

“Validity of Transsexual Marriages in India”

*Romit Bhattacharjee,
LLM,*

West Bengal National University of Juridical Sciences

ABSTRACT

Transsexuals in India have had to face a lot of trauma and oppression from the dominant sect of the society. They have trodden a very long and arduous path in securing their rights. In this paper we discuss about how the transsexuals and also the LGBTQ community have approached the campaign for their rights step-by-step. In this paper we initially discuss about the concept of marriage and its interpretations by courts of various countries; and in turn try to find out whether the conventional marriage systems are able to accommodate the transsexuals.

Then we move on to how the word ‘transsexuals’ and the people associated with this community came into being; their rights, the problems they faced and how they have or have not been brought to justice by the courts. This has been corroborated with a comparative study of cases between UK, USA and India. Each have provided us variety of opinions from time to time.

Finally, we move on to a strategic analysis of their present situation of these people and try to draw a rationale about why the Indian society is not receptive to their cause and what can be done to broaden the narrow outlook of the archaic society for accepting this oppressed community as one amongst them and measures to formalize marriages for transsexuals.

In conclusion, we try to examine the validity of the newly enacted Transgender Persons (Protection of Rights) Bill, 2016 and point out loopholes in it which are preventing transsexuals from exercising their rights in the proper way. This paper is an attempt to counter the undercurrent of an anti-LGBTQ narrative flowing in the society.

Keywords: Transsexuals, marriage, LGBTQ community, rights, family rights, society.

I. INTRODUCTION

The term transgender or transsexual may be derived from the Latin terms ‘trans’ or ‘across’ and ‘gender’ or ‘sex assigned at birth’¹. But the term ‘gender’ still continues to be ambiguous and forms the core of the problem that engulfs roughly about 4 million people in its fold. This very specific term has been a huge hurdle for the people of the LGBTQ community globally in attaining the rights they deserve for a long time, especially the trans people. Traditionally trans people may be identified but were subject to heavy discrimination and rejection from the society. Legally they had to embark on a long journey to attain their rights guaranteed under the Constitution of India. These people heaved a huge sigh of relief when the apex court delivered a judgement in the case *Navtej Singh Johar v. Union of India*². In this long journey,

¹ *NALSA v. Union of India* (2014) 5 SCC 438.

² AIR 2018 SC 4321.

the first category to be listed out was the transsexuals or transgenders, i.e., people who identify themselves to be of the opposite from the sex which was assigned to them at birth, or who were a cross between both male and a female naturally. For some, Sexual Reassignment Surgeries (SRSs) came up as a solution as they could finally attain the sex they ultimately desired through operative methods. The case of Aparna Mafatlal sprung into focus highlighting such techniques and ramifications of the same³. But it did not stop them from being harassed and being subjected to discrimination. And also, such SRSs were expensive and not all could avail them.

Considering the plight and gravity of the situation, the Supreme Court recognized the rights of such people in its *NALSA*⁴ judgement, even before the *Navtej Singh Johar*⁵ judgement was delivered. They were allowed to now reassign their sex and live as the gender they identified themselves of. Of late in a landmark judgement by the Madras High Court, a transsexual marriage was also allowed under The Hindu Marriage Act⁶. In this case, although the man and a transwoman, got married they received serious rejection from the Registrar with respect to registration of their marriage⁷. But the High Court held that as it is stated in the Hindu Marriage Act that a heterosexual couple can marry, i.e., a transwoman falls within the category of a woman and was eligible to marry under the personal law⁸. This is the only authority of transsexual marriages in India at the moment. In western countries like UK and US, this concept has developed to a huge extent and they have far before legalized LGBT rights. The UK case of *Corbett v. Corbett*⁹ still serves as the authority in any kind of disputes regarding transsexuals.

But the question arises that with the introduction of the *NALSA*¹⁰ and *Navtej Singh*¹¹ judgements, will it be possible to bring a change in the prevalent social narrative already set by the *Corbett*¹² case and provide the impetus for legitimizing transsexual marriages in India?

