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Transgender Marriage in India: Balancing Act of Interpretation

SHAUNAK CHOUDHURY¹

ABSTRACT

This paper is a study on the marriage of transgender individuals in India. The research focused on incorporates both, the existing law on marriage in the country and foreign judgements that have given their ratio on the same matter. The Arunkumar case of the Madras High Court has been discussed, alongside the landmark cases in the US, New Zealand, the UK, Australia, and Hong Kong, in order to draw inferences and provide interpretative guidelines for determining the state of transgender marriage in the current legal regime in India. The paper treads into analysing the possibility of homosexual marriage in a very limited manner and primarily focuses on rubrics on which interpretation can be based off of.

Keywords: *Transgender, marriage, interpretation, Arunkumar case, foreign jurisprudence.*

I. INTRODUCTION

Through several years of human civilization, the multiplicities of cultures and religions that have come and gone and stayed, marriage is a concept that has largely been common among them. It comes in various forms and through evolving cultural practice and legal jurisprudence its details have changed, mostly for the better, but no greater challenge to the traditional norms of marriage has been put forth which is as revolutionary as gay and transgender marriage. The very core of what a marriage has been heterosexual² in nature with rigid ideas of who is a man and who is a woman, and to most, marriage is a union of a husband and wife.³ But definitions can change with perception. This paper concern's itself with a particular aspect of that perception. Transgender rights have recently become a hotly debated issue, which includes matters like public washrooms, sex change treatment (whether to be given by the state or no) etc. The issue that this paper is addresses is that of transgender marriage. If we are to consider the components of traditional marriage then perhaps transgender marriage would be closer to the norm than same sex marriage, so on a cultural and legal sense it is a good place to start

¹ Author is a student at SVKM's NMIMS Kirit. P. Mehta School of Law, India.

² Hyde v. Hyde and Woodmansee, (1886) L.R. 1 P&D 130; Sebastian Poulter, *The Definition of Marriage in English Law*, 42 MOD. LAW REV. 409 (1979).

³ *Marriage & Common Law Marriage*, BLACK'S LAW DICTIONARY (9th ed., 2009).

from if we wish to move towards homosexual marriage. This paper will be largely dealing with the binary form of gender and heterosexual form of marriage as the issue of freeing marriage from its traditional sex dyad is an entirely different issue that can be discussed in another paper. Moreover, the recent judgement of *Arunkumar v. Inspector General of Registration*⁴ has given way for a conversation incorporating the opinion of the judiciary.

The fastest route to solve this issue would be to add an amendment to the marriage laws and allow for same sex marriage, so the issue of dealing with interpretation for transgender marriage is erased entirely, this would be quite a facile solution to give through a research paper. It would indeed be the best option, qualified as “best” as it would allow more freedom to marry than restrict it, and would treat everyone equally. But considering the politics behind marriage and lackadaisical attitude of most governments regarding LGBT rights, it would be unrealistic to suggestion this best possible solution.

Which is why this paper takes a step by step approach with the existing legislation in the country along with the foreign jurisprudence that has developed over the years. This paper is a scholarly exercise on the interpretation of the law of marriage in India and it aims to provide an interpretation of the law that would be derived from the discussions had in foreign cases, along with considering Indian legislation.

After the introduction, the paper conducts a review of the literature (in Chapter 2.) on transgender persons in India and the existing research on transgender persons getting married. The gap in the literature is explained in Chapter 3. The main examination is contained in Chapter 4. where the paper analyses the *Arunkumar* case along with Indian marriage law and law on transgender persons. Foreign cases are then discussed to form a more exhaustive view of the matter for drawing inferences and providing suggestions in Chapter 5. The conclusion along with recommendations for further study are provided in Chapter 6.

(A) Significance

There are several stakeholders in this discussion who would benefit out of this research paper. The most obvious group who would benefit from this paper is the transgender community. This is primarily a fight for their rights and this paper has taken a step in the discussion about their right to marriage in a tempered manner so as to consider the rigidity of law and societal views. Seeing that transgender individuals do not always marry other transgender persons; this would also benefit their partners.

