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# Adoption Struggle of Transgenders: Need of Equity Norms

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## ABSTRACT

*Transgenders, from the very beginning have suffered and fought for their human rights. With the landmark NALSA judgement, brought a ray of hope. However, recognition of their gender and their constitutional rights was a long-awaited decision. Further, with the partial slashing of section 377 of the IPC by the Supreme Court of India led to further happiness and hope for a far better tomorrow. The Transgender (Right to Protection) Bill of 2016, 2018 and 2019 only scratch the surface of what must be done and don't get to the nitty gritty, tons of loopholes and gaps remain within the legislations which hinder the enforcement of the rights of Transgenders, one of which is their right to adopt children. Through this research paper, an attempt has been made to highlight the gaps and provide suggestions to overcome those gaps with regard to the right to adoption of transgenders. The Right to adoption is a human right but there's no law or legislation which would help transgenders enforce this right. An attempt has been made to discuss current laws of India and compare it to international laws concerning marriage and adoption. This article is mostly based on secondary resources as well as on observations.*

**Keywords:** Gender identity, discrimination, Adoption, Exclusion of basic rights, Transgenders.

## I. INTRODUCTION

The term “transgender” popularly known as Hijra or Kinnar in India has existed in our traditional society since ancient times, it is when an individual realises that their gender does not match with the sex assigned to them at their birth.<sup>3</sup> In the last survey that took place in April 2014, where the Supreme Court declared that there are about 490,000 transgenders in India. In the case of **National Legal Service Authority v. Union of India**<sup>4</sup>, the apex court

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<sup>3</sup> Jeffrey Gettleman, *The peculiar Position of India's Transgender*, The New York Times (Feb 17, 2018), <https://www.nytimes.com/2018/02/17/style/india-third-gender-hijras-transgender.html>.

<sup>4</sup> Rema Nagarajan, *First count of third gender in census: 4.9 lakh*, The Times of India, (May 30, 2014, 01:47 IST) <https://timesofindia.indiatimes.com/india/First-count-of-third-gender-in-census-4-9-lakh/articleshow/35741613.cms>.

<sup>5</sup> National Legal Service Authority v. Union of India, AIR 2014 SC 1863.

held that Transgender will be recognized as the third genders and that the fundamental rights embedded in our Indian constitution will apply to them as much as to another gender, now India recognizes three gender, Male, Female and Transgenders. They were granted the most obvious and already existing right of self-determination, self-identity as male, female or transgender.

However, this is just one step towards treating every gender-equal, without any discrimination based on gender or sexual orientation. The **Transgender Persons (Protection of Rights) Act, 2019** is the first Act that has been passed in the favour of transgenders after the 2014 judgement, although it has its drawbacks, one of which is there is no mention of provisions related to Marriage or adoption. There are various laws in India mentioning the right to marriage for men and women with limitations along with recognizing it a fundamental right under Article 21 in the case of **Lata Singh v. State of Uttar Pradesh**<sup>6</sup>, yet again it is only applicable for marriage between men and women who have attained their legal age for marriage. Marriage between same-sex or marriage of transgenders is not included under any law even after the supreme court declared their gender as recognized gender, granting them the same and equal fundamental rights as other genders. The issue of adoption also does not fall under constitutional right, it is only governed by personal laws under Hindu, Muslim, Parsis and Christians. The personal laws in India do not include any third gender for marriage or adoption.

The community of transgenders are usually considered to be poor as they are rejected by society and their families during their early childhood or whenever they disclose their identity. Through the new Act, all transgenders are given a reservation for employment<sup>7</sup>. However, tackling the mentality for the upliftment of society is essential especially in a traditional society like ours where the major decision taken by an individual is mostly influenced by the society. There have been various changes in the way society and laws recognizing transgenders in India, though granting them basic rights such as marriage, adoption, etc is a long way to go but depriving them of basic human rights is unacceptable and ultra vires in nature.

The paper henceforth has been divided into three main parts, the first part deals in adoption of transgender, the second with challenges faced by transgenders for adoption rights and the last part of the paper entails the conclusion where we have summarised our stance and have commented on the need of recognition of basic rights for the transgender community and

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<sup>6</sup> *Lata Singh v. State of Uttar Pradesh*, AIR 2006 SC 2522 .

