her in the act and trashed her. Now 14, Gulshan dropped out of school and is pursuing class 10 through distance learning. She never received any understanding at home. "I face abuse and humiliation from my parents every day. I hope that one day, they will treat me like their other children, who they say are 'normal'," Gulshan said. Many transgender like Sheila (her name of choice) are forced to leave their homes and find employment at a young age to support themselves as their families disown them.⁵⁶ Therefore, if surrounded by the family leads them to such hardships, how is the family considered the safest place by them?

In addition to this, the trans-community has attempted to garner the attention of the other Human Rights Commission into this matter as their rights are being controlled and governed by a legislation which is unacceptable to the whole community. Where on one hand a right of residence⁵⁷ of a child is vested upon the parents but the act fails to address the issue in case whereby they are unwilling to stay at their parental home due the increasing violence by the family members or if their own parents abandoned them after they found out. Herein, the competent court will decide and send the child to the rehabilitation centre if the parents are unavailable to take of the child.

Often it is vehemently argued that the families are themselves the source of conducting violence upon their child,⁵⁸ then why the legislations forces the child to stay at the parental residence. Even in the worst scenario, the orders of sending the child to rehabilitation centers adds more agony due to the clear reason that at rehabilitation centers also the community harass the Trans. The act failed to legislate properly the prevention of commission of sexual abuse not only by the family members but also other members of the society and the deterrent punishment for posing such mental trauma upon the trans-community. Such provision denies the right of the trans-community to join their community and violates right to life and dignity.⁵⁹ Further, reference would have added to sending their child to their community centers where they actually feel comfortable by being surrounded from the same people.

- **No demarcation between Intersex and Trans**

The act which was intended to culminate the rights of trans-community but even fails to

⁵⁶ Fareeha Iftikhar, 'Accept us for who we are': Transgender children deprived of normal school life, Hindustan Times, 15 November, 2018, Available at : <https://www.hindustantimes.com/delhi-news/accept-us-for-who-we-are-transgender-children-deprived-of-normal-school-life/story-ockbGZM0bjAIaF0e8e3RnL.html>, last accessed on: 29 August, 2020.

⁵⁷ Section 12 of the Act.

⁵⁸ "The Transgender Personal Bill explained", *The Hindu*, 30 Nov, 2019, Available at: <https://www.thehindu.com/news/national/watch-all-about-the-transgender-persons-bill/article30122229.ece>, last accessed on: 29 August, 2020.

⁵⁹ *Supra note 26*.

differentiate between the intersex and the trans-community as per the definition⁶⁰ prescribed. This failure to distinguish the two concepts has angered many trans-activists.⁶¹ However in reality, not every intersex person identifies as trans, and not every trans person is an intersex. Thus the definitions have been obtained ignoring the differences of the two concepts.

- **Obtaining certificate from the District Magistrate**

The freedom to determine and express their sexuality is based on the decision of the certificate issued by the District Magistrate accordingly.⁶² The act fails to prescribe the procedure for the rejection of the certificate by the Magistrate. From the bare perusal of the said section, no grounds for acceptance and rejection of the certificate have been mentioned in the act. Taking into consideration the benefits of the Welfare Scheme⁶³ as mentioned in the act, it can be availed only by the transgender. So for all those who are unable to obtain the certificate from the district Magistrate is unable to avail the services as such. However, the said judgment clearly mentions the fact that the trans community are 'self identified' class in the society but what seems in reality is that the said act totality takes away their individuality as it is the District Magistrate who will confirm the identity as transgender according to the procedure mentioned in the said act.⁶⁴ Moreover, an application is to be filed and then through various processes and procedures the gender of such community will be identified.

- **SRS necessary for change in gender certificate (Self perceived)**

The provision of change of the gender is contradictory to the guidelines directed in the NALSAR Judgment, which clearly stated that transgender have the right of self-identity and in no manner mandated the surgery. Herein, change in the gender identity mandates surgery and without the permission of the medical officer, the revised certificate of gender identity will not be issued by the District Magistrate. These sections prove the fact that it is the District Magistrate deciding the gender of the trans-community and controlling their life. Such act of the law makers segregates the trans from other citizens of the country. Notably, no mention has been made to aid in the SRS surgery rather an authoritative stand have been enforced. The need of the hour was to protect the rights of the trans but the fact is still not clear that when the said NALSAR judgment have recognized them as 'third gender', then what is the need for gender certificate or SRS surgery to claim the rights in the society.⁶⁵

⁶⁰ Section 2(k) of the Act.

⁶¹ *Supra note 5.*

⁶² Chapter III of the Act.