⁴ *Arunkumar v. Inspector General of Registration*, (2019) SCC OnLine Mad 8779.

From a policy state point the paper gives unique insight into the interpretation of law and the changes that not only the government can make but also the kinds of interpretation that the court can adopt before there is any conclusive legislation on the matter.

The paper is filling a gap in the literature on transgender marriage in India and is thus providing a stepping off point for scholars, researchers, and students to further analyse the issue, taking different perspectives.

(B) Review of Literature

Robson (2007) underscores the judgements that have considered the question of transgender marriage in the United State, taking in cases from the Federal and State level. The paper highlights the differences in the opinions of the courts within the country, differences largely caused due to the prevailing political beliefs, either conservative or liberal, in the state that the case was being fought in. The article also incorporates certain references to popular culture to determine whether the heterosexual hegemony on the concept of marriage has been affected at all. The author concludes that instead of adopting marriage, the LGBTQ community should develop a liberatory politic beyond marriage.⁵

Sharpe (2012). The Matrimonial Causes Act of 1973⁶ was amended by the Gender Recognition Act in 2004⁷ which required a transgender person to disclose their gender history to the person they were marrying. The article contends that such a law would violate the right to privacy of that transgender person, and by extension violate the European Convention on Human Rights⁸. The study also argues that such a condition on the trans-community would amount to a violation of the right to equality enshrined in the Convention since non-transgender individuals are not subject to same scrutiny.⁹

Larry (2018) illuminates the reader on the situation some transgender couples are in, who would have married before the *Obergefell v. Hodges*¹⁰ case (landmark gay marriage case in US). Even though the judgement allowed marriage between two persons regardless of their sex, the same was not applicable to the marriages that occurred before the judgement due to the principle against retrospective interpretation, certain marriages would be considered void.

⁵ Ruthann Robson, *A Mere Switch or a Fundamental Change? Theorizing Transgender Marriage*, 22 HYPATIA 58 (2007).

⁶ Matrimonial Causes Act, 1973, c. 18 (UK).

⁷ Gender Recognition Act, 2004, c. 7 (UK).

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Rome, 4.XI.1950.

⁹ Alex Sharpe, *Transgender Marriage and the Legal Obligation to Disclose Gender History*, 75 MOD. LAW. REV. 33 (2012).

¹⁰ *Obergefell v. Hodges*, 575 U.S. 644 (2015).

Marriages before the case done without updating the transgender person's legal identity in states that authorized such changes would be affected as a result.¹¹

Laha (2019) describes the plight of the transgender community in India from a socio-legal perspective, incorporating the progression of the laws pertaining to transgender persons and the treatment that they have received from society. Through statistical data the study lays down the educational and occupational condition of the community. After an analysis on the laws of the Asian countries, the paper critically analyses the Transgender Persons (Protection of Rights) Bill, 2019¹² (before it was passed by Parliament).¹³

Sawhney & Grover (2019). There are issues that the Transgender Bill (now an Act) was trying to solve, that the author analyses in this paper. The study examines the definition given by the Bill, and the provisions on healthcare, education, and employment. As the paper observes there are no provisions in law that solidify the marriage of transgender individuals, for which the Parliament need to legislate upon.¹⁴

Khanna (2021) studies the plight of intersex persons and marriage of transgender individuals in India. The author draws from Indian mythology and neuroscience to establish the history and scientific premise of what it means to be transgender. The author, in order to bring home the point of social change through law and marriage, directs attention to the progress made against casteism in India, progress that has been brought about by intercaste marriages. The paper comments on the *Arunkumar* judgement, hailing it as one of the rare cases where the NALSA judgment was applied in the correct manner.¹⁵

(C) Research Gap

The topic of transgender marriage has only been briefly addressed in the literature pertaining to India. Foreign papers on this topic are also not especially exhaustive on this subject due to its novelty in jurisprudence and recognition in society. This paper thus looks solely at the aspect of transgender marriage with an extent of detail hitherto not applied. The legislation on marriage and transgender rights has also never been adequately analysed to understand the potential in change of interpretation that may not only affect how transgender marriages are treated but also how gay or lesbian marriages can be comprehended, at least in the current legal

¹¹ Julian N. Larry, *The Transgender Marriage Dilemma*, 33 WIS. J. L. GENDER & SOC'Y 23 (2018).

