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Adoption Laws and Transgender identities in India, In an Era of New Gender Norms: A critical analysis.

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Adoption Laws and Transgender identities in India, In an Era of New Gender Norms: A critical analysis.

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Abstract

Due to the heteronormative beliefs of our society, transgender identities have been treated like social pariahs. The Judgment of the Hon'ble Supreme Court of India in the case of National Legal Services Authority vs. UOI (hereinafter NALSA) brings a ray of hope for them by granting them the status of 3rd gender identity. However, in the aftermath of NALSA, the law that was passed by the legislature to protect their rights shattered their hopes, it neglected various aspects of Transgender rights and one of them is the right to adopt a child. Still, being a transgender parent is something that Indian society is not able to come to terms with, and the adoption laws are a reflection of it. Hindu Adoption and Maintenance Act 1956 and Juvenile Justice Act 2015 read with CARA guidelines are the two main legislature that deal with the adoption and parenting rights in our Country. Ironically, the eligibility criteria set out in both the Acts include only male-female binaries and exclude the non-binaries from it. A transgender person who has opted for third gender identity and wants to adopt a child does not fit anywhere in the present adoption laws. Moreover, the Transgender Persons (Protection of Rights) Act, 2019 also fails to address this set of rights of TG people. This status quo is not in conformity with the Equality doctrine of the Indian Constitution discussed by the Supreme Court in the NALSA case. The Apex Court held that the word 'person' is not limited only to males and females it includes TG persons also, who do not fit in the traditional notion of binary gender. But, adoption laws in India do not seem to be in alignment with this spirit of the Indian Constitution and NALSA judgment. Consequently, it is creating a heteronormative belief that only cisgender persons are qualified to be a parent.

Keywords- Transgender, Adoption, Motherhood, and Equality.

Introduction

The family is the foundational unit; our social system relies and thrives upon this foundational base. It is an institution that not only helps the community to grow but also the individuals.¹ A family may include parents, spouses, married, unmarried children, etc. however, the structure of the family changes from one culture to another culture. Moreover, in traditional family systems, marriage is the most critical component to starting a new one and expanding the existing one, procreation being one of the outcomes of this relationship. Those who cannot procreate or do not want to, can adopt a child and expand their family. However, it will not be wrong to say that not every member of our society has the privilege of having a family in a traditional manner. There are sections of society that have been left out not just by the conventional norms of society but by the law also. One of these neglected sections of our society is the Transgender community.

“Transgender is generally an umbrella term for persons whose gender identity, gender expression, or behavior does not conform to their biological sex.”² TG may also include hermaphrodites and transsexuals; in popular traditional Indian culture, they identify themselves as Hijras, Aravanis, Kothis, etc.³ In other words, any person who emotionally and psychologically feels that they belong to the opposite sex may come under this umbrella term. In India, being a TG means living a life full of problems. They have to leave their biological family due to mental harassment and physical harassment, and many times they are beaten and exploited by their family members.⁴ Our legal system, in place of protecting them, aided in their ordeals by not providing them with equal rights and protection.

However, the Supreme Court of India, in its historical judgment in the case of *National Legal Service Authority v Union of India and others*,⁵ has recognized their right to be known as a 3rd gender other than male/female, or they can opt for Sex reassignment surgery. But this recognition has come with its share of difficulties, and it's imperative to analyze whether there has been any change in the status of the Legal rights of TG people since the judgment, and this article is an attempt to do that, the focus of this article will be adoption rights of TG people.

It has been more five years since the NALSA judgment was rendered. Still, until now, the legislature is unable to eradicate all kinds of discrimination by enacting a meaningful law that includes all facets of their problems. The one area where widespread discrimination against

¹ N Ahsan & H Ahsan, “Foundation of a family: Importance, obstacles and possible solutions” 1(1) *Policy Perspectives*, 95–107 (2004). Available at <http://www.jstor.org/stable/42909132> (last visited on July 21, 2022)

² B Mondal, S. Das, D Ray, & D Banerjee, “Their Untold Stories...” Lived Experiences of Being a Transgender (Hijra), A Qualitative Study From India” 2(2) *Journal of Psychosexual Health* 165–173 (2020). Available at <https://doi.org/10.1177/2631831820936924> (last visited on July 24)

³ A Dutta, “An Epistemology of Collusion: Hijras, Kothis and the Historical (Dis) continuity of Gender/Sexual Identities in Eastern India” 24 *Gender and History* 825-849 (2012).

