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**TRANSGENDERS: IDENTITY AND POSITION IN THE FAMILY LAW IN
INDIA**

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ABSTRACT

This paper attempts to bring to light the problems and challenges that the transgender population of India have to face due to the non-accommodating nature of the existing personal laws in the country. Given that their right to a self-perceived gender identity has been recognized by the Supreme Court, several other challenges in bringing their lives under 'equal protection of laws', guaranteed under Article 14, continue to persist. This paper systematically analyses this problem, focusing first on the various identities that comprise the transgender community of India; namely Transsexuals and 'The Third Gender.' It then further examines various identities that constitute the third gender, and the various practices and customs which govern their personal lives. Further, considering that majority population of transgender is mostly Hindu or Muslim, an analysis of applicability of Hindu & Muslim marital and adoption law to transgenders is undertaken in this paper. A secular legislation in both respects has also been analysed to understand the scope of their rights under law. Finally, the paper concludes with a policy suggestion with regards to the improvement that can be made in the personal laws using a sui generis approach.

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I. INTRODUCTION

The term ‘transgender’ is derived from two words, namely, ‘trans’ and ‘gender’. While the Latin term ‘trans’ means “across” or “beyond”,¹²⁷ the term ‘gender’ is a complex concept. It forms the core of the problem that grapples within its fold more than 4 million people in India.¹²⁸ ‘Gender’, according to the World Health Organisation, refers to “the socially constructed characteristics of women and men – such as norms, and roles and relationships of and between groups of women and men.”¹²⁹ Therefore, a transgender is a person who is beyond the socially and culturally defined difference between men and women.

At the outset, it is very important to understand the concepts of ‘gender’ and ‘gender identity’ in order to understand the transgender identity comprehensively. ‘Gender’ refers to the behaviour and characteristics that society expects out of a person on the basis of their assigned, biological sex. However, ‘gender identity’ is how that person psychologically perceives his/her gender. It is the way a person desires to express his/her gender through clothes, emotions, appearance or behaviour.¹³⁰ The gender identity of a person is exclusive of their assigned sex. Thus, a person whose gender identity aligns with his/her assigned sex

¹²⁷ National Legal Service Authorities v. Union of India, (2014) 5 SCC 438 ¶107 [hereinafter NALSA v. UOI].

¹²⁸ Rema Nagarjani, *First Count of Third Gender in Census: 4.9 Lakh*, THE TIMES OF INDIA (May 30, 2014), <http://timesofindia.indiatimes.com/india/First-count-of-third-gender-in-census-4-9-lakh/articleshow/35741613.cms>.

¹²⁹ WHO, *Gender, Equity and Human Rights*, WHO INTERNATIONAL, <http://www.who.int/gender-equity-rights/about/en/> (last visited July 14, 2018).

¹³⁰ Planned Parenthood, *Gender and Gender Identity*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/sexual-orientation-gender/gender-gender-identity> (last visited July 14, 2018) [hereinafter Planned Parenthood].

is called cis-gender. While, a person whose gender identity is in conflict with his/her assigned sex is called a transgender.¹³¹

Over the course of time, with the growing consciousness about human rights, there has been significant advancement towards ensuring dignity of individual. One such advancement is the recognition or expression of their gender identity. It has been recognised as a fundamental right under right to life,¹³² however, significant issues pertaining to their human rights still remain unresolved. One such issue is that of personal laws that govern their lives and relationships. Marriage and the right to have a family has been recognised as a fundamental human right. However, its recognition in both UDHR (ICCPR),¹³³ as well as Indian personal laws, has remained restricted to man and woman.

This paper is an attempt to analyse the position of transgender community in the context of application of marriage and adoption laws of India to them. However, a prerequisite to such an analysis necessarily entails an analysis of the unique characteristics of the transgender community in India. Therefore, the paper takes a trajectory starting from analysis of the characteristics of the community, followed by a critical analysis of the laws applicable to them in the status quo, and ends with providing a perspective for the required policy change for improvement of their position in a *sui generis* manner.

¹³¹ *Id.*

¹³² NALSA v. UOI, *supra* note 127, at ¶121.