¹² Transgender Persons (Protection of Rights) Bill, 2019, Central bill 169 of 2019 (2019).

¹³ Sangita Laha, *Journey From Marginal to Mainstream – The Woes of Transgender in India*, 11 RMLNLJ 18 (2019).

¹⁴ Abhimanini Sawhney & Sara Grover, *The Transgender Persons (Protection of Rights) Bill 2019 Divergent Interpretations and Subsequent Policy Implications*, 6 IJLPP 1 (2019).

¹⁵ Aastha Khanna, *From Gender Binary to Gender Spectrum: Recognition to Cis-Trans Marriage in India*, 2021 SCC OnLine Blog OpEd 30.

regime in India.

II. ANALYSIS

(A) The Marriage Case

*Arunkumar v. Inspector General of Registration*¹⁶ is a vital judgement in the Indian jurisprudence, pertaining to transgender rights and marriage, that has unfortunately not gotten the attention that it deserves. The case contains a simple challenge, which is answered by the court in consonance with the *National Legal Services Authority v. Union of India* case (The Landmark Transgender Case)¹⁷. A MtF (Male to female) transgender woman, by the name of Sreeja, wished to get married to a man by the name of Arunkumar. The Inspector General of Registration refused to register the marriage under the Tamil Nadu Registration of Marriages Rules, 2009¹⁸, because the bride, under the Hindu Marriage Act 1955¹⁹ needs to be a woman, and as per the registrar's office, Shreeja was not.

The Madurai Bench of the Madras Court did not agree with this assessment of the registrar office. There is one premise and one variable that is to be understood before determining whether a transgender woman can marry a man in the current legal regime of the country. The premise is that only a man and a woman can marry each other as per the Hindu Marriage Act, 1955. The focus through the judgement is put on the word "bride" since the variable here is Sreeja who is a transgender woman, or more specifically, an intersex person at birth who was assigned as female, but in her school records she is a male, whereas her Aadhar has "T" as her assigned gender, i.e. Third Gender.²⁰ This would mean that Sreeja would have the option to choose whether she identifies herself as a male or a female for the purposes of marriage. Through the judgement there are justifications for why a transgender woman should be considered as a bride under the HMA, but little is said about the premise that only a man and woman can get married to each other.

(B) Legislative Content and Intent in Marriage Laws of India

There are four legislations on marriage law that are exhaustive in nature and take the burden of regulating these affairs. These four are the Special Marriage Act 1954 (SMA)²¹, the Indian

¹⁶ Arunkumar, *supra* note 5.

¹⁷ National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (hereinafter NALSA)

¹⁸ Tamil Nadu Registration of Marriages Rules, 2009, R. 5(1), Tamil Nadu Government Gazette, Extraordinary, Part III Section 1(a).

¹⁹ The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (hereinafter HMA).

²⁰ Arunkumar, *supra* note 5 at ¶27.

²¹ The Special Marriage Act, 1954, No. 43, Acts of Parliament, 1954 (hereinafter SMA).

Christian Marriage Act 1872 (ICMA)²², the Hindu Marriage Act 1955 (HMA)²³, and the Parsi Marriage and Divorce Act, 1936 (PMDA)²⁴. The latter three are religious marriage laws whereas SMA is a secular marriage law that is not governed by any religious practice. The muslim law on marriage is mostly centred around custom that is given authority by the Shariat Act²⁵.