⁴ A Revathi, & V. Geetha, *The truth about me: A hijra life story*. (Penguin India, Delhi, 2010).

⁵ *NALSA vs. UOI and others*, AIR 2014 SC 1863 available at <https://translaw.clpr.org.in/wp-content/uploads/2018/09/Nalsa.pdf> (Last visited on September 5, 2022)

transgender identities prevalent in our family laws. However, the legislature enacted The Transgender Persons (Protection of Rights) Act 2019⁶, to eradicate the discrimination faced by the community and give them their long-due recognition in the eyes of law. But, many facets of their rights concerning marriage, inheritance, adoption, etc. have not been addressed by the Act.⁷ And, most of the existing family laws are in binaries⁸, consequently, a transgender person does not come within the purview of these laws. One of the vital domains of these family laws is the law of adoption.

Adoption as per the Juvenile Justice Act, 2015 "means the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents, with all the rights, privileges, and responsibilities that are attached to a biological child."⁹ In other words, "Adoption is a legal procedure that permanently terminates the legal relationship between the child and his or her biological parents and initiates a new parent-child relationship."¹⁰ Going by these two definitions, adoption means creating a new parent-child relationship through a procedure established by law. This institution created by law provides a parent to a child who has been abandoned, orphaned, etc., and gives a child to a prospective parent.

However, the modern laws of adoption, i.e., the Juvenile Justice Act, have been enacted to take care of the child's best interests, but the purpose of traditional Hindu adoption customs and laws was only to provide a childless parent with a child.¹¹ Analysis of the practice and enactment of adoption laws shows clearly how important it is to have a child as per the traditional norms of our society because, without a child, a family is considered to be incomplete. Moreover, in contemporary times also importance of a child is evident that even though a fraction of our modern generation does not want to get married but to have a child, they are exploring surrogacy options.¹² To understand more about adoption, first, we have to understand the prevailing stereotypes and norms of our society related to parenthood

⁶ Available at <https://www.indiacode.nic.in/bitstream/123456789/13091/1/a2019-40.pdf> (Last visited on September 12, 2022)

⁷ A Banerjee, 'Why India's transgender people are protesting against a bill that claims to protect their rights'. *Scroll.in*. (November 26, 2019), Available at <https://scroll.in/article/944882/why-indias-transgender-people-are-protesting-against-a-bill-that-claims-to-protect-their-rights>. (Last visited on August 25, 2022)

⁸ Hindu Succession Act, 1956 available at <https://www.indiacode.nic.in/handle/123456789/1713?locale=en>, Hindu Adoptions and maintenance Act, 1955 available at https://legislative.gov.in/sites/default/files/A1956-78_0.pdf, Hindu marriage Act, 1955 available at https://highcourtchd.gov.in/hclsc/subpages/pdf_files/4.pdf (Last visited on September 12, 2022)

⁹ Juvenile Justice Act, 2015. Available at <http://cara.nic.in/PDF/JJ%20act%202015.pdf>. (Last visited on August 28, 2022)

¹⁰ Manooja, and Dalip Chand, *Adoption Law and Practice* (Deep and Deep, Delhi, 1993).

¹¹ S.A. Desai, *Mulla Principles of Hindu Law* 20 (LexisNexis New Delhi, 2007).

¹² A. Ellenbogen, D. Feldberg, & V. Lokshin, "Surrogacy - a worldwide demand. Implementation and ethical considerations" *Gynecological and Reproductive Endocrinology & Metabolism* (2021) Available at <https://gremjournal.com/journal/02-2021/surrogacy-a-worldwide-demand-implementation-and-ethical-considerations/> (Last visited on August 26, 2022)

Defining Parenthood.