¹³³ Ms. Juliet Joslin et al. v New Zealand, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002).

The researcher has used an analytical approach to understand the position of transgenders under family law. The data primarily relied on for this purpose is secondary data, however, personal observation has helped the researcher in comprehending the realities presented by the secondary data.

II. TRANSGENDER COMMUNITY IN INDIA

In *NALSA v. Union of India*,¹³⁴ the Supreme Court arrived at a classification of the transgender community of India. The Court in the judgment divided the transgender community into two categories. *First*, those who psychologically identify themselves as belonging to a gender on the opposite end of the spectrum vis-à-vis their assigned sex and prefer to get their sex reassigned. And *second*, those who are perceived publicly as ‘third genders’ and are recognised distinctly as a separate class/category in the subcontinent viz. Hijras, Aravanis, Jogtas, Kothis and Shiv-Shaktis.¹³⁵ The Court granted the legal status of ‘third gender/other’ only to the latter category.

However, there are caveats attached to such a classification. One such caveat is that the categories are not mutually exclusive of each other.¹³⁶ Additionally, the criteria relied on by the Court has mostly to do with the specific identities of transgender groups unique to the

¹³⁴ *NALSA v. UOI*, *supra* note 127.

¹³⁵ *Id.* ¶ 79.

¹³⁶ V. Chakrapani, *Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion*, UNDP INDIA (December 2010) http://www.undp.org/content/dam/india/docs/hijras_transgender_in_india_hiv_human_rights_and_social_exclusion.pdf.

subcontinent rather than on the kind of conflict between the gender identity and assigned-sex.¹³⁷ This is problematic as all of the people who wish to identify themselves as a ‘third gender’ have to necessarily fall into one of the categories that the Court has recognised. However, had there been a classification on the basis of the conflict in the gender identity and assigned sex, any person having gender dysphoria, if they wished to get their sex re-assigned, could have qualified as transsexuals. Whereas, all others who wished to maintain their gender identity as different from the binary genders, could have qualified as a third gender or transgender.

The consequence of such a specific community-identity based recognition of the third gender, as done by the Court, becomes especially problematic in India. This is on account of the fact that the third gender identities in India have a specific culture and are generally ghettoised. Therefore, a person has to necessarily be a part of one of the pigeonholes identified by the Supreme Court and must conform to their norms in order to get the ‘third-gender’ recognition.

Understandably, the Court committed a folly in classifying the third gender category in pigeonholes. Nevertheless, the classification that the Court used to classify the transgender community into ‘transsexuals’ and ‘third genders’ has some value to the analysis of this community in India.

This is on account of the fact that the Court classified the community into two groups according to their desire to identify with their

¹³⁷ Planned Parenthood, *supra* note 130.

psychological gender identity. *First*, the people who wish to get their sex reassigned via medical procedures (i.e. ‘transsexuals’ or transgenders who wish to come out of their gender dysphoria). And *second*, those who don’t wish to identify themselves as either male or female, and wish to maintain their gender identity confirming to one of the identified ‘third gender’ community in India.

It is imperative to analyse both these categories of transgender community and their characteristics in order to arrive at an understanding of their respective position with regard to the marital and adoption laws applicable to them.

A. THE TRANSEXUALS

The first category as listed out by the Supreme Court is generally referred to as transsexuals. It is essentially composed of those people who wish to transition permanently to the gender that they identify themselves with. They constitute a subset of the transgender community whose sense of difference between their gender identity and assigned sex is very strong. Moreover, they are certain that they belong to the gender opposite (on the gender spectrum) to their assigned sex.¹³⁸

The procedure is generally described as Sex Reassignment Surgery (SRS), but may also involve other medical procedures such as hormone therapy.¹³⁹ Transsexuals, as a community/category never came to light in

¹³⁸ NALSA v. UOI, supra note 127, at ¶81.