<sup>7</sup> Legal Correspondent, Transgenders entitled to reservations under MBC quota, government tells HC, The Hindu, (June 15, 2019, 01:30 IST), <https://www.thehindu.com/news/national/tamil-nadu/transgenders-entitled-to-reservations-under-mbc-quota-govt-tells-hc/article27944656.ece>.

implementation of stronger statutes.

## II. TRANSGENDER AS PER SCIENCE, SOCIETY, LAW & HISTORY

To understand who transgenders are, we first need to understand the difference between a few key concepts which are at times used interchangeably. Sex and gender are two different things and are required to be understood first to get a transparent understanding of transgenders. A widely used definition quoted from a pamphlet published by the American Psychological Association is:

*“Sex is assigned at birth, refers to one’s biological status either male or female, and is associated primarily with physical attributes like chromosomes, hormone prevalence, and external and internal anatomy. Gender refers to the socially established roles, behaviours, activities, and attributes that a given society considers appropriate for boys and men or girls and ladies. These influence the ways with which people act, interact, and feel about themselves. While aspects of biological sex are similar across different cultures, aspects of gender may differ.”*<sup>8</sup>

This definition points to the apparent undeniable fact that there are social norms for men and women, norms that change across different cultures which aren't simply determined by biology. But it goes further in holding that gender is whole “socially constructed” – that's detached from biological sex.<sup>9</sup> Anthropologist Gayle Rubin writing in 1975 states “Gender may be a socially imposed division of the sexes. it's a product of the social relations of sexuality.”<sup>10</sup> She means to postulate that if it weren't for the social impositions of roles, males and females would still exist but not ‘men and women’. Furthermore, Rubin argues, if traditional gender roles are socially constructed, then they can even be deconstructed, and that we can eliminate “obligatory sexualities and sex roles” and make “an androgynous and genderless (though not sexless) society, within which one’s sexual anatomy is irrelevant to who one is, what one does, and with whom one makes love.”<sup>11</sup> Now, legally, in India, abiding the Transgender Persons (Protection of Rights) Bill that was passed in 2018, transgenders are defined under section 2(k). Section 2(k) states the following: “transgender person” means an individual whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone

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<sup>8</sup> CLGBTC, Answers to Your Questions About Transgender People, Gender Identity and Gender Expression, American Psychological Association,(pamphlet), (2014), <http://www.apa.org/topics/lgbt/transgender.pdf>.

<sup>9</sup> The New Atlantis, No. 50, Special Report: Sexuality and Gender (Fall 2016), pp. 10 143.

<sup>10</sup> Gayle Rubin, *The Traffic in Women: Notes on the Political Economy of Sex, in Toward an Anthropology of Women*, ed. Rayna R. Reiter, New York and London: Monthly Review Press, 1975.

<sup>11</sup> Ibid.

therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.”<sup>12</sup>

From reading and analyzing the article ‘Exclusion as Language and the Language of Exclusion: Tracing Regimes of Gender through Linguistic Representations of the "Eunuch"’ written by Shane Gannon<sup>13</sup>, I have come to the understanding that in India, historically, there were various gender identities which existed and were accepted. Each type had a really specific name but during translation of our ancient and historical texts to English, the intricacies were lost and a universal term “eunuch” was given and used. This term did not come close to explaining all the different gender identities one of which was transgenderism. Historically, transgenders were also defined as people who were abnormal and had certain mental issues<sup>14</sup>. So, society, to a great extent still may believe this even though they wish to change this because it has been drilled into the subconscious of the societal morals or definitions through history that what is not understood by most is abnormal. So, to understand the complexities and intricacies of the term transgender, we need to understand a host of different concepts and have a proper understanding of these to come to the real meaning of transgenderism. To conclude, Transgender means anyone whose gender identity, expression or behaviour differs from the sexual identity they were assigned at birth which may be so naturally or by choice.