In our society, parenthood has always been looked at from a gendered perspective on conventional terms. Going by the traditional understanding of parenthood, a father can only be a male, and a mother can only be a female, with nothing else in between. What if a person chooses not to be identified by any of the two genders? Do they forfeit their right to be a parent? The answer might be yes because, according to societal norms, a person other than male and female cannot be considered a parent. Popularly and traditionally, 'Mother' is a woman concerning her child or children, and 'Father' is a man pertaining to her child or children. It means, that only a woman can become a mother and only a man can become a father. This is a heteronormative belief that has stereotyped the notions about mother and father. Can there be a more expanding meaning for these two terms? Meeting the current requirements of a dynamic society that emphasizes a more inclusive approach toward parenting.

While elaborating on the problem a little more, let's play a game¹³; what did you think when you heard the word "father"? How will you picture "father" in your mind, maybe a disciplined, tough, and protective man? What did you think when you heard the word, mother? How will you picture "mother" in your mind? Maybe a loving, caring, and perhaps home-cooked food. What if I ask you to think about a Transgender as a Parent, who might be both father and mother or only one of them? Can you picture a TG as a parent? Probably you will find it difficult to imagine a TG as a parent.

This perception is the cisnormative¹⁴ and heteronormative¹⁵ mentality of our society. Due to this, there has been little discussion on the parenting rights of transgender people because transgender persons are considered an outsider by certain beliefs of the family system. And this has a tremendous influence on the social structure. It obstructs the way to providing parenting and family rights to transgender people while making it difficult for those to secure their rights, who dare to defy society's binary norms.

Supreme Court also observed¹⁶ in the NALSA judgment that "*TGs face many disadvantages due to various reasons, particularly for gender abnormality which in certain level needs to physical*

¹³ Ryan. G Polly, *(Trans)forming the family: a narrative inquiry into the experiences of transgender parents (doctoral dissertation)* (2015) Available at <https://pqdtopen.proquest.com/doc/1707689938.html?FMT=ABS>. (Last visited on August 29, 2022)

¹⁴ Cisnormativity "describes the expectation that all people are cissexual, that those assigned male at birth always grow up to be men and those assigned female at birth always grow up to be women" See: Bauer & Greta et.al. "I Don't Think This Is Theoretical; This Is Our Lives": How Erasure Impacts Health Care for Transgender People" 20(5) *The Journal of the Association of Nurses in AIDS Care* 356, (2009).

¹⁵ Heteronormativity is defined as the prevailing and assertive belief in the society that a normal family means a heterosexual mother and a heterosexual father living with heterosexual children together. See. Joshua Gamson, "Sexualities, queer theory, and qualitative research", *Handbook of Qualitative Research* 347-365 (Sage Publications, New Delhi, 2000)

¹⁶ Ibid 5

and mental disability. Until recently, they were subjected to cruelty, pity, or charity.... There appears to be limited public knowledge and understanding of same-sex sexual orientation and people whose gender identity and expression are incongruent with their biological sex. As a result of this approach, such persons are socially excluded from the mainstream of society. They are denied equal access to those fundamental rights and freedoms that the other people enjoy freely".

Analysis of Prevailing Adoption laws (a 3rd Gender perspective)

Before starting the analysis of TG's adoption and parenting rights, a brief historical development of the concept of Adoption in India is required. It is not a modern institution; it is a legal fiction that is in practice for centuries. In Hinduism, this long practice holds a significant place, especially in the case of a male child.¹⁷ According to Hindu belief, a person cannot attain Moksha until their son performs 'Pinddaan' and other 'sacred oblations',¹⁸ due to this belief, those who were childless used to adopt a son.

However, religion was not the sole reason. There were also some socio-economic reasons, and one was to carry forward their lineage and inheritance; this desire to move forward their lineage and their name always tempted the childless person to adopt a child.¹⁹ The process of adopting a child was not a rigid one; before the codification of Hindu personal laws, customary laws of adoption required only a 'giving-taking' and 'Datta Homam' ceremony, and after performing these two ceremonies, the child was treated like a natural-born child.²⁰ If we talk about adoption laws in other religions, i.e., Islam, Christianity, and Parsi Adoption was/is forbidden. But they can act as a guardian of a child under The Guardianship and Wards Act 1890.