The out of the four written legislations on marriage, none of them in fact mention that a marriage can occur only between a man and woman, the definition of what a man is and what a woman is, has also not been provided in the legislation itself. What we can go by in the Acts is the condition for valid marriages as given in Section 4 of the SMA, Section 60 of the ICMA Section 5 of the HMA, and Section 3 of the PMDA. These give out the age of consent required to get marriage under the law, 21 being of males and 18 being for females. But other than that, there is no explicit mention of the same. The term “bride” was analysed in the *Arunkumar* case²⁶ because it occurs in S.5 of the HMA, giving the age at which, the bride can get married; “the bridegroom has completed the age of twenty one years and the bride the age of eighteen years at the time of the marriage”²⁷. In HMA there are other places where the genders are mentioned separately but the reading of such sections, say the one for restitution of conjugal rights, can be done in a way that would be removed from the basic premise of only men and women being able to marry each other.

When **either the husband or the wife** has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.²⁸

The same reading can be done throughout the HMA, which can lead a person to believe that the premise does not exist in the legislation if it were not for Section 7 of the Act which is pertaining to the solemnization of the marriage through customs like saptapadi where the bride and bridegroom would have to take 7 rounds around the sacred fire. This includes other customs that are specified in the act itself, but the point is that if the custom itself is laying down the premise, the Act is quite helpless to oppose that.

²² The Indian Christian Marriage Act, 1872, No. 15, Acts of Parliament, 1872 (hereinafter ICMA).

²³ HMA, *supra* note 20

²⁴ The Parsi Marriage and Divorce Act, 1936, No. 3, Acts of Parliament, 1936 (hereinafter PMDA).

²⁵ The Muslim Personal Law (Shariat) Application Act, 1937, No. 26, Acts of Parliament, 1937.

²⁶ *Arunkumar*, *supra* note 5 at ¶3.

²⁷ HMA, *supra* note 20 at §5(iii).

²⁸ HMA, *supra* note 20 at §9 (gay couples having two husbands and lesbian couples having two wives)

The ICMA goes to the extent of laying down the words that would have to be spoken by either husband or wife in S.60; “I call upon these persons here present to witness that. 1, A. B., in the presence of Almighty God, and in the name of our Lord Jesus Christ, do take thee, C. D., to be my lawful wedded wife [or husband]” or words to the like effect”. These words can be said to a transgender person or even be said by a gay or lesbian couple if it were not for the customs that back the legislation. And perhaps in the future the Christian faith in India would also solemnize gay marriages as is done in some western countries, but that is not the subject matter of this paper.

The burden of custom is on the religious laws, customs that may or may not recognise gender identity and may go by traditionalist views on who is a bride and who is a bridegroom. But other than the customs in the religions, we must give some credence to the legislative intent and the reading of the statutes as a whole²⁹. The legislation in its initial form was certainly not meant to be looked at as giving way to marriage between anyone but heterosexual couples. Even if we were to look at SMA, which is a secular law that does not incorporate any customs, this roadblock in a more liberal interpretation would still exist. Taking other legislations of succession and adoption into the picture we would get clearer idea of the fact that what the government means to say is that same sex marriage is not an option. But we aren't really having a conversation about same sex marriage.

The purpose of this discussion was to elucidate upon the idea of interpreting the legislation currently at work in a manner that would suit transgender individuals. The question is why this kind of interpretation would actually matter, since the *Arunkumar case* has vindicated the community at least in the state of Tamil Nadu in the eyes of the HMA. The answer to that is the elusive Transgender Persons (Protection of Rights) Act, 2019³⁰.

(C) The Transgender Act and Marriage

Although the *Arunkumar case* has allowed transgender men and women to get married under the HMA, it has allowed it on the basis interpretation of the word “bride”, there is no mention of the Transgender Persons (Protection of Rights) Act, 2019 because the case was decided on the 22nd of April 2019 whereas the Act was given the President's assent on 5th December 2019, being effective from the 10th of January 2020.³¹ There was no consequence of the legislation on the case hence the status quo is not the same as the conditions prevailing at the time of

²⁹ N.S. BINDRA, INTERPRETATION OF STATUTES, 502 (Amita Dhanda eds., 11th ed. 2014).

³⁰ Transgender Persons (Protection of Rights) Act, 2019, No. 40, Acts of Parliament, 2019 (hereinafter TPA).