### III. TRANSGENDER RIGHT TO ADOPTION

Transgender people have a gender identity or gender expression that differs from the sex that they were assigned at birth, which is now legally recognised as the third gender by the supreme court in the case of **National Legal Service Authority v/s Union of India**<sup>15</sup>, Further, the Court directed *central and state governments to grant legal recognition to transgender persons, address social stigma and discrimination faced by them, and provide social welfare schemes for them*. The recognition and acceptance of transgenders in Indian society have taken more time than it should have taken, especially when our Indian Constitution states non-discrimination on the ground of religion, race, caste, sex or place of birth under article 15, which is guaranteed to every citizen of India. The government of Madhya Pradesh is granting trans their rights which were their very own from the very beginning. The social justice department of the MP government will ensure societal change with the implementation of

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<sup>12</sup> The Transgender Persons (Protection of Rights) Bill, 2018.

<sup>13</sup> Shane Gannon, Exclusion as Language and the Language of Exclusion: Tracing Regimes of Gender through Linguistic Representations of the “Eunuch”, *Journal of the history of sexuality*, Vol. 20, No. 1 (Jan, 2011), [https://www.jstor.org/stable/40986353?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/40986353?seq=1#metadata_info_tab_contents).

<sup>14</sup> Transgender no longer recognised as 'disorder' by WHO, BCC News, (May 29, 2019) <https://www.bbc.com/news/health-48448804>.

<sup>15</sup> National Legal Services Authority vs. Union of India [(2014) 5 SCC 438.

Transgender Persons (Protection of Rights) Rules, 2020, introduced by the Centre in July 2020<sup>16</sup>. Although merely establishing the presence of transgender community is not enough, systematic implementation of those rights is also required otherwise the law is not equal for all and it is not administered equally without any distinction based on gender or sexual orientation. No adoption rights for Transgender's in India is one such issue that raises the question of whether the rights granted by our constitution applied justly.

The Transgender Persons (Protection of Rights) Act, 2019 grants the right to self-perceived gender identity and prohibits discrimination against them in education, housing, healthcare services and employment. However, the trans community in India started protesting against the bill stating that already vulnerable community is now being subject to bureaucratic layers and red-tapeism by the government as recognising oneself as transgender will require a certificate from the district magistrate violating their right to dignity and to recognise oneself as female or male will require them to go our surgery is, such provisions are not only violative of supreme court judgement but also an international standard for legal gender recognition<sup>17</sup>. In the case of **Christine Goodwin v. the United Kingdom**<sup>18</sup>, the court held "Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender reassignment, the Court concludes that the notion of fair balance inherent in the Convention now tilts decisively in favour of the applicant", making it clear that there should be social acceptance of transsexuals and legal recognition for post-operative transsexuals as the basic right. Even the adoption of online forms do not have a third option, other than male and female, the law of India does not allow minorities to legally adopt children says Vijayaraja Mallika, the transwoman poet.<sup>19</sup>

Non Recognition of same-sex marriages (Indian Special Marriages Act, 1954), availability of adoption, surrogacy, IVF is violative of Article 14, 15, 19, 21, 29. The Surrogacy ( Regulation) Bill, 2019 prevents single parents, same-sex couples, divorced or widowed persons, transgender persons, live-in partners and foreign nationals from using a surrogate mother<sup>20</sup>. The bill is restricted to married heterosexual couples and this difference of treatment is

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<sup>16</sup> Shweta Sengar, *Transgenders Will Now Get A Right To Parental Property & Child Adoption In Madhya Pradesh*, The Indiatimes, (Nov 05, 2020, 17:55 IST) <https://www.indiatimes.com/news/india/transgenders-will-get-a-right-to-parental-property-child-adoption-in-madhya-pradesh-526923.html>

<sup>17</sup> Sushmita Pathak, *India Just Passed A transgender Rights bill*, NPR, (Dec 4, 2019, 11:42 AM ET)<https://www.npr.org/sections/goatsandsoda/2019/12/04/784398783/india-just-passed-a-trans-rights-bill-why-are-trans-activists-protesting-it>.

<sup>18</sup> *Christine Goodwin v. the United Kingdom* (application no. 28957/95), July 11, 2002.

<sup>19</sup> Mini Muringatheri, *Transgenders raise the adoption question*, The Hindu, (Jan 04, 2020, 23:33 IST) <https://www.thehindu.com/news/national/kerala/transgenders-raise-the-adoption-question/article30481170.ece>.