The modern concept of adoption came into existence when Hindu personal laws were codified in 1955, the legislature enacted Hindu Adoption and Maintenance Act 1956, and through this Act, the legislature tried to follow the equality framework of our Constitution while providing the adoption rights to the single female parent which includes divorced woman as well. After that, in 2000, the legislature enacted Juvenile Justice Act (from now on JJ Act for brevity). This was a significant reform in adoption laws because it gives adoption rights to everyone, including non-Hindu religions. Also, provisions were made to adopt abandoned, orphaned, and surrendered children. As a secular law, JJ Act read with Central Adoption Resource Authority (CARA) regulations provides for secular legal options for adoption. So, at present, we have the Hindu Adoption and Maintenance Act 1956, Juvenile Justice Act 2000 read with CARA regulations to govern adoptions in our Country. Personal laws of Muslims, Parsi, Christian, and Jews do not recognize the concept of adoption.

¹⁷ G Nene, & Kullūkabhaṭṭa. *The Manusmṛiti* (Jai Krishna Das Haridas Gupta, Chowkhamba Sanskrit Series Office, Benares, Benares, 1935).

¹⁸ Yajñavalkya., N Khiste, et. al., *The Yajñavalkya smṛti, with Viramītrodaya, the commentary of Mitra Misra and Mitaksara, the commentary of Vijñanesvara* (Chowkhamba Sanskrit Series Office, Benares, 1930).

¹⁹ *Ramasubbayya v. Chanchu Ramayya*, AIR 1947 (Privy Council 1947).

²⁰ J.D MAYNE, *Mayne's Treatise on Hindu Law and Usage* 443-444 (Higginbothams, Madras, 11th edition, 1953)

Nevertheless, all these adoption laws are not sufficient to provide equal rights to prospective adoptive parents in the modern nature of our society; they have become an example of unequal treatment based on gender. Supreme Court in the NALSA judgment rightly observed that "*denial is premised on a prevalent juridical assumption that the law should target discrimination based on sex (i.e., whether a person is anatomically male or female), rather than gender (i.e., whether a person has qualities that society consider masculine or feminine).*"

Moreover, the framework of the family laws is incompatible with the spirit of the ratio laid down by the Hon'ble Supreme Court. In the said judgment Supreme Court had also recognized the right to opt for a Third Gender other than male and female. So now, a transgender person can opt for a separate gender identity other than what was assigned to them at the time of birth. The Hon'ble Supreme Court asked the government to incorporate laws to protect the interest of the transgender community, and the Indian parliament enacted the Transgender Persons (Protection of Rights) Act, 2019. But the Act conveniently ignored, the demands of the transgender community to provide them the right to adopt a child. This demand is justified because, as per the prevailing laws on adoption, a transgender person cannot adopt a child if they choose the Third Gender as their identity; there are no provisions for that.

To elaborate further we will now analyze the prevailing laws on adoption from the perspective of a transgender person who has opted for a Third gender, transitioned from male to female, or vice-versa (it is not the same identity that was assigned to him at the time of birth, which may be male or female).

- **Hindu Adoption and Maintenance Act 1956 (Hereinafter, HMA 1956.)²¹**

The Act governs the adoption procedure to adopt a child if a Hindu person wants to adopt (Hindu Adoptions and Maintenance Act, 1956). As per Section 2, the Act applies to Hindus, Jain, Sikhs, and Buddhists by religion. And also applies to those who are not Muslim, Christian, Parsi, or a Jew by faith, so basically, it is not a secular law and applies only to Hindus. Chapter two of the said Act regulates adoptions, Section 6 talks about the requisites or essentials of a valid Adoption, according to it, no adoption will be a valid adoption unless the person who is adopting has the capacity and also the authority to adopt. Sections 7 and 8 talk about the ability of a Male and female Hindu to take in adoption. According to Sections 7 and 8, respectively, any Hindu male and female who is of sound mind and not a minor can take in adoption, and if they are married, only with the consent of the other spouse if he or she is living.

If a Hindu person does not fulfill the requirements of sections 6, 7, and 8, he cannot adopt a child or does not have the authority to adopt a child under HMA 1956. But these requirements have excluded the TG person 'per se' if he or she chose to be of the Third Gender rather than male and female. A TG person of a 3rd gender does not have the right to take in adoption as per the Act's requirements because he does not fit in the categorization of the Gender of HMA 1956. And the

²¹ Available at https://legislative.gov.in/sites/default/files/A1956-78_0.pdf (Last visited on: September 5, 2022)

government also has failed to address this lacuna in law arising after the NALSA Judgment. Because, as mentioned earlier, the TG persons Act of 2019 doesn't have anything about the adoption rights of the TG community.