⁶³ Chapter IV of the Act

⁶⁴ *Supra note 4.*

⁶⁵ *The Transgender Persons (Protection of Rights) Bill, 2016*, PRS Legislative Research, , Available at:

Therefore, the coercion of Gender-Identity Certificate and SRS procedures makes the very idea of the third-gender recognition to trans community quite nebulous/vague.” These first steps towards making the lives of the so long suffering community should be protected and safe-guarded so as to make sure our efforts serve the purpose.

- **Imprisonment up to 2 years only**

There are various criminal and civil offences which are especially targeted to either female or male categories but the act does not mention about the fact that how these procedures will be applicable if any such offence occurs to a *trans* person.⁶⁶ Also, the penalty is extended only to 2 years be it any form of sexual abuse. This variation of punishment against this crime shows how this community is being treated unfairly and to what extent the act works in favour of the *trans* community.

- **Reservation and Marriage, adoption Laws**

Apart from the provision of mere recognition as socially and educationally backward, the act does not mention any further compensation or reservation so as to make good the loss, be it education or workplace. The act even fails to assist them with least of their economic hardships. In addition to this, no marriage or adoption provisions have been raised in the act. Therefore, sheer portrayal of how their lives are controlled by all others, be it the legislation or the government, but not them.

Reservations should be provided in jobs and vacancies for trans people so as to provide them with equal opportunities to lead a better life. As per reports, in India only 2% of transgenders live with their parents as they are rejected and excluded from their families, thus, they are forced to leave studies and take up extreme options such as getting into flesh trade to survive. Suggested reservations will facilitate their inclusion at the workplaces, give them adequate platform to earn a living as well as protect their dignity. According to a report, almost 92 per cent of Trans people are refused any rights of participating in any form of economic activities in India and even the qualified ones face rejection if applied for jobs which compels them to either beg or choose sex work for livelihood. Thus, introducing reservations specifically for them will lead to a much needed sense of security among the people of trans community as they will not have to face unfair rejection at workplaces.

<https://www.prsindia.org/billtrack/transgender-persons-protection-rights-bill-2016>, last accessed on: 29 August, 2020.

⁶⁶ *Ibid.*

VII. CONSTITUTIONAL VIOLATION

The Hon'ble Supreme Court in the NALSAR judgment held that self determination is the fundamental to the nature of right to life and dignity under Article 21 of the Indian Constitution. But this determination of the identity of the trans-community by the District Magistrate is violation of article 21 and contradictory to the guidelines provided in the said judgment. Any individuals' sexual orientation or gender identity is intrinsic to its own personality as they have a right to chose once identity being fundamental to the very nature of the right to lead a life with dignity under Article 21 of the Indian Constitution.

Human Right Violations have always been an international concern and recognized under Universal Declaration of Human Rights, 1948 (UDHR), International Covenant on Civil and Political Rights, 1966 (ICCPR) and Yogyakarta Principles. But here the mandate of the certificate and the surgery in case of change in the gender identity is complete violation of the human rights. Also the determination of identity by the District Magistrate and then providing certificate is infringing the privacy of the trans-community. By testing their gender, and on being satisfied of so, is inhuman amounting to violation of article 14 and 21 of the Indian Constitution. As in contrast no cisgender could be asked to determine their gender identity.

Ordinarily, Right to Privacy covers, enjoyment of privacy regardless of the arbitrary and unlawful interference to their personal life or corresponding to their family. This right is exercised ignoring the gender identity and gender expression issues and seeks to protect the honour and reputation of a person as a whole. Herein, the legislation interferes in their personal space and exercised arbitrary power to control thier life.

Likewise in the Indian Constitution, every citizen is provided with the right to express their opinion but wherein, this right was completely taken away by the authority and the opinions of the trans-community were ignored. In spite of the various protests, the concerns of the trans-community was not catered.

VIII. THE UNWILLING SOCIETY: PLIGHT OF TRANSGENDER

1) **HEALTHCARE:** The Trans community does not have access to adequate healthcare facilities. The medical/healthcare staff members lack the training and indoctrination about the health issues or rather complications of a Trans person. There are less number of Gender Identity Clinics because of which the people of this community are required to wait for 1-3 years to seek an appointment. At times, they even face inappropriate behavior, discrimination and rejection of treatment. The complications can accumulate in this waiting period which in turn pushes them into more critical situations. Adolescent trans people are more vulnerable

and it is also suggested that if they receive proper treatment and guidance at the right time they can be saved from becoming suicidal or depressed. The Trans people refrain from seeking medical support even for problems such as injuries or cold due to rude behavior and being stared at.⁶⁷ More often they are even charged extra if they wish to access healthcare privately. There have been instances where medical establishments or professionals have received letters from trans-phobic groups not to treat or affirm to a transgender who wish to undergo a reassignment surgery which does nothing else than making it even worse for this community.