³¹ Notification dated 10th January 2020, No. S.O. 135 (E). Gazette of India, Extraordinary, Part II Sec. 2(ii) (2020).

Arunkumar.

A change in official gender identity is now regulated by the government through the Act, more specifically through Chapter III³². Gender identification will have to be put through the bureaucracy of the system, a district magistrate providing a certificate along with a complete change in all official documentation of the individual.³³ Without doing the same, the fate of a transgender individual with respect to all aspects of the Act itself, along with marriage is uncertain. The NALSA judgement allowed the self-identification of gender, as it is seen as a part of one's fundamental rights to do so, without it precluding oneself from enjoying rights that others do.³⁴ The Act allows it but only through the regulated process in Chapter III, a process that everyone may not be aware of or be able to practically avail, and thusly even though the transgender man or woman can self-identify for society and themselves, officially and legally speaking the jury is still out to decide on the matter.

Which is why in the previous section of the analysis, focus was drawn towards an interpretation of the statutes that would benefit transgender persons that have not actually gone through Chapter III. SMA can perhaps be a saving grace if interpreted in a manner that would be devoid of the premise of heterosexuality of marriage. It is free from custom but even still can be weighed down by circumstances under which it was passed in parliament and the main reasons as to why it was done (a secular law for inter-caste and inter-faith marriages).

(D) The Foreign Law

Undoubtedly other countries are several leagues ahead of India in terms of legislation and judgements when it comes to transgender rights and transgender marriage. The debate in other common law countries has been far more extensive than just one landmark case law, there have been different rubrics, definitions and issues that have been discussed.

When discussing the prospects of allowing transgender marriage, the first question that the law must answer is whether a transgender woman or man would be considered a woman or man under the legal sense of the terms. This question has been answered in the *Arunkumar* case in the affirmative but there has been much debate in other countries on this matter.

Corbett v. Corbett (1970)³⁵ is a crucial and one of the earlier cases in English jurisprudence

³² Recognition of Identity of Transgender Persons.

³³ TPA, *supra* note 31 at §6.

³⁴ NALSA, *supra* note 18 at 492 ¶82.

³⁵ *Corbett v Corbett*, [1970] 2 All ER 33, the case was about a marriage nullity proceeding where the husband was claiming that the marriage was null and void since his wife was a male at the time of their marriage. The husband, Arthur Ashford was aware about the fact that April Ashley, the wife, used to be a man and had undergone sex reassignment surgery. He knew this well before the marriage. He himself was a cross-dresser and had been

that decided upon this matter. The judge, after considering the expert opinions of doctors and researchers adjudicated that there are four rubrics to determine whether someone is male or female;

- i) Chromosomal factors
- ii) Gonadal Factors
- iii) Genital Factors
- iv) Psychological Factors

Additional rubric being hormonal and secondary sexual characteristics.³⁶ Marriage was seen as a matter pertaining to sex and not gender³⁷ and in determining the sex of the transgender person in question, the judge said that she is not a biological woman hence is incapable of consummation as an artificial vaginal cavity would not constitute consummation for the purposes of the law. This was later affirmed by the Queen's Bench in *R. v. Tan*.³⁸

*MT v. JT*³⁹ was a case in the Superior Court of New Jersey, Appellate Division that gave a different answer to the question of transgender marriages. The rubrics that were used in the *Corbett* case were not seen to be appropriate for marriage. The case was similar to *Corbett* as it also involved a MtF transgender individual getting married and seeking maintenance. Since the plaintiff had undergone SRS (sex reassignment surgery) and had become "physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy",⁴⁰ her marriage to the defendant would be considered valid and the defendant would be liable to pay her the marital maintenance.

In the High Court of New Zealand, *Attorney General v. Family Court at Otahuhu*⁴¹, decided that the *Corbett* classification for who is male and female is far too restrictive and does not particularly look into any other possibilities of how a marriage can be determined. The Court held that if anatomy of the couples is resembling that of a male and a female, then the marriage would be valid. Sexual intercourse in the ordinary sense is not the only way of sexually expressing oneself to another thusly consummation in the traditional sense was disregarded as a necessity. Sex is not the end all be all of marriage as the mutual society of the

intimate with other men. He had also claimed that the marriage had not been consummated. Justice Ormrod as per the rubrics said that April was not a woman for the purposes of understanding marriage.