- **The Juvenile Justice (Care and protection of children) Act 2015²² (Hereinafter, JJ Act) read with adoption regulations²³ of the Central Adoption Resource Agency (Hereinafter, CARA).**

JJ Act (The Juvenile Justice Act., 2015) is another law with legal provisions on adoption; it is a secular law, which means any person irrespective of their religion can adopt under the provisions of this Act. As per Section 68, read with clause (3) of section 2 of the Act, Central Adoption Resource Agency has been established by the government to promote and regulate adoption (by framing regulations for adoptions and related matters from time to time). Provisions of the JJ Act have been formulated to fulfill the obligations towards the United Nations Convention on the Rights of the Child, which India ratified in 1992.

The purpose of adoption provisions under the JJ Act and adoption regulations of CARA (Adoption Regulations, 2017) is to take care of the child's best interest. To fulfill this purpose, the eligibility conditions of prospective parents have been framed. Under Section 57 of the JJ Act, these conditions have been mentioned. The first condition under clause (1) of section 57 is about fitness, and the criteria of this fitness are physical, mental, financial, and high motivation for adoption. Under clause (2), if the prospective adoptive parents are couples, both spouses' consent is compulsory. Clause (3) allows single or divorced persons but is subject to the fulfillment of specific criteria and provisions framed by CARA from time to time. After reading these provisions, it seems that not having any marriage rights, a transgender person (who has adopted a third gender identity) can adopt under this clause but subject to specific requirements.

However, when it comes to adoption regulations 2017, which are necessary to fulfill under clause (3) of section 68 of the JJ Act, things became complicated. Section 5 of CARA regulations talk about the eligibility criteria of prospective adoptive parents, clause (1) of it talks about mental, physical, financial, and emotional fitness, and they also shall not have any life-threatening medical condition. Clause (2) says that any prospective parents, whether they are married or single and irrespective of the fact that they have any biological child or not, can adopt a child but are subject to certain conditions. These conditions are: necessary consent of both the spouses in case of a married couple, a female can adopt a child of any gender, but a single male is not eligible to adopt a girl child.

Here it is evident that if a TG wants to adopt a child, they won't be able to because they have been disqualified per se, but how? They cannot be considered in the married couple category because

²² Available at <http://cara.nic.in/PDF/JJ%20act%202015.pdf> (Last Visited on: September 5, 2022)

²³ Available at http://cara.nic.in/PDF/Regulation_english.pdf (Last Visited on: September 5, 2022)

they do not have a right to marry as per the Indian matrimonial laws. And if we think of them as a single person, there is no mention of the third gender as a separate identity anywhere in the JJ Act and adoption Regulations. Although, a TG person can be physically, mentally, financially, and emotionally fit. However, still, they will not be considered for adoption because the said Act has not recognized his gender identity, and the Act of 2019 also has failed to address this lacuna in the law. The other major void in adoption laws is that there are no legal provisions for the adoption of an intersex child, who are surrendered or abandoned; however, the number of such children is unknown. But there are reported cases; one is from Bengaluru,²⁴ where a mother surrendered her intersex child to Bengaluru district child protection because she does not have the means to support the child. In the future, if this child is put for adoption under the current legal framework, there are minuscule chances that someone will be ready to adopt the child. But if there would have been special provisions for adopting such kinds of individual children, then people from the transgender community could have adopted the child without any legal complications. And it is deplorable that JJ Act., which was enacted to protect children, has failed even to provide general medical protection and rehabilitation facilities in these particular cases, leaving aside the special provisions.²⁵

Adoption and motherhood some reported experiences of Transgender

In an incident published in Livemint,²⁶ Danny, a Trans Man, adopted a girl child by identifying as a female (his biological sex). The story highlighted the ordeals of Danny, who is planning to undergo Sex reassignment surgery and is experiencing the transition. Danny is worried about what will happen to the child he adopted when his transition is completed. Will he be considered a mother or father? What will be the legal status of their relationship when he is a man, especially in the eyes of the law? In the report, Danish Shaikh a transgender activist pointed out a legal vacuum on the adoption right of a person who recognizes themselves with the third sex. He pointed out that there has been significantly less debate on this issue. Until the NALSA judgment, it could have been understood why there was no debate on adoption by 3rd Gender because the law doesn't recognize them as a separate gender. The story was published in December 2014, eight months after the NALSA judgment, and it has been nine years since the court pronouncement, and five years since the TG Act was passed, but there is no change in the status quo.