<sup>20</sup> The surrogacy ( Regulation) Bill, 2019.

discriminatory if it has no objective and reasonable justification for the same, as in the present case. **Belgian Linguistic case**<sup>21</sup>, is one of the first ever judgments that determined the scope of non-discrimination, the European court established an analytical scheme for determining if prohibited discrimination has occurred, the same interpretation was applied to cases concerning Articles 8 (right to respect for private and family life) and 11 (freedom of assembly and association).

The Supreme Court in **Vidhyadhari v Sukhrana Bai**<sup>22</sup> passed a landmark judgement wherein the Court granted inheritance to the children born from the live-in relationship in question and ascribed them the status of “legal heirs”. Therefore, denying surrogacy to single parents, homosexuals, transgenders – the government is denying them their rights, making it a regressive or limited view of what a family is as well as denying them rights within the ambit of Article 21.

#### IV. IRRATIONAL ASSUMPTIONS CAUSING HINDRANCE IN ADOPTION RIGHTS

A report by SOS Children’s Villages shows that India is a home for 20 million orphans which is projected to increase by 2021<sup>23</sup>. The report of CARA shows that in 2017-2018, 2018-2019 2019-2020 only 3276, 3374 and 3351 respectively adopted in country and 651, 653 and 394 inter-country adoptions took place<sup>24</sup>. These numbers are very less as compared to the total number of orphans living under poor conditions in orphanages. Giving adoption rights to Transgenders and same-sex couples will bring social benefits, more children will be deemed to be adopted as the surrogacy bill does not allow them to have a biological child through surrogate mothers.

Despite such stats, the most basic right to adopt children is not granted to transgenders. It shall be noticed that the Principe of best interest shall be the primary consideration in actions concerning children<sup>25</sup>. It is being violated as the children require love, understanding and guidance of parents rather than living in orphanages where the conditions of infrastructure are deteriorating. Many times the children are subject to mental, emotional and sexual abuse as well<sup>26</sup>. Despite enjoying charity and kindness in public’s heart, the orphanage fails to provide the warmth and love to the children which they need for their right growth and development

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<sup>21</sup> Belgian Linguistic case (No. 2) (1968) 1 EHRR 252.

<sup>22</sup> Vidhyadhari v Sukhrana Bai, AIR 2008 SC 1420.

<sup>23</sup> SOS Children’s Villages, <https://www.soschildrensvillages.ca/india>.

<sup>24</sup> Central Adoption Resources Authority, [http://cara.nic.in/resource/adoption\\_Statistics.html](http://cara.nic.in/resource/adoption_Statistics.html).

<sup>25</sup> The Juvenile Justice Act, 2015 § Section 2(9), No. 99-C, Acts of Parliament, 2015 (India).

<sup>26</sup> *How India’s Children are Mistreated at Orphanages*, Save the Children, (Apr. 24, 2021, 9:29 IST) (<https://www.savethechildren.in/child-protection/how-indias-children-are-mistreated-at-orphanages/>).

whereas the experts have stated that homosexual couples are the right fit for the adoption of children, those children are likely to experience less psychological disorders. Opposed to such a view, people have two views first that it is often stated that children residing with transgenders or homosexual couples are likely to experience the gender-identity disorder. This raises a question of concern that transgenders who were born where both parents were cisgender did not face gender disorder then why is it presumed that cisgender kids will face gender identity issues if they reside with trans parents?

The second view is that People believe that children must know the value and should be brought up by both the parents, mother and father, thus they keep those orphan children under bad conditions rather than giving them for adoption to same-sex couple or transgender. Malti, who runs an adoption agency in Bengaluru stated that according to her '*a child shall not be given to an inferior family, and we prefer to place them in a wonderful family, A family that is physically, mentally, and financially healthy*'.<sup>27</sup>

According to the qualifications of CARA, transgenders and same-sex couples do not pass it as they have not been given any marital status along with not having any third option other than male and female, which in itself prevents them from adopting children<sup>28</sup>. The law supports abandoning children rather than giving them for adoptions to transgenders or same-sex couples, disrupting the structure of family. It is also believed by many that although marriage and inheritance can be continue filing in the court but adoption is one such areas that is also governed by anti-trafficking laws, in many cases even heterosexual couples find it challenging<sup>29</sup>. However, marriage, adoption and inheritance are inter connect and are fundamental to any human being irrespective of sex or gender.