³⁶ Ibid at 44.

³⁷ Ibid at 49, which is perhaps why the judgement throughout used "she" for referring to April in the third person. Even though for the purposes of the law and marriage the decision did not consider April as a woman but to refer to her as a person, the judge used her preferred pronoun.

³⁸ *R. v. Tan*, [1983] QBR 1053

³⁹ *MT v. JT*, 140 N.J. Super. 77 (1976, Superior Court of New Jersey).

⁴⁰ Ibid at 89, 90.

⁴¹ *Attorney General v. Family Court at Otahuhu*, [1995] 1 NZLR 603 (1994 High Court of New Zealand).

spouses is perhaps the most important aspect of a healthy relationship. Moreover, if transgender persons were not allowed to marry persons who are of the opposite sex to their reassigned sex, the only persons they would be able to marry are those of the same sex, inadvertently allowing same sex marriages.

In Australia, the situation in *In Re Kevin*⁴² was such that a MtF individual was questioned. In this case Kevin had undergone hormone therapy and had some surgery done, but had not gotten a phalloplasty⁴³, meaning that anatomically Kevin still resembled a woman and not a man. But he was socially recognised as a man and through his psychiatric examination it was clear that he was a right minded male individual. He was mentally a male who was married to a biological female. He also fathered a child through an IVF program with his wife. The court viewed the marriage to be valid as one's sex is not determined only through their physical characteristics but also their life experience, self-perception, upbringing, psychological and surgical circumstances, and treatment by society. Looking at all these factors, the court deemed Kevin to be a man eligible to marry a biological woman.

The above two judgements in New Zealand and Australia had then gone on to influence a decision in the European Court of Human Rights in *Christine Goodwin v. United Kingdom*.⁴⁴ The court found that the treatment of the plaintiff was in violation of Article 8 and 12, i.e. violation of right to respect for private and family life and right to marry and to found a family, respectively. With a change in science and society, *Corbett v. Corbett*'s decision was no longer viable and that a restriction on the marriage of transgender persons would amount to a violation of basic human rights. This would essentially overturn *Corbett v. Corbett*.

In Hong Kong, the situation has been dealt differently. In *W. v. Registrar of Marriages*⁴⁵, the Court of Final Appeal overturned the verdict given in the Hong Kong Court of First Instance that had not allowed the petitioner to get married to her boyfriend. The Court of Final Appeal pointed out the apparent inadequacies in the way that *Corbett* had looked at the concept of sex and marriage and instead followed the path of *Goodwin*, *Bellinger v. Bellinger*⁴⁶, and *In re Kevin*. The way that this case handled the final verdict differently was that the judgement

⁴² In re Kevin, [2001] FamCA 1074 (Family Court Australia).

⁴³ Surgical construction of a penis.

⁴⁴ *Christine Goodwin v. United Kingdom*, App. No. 28957/95 (2002, European Court of Human Rights, Grand Chamber).

⁴⁵ *W. v. Registrar of Marriage*, [2013] HKCFA 39.

⁴⁶ *Bellinger v. Bellinger*, [2009] AC 287; Sharon Cowan, "That Woman Is a Woman!" *the Case of Bellinger v. Bellinger and the Mysterious (Dis) appearance of Sex: Bellinger v. Bellinger* [2003] 2 All ER 593; [2003] FCR 1; [2003] 2 WLR 1174; [2003] UKHL 21, 12 Feminist Legal Studies 79 (2004) (where the House of Lords for the first time exercised powers to make a declaration of incompatibility under S. of the Human Rights Act 1998 after the Goodwin case).

put a stay on the marriage of the petitioner and her boyfriend in order for the government to first amend the law and allow transgender persons to marry, and then let the couple marry. (E)

(E) Inferences from Foreign Judgements for India

As mentioned before the discussion on transgender marriage has been based on different rubrics that the courts have used to determine who can marry and who cannot. Three distinct levels of rubrics appear after we peruse through the above mentioned cases. These three being biological, anatomical, and societal and psychological. The cases have also been prudent with their interpretations in order to not step into the realm of legislating the law itself. They have kept away from legalising same sex marriage, as it has been considered a matter to be legislated by the law makers, but through the power of interpretation the courts have determined who is a man or woman in order to give the right to marry.