Urvashi Butalia, in her essay 'Mona's Story',²⁷ explains how Mona, a Trans woman, yearned to be a mother and how her life changed when she adopted a girl child named 'Ayesha' along with

²⁴ Y.S. Ashwini, 'Does Anybody Care for This Intersex Infant?' *Deccan Herald* (January 14, 2016) available at <http://www.deccanherald.com/content/522957/does-anybody-care-intersex-infant.html> (Last visited on August 21, 2022)

²⁵ Ibid.

²⁶ Seema Chowdhry, 'Adoption: Two shades of grey' *Livemint* (December 5, 2014) available at <https://www.livemint.com/Leisure/pZ1rSusqj8ub50NdgiTQmO/Adoption-Two-shades-of-grey.html>. Last visited on August 24, 2022

²⁷ Urvashi Butalia, "Mona's Story" *Granta*, p 115 (May 9, 2011), Available at: <https://granta.com/monas-story/>. (Last Visited on August 22, 2022)

her Guru and another fellow Hijra of their commune. Ayesha's mother, who was Mona's neighbor, died during childbirth. Her father was not ready to keep and raise her, it was then Mona and her Guru offered to take the child in. After the Adoption of Ayesha, Mona feels that now she is a complete woman because, in her opinion, being a mother is the only way to attain full womanhood. Later on, she went to lengths to get her daughter back when she was separated from her by her Guru and co-adoptee, who was also the patriarch of their Gharana (a communal home). She made every effort in her desperation to get her daughter back; she even filed a complaint in the police station, which is a cardinal sin for Hijras, for which she was also ostracized from the community. She mourns in her own way when her motherhood was snatched from her; she turned religious, started praying five times a day, and went to Hajj, hoping that God would bring her daughter back.

Chinki Sinha, in her article in *Open Magazine*,²⁸ narrated the story of two Trans women, Zeenath Pasa and Gauri Sawant. Zeenath has two adopted children a daughter 'Saleha' and a son 'Asif.' The biological mother of both the children happens to be a sex worker. Saleha was an unwanted child; her mother wanted to abort her, but Zeenath counseled her and convinced her not to abort the child; she also undertook the child's responsibility by adopting her. Asif's mother dies because of HIV AIDS soon after giving birth to him; Zeenath adopted him and took care of his education and all other things.

Gauri, the director of a Trust called 'Sakhi Char Chowghi,' adopted a girl child named Gayatri. Her mother was also a sex worker who died because of HIV AIDS; Gauri sent Gayatri to a boarding school in Pune to provide her with a better education and keep her away from the impacts of living with Hijras. In 2017 Vics, a brand of P&G made a commercial²⁹ on Gauri Sawant and Gayatri; the ad depicted beautifully how a Trans woman can also be a loving and capable mother. Under which law and how those children were adopted is unknown. Most of the adoptions undertaken by TG are illegal and informal.³⁰ Still, two critical things are common to every story: their yearning to be a mother or parent and their caring for their adopted child. In an interview with *Times of India*, Gauri Sawant says, "Motherhood has no gender; all you need is care."³¹ Amidst all this all that comes to my mind is, is the adoption only a matter of cis privilege? Motherhood, is it biological or sexual?