2) **EDUCATION:** The trans community struggle to pave way for education and lead a quality life, especially in countries like India where they are forced to leave schools at an early age because there is lack of support from the family which disown them and do not provide financial assistance. Also, the children who go to school face bullying and harassment which rises when they reach higher secondary grades as this is where the puberty hits and gender-nonconformity is visible enough.⁶⁸ The 2011 census showed the total population of transgender was around 4,87,803 in India out of which 57% were literate as compared to 74% of the total population. In 2011, the transgender children between the age group of 0-6 years were 54,854 however, according to the published CBSE results, in India, there were drastic decrease in the number of transgender candidates being only 19 for 10th while only 6 for 12th board exams.⁶⁹ This shocking reduction discloses an unfortunate tale of transgender school children. At U.S. colleges, barring from the bathrooms, suspension from schools and suffer depression.⁷⁰

*She recalled an incident when a group of students locked her up in the bathroom of the all-boys government school that she attended till class 9. "They mocked me and said they will check if I am a girl or a boy. I lost my voice and couldn't call out for help. Thankfully, some other boys intervened and rescued me. But that was the last time I used the bathroom in my school."*⁷¹ Furthermore, these children are not welcomed by the school authorities and often

⁶⁷ Scott Rayor, *Transgender Issues in the Workplace: Bathroom access, workplace abuse, hiring discrimination*, 19 February, 2020, Available at: <https://everfi.com/blog/workplace-training/transgender-issues-workplace-abuse-hiring-discrimination/>, last accessed on: 29 August, 2020.

⁶⁸ Bhumika Rajdev, *For Transgender Persons Discrimination Begins at School*, *The Wire*, 24 July, 2020, Available at: <https://thewire.in/lgbtqia/cbse-results-transgender-students-education-stigma-discrimination>, last accessed on: 29 August, 2020.

⁶⁹ Bhumika Rajdev, *Status of Transgender Students in Schools Part of Our Current Education System*, *Mainstream* Vol. 8 no.33, 1 August, 2020, Available at: <http://mainstreamweekly.net/article9736.html>, last accessed on: 29 August, 2020.

⁷⁰ Rachel Savage, *Barred, bullied, depressed: Life for many U.S. Trans students*, *Reuters*, 16 August 2019 Available at: <https://www.reuters.com/article/us-usa-lgbt-education/barred-bullied-depressed-life-for-many-u-s-trans-students-idUSKCN1V609P>, last accessed on: 29 August, 2020.

⁷¹ *Supra* note 54.

asked to behave 'normally' that is according to their biological gender rather than their identity. Therefore, the trans people are deprived of proper education and an environment to grow up with dignity which they of course deserve as per the Human Rights Dogma.

3) **EMPLOYMENT:** There are several instances of pestering and bullying with transgender people by employers and colleagues at workplaces. Many are denied jobs in the first place while the ones who are taken in are under constant pressure. They have to adjust in an environment where the policies are formulated only for binary genders i.e. 'male' and 'female'.⁷² Also, other practicalities such as 'toilets' and 'dress-codes' or 'uniforms' more than often put the trans people into a dilemma of whether to choose what they want to or what the society would want them to. Trans people are often rejected promotion.⁷³ They avoid using a toilet as it's an opportunity for their assault or humiliation by transphobic cis-gender 'normal' people.⁷⁴ Many transgender people report experiencing abusive language, restricted policies at workplace.⁷⁵

4) **PSYCHE:** The trans people struggle psychologically due to various reasons. First, they are already into an identity-crisis which hampers their emotional health and self-esteem. The dilemma of whether to come out haunts them all the time. Since they are badly off with financial stability and fluctuating education and job opportunities, they are often forced to choose begging, sex-work, pub-performing etc. to earn for medical assistance/treatment and surgeries they want to undergo. In addition to this, the children and young adults who suffer mistreatment, rude behavior at schools/colleges and even rejection by their own friends after coming out, go through isolation, self-destruction and even suicide attempts. In a survey conducted in the US, as high as 98 per cent of the respondents who had experienced a number of four instances of discrimination or violence in the past year thought about suicide that year out of which 51 per cent attempted suicide in that year.⁷⁶ In another research conducted by American Academy of Pediatrics, it was found that among non-binary youth, 41.8 percent of

⁷² *ibid.*

⁷³ Skylar Davidson, *Inequality: Nonbinary Transgender people in the workplace*, 22 September, 2016 Available at: <https://scholarworks.smith.edu/cgi/viewcontent.cgi?article=1741&context=theses>, last accessed on: 29 August, 2020.

⁷⁴ Daniel Trotta, Reuters, *Massive, landmark survey finds 60% of transgender Americans have avoided public bathrooms for fear of being harassed*, Business Insider, 8 December, 2016, Available at: <https://www.businessinsider.com/r-us-transgender-people-harassed-in-public-restrooms-landmark-survey-2016-12?IR=T>, last accessed on: 29 August, 2020.