## V. REASONS FOR GRANTING RIGHT TO ADOPTION

Transgender Activist like Gauri Sawant in order to legalize adoption filed the first PIL to supreme court as transgender<sup>30</sup>. Furthermore, the case filed by Tushar Nayyar in supreme court to grant of civil rights to the members of the LGBTQ (lesbian, gay, bisexual, transgender,

<sup>27</sup> Prashasti Awasthi Awasthi, India's Adoption Policy Discriminative Against LGBTQIA+, 20 Million Kids Remain Without Family, The Logical India, (Nov 10, 2019, 12:00 PM) <https://thelogicalindian.com/exclusive/adoption-policy-discriminative-against-lgbtqia/?infinitescroll=1>.

<sup>28</sup> Central Adoption Resource Authority, Ministry of Women & Child Development, Government of India, [http://cara.nic.in/Parents/eg\\_ri.html](http://cara.nic.in/Parents/eg_ri.html).

<sup>29</sup> Shaswati Das, *History Verdict holds hope for same-sex marriages*, adoption, LiveMint, ( Sep, 07, 2018, 01:56 pm IST), <https://www.livemint.com/Politics/fEiZSRM7ng7Ja4ssTyfl8J/Historic-verdict-holds-hope-for-samesex-marriages-adoption.html>.

<sup>30</sup> Soumya Mathew, *How two mothers came to embrace and accept LGBTQI*, The Indian Express, (Aug, 06, 2017, 08:05 PM IST), <https://indianexpress.com/article/lifestyle/life-style/gauri-sawant-mothers-day-lgbtq-4650587/>.

transsexual, queer) community such as marriage, adoption, surrogacy was rejected by a three-judge bench headed by Justice N V Ramana, but a five-judge constitution bench headed by the then Chief Justice Dipak Misra had already dealt with the batch of petitions on homosexuality. However, the court missed out to recognize that **Navtej Singh Johar v/s Union of India**<sup>31</sup> did not address direct and indirect discrimination faced by trans community.

(A) The golden thread that runs through the equality scheme of the Indian constitution (Articles 14,15,16, 19 and 21) is ‘enjoyment of life by all citizens and an equal opportunity to grow as human beings irrespective of their race, caste, religion, community, social status and gender. One such tenet of equality is self-determination which is now granted by our constitution to transgender community. However, their basic rights are still not in accordance with Human Rights Watch. Prohibition on Same-sex marriage and adoption violates their following rights

1. **Article 14 of The Indian Constitution** - Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth<sup>32</sup>.
2. **Article 15 of The Indian Constitution** - Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth
  - (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them
  - (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to
    - (a) access to shops, public restaurants, hotels and palaces of public entertainment; or
    - (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public
  - (3) Nothing in this article shall prevent the State from making any special provision for women and children
  - (4) Nothing in this article or in clause ( 2 ) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes<sup>33</sup>.

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<sup>31</sup> Navtej Singh Johar v/s Union of India, AIR 2018 SC 4321.

<sup>32</sup> INDIAN CONST. art. 14.

<sup>33</sup> INDIAN CONST. art. 21.

**3. Article 21 of The Indian Constitution** - Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

**4. Article 16 of Universal Declaration of Human Rights** - It states that :-

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

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

c) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State<sup>34</sup>.

This article is applicable on transgenders as there is a reasonable difference between one's sexual orientation and gender orientation therefore, the transgenders who perceive themselves as women, shall be referred to as women and transgenders who perceive themselves as men shall be referred as men with or without going through the surgery, solely on the basis of self-determination and personal liberty.

**5. Article 3 of Convention on the Rights of the Child** -

a. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

b. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

c. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.<sup>35</sup>

It is clearly stated under Universal Declaration of Human Rights that family is a fundamental group of society which should be protected by the state for its growth and well-being of all

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<sup>34</sup> INDIAN CONST. art. 16.

<sup>35</sup> UN Rights of Child. art. 3.

members. Therefore refusal to provide right to adoption will violate equality and nondiscrimination rights, the right to protection of the organizations as well as the development of the family as stated by the supreme court of Mexico in May 2019.