²⁸ Chinki Sinha, "The Eunuch Mothers" *Open the Magazine* July 6, 2012, Available at <http://www.openthemagazine.com/article/india/the-eunuch-mothers>. (Last visited on August 24, 2022)

²⁹ Article, "Indian TV commercial showing adored transgender mother goes viral" *Hindustan times*, April 11, 2017, available at: <https://www.hindustantimes.com/business-news/indian-tv-commercial-showing-adored-transgender-mother-goes-viral/story-cOkzgxyZ51PvmodGjjjDHI.html> (Last visited on August 26, 2022)

³⁰ Chinki Sinha, "Indian eunuchs adopt to fulfill motherhood" *Aljazeera*, December 13, 2013, available at: <https://www.aljazeera.com/indepth/features/2013/12/indian-eunuchs-adopt-fulfill-motherhood-2013121293357705443.html>. (Last visited on August 26, 2022)

³¹ Article, "Inclusivity not a distant dream, says transgender community" *Pune News - Times of India*, April 11, 2017, available at <https://bit.ly/3xlr57b>. (last visited on August 29, 2022)

Equality Doctrine: The Constitutional ideals

The preamble of the Indian Constitution is an outlook of the ideals of the Indian Constitution, and one of those ideals is Equality- "Equality of Status and Opportunity," but is this equality available to TG? Do they have the same status in our society and even laws? Are they having equal chances of opportunity? I don't think that answer would be definite. Another Ideal is "Justice- Social, economic, and political," but here also, the state and our society have failed to provide them the justice they deserve. Is not it an injustice to them that they cannot start a new family or adopt? Is not it an injustice that they don't have the liberty to express themselves?

Supreme Court in NALSA³², while defining the word 'person' which has been used in Article 14, said that *"Article 14 does not restrict the word 'person' and its application only to male or female. Hijras/transgender persons who are neither male/female fall within the expression 'person' and, hence, are entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country."* Do transgender identities have equal civil and citizenship rights? As enjoyed by the other binary identities. On Article 15(1) which says that the state will not discriminate between its citizens based on race, sex, religion, caste place of birth, or any of them, the Court noted that *"discrimination based on sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or equal protection of laws."* Is it not discrimination against the binary identities that they have been excluded from the protection of several laws?

While exploring Article 21 the Apex Court said that *"Article 21 takes all those aspects of life which go to make a person's life meaningful,"* which ultimately helps explore their personality to its fullest. Being a parent and starting a family is also an integral part of the personality; it can help a person experience motherhood or fatherhood, and our legal provisions obstruct this exploration of personality. The adoption laws in our country are against the spirit of part III of the Indian Constitution, violating fundamental rights. Furthermore, if we analyze UDHR and other International Human rights conventions, we will find that every convention promotes equality, and this equality is not just equality among equals but based upon non-discrimination. And discrimination starts when the law arbitrarily discriminated between two persons and excluded one of them from equal chances of opportunity and participation.

³² Ibid 5.

Conclusion and way forward

The supreme court of India has provided the right of positive registration in its judgment of NALSA; due to this right, a TG who cannot identify themselves with the collective binary identity can go for the 3rd Gender. This judgment has proven a shot in the arm of the LGBTQ movement. However, there is significantly less engagement with ground-based realities following the court's ruling, and that is due to various legal, economic, and social obstacles to realizing the equality framework discussed by Supreme Court. The right to be recognized doesn't work in a vacuum; with this right, other rights are also available to already known Gender. "For the recognition for having a practical meaning all the gender-related facilities, Society and law have to expand its sexed-lenses."

Our legal system is a living example of trans-discrimination. The situation has barely improved after NALSA; it might get worse if the legislature does not take necessary steps. For instance, if a person who is married, and has a family with children, not able to identify himself with his body and feared coming out of this prison. What if he decided to come out and choose to be a 3rd gender? What will be his status with his current family? By which law he will be governed now? The TG people do not want to be put at a disadvantage mode just because they have dared to break the norms of society, they also have a right to have a family, and they also have a right to adopt a child as per the procedure. The heteronormative legal framework has failed the Transgender community; the same legal framework that talks about Human rights for all, have been unable to provide fundamental civil rights to transgender people. This male-female dichotomy has stereotyped the TG community because they failed to fulfill the gender expectations assigned to them, resulting in exclusion from the mainstream.

There is still deep skepticism and many times the outright rejection from the mainstream of self-identification beyond male and female. Suppose the government is committed to the idea of protecting TG. It has to create a level playing field by removing all laws that talk in binaries. The government needs to find out the areas of legislation where discrimination occurs due to the heteronormative nature of laws. Supreme Court has provided them the justice they deserved, but the legislature has to frame the rules and bring reform following the judicial pronouncement.

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