¹³⁹ Planned Parenthood, *What Do I Need to Know About Transitioning?*, PLANNED PARENTHOOD, available at <https://www.plannedparenthood.org/learn/sexual->

India because they are not organised as a political or social community. Their gender dysphoria was never recognised and their plight was never acknowledged until the unique case of *Aparna Mafatlal* captured the media attention.¹⁴⁰ In this case, a lady from the famous Mafatlal business house transitioned permanently, which resulted into a family property and inheritance feud. This case brought to light the distress, the discomfort and the legal challenges that the community faces due to their psychological conflict.¹⁴¹

The Supreme Court in the *NALSA* judgment recognised the constitutional right of the transsexual people to identify with their transitioned identity, i.e., their gender identity in the first place.

B.THE THIRD GENDER

The transgenders who reject both male and female as the normative gender categorizations constitute the second sub-set of the transgender community.¹⁴² In the Indian subcontinent, these third genders have assumed a distinct identity owing to their behaviour, characteristics, and expression. Thus, this category is composed of a wide range of transgender-related identities, cultures, and experiences. In India, traditionally and popularly, queer identities such as Hijras, Eunuchs,

orientation -gender/trans-and-gender-nonconforming-identities/what-do-i-need-know-about-transitioning (last visited July 14, 2018).

¹⁴⁰ PTI, *Businessman Ajay Mafatlal, First Major Sex Change Case in India, Passes Away*, DNA INDIA (Aug. 23, 2015), available at <http://www.dnaindia.com/india/report-businessman-ajay-mafatlal-first-major-sex-change-case-in-india-passes-away-2117607>.

¹⁴¹ Express News Service, *No Settlement, Mafatlal Feud Continues*, THE INDIAN EXPRESS (Aug. 10, 2012) available at <http://indianexpress.com/article/cities/mumbai/no-settlement-mafatlal-family-feud-continues/>.

¹⁴² *NALSA v. UOI*, *supra* note 127, at ¶108.

Kothis, Jogas/ Jogappas, Aravanis and Shiv-Shaktis are recognised as third genders. They are not a homogenous group or community; there are differences in their identities and practices across regions and cultures.

It is also important to note that the modern taxonomical concepts of gender identity and sexual orientation might not be quite discernible among these identities.¹⁴³ There may be instances of people who are intersex or who have homosexual orientation being classified into these identities. This can be on account of societal taboos regarding sexual orientation or homosexual relationships.¹⁴⁴ However, predominantly these identities are based on gender dysphoria. Additionally, the Supreme Court has recognised just the above-mentioned identities as belonging to third gender, thus providing legal backing to only their gender identity.¹⁴⁵

In order to understand the application of personal laws to this sub-set of the transgender community we need to understand the identities *a priori*. Hence, an analysis of the recognised identities is in order.

Hijras: They are the largest and most organised community among the third gender. It is composed of biological males who over the course of time reject their masculine identity in favour of a more feminine one. They identify themselves as “neither male nor female.”¹⁴⁶ Most

¹⁴³ Evan B. Towle & Lynn Marie Morgan, *Romancing the Transgender Native: Rethinking the Use of the "Third Gender" Concept*, 8 GLQ: A Journal of Lesbian and Gay Studies 469 (2002).

¹⁴⁴ *Id.*

¹⁴⁵ NALSA v. UOI, *supra* note 127, at ¶81.

¹⁴⁶ *Id.*

transgender people who choose to identify as third genders, generally, are ostracised by their families and community. As a result, they are left with just one resort to find solace, i.e., a community of similar people who too have been ostracised and come from the same background that they do.¹⁴⁷

A transgender person belonging to any religious denomination can be associated with the Hijra identity. Mostly, the community as a whole worship a deity called Bahuchara Mata. Yet, they don't convert from their original religion. Thus, a Mohammedan joining the transgender community though may worship Bahuchara Mata, it is no less a follower of Islam vis-à-vis other men or women. This is evident by the fact that at the time of death the crematorium or burial takes place according to the person's religious denomination.¹⁴⁸

Hijras are known by various denominations in different parts of the country. They are referred to as 'Aravanis' and 'Thirunagis' in Tamil Nadu.¹⁴⁹

Eunuchs: Being a eunuch is not a question of gender identity; however, the Court has still classified them as third gender. Eunuchs are generally intersex individuals who have ambiguous genitals.¹⁵⁰

Kothi: They are a heterogeneous group of people who are identified as male according to their assigned sex, but show varying degrees of

¹⁴⁷ Vaishali Raode, *Lakshmi's Story*, WORDS WITHOUT BORDERS (June, 2013) <https://www.wordswithoutborders.org/article/lakshmi-story>.