(B) Legal experts have urged the Government to pass legislation reflecting the decision, and frame laws to allow same-sex marriage, adoption and inheritance rights for LGBTQ couples. The decision of adoption should serve the interest of children in all ways, that are being adopted as mentioned under **STEC v United Kingdom**<sup>36</sup>. Even in **A & B-v-Director of Child and Family Services**, “*A difference of treatment is ... discriminatory if it has no objective and reasonable justification: in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.*”<sup>37</sup>”

In general terms, an irrational assumption that heterosexual couples are more suitable to adopt children and give an healthy environment than transgenders or homosexual couples. Such an irrebuttable presumption has defined our laws for LGBTQ community in India. The discrimination should be on rational basis, in cases of adoption rights of transgenders it is straightforward based on unreasonable generalization that is turned into an irrefutable presumption for individual cases in India. The relationship between the child who is given for adoption and the parents shall be the reasonable differentiation for treatment. As the best interest of the child shall remain the paramount consideration. Article 39(f) of the constitution states the responsibility on the state to provide children opportunities and facilities to develop in healthy manner and in conditions of freedom and dignity, there it is the responsibility go Indian government to enact legislature allowing LGBTQ adoptions<sup>38</sup>.

Not granting adoption rights solely on the basis of sexual and gender orientation defeats the objective of constitution makers who entrusted our constitution with rights for all citizens of India, unfairly discriminates against the constitution on the basis of sexual orientation, marital status and right to dignity as also stated in **Du Toit and Another v Minister for Welfare and Population Development and Others**<sup>39</sup> in Brazil jurisdiction.

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<sup>36</sup> STEC v United Kingdom, AIR (2006) 43 EHRR 47.

<sup>37</sup> A & B-v-Director of Child and Family Services [2014] SC 11.

<sup>38</sup> INDIAN CONST. art.39(f).

<sup>39</sup> Du Toit and Another v Minister for Welfare and Population Development and Others, 2002 (10) BCLR 1006 (CC)

Considering that the law should be based upon children's best interest, these are the following pros and cons of the granting adoption rights to trans parents.

### 1. Pros

- The right of a child to have a family life, guardians or people who can take care of their wellbeing other than residing at an Orphanage.
- There is no difference between being adopted. Y heterosexual or homosexual parents. For that reason, sexual orientation of the parents has almost no relevance when it comes to raising a child.
- Evidence confirming that, despite the claims of those opposed to LGBT+ parenting, same-sex couples can provide good conditions to raise a child.
- Expanding sexual diversity through legal and social advancement.
- Breaking paradigms to open vision to our social reality in order to guarantee rights of Individuals.
- Protection and developments of the family.
- In the case of **X, Y and Z v. the United Kingdom**<sup>40</sup>, held that X, who was female to male transsexual held has acted as a father in ever aspect of child's since birth therefore there is no violation of Article 8 of Right to respect for private and family life of the Convention.
- More children from orphanage will be adopted there it will not just ensure rights for transgenders but will allow many transgenders to get adopted.

### 2. Cons

- Experts have observed that the transgender community faces ostracization, unemployment and homelessness, which will cause hindrance in well being of the child.
- Many adoption agencies are faith-based - it may go against their religion to support LGBTQ+ parents.
- A few individuals also believe that children require both Mom and Dad rather than both of one or the other, or neither (nonbinary), which one gender cannot teach them
- Children are more likely to experience gender and sexual disorders.

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<sup>40</sup> X, Y and Z v. the United Kingdom, no. 21830/93, 22 April 1997.

- Child will be affected as trans couples are still not accepted and respected in the traditional Indian society, which will affect its happiness.

### **(C) Granting equal rights to Transgenders**

The Transgender Persons (Protection of Rights) Act, 2019 has protected transgenders right to self-determination, Non-discrimination in employment, right to residence, Education facilities, vocational training and self-employment and healthcare facilities under Section 4, Section 9, Section 12, Section 13, Section 14 and Section 15 respectively<sup>41</sup>. Just as any other cisgenders or heterosexual couples right in India, the government taken a step protect basic rights of transgender to support them with education facilities, residence and self-employment skills. These provisions access trans community to have a bare minimum to uplift social and economic backwardness, to support and adopt a child, can use these provisions for self-development, which would make them accountable for child care.