II. THE CONCEPT OF MARRIAGE

It has taken centuries and we are yet to generalize the concept of marriage. Sociologists and jurists have time and again pondered upon the meaning, requirements, characteristics and implications of a marriage and every time they came out with different opinions. Marriage in a way, whether an entity or by way of its nature, a social institution has been discussed in great detail for long but there is no single way to generalize the term. For some it indicates a separate

³ Press Trust of India, 'Businessman Ajay Mafatlal, First Major Sex Change Case in India, Passes Away', DNA INDIA, 23 August 2015, (June 26, 2024, 07:40 AM), <http://www.dnaindia.com/india/report-businessmanajay-mafatlal-first-major-sex-change-case-in-india-passes-away-2117607>.

⁴ *Supra*, note 1.

⁵ *Supra*, note 2.

⁶ The Hindu Marriage Act 1955.

⁷ *Arun Kumar & Sreeja v. the Inspector General of Registration, Madras* WP(MD) No. 4125 of 2019 (Madras High Court).

⁸ *Ibid.*, Section 5.

⁹ [1971] P 83.

¹⁰ *Supra*, note 1.

¹¹ *Supra*, note 2.

¹² *Supra*, note 9.

distinct entity, some digress from the same and uphold it as only a required social institution for maintaining societal equilibrium, while many consider it as both. Generally speaking, marriage found its definition as a ‘the legally recognized union of two people known as partners in a personal relationship’ after ages of study and series of debates and discussions on the same. But predicting the nature of it, especially when it varies from time to time, is no doubt an aspect much debatable.

Western countries like the UK and the USA are predominantly responsible for introducing this term into question for discussion. Some other Western countries like Spain and Canada also played an active role in this. The most classic legal definition of marriage was first laid down in *Hyde v. Hyde*¹³ where Lord Penzance J. established marriage to be ‘voluntary union for life of one man and one woman to the exclusion of all others’¹⁴. This decision was reaffirmed in a case before the House of Lords known as *Ghaidan v. Godin Mendoza*¹⁵. In addition to that, the Court was of the view that there has to be a heterosexual couple for a marriage to persist, i.e., a woman should be a man’s spouse and vice versa. So, UK in a way has been quite conservative in defining marriage and its extent and their approach has been followed and replicated in many other countries around the world.

But the U.S. Courts found such an approach to be anachronistic and violative of the right to life of the LGBT community. They challenged these UK decisions and ratios in the cases of *U.S. v. Windsor*¹⁶ and *Hollingsworth v. Perry*¹⁷. Both the cases challenged the ambit of marriage being only a heterosexual union. While the former only challenged the definition of marriage, the latter somewhat paved a way for same-sex marriages in California, which was a stepping stone in the legitimizing of LGBT marriages in USA.

Now, shedding light upon the Indian state of affairs, India has been following the age-old practice of marriages as laid down in the personal laws of various religions. It has been conservative throughout, limiting the definition within a heterosexual couple only, uniformly through all personal laws, which could not accommodate members of the LGBT. Marriages have been defined and enshrined in each and every religion’s personal laws and also reiterated again and again through some landmark cases. On a first instance ‘marriage’ was defined in the case of *Reema Aggarwal v. Anupam*¹⁸ where the Supreme Court held that marriage was a ‘union of two souls and not merely the tying of the nuptial knot. Marriage creates a new relationship between the two spouses which had love, concern for each other, affection, care’. This was the classic definition of marriage which has been used for a prolonged period now. According to Hindu Vedic study, it was a *samskara*; one of the sixteen important sacraments to be taken during one’s lifetime. The case of *A Jayachandra v. Aneel Kaur*¹⁹, further added

¹³ 1 P. & D. 130.

¹⁴ *Ibid.*

¹⁵ [2004] UKHL 30.

¹⁶ 570 US 744 (2013).

¹⁷ 570 US 693 (2013).

¹⁸ (2004) 3 SCC 199.

¹⁹ AIR 2005 SC 534; (2005) 2 SCC 22.

that there may be a physical relationship between the two spouses for procreation, creation of lineal progeny for ensuring spiritual salvation and ensuring performance of religious rites, but there should be the union of two souls. Now, these cases primarily indicated that a Hindu has to marry a Hindu, and the same protocol should be followed by other religions too. In a nutshell, no inter-caste or inter-religion marriages were allowed. But the Supreme Court, shunned the archaic system of belief and took up a modern outlook. It was of the opinion that restrictions in marriage were effectively affecting the right to life of the persons in question. Thus, through *Shafin Jahan v. Asokan K.M.*²⁰ broke the quintessential marriage barriers and directed citizens to marry a person of their own choice.