¹⁴⁸ *Id.*

¹⁴⁹ NALSA v. UOI, *supra* note 127, at ¶14.

¹⁵⁰ NALSA v. UOI, *supra* note 127, at ¶44.

femininity. This category also slips mostly into being one based on sexuality rather than on gender, as most Kothis are bisexual or homosexual males. They show feminine characteristics in sexual relationships, to fulfil their desire of penetration.¹⁵¹

Jogas/Jogti Hijras: They are a unique community of transgenders formed on the basis of a long standing superstition. As per the superstition, male to female transgenders are believed to be possessed by the Goddess Yellamma or Renuka. Thus, they are estranged from their family and are supposed to serve Goddess Renuka throughout their life.¹⁵² They enjoy a great amount of respect in the society. Majority of their religious denomination is Hindu. Their situation is very similar to devadasis in Maharashtra.

Shiva-Shaktis: Analogous to Jogas/Jogti Hijras, Shiva-Shaktis are male to female transgenders and therefore are married to the sword of Shiva, a representation of masculine power.¹⁵³ They belong to the Hindu religion and are unique to the states of Andhra Pradesh and Telangana.

¹⁵¹ G. Reddy & S. Nanda, *Hijras: An "Alternative Sex/Gender in India*, GENDER IN CROSS-CULTURAL PERSPECTIVE, 275-282.

¹⁵² Makepeace Sitlhou, *Jogappas, the Men Who Marry a Goddess to Become Women*, THE WIRE, (Dec. 1, 2016) <https://thewire.in/83643/jogappas-goddess-gender/>.

¹⁵³ NALSA v. UOI, *supra* note 127, at ¶ 44.

III. ANALYSIS OF APPLICABILITY OF MARRIAGE & ADOPTION

LAWS

The Supreme Court in *NALSA* has recognized the right to a ‘self-perceived gender identity’ as a fundamental right under right to life.¹⁵⁴ However, even after the recognition of their right to identity, there is a considerable amount of ambiguity regarding the applicability of personal laws to transgenders.

In this section, the position of transgenders is analysed with respect to laws relating to marriage and adoption under Hindu Law, Mohammedan Law (since the majority belongs to these two denominations) and secular law. The secular law for the purposes of this paper constitutes all the personal laws which can be applicable on the parties if they choose to opt out of their religious laws – viz., Special Marriages Act, 1954 for marriage and Juvenile Justice Act, 2000 for adoption.

A. APPLICABILITY OF MARITAL LAWS

i. Transsexuals:

Post *NALSA*, a person after undergoing a sex reassignment surgery can get their gender marker changed in all of the official documents and can be officially recognised as male or female. The process involves signing an affidavit swearing a change in the gender identity. It has to be signed and satisfied before a judicial magistrate, which is generally hassle-free if medical records indicating SRS are shown,

¹⁵⁴ *NALSA v. UOI*, *supra* note 127, at ¶ 121.

after which it is to be notified in two newspapers.¹⁵⁵ Consequently, no one can refuse to alter any or all of the documents.

Applicability of Hindu Marriage Act

Section 5 of this Act prescribes the essentials of a Hindu marriage. As per this section, two Hindus, one of whom can be identified as bride and other the bridegroom, can solemnize a marriage, unless it is barred by subsection (iii), (iv), and (v) of the section.¹⁵⁶ Therefore, transsexuals who have got their sex reassigned in all of their official documents and can legally identify themselves to be female or male, i.e., bride or bridegroom, can get their marriage legally recognised. Such a marriage is also not a subject matter of challenge by a third person, since a petition for nullity of marriage or for divorce can be brought only by the parties to the marriage.¹⁵⁷

Validity of Marriage under Mohammedan Law

The contract of Marriage under Mohammedan Law can be entered into when there is an offer on the part of one party, acceptance on the part of other, and the same is done in the presence of sufficient witnesses.¹⁵⁸ Opposite sexes of the contracting parties is also a prerequisite for the marital contract.¹⁵⁹ Therefore, so long as a Muslim transsexual is

¹⁵⁵ NeeNee, *How to change the gender marker and name*, Transgender India, June 23, 2016 www.transgenderindia.com/change-gender-marker-and-name/.