There is no judgement in India that has analysed these categories after the passing of the Transgender Act in 2019. If we are to look at each of these rubrics to understand what kind of interpretation we can make of the existing law, then depending on the rubric, the right to marry for a transgender person will change. And with the existence of the Transgender Act, we can say that the intent of the legislatures identifies the existence of the trans-community hence allowing the interpretative powers of the courts to incorporate this aspect.

If we go by the biological standard set up by *Corbett*, then certainly there would be no scope for any transgender person to get married as the determination for the answer is based on chromosomes, which cannot be changed. It is the most rigorous definition of what the sexes are, which does not allow any to be seen as anything other than the sex determined by their chromosomes (XX for females and XY for males). Even after SRS, the transitioned transgender person would not be allowed to marry the opposite sex, instead would be compelled to marry someone of the same sex as theirs, who they might not be sexually attracted to. This issue was pointed out in *Attorney General*. Anatomically similar individuals would be allowed to get married which would in practicality lead to same sex marriage, which is a matter largely left to be legislated by the government as per the above judgements.

When we come to anatomy being the standard then the Transgender Act can create two categories of transgender persons. One who have not undergone SRS but have a certificate granted to them by the District Magistrate, and the other who gone through SRS. The anatomical status of the transgender respondent Shreeja, in the *Arunkumar* case is not mentioned so the case itself does not concern itself with such a private aspect of the respondent's life. None the less if the courts decide to take this route, then only transgender

persons who have gone through SRS would be eligible to get married. This is a rather discriminatory choice against those who have not gone through SRS, which happens to be a complicated and painful surgery that has high risk attached to it.⁴⁷ Even though the Act provides that the Government will facilitate SRS and hormonal therapy to transgender individuals, inadvertently forcing them to go through SRS in order to get married would be extremely regressive.

If we go by the rubric of psychological treatment then that would incorporate all transgender individuals. But one thing to consider here is that, in the *In re Kevin* case where this principle was applied, the petitioner had undergone some surgery and had also gone through hormonal treatment. One cannot say then that those who have undergone some medical procedure to align their gender and sex, and those who have not, are similarly positioned.

Through this brief analysis we find ourselves with four categories of persons who need to be addressed by the courts or the government through legislation. These four categories are –

1. Persons who have fully transitioned to their desired gender through psychiatric and hormonal therapy along with SRS.
2. Persons who have not gone through SRS but have had some surgery done to align secondary sexual characteristics, or gone through hormonal treatment, or both.
3. Those who have not gone through any surgery or hormonal treatment.
4. Those identifying in a third gender, not as female or male.

These four categories can further be divided into those with a certificate as per section 5 and 6 of the Transgender Act (without SRS) or Section 7 of the Act (with SRS).

III. SUGGESTIONS

After identifying the rubrics for determining gender for marriage and the categories of persons in the transgender community on the basis of their journey towards alignment of gender and sex, there are some suggestions that the paper would give to fill this gap in the legislation.

The reason why it is important to consider gender and sex is that at the moment the law does not recognise same sex marriages. From the section in this paper discussing the Indian legislations and their apparent gap in specifying the marriage in between a man and woman we see that there can be a very liberal interpretation of the SMA to provide for same sex marriage but the same would be stretching the power of interpretations too far. Moreover, the paper

⁴⁷ Cecilia Dhejne et al., Long-term follow-up of transsexual persons undergoing sex reassignment surgery: cohort study in Sweden, 6 PLoS one e16885 (increased mortality, suicide rates and psychiatric morbidity after SRS)

recognises the existence of the *Arunkumar* case, but the judgement has not encapsulated all possible circumstances that can occur and has not provided any definitive rule to follow. It is also a case of a High Court which is not authoritative in other states, leaving the possibility of different interpretations of the law.