⁷⁵ Mathew S, MeurerLynn, *Trans individuals' experiences with employment discrimination : supporting self-efficacy in the job-seeking process*, 2015.

⁷⁶ Jody L. Herman, Taylor N.T. Brown and Ann P. Haas, *Suicide Thoughts and Attempts Among Transgender Adults*, UCLA School of Law William Institute, September, 2019, Available at: <https://williamsinstitute.law.ucla.edu/publications/suicidality-transgender-adults/>, last accessed on: 29 August, 2020.

the respondents admitted of having attempted suicide at least at some point in their life.⁷⁷ All these circumstances are not easy to cope up with and it shows how these people are subjected to abnormal treatment by the society.

IX. GLOBAL EXTENT OF PROTECTION

There is a rise in the belief that the society/countries are becoming more tolerant towards the trans community. The fact that being a trans is a natural occurrence and not a ‘mental illness’ or ‘sin’ is also supported.⁷⁸ However, there still lays a long path to go. Using correct pronouns for addressing trans people, recognizing their rights to opportunities, especially the basic ones such as Healthcare and Education and providing the same.

Training, counseling the parents, school children, healthcare staff about treating them right and considering them normal as well as talking about it more to create awareness at large in the society as a whole, are all required to assure that trans people suffer no more and their Human Rights are intact. Furthermore, reversing the transgender health protection as in the US and any such decision-making for trans people, especially during crisis (COVID).⁷⁹ Even the government(s) or any authoritative organization(s) should analyze the impact of their decision-making prior to making one. Increased level of acceptance at workplace(s) continuous efforts being made by activists all around the world and amendments/formulations of adequate laws shall make our society a better place to live in for the trans community where they would lead with dignity and peace.

X. RECOMMENDATION

The Act was enacted to protect the interest of the trans-community but after analyzing the loopholes in the act, it is quite evident that the act, instead of safeguarding their fundamental and their legal rights tend to exploit it. Therefore, the following suggestions are carried by the authors:

1. Within the definition of family under the act, their own trans community members should be included as they are the one with whom they feel comfortable other than their family members.

⁷⁷ *New Study Reveals Shocking Rates of Attempted Suicide Among Trans Adolescents*, Human Right Campaign, 12 September, 2018, Available at: <https://www.hrc.org/blog/new-study-reveals-shocking-rates-of-attempted-suicide-among-trans-adolescenc>, last accessed on: 29 August, 2020.

⁷⁸ Julia Clark and Chris Jackson, *Global Attitudes towards trans gender people*, Ipsos, 28 January, 2018, Available at: <https://www.ipsos.com/en-us/news-polls/global-attitudes-toward-transgender-people>, last accessed on: 29 August, 2020.

⁷⁹ Selena Simmons-Duffin, *Transgender Health Protections Reversed By Trump Administration*, 12 June, 2020, npr, Available at: <https://www.npr.org/sections/health-shots/2020/06/12/868073068/transgender-health-protections-reversed-by-trump-administration>, last accessed on: 29 August, 2020.

2. Other than sending them to the rehabilitation centre when family itself an unsafe place for them, therefore, in order to prevent further exploitation in the rehabilitation center, they should be send to their own community center. In addition to this, the parents should be directed to finance the education of their trans child as they would have done in case the gender identity would have not been disclosed as trans, also the parents have the moral obligation to provide education to their child, in case, they have sufficient means to do so.

3. There should be reservations in matter pertaining to jobs, education sector of the trans community as due to the societal non-acceptance they had to face the various financial atrocities of life.

4. The arbitrary power vested with the District Magistrate should be curtailed as it is a complete violation of fundamental right as discussed above.

5. The act should be more punitive in nature as the punishment for the abuse be it in the form of sexual, physical, verbal, emotional and economic abuse, which is maximum two years being very less as compared to the punishments mentioned under the Indian Penal Code.

XI. CONCLUSION

Human Rights Conventions were set to serve the purpose of protection of the rights of every individual irrespective of their caste, creed, gender or creed. It defines the very essence of life which every person deserves. Unfortunately, this wonderful protection is yet to reach out to many struggling and deprived lives including those of the Transgender people. Saving the Dogma of Human Rights from becoming just a document which is preserved for this community is important. Since it has already been long for them being ignored by the society as well as the legislation both of which play an essential role in making an impact in the lives of people of every culture and community, they should hold the responsibility to the fullest in reducing the sufferings and negligence faced by this community.

Prolonged ignorance would start to destroy the very marrow of the Human Rights Principle. It requires collective effort of the society, legislation and countries as a whole to uplift these people's hope for a better life where they will be welcomed, understood and completely accepted as they dream of 'the Normal'.