¹⁵⁶ The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (India) §5 [hereinafter The Hindu Marriage Act].

¹⁵⁷ *Id.* at §11, §13, and §5.

¹⁵⁸ A.A FAYZEE, *OUTLINES OF MOHAMMEDAN LAW* 11.8 (5th ed., 2009) [hereinafter A.A Fayzee].

¹⁵⁹ *Id.*

entering into a heterosexual relationship of marriage, their marriage could be recognised and accepted as a valid Muslim marriage.

However, it can be contested that marriage under Mohammedan Law is defined to be a contract which has the procreation and the legalising of children as its object.¹⁶⁰ However, for people who have been operated via SRS, it involves the artificial creation of genitalia of the reassigned sex. As a result, there is no reproductive capacity on the part of the transsexual person contracting marriage. Therefore, on a primary requirement that object of such a marriage can never be procreation, Mohammedan Law does not provide for marriage among people who have undergone SRS.

Therefore, such a deduction leaves the status of marriage of transsexuals ambiguous. It could be argued that the term procreation be given a liberal interpretation and thus, transsexuals must be included as they can procreate via surrogacy. However, surrogacy via IVF is not possible for a transsexual, while traditional surrogacy is prohibited under Mohammedan Law.¹⁶¹

Despite all of this, there could still be a presumption in the favour of the validity of marriage by ignoring the second position that relates to procreation as an object of marriage. This can be done on account of the fact that the object of a contract is not an essential precondition and

¹⁶⁰ M. MULLA, PRINCIPLES OF MOHAMMEDAN LAW 250 (21st ed., 1990) 250 [hereinafter Mulla].

¹⁶¹ Suketu V. Shah, *Issues Of Surrogacy In India*, 2 INTERNATIONAL JOURNAL OF CULTURE AND HISTORY 173, 173-177 (2016).

hence, they cannot be equated. Thus, the marriage must be recognised, even though it doesn't serve the object enshrined for it.

Registration under Special Marriage Act

Section 4 of this Act prescribes that any male above 21 years of age and any female above 18 years of age may solemnize marriage, unless it is prohibited by sub-section (d).¹⁶² Thus, a transsexual person's marriage with someone from the opposite gender can be registered under this Act, as it is very similar to Hindu Marriage Act.

ii. The Third Gender

The analysis pertains to those who have got their gender legally recognised as 'third gender/other.' For transgenders who have maintained their legal status the same as their assigned sex can marry someone from the opposite sex (opposite to their assigned sex) and get the marriage validated under any of the personal laws.

Interestingly, the identities that were discussed, that come under the umbrella of third gender, do not all intend on marriage. Instead, some identities like Jogas/ Jogti Hijras, Shiva-Shaktis etc. are married to their Gods under long-standing superstitions. Thus, it is in the context of Hijras that this analysis may take place, since they have tried to get their marriage recognised in the contemporary times.

Applicability of Hindu Marriage Act

¹⁶² The Special Marriage Act, 1954, No.43, Acts of Parliament, 1954 (India), §4. [hereinafter The Special Marriage Act]

As per Section 5 of this Act, only a marriage of a bride and a bridegroom is valid and recognised.¹⁶³ The terms ‘bride’ and ‘bridegroom’ are gendered terms. It necessarily translates to ‘woman’ and ‘man’ on their wedding day. Thus, it provides no recognition to marriages for the third gender.