The paper can suggest legislation to enable same sex marriage but the law on that has not been discussed in this paper nor has there been any relevant legislation for gays and lesbians in India. The Transgender Act has been created and thus the suggestions will focus on the marriage as a matter between two different sexes. Moreover, there are some portions of the Transgender Act, like the provisions for identification that may seem regressive and violation of the right to privacy, one can suggest removing them, but since this paper has not dealt with that issue it wouldn't be prudent to suggest an omission in the law.

To consider the transgender community as a whole for marriage would be ignorant of the personal changes that each member of that community has undertaken for themselves to move towards their gender identity. But at the same time to discriminate among the members based on whether they have had SRS or no would mean to inadvertently force people into going through SRS if they want to get married. At the same time, we must consider the issue of not treading into same sex marriage. The path of interpretation taken by the Australian court in *In re Kevin* is perhaps the best suited as it incorporates psychological and anatomical aspects of transitioning. If a person identifies as another gender and they have not gone through any treatment whatsoever to alleviate their situation, we cannot say that they are similarly positioned in law with someone who has gone through hormonal treatment (at least). The government has even provided in the law, for facilities that would help transition. The reason this difference would have to be made by a court interpreting the law is because if this difference is not made, then those who are by outward appearance and anatomically the same gender as they were assigned at birth (but consider themselves to be the other gender) are considered to be the other gender, in all practicality, the court would be allowing same sex marriage. The courts would perhaps hesitate to allow this.

Thusly, having that line between who can legally be considered for traditional marriage and who cannot be is necessary from a conservative interpretation of the marriage law. The above analysis is wholly based on the interpretative aspects of marriage and not legislative steps that should be taken.

The question of who fall in a third gender category (gender non-conforming or cultural identities such as *hijras*) is a more complicated one but if the person chooses to lean towards

one gender over the other and has had some treatment done for the same, then that desired gender is what the court should consider.

It goes without saying that the government needs to bring amendments to the Transgender Act as it is entirely silent on this matter, leaving much to the imagination of the courts. Those amendments should also be accompanied with local government effort to alleviate the issues that transgender persons face in their day to day life. A central act can only go so far as to provide the guideline, at the end of the day it is local efforts in conjunction with NGOs that would make a practical difference.

IV. CONCLUSION

This paper has thoroughly analysed this issue by reviewing the Indian law on marriage, the *Arunkumar* case, and foreign jurisprudence on transgender marriage to draw inferences and provide suggestions. It has been reiterated through the paper that there is gap in the law with respect to marriage. Perhaps an oversight or purposeful omission, regardless of the intentions of the government, it is bound to create more doubt in the minds of the courts and individuals who have a stake in this issue, not just transgender persons but their partners as well.

It would be easy for us to say that all transgender persons and homosexual persons should be allowed to marry whoever they want, and the author's opinion aligns with that sentiment, but the unfortunate fact is that legislation and interpretation of the same are not always so simple. We can start by the rubrics and suggestions given in this paper to move towards the freest form of marriage in the distant future, but for the near future a more conservative change would be more probable (taking smaller and more calculated steps to achieve a freer society).

It is regrettable that so much politics and debate need to take place for the right of someone to get married to the person they love, but as in any problem in a republic democratic society, the solution is never a hatchet, rather it is a scalpel.

(A) Recommendation of further study

This paper by no means claims to be exhaustive but has attempted to begin a productive conversation on the matter in India. For a more holistic understanding of the problem, more doctrinal and empirical studies should be conducted. Marriage is only the first step in the relationship, matters such as divorce, maintenance, adoption, succession, and custody should also be analysed with the various religious and secular legislation of family law as a backdrop. The laws that come after marriage are perhaps more crucial than just the establishment of marriage since those determine the relationship between the spouses and the rights between

them.