It is evident that in various cases marriage has been interpreted as a separate entity binding two individuals and at times as a social institution that socially blends two families, cultures, communities and many other social actors. In modern day, marriage not only binds two souls in a wedlock but also creates a confluence of two distinct legal personalities blended with love and affection for each other, for the purpose of creating a family.

III. EVOLUTION OF THE RIGHTS OF THE TRANSSEXUALS

The first-time transsexual rights were recognized was way back in 1971 through the landmark case of *Corbett v. Corbett*²¹. This case set a precedent for the status of trans-women in the UK. In the case, the plaintiff Mr. Corbett sought to end his marriage to model Ashley White (Mrs. Corbett) at a time when mutual consent was no ground for annulment of marriage. In order to succeed in the same, Mr. Corbett challenged on the ground that Ashley was born a man, who later on through surgery transformed into a woman. Through a number of medical tests, it was established that Mrs. Corbett had never been a woman and that the marriage on such grounds stands void²². In effect to this Ormrod J. observed that the sexual constitution of a person cannot be altered, as it is a natural phenomenon from birth. Even though she psychologically regarded her as a woman and underwent surgical methods to change her physical appearance to look like a woman, she remains a man from the time of her birth²³. He also stated that because marriage is essentially a union between a man and a woman, the relationship depended on sex, and not on gender²⁴. But this judgement somewhat is based on a narrow understanding of the needs and nuances of the transsexual diaspora. The judiciary in UK failed to understand the various nuances, emotions, plight, trauma and discrimination which were faced by the trans community, and to their utter dismay and trepidation, aggravated over the years.

On the other hand, US Courts have always exhibited a comparatively deep understanding of the LGBT community's hardships, and respected the nuances which UK had disdainfully overlooked. They have frequently taken a liberal stand and has always been receptive to new

²⁰ 2018 SC 343; *Supra*, note 7.

²¹ *Supra*, note 9.

²² Joseph M Thomson, 'Transsexualism: a legal perspective' [1980] *Journal of Medical Ethics*, King's College London 92,97.

²³ *Ibid.*

²⁴ *Supra*, note 9.

social changes. A challenge came before the US Court a few years later after *Corbett*²⁵ in 1976. In this case, the plaintiff who was biologically born a male identified herself as a female, and took financial assistance from the defendant to undergo a sex reassignment surgery. Following the surgery, she applied to change her birth certificate to reflect her female gender²⁶. In 1972, the plaintiff and the defendant married and in 1974, they divorced. The plaintiff then sued for support²⁷. As went the trend, this time also the US Court did not disappoint the aggrieved community. The court opined as ‘The evidence and authority which we have examined, however, show that a person’s sex or sexuality embraces an individual’s gender, that is, one’s self-image, the deep psychological or emotional sense of sexual identity and character²⁸.’ The court also said that the sex obtained post operation was devoid of any taboo, or legal barrier and recognizable for the purposes of marriage²⁹. The judgement delivered in this case was thus in contrast to *Corbett*³⁰ case.

As far as India is concerned, it had to traverse a long and arduous path in achieving its rights for the transsexuals (also the LGBTQ community at large). All throughout these years it has been following the non-accommodative narrative set by the *Corbett*³¹ case. The inclination towards a change was spotted thereafter and it started with the *Naz Foundation v. Govt. of NCT of Delhi*³². In this case a division bench of the Delhi High Court decriminalized homosexual acts involving consenting adults ruling out Section 377 of IPC. It said that to regard consensual homosexual acts between two consenting partners as a criminal activity violated the rights guaranteed under Articles 14, 15 and 21 of the Indian Constitution. But the relief was pretty much short-lived and to their dismay the decision was overturned in *Suresh Kumar Koushal v. Naz Foundation*³³. The Supreme Court overruled the previous order and held that any kind of homosexual activity was ‘carnal’ in nature and against the order of the society and man and hence such type of an activity was criminal in nature. Hence Section 377 was once again restored³⁴. Progress took a great leap next when people from the third gender (TG) were granted recognition under Articles 14, 15 and 21 of the Indian Constitution³⁵. As a step towards empowerment of the TG, Krishnanagar College in West Bengal appointed a trans-woman Manabi Bandopadhyay as its principal, an instance first of its kind in India³⁶.

²⁵ *Ibid.*

²⁶ *MT v. JT* 355 A.2d 204.