Validity under Mohammedan Law

The essentials required to be fulfilled under Mohammedan Law for a civil contract of marriage just require parties to be of opposite sexes, and not man and woman.¹⁶⁴ Hence, so long as the party belonging to the third gender marries someone from the opposite sex, the marriage is valid. Therefore, two parties who belong to third gender, but have different assigned sexes could marry under Mohammedan Law. Similarly, a third gender person could marry a cis-gender person so long as they are a heterosexual couple. This has been derived specifically from the textual interpretation of Mohammedan Law in India, as no reported fact-situation depicting conflicts in such an interpretation exist so far.¹⁶⁵

Registration under Special Marriage Act

Similar to the Hindu Marriage Act, Section 4 of this Act requires a ‘male’ and a ‘female’ among other conditions to register a marriage.¹⁶⁶ Therefore, there is no scope for registration of a marriage for ‘third gender’ under the Special Marriage Act.

¹⁶³ The Hindu Marriage Act, *supra* note 156, at §5.

¹⁶⁴ Mulla, *supra* note 160.

¹⁶⁵ A.A. Fayzee, *supra* note 158.

¹⁶⁶ The Special Marriage Act, *supra* note 162, at §4.

B. APPLICABILITY OF ADOPTION LAWS

Adoption is one of the forms of relationship that is recognised under the umbrella of family, and thus makes it part of the fundamental right to have a family. Under personal laws, only Hindus were allowed to act as legal parents for the adopted child. No other personal law in India recognised such a right. However, the Juvenile Justice (Care & Protection of Child) Act, 2000, acting as a secular legislation has provided people from any religious denomination to adopt a child. For analysis of the position of transgenders, both the Hindu Act and the secular law is imperative:

i. Transsexuals:

Validity of Adoption under Hindu Adoptions and Maintenance Act [“HAMA”]

Hindu Transsexuals after getting their sex reassigned can validly adopt a child after fulfilling the conditions under Section 7 in case of males and Section 8 in case of females.¹⁶⁷ There is no formal scrutiny required for adoptions under HAMA, and transsexuals can validly adopt children privately from their parents.¹⁶⁸ However, in case of adoption which doesn't involve their natural guardians, there is higher level of scrutiny where the transsexuals have to prove before the court that they are actually eligible, under Section 7 or Section 8 of the HAMA.¹⁶⁹

¹⁶⁷ The Hindu Adoptions and Maintenance Act, 1956, No.78, Acts of Parliament, 1956 (India) at §7, §8.

¹⁶⁸ The Special Marriage Act, *supra* note 162, at §9.

¹⁶⁹ The Special Marriage Act, *supra* note 162, at §9(5).

Validity of Adoptions under Juvenile Justice Act

The Juvenile Justice Act is a secular legislation. Section 41(6) of this Act, is an enabling provision which allows any ‘person’ to adopt a child. The term ‘person’ is not gendered. As a result, both male or female transsexuals can adopt a child under this Act. Hence, apart from enabling people from all religious communities to adopt a child, it also allows adoption to happen irrespective of the gender of the parent.

ii. The Third Gender:

As discussed previously, there are various identities under the third gender umbrella. Of them, the most prominent and largest is the Hijra community. Hijras, as an organised community, function by way of adoptions. A person who decides to identify himself as Hijra undergoes a formal christening ceremony called reet. As a result, they become a family in themselves, by virtue of the guru being their mother and the disciples being her children. The tendency of adoptions in other communities under third gender is vastly unknown and undocumented. Nevertheless, an analysis of the provisions that are relevant for adoption by the third gender is still imperative:

Validity of Adoptions under Hindu Adoptions and Maintenance Act [“HAMA”]

The HAMA under Sections 7 & 8 recognises a valid adoption only if it is done by a male or female, and thus, third genders are out of the

scope of application of this Act.¹⁷⁰ Also, by virtue of Sections 4 & 5 of the said Act, adoptions by virtue of the custom of *reet* in Hijras have been delegitimized, by providing overriding powers to the provisions of the Act over customs.¹⁷¹

Validity of Adoptions under Juvenile Justice Act

Section 41(6) of this Act is a path breaking reform that provides the right to any ‘person’ to adopt a child, and not a ‘male’ or ‘female.’¹⁷² Additionally, it also confers the right on the third gender couple to raise a child (if they are recognised as a couple) since they can be classified as a childless couple under the provision.