Equal rights of successor and inheritance must be granted to transgender. The Indian Succession Act, 1925 is applicable to all Indian except muslims, however certain provisions are applicable to Non-Hindu citizens<sup>42</sup>. In the Act, there is no mention of third gender. Right to successor and inheritance falls under the ambit of right to life under Article 21. In the case of **National Legal Service Authority v. Union of India & Others**<sup>43</sup>, the court stated that they have the right to education, employment and inheritance of property. Therefore, it shall be their right to have a successor, which falls within the ambit of inheritance rights.

International Covenant on Civil and Political Rights in its Article 17 states that no one shall interfere with the transgender right to privacy, family, etc. and should be given right to protection of law against such interference<sup>44</sup>. Social acceptance and change of perspective towards transgenders plays a major role in granting equal rights to them. Merely enacting legislature without the social acceptance fails to fulfil the objective of the act, equal constitutional status can only be granted when transgenders are respected, protected, accepted by the society.

In the landmark judgement of NALSA V/S Union of India, the court stated that Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity shall be applied to Indian law, sexual and gender equality in increasing and gaining acceptance in the international law thus Indian law must also accept and implement

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<sup>41</sup> The Transgender Persons (Protection of Rights) Act, 2019.

<sup>42</sup> The Indian Succession Act, 1925.

<sup>43</sup> National Legal Service Authority v. Union of India, AIR 2014 SC 1863.

<sup>44</sup> International Covenant on Civil and Political Rights, art.17.

it.<sup>45</sup> Yogyakarta principles will act as an authoritative guidance to bring justice, fundamental rights and acceptance in the society.

## **VI. SECTION 24 OF YOGYAKARTA PRINCIPLES STATES**

The Right To found a Family - Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.

For the implementation, the state shall make legislative, administrative, and other measure to ensure adoption or assisted procreation. Such laws and policies will ensure social diversity without any discrimination on the basis of sexual or gender orientation, with other benefits such as employment, education, immigration for support.

## **VII. CONCLUSION**

In conclusion, as we can see, the laws in the country are of conflicting nature. The Transgenders have been given rights to be recognized officially as the Third Gender and the process for gender recognition is present. It has also been stated that transgender have the same fundamental rights as the other citizens of the country. Fundamental rights include the right to life and personal liberties which consists of a lot of rights, mentioned under Article 21 of the Constitution by our Supreme Court. However, there is no proper enforcement of these rights. This is because the various acts and statutes that we have in this case, regarding adoption are gender binary in nature and do not mention the third gender anywhere. Also, our courts have had a great problem in realising that gender identity and sexuality may be vastly different things, but these concepts are connected and interlinked with each other. The recent Transgender Persons Rights Bill that was passed in 2018 proves that the gravity and depth of the matter is not recognized and what the legislature has come up with is something that barely scratches the surface and only talks about things which can be enforced using Chapter III of our Constitution which deals with fundamental rights. It ignored the opportunity to actually dig deep and give and provide for rights which cannot be enforced directly by the fundamental rights chapter. The right to marriage is sensitive in nature, therefore, must solely be dealt by Indian judiciary and legislature. That could be the beginning of changing of mindsets of people as well as beginning of acceptance of the same. It is highly immoral for laws to exist without fulfilling the actual nature of its existence i.e providing justice and being fair to all its citizens. As Indian citizens, they must have the right to adoption and what better way to do that but by

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<sup>45</sup> Yogyakarta Principles, <https://www.refworld.org/pdfid/48244e602.pdf>.

providing for laws or amending the existing laws in such a manner as to accommodate transgenders as well. Victims of human rights violation have effective remedies and redress, even the ones concerned with sexual or gender orientation. The supreme court of India has delivered various judgements to grant trans community already their existing rights. As mentioned in the paper, there are many constitutional remedies available to fight against the injustice faced by Transgenders in 21st Century, however, the Indian courts and government must identify the flaw in our laws and society in order to provide right to life to LGBTQ community in India. Around 44+ countries throughout the world have removed the ban from right to adoption, with a several restrictions and conditions, in comparison to those developed countries, India is too far to appreciate and implement Right to Adoption for transgenders and LGBTQ community.

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