²⁷ Anonymous, ‘Case Comment: MT v. JT’, *International Court of Justice*, 17 July 2009, (June 12, 2024, 11:24 PM), <https://www.icj.org/sogicasebook/mt-v-jt-superior-court-of-new-jersey-appellate-division-united-states-22-march-1976>.

²⁸ *Supra*, note 19.

²⁹ *Supra*, note 20.

³⁰ *Supra*, note 9.

³¹ *Ibid.*

³² 160 Delhi Law Times (DLT) 277.

³³ AIR 2014 SC 563.

³⁴ Anonymous, ‘Case Summary: Suresh Kumar Koushal v. Naz Foundation’, *Equal Right Org*, 20 December 2013, (May 20, 2024, 08:25 PM), <https://www.equalrightstrust.org>.

³⁵ *Supra*, note 1.

³⁶ Piyasree Dasgupta, ‘From Somnath to Manabi’ *The Indian Express* (India, 27 May 2015) 1.

The LGBTQ community tasted its final victory with the verdict of the Supreme Court in *Navtej Singh Johar v. Union of India*³⁷. The court was asked to validate the constitutionality of a colonial era law which described homosexual activities as “unnatural offences” and criminalized them. The court found that criminalizing the homosexual acts of two consenting individuals deprives them of right to equality guaranteed under the Constitution of India. It ruled that people belonging to the LGBT community based in India are entitled to all kinds of rights as provided to any other citizen and they will not be subject to discrimination under any grounds³⁸. This landmark judgement paved the way for LGBT rights and probably an opening for subsequent transsexual marriages in India.

As goes the saying around the community, the relief came late, probably quite late, but it is still better late than never. It took a decade, perhaps even more, and several petitions and a strong resistance from the society, for the Supreme Court to finally realize it was heading for a stampede to cripple the rights of the LGBTQ community in India when the process for rescue started from the *Naz Foundation*³⁹ judgement. The rationale set by the judiciary evolved over the years and finally came as a big relief for the LGBTQ community at large, and resultantly the trans community, from the judiciary itself. Now as far as marital rights are concerned, there is still a distant path to traverse but with the precedent set already it will be easy to navigate through the hurdles *en route*.

IV. TRANSSEXUAL MARITAL RIGHTS IN UK, USA AND INDIA: A COMPARATIVE ANALYSIS

A. United Kingdom

United Kingdom is probably the first country that has developed sufficient research and laws about LGBT rights. It has a plethora of cases which deals with transsexual relationships and marriages. So, UK holds the authority whenever any such cases are in contention. Post the *Corbett v. Corbett*⁴⁰ case, a few disputes regarding transsexual marriages arose in UK. A very significant case is the *Goodwin v. United Kingdom*⁴¹ case. Here the applicant, Christine Goodwin, was a post-operative transgender woman. She claimed to have been harassed at her workplace after her reassignment. She said that just because she kept the same NI number post operation, she was subjected to humiliation and embarrassment. The case was before the European Court of Human Rights (ECtHR) and relied on Articles 8 (Right to respect for private and family life), 12 (Right to marry), 13 (Right to effective remedy) and 14 (Prohibition of discrimination) of the European Convention on Human Rights. In the judgement, ECtHR found violations of right to respect for family and private life, and, right to marry and found a family

³⁷ *Supra*, note 2.

³⁸ *Ibid*.

³⁹ *Supra*, note 31.

⁴⁰ *Supra*, note 9.

⁴¹ Application no. 28957/95.

under Articles 8 and 12 respectively. Government's loss in the case led to the introduction of Gender Recognition Act, 2004⁴².

In another case⁴³, the House of Lord deviated from the decision given in the *Corbett v. Corbett*⁴⁴ case, even though it realized that society and its laws relating to trans-people needed to be changed on the pretext of *Corbett*⁴⁵. But it was not for the House of lords to do so but for the House of Commons to legislate relevant statutes. In this case parties had gone through a form of marriage, but Mrs. Bellinger had previously undergone reassignment surgery. The marriage act required that the partners be a male and a female⁴⁶. It was contended that certain sections of the act were incompatible with the plaintiff's human rights. It was held that she cannot marry as she was born a male⁴⁷, thus negating the ratio laid down in the *Goodwin*⁴⁸ decision. Although the Court had deviated from the principle laid down in the *Corbett*⁴⁹ case, it did not provide any relief to the petitioner.

So, it can be drawn from the discussion above that the biggest shift to the ongoing state of affairs came from the introduction of the Gender Recognition Act, 2004 which is perhaps the most wide-reaching, trans-focused legislation. Trans people were given full recognition by the State and could acquire new birth certificates or amend the existing ones. These things provided the push for the introduction of the Equality Act, 2010 which censored discrimination in the workplace and society on the basis of gender reassignment⁵⁰. But the Act did not really achieve the motive it was enacted for and still a bit of lacunae about the nuances of transgender identity prevails. Non-binary citizens are still not recognized by law and the passports and authorized documents still limit themselves to "he" and "she". So, the enactment is effectively proving to be fruitless. As a suggestion, UK should be following the footsteps of its Western counterparts such as Canada and USA and the legislation should be made with proper implementation by the authorities to make it free from any ambiguity or barriers⁵¹.

⁴² European Court of Human Rights, 'Case Analysis: Goodwin v. United Kingdom App: Case 28957 of 1995', *European Court of Human Rights*, 21 November 2004, (28 May, 2024, 08:20 AM), <https://www.refworld.org/cases,ECHR,4dad9f762.html>.

⁴³ *Bellinger v. Bellinger* [2003] UKHL 21; [2002] 2 Weekly Law Reports (WLR) 411.

⁴⁴ *Supra*, note 9.

⁴⁵ *Ibid*.

⁴⁶ Samantha L.C. Singer, 'Bellinger v. Bellinger, [2002] 2 WLR 411' (2004) 26(1) *Journal of Social Welfare and Family Law* 79, 87.

⁴⁷ *Supra*, note 33.

⁴⁸ *Supra*, note 41.

⁴⁹ *Supra*, note 9.

⁵⁰ Sophie Nevrla, 'The history of transgender rights in the UK', *allaboutlaw.co.uk*, 12 November, 2018, (April 28, 2024, 07:21 PM), <https://www.allaboutlaw.co.uk/commercial-awareness/legal-spotlight/the-history-of-transgender-rights-in-the-uk-/>.

⁵¹ *Ibid*.

B. United States

In 2003, Massachusetts became the first state to recognize LGBT rights and legalize same-sex marriage. But for transsexual marriages, the process had started way back simultaneously with the development of LGBT rights in UK.

The first case registered in the US regarding marriage of a transsexual was *M.T. v. J.T.*⁵². In a similar case in 1999, a marriage was declared void because one of the partners was a transwoman⁵³. After her husband's death, the appellant Mrs. Littleton sued her husband's physician, Dr. Prange accusing him of medical malpractice. The defendant reverted back by arguing that the appellant was a biological male, so there was no marriage. Phil Hardberger C.J. opined that same sex marriages in Texas were not allowed. In case a cis man or woman marries a transgender man or woman the marriage can be valid if both the partners were assigned opposite sexes during the time of birth⁵⁴.

The long-awaited break finally came when the US Supreme Court legalized marriage for the LGBT community on June 26, 2015. The highest Court of the land proclaimed the right to marry to be gender-blind and free of encumbrances for the people of this community⁵⁵. So, by virtue of the decision, transsexuals from all the 50 states could marry a person of their choice regardless of whether the State they are in recognized their gender or not⁵⁶.

C. India

India has just started recognizing the LGBT community and its rights and is much younger than the former as far as marital rights of transsexuals are concerned. Also, Indian societal and legal framework has not been enlightened by such new concepts and is by and large miles apart from the kind of development that has taken place in UK and USA. But of late a few cases of transsexual marriages has taken place and has received the regard of the Courts. The most significant among them is the case of *Arun Kumar and Sreeja v. The Inspector General of Registration, Madras*⁵⁷. Arun got married to Sreeja, a transwoman as per Hindu rites and customs. When they attempted to get their marriage registered the Inspector General of Tuticorin refused the same. The petitioners challenged this issue before the District Registrar of Tuticorin who upheld the Inspector General's decision. A writ petition was filed before the High Court of Madras. The Court responded in the affirmative by overruling the Registrar's decision. The Honourable Bench opined that marriage solemnized between a man and a transwoman, both professing Hindu religion was valid under Section 5 of The Hindu Marriage Act⁵⁸. Although the question of gender identity of a transsexual was answered by the *Corbett*⁵⁹

⁵² *Supra*, note 19.

⁵³ *Littleton v. Prange*, 9 S.W.3d 223 (1999).

⁵⁴ *Ibid*.

⁵⁵ *Oberfell v. Hodges* 576 U.S. 644 (2015).

⁵⁶ Anonymous, 'Transgender People and Marriage Laws', *Lambda Legal*, May 20, 2018, (April 28, 2024, 07:20 AM), <https://www.lambdalegal.org/know-your-rights/article/trans-marriage>.

⁵⁷ *Supra*, note 7.

⁵⁸ The Hindu Marriage Act 1955.

⁵⁹ *Supra*, note 9.

case, the Madras High Court also cited the Oberfell⁶⁰ case to address that marriage should be a union of two souls and gender-blind. Although staying within the ambit of the Hindu Marriage Act⁶¹, the Court opined that one of the spouse being a transsexual does not stand as a limitation to the marriage. Additional references were also drawn from *NALSA*⁶² case, and right to marry was held as an inherent part of right to life and that all members of the LGBT community were to be conferred with the same rights as any other citizen.

V. ANALYSIS

Indian mythology on numerous occasions has shed light on altered sexes. *Ardhanarishwara*, as the name suggests is a deity in Hindu texts who was half man and half woman. Transsexualism has been mentioned in the various versions of the Holy text of *Ramayana* also. *Ramayana* talks about *King Ila*, who spent half of his life as a man, and the other half as a woman. In *Mahabharata* also, *Arjuna*, the great warrior and one of the most gallant characters spent a year of his life as a woman⁶³. On other mythological scripts there is mention about a certain *King Bangasvana*, who was turned into a woman by *Lord Indra* when the latter was offended by him⁶⁴. Another character in *Mahabharata*, *Shikhandini*, was born a female but trained as a man in warfare. On a certain occasion she met another character *Yaksha* and was turned to a man, and henceforth was called *Shikhandi*. He had supposedly fathered children after such transformation⁶⁵. So, it suggests that Indian mythology has various instances where transsexualism has been depicted which indicates that the concept of transsexualism was quite prevalent in those times. The foundation for transsexualism and rights have long been laid down. But the question of the hour is “Is the Indian society ready to accept this new-age concept?”. Another pertinent question follows up: Why isn’t the Indian society ready to accept transsexualism or other LGBTQ rights which have been indicated and deep embedded in the ancient religious texts? The answer lies with the society itself. Indian society has never perceived transsexuals and other members of the LGBTQ community as a part of it, rather they have been always subject to ostracism by the society. Also, any kind of homosexual and transsexual behaviour is perceived as taboo in the Indian society. The attitude of the society somewhat was like; if a boy is born then he will have to be brought up as a boy only, has to do ‘man things and eventually father children and raise a family. The same goes with a girl. If that person identifies himself/herself as of the opposite gender, then he/she is put to shame by the society. The primary support system of the person, i.e., the family also chides away from helping such a person. Hence comes depression, insecurity, anguish, shame and other emotions that hamper the self-confidence of the person. Out of these a few lone warriors emerge who garner the courage to follow their desires and identify themselves of their desired gender and

⁶⁰ *Supra*, note 53.

⁶¹ The Hindu Marriage Act 1955.

⁶² *Supra*, note 1.

⁶³ Richie Gupta and Anil Muraraka, ‘Treating transsexuals in India: History, prerequisites for surgery and legal issues’ (2009) 42(2) *Indian Journal of Plastic Surgery* 226, 233, (May 21, 2024, 08:30 AM), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2845370/>.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

not with the one they are born with. But the path they have to traverse tends to be very long and full of hurdles. The *Navtej Singh Johar v. Union of India*⁶⁶ judgement has definitely shown a ray of light for such people and the community at large. In the *NALSA v. Union of India*⁶⁷, the Supreme Court of India held that transsexuals have the right to marry which falls precisely within Article 21 of the Indian Constitution. In the process, the Court also upheld that a person should be allowed to marry any one of his/her choice⁶⁸. These judgements allowed the transgenders to join the mainstream. Also, in Justice *K Puttaswamy v. Union of India*⁶⁹, the Supreme Court cited the US case of *Obergefell v. Hodges*⁷⁰ and held “that the right to privacy decision to enter the relationship that is the foundation of the family in our society” thus bringing the newly evolved privacy law within the fold of transsexual marriages. Of the very few authoritative sources