III. POLICY SUGGESTION & THE WAY FORWARD

The Supreme Court in *Vishaka v. State of Rajasthan*,¹⁷³ observed that international conventions or norms could be relied upon for construing the domestic law wherever there is a void in law. However, the same cannot be in violation of or be inconsistent with the law of the land.¹⁷⁴ In *NALSA*, the Supreme Court relied upon this to use Yogyakarta Principles in order to ensure the right of self-perceived gender identity for the individuals.¹⁷⁵

¹⁷⁰ The Special Marriage Act, *supra* note 162, at §7, §8.

¹⁷¹ *Id.* at §4, §5.

¹⁷² *Id.* at §41(6).

¹⁷³ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 [hereinafter *Vishaka v. State of Rajasthan*].

¹⁷⁴ *Id.* ¶14.

¹⁷⁵ *NALSA v. UOI*, *supra* note 127, at ¶22.

The same Yogyakarta Principles prescribe in principle number 24 that everyone has a right to found a family irrespective of the sexual orientation or gender identity. However, the only obstacle that stands in the way of co-opting these principles is Section 377 of the Indian Penal Code (IPC) which would not allow the Court to use these principles because they are in conflict with the domestic law.

Interestingly, an interpretation can be brought, as a solution, till the time section 377 is not decriminalised. This interpretation involves giving limited application to Principle 24 of the Yogyakarta Principles, i.e., by restricting it to gender identity and not extending it to sexual orientation. Understandably, it may not open up the route to marital recognition in some cases. However, it will surely open up the possibilities of adoption for this community.

IV.CONCLUSION

The Supreme Court in *NALSA v. Union of India*, recognized the trauma and oppression faced by the transgender community in India. As a result, it laid down that the transgender community must be treated with dignity. The Court recognized that the expression of one's own gender identity is an integral part of one's dignity. Therefore, it held that expression of one's gender identity is a vital part of their fundamental right to life and freedom of expression.

However, the Court fell short in elevating the rights of the transgender community to be at par with all the citizens. The Court

remarkably failed to ensure the protection of Article 14 to the transgender community. Simply put, the Court didn't recognize the principle of 'equality before law' and 'equal protection of law' to be applicable to the transgender community vis-à-vis other citizens. This is evident as the fundamental right to have a family is not ensured to the transgender community on account of the gendered nature of the personal laws.

Arguably, it could be said that on account of *State of Bombay v. Narasu Appa Mali*, the personal laws are not subject to scrutiny under Part III of the Constitution of India. And therefore, the Court couldn't have done much. However, it is pertinent to note that the *Narasu* judgment limited the judicial review of personal laws to only those laws that owe their origin to scriptures. As a result, the Court could have very well interpreted the gendered terms in the secular statutes to make them equally applicable to transgender persons vis-à-vis other citizens.

Yet, the Court left it for the legislature to ensure that equal rights are ensured to the transgender community. The legislature, soon after the judgment, came up with a Transgender Persons (Protection of Rights) Bill, 2016. However, the Bill lacked any provisions that would confer any rights to the transgender persons, relating to starting a family. Moreover, the Bill too had a number of problematic provisions which would even reduce the rights that were granted to them by the Court in *NALSA*.

As a result, it becomes clear that the legislature cannot be the saviour that ensures rights to the community. This is on account of the fact that there will always be a lack of political will in the legislature to

ensure equal rights to the community. Therefore, the reform that ensures equality before law, and by extension 'fundamental right to have a family' to the transgender community, has to come from the Judiciary. Understandably, the curative petition regarding the decriminalisation of S. 377 of the IPC, 1860 is being heard by the Court. And if it is decriminalised, it would be a harbinger of rights to the community. However, that seems to be a distant goal currently.

Therefore, given the current regime, the suggestion to give limited application to Yogyakarta Principles is a feasible one. It ensures the transgender persons to at least have minimum rights that can be provided to the community by legitimising adoption of children for them. It is time that an appropriate order be passed in accordance with the Yogyakarta Principles in order to alleviate this community and emancipate them from the regime that has restricted their rights for more than a 100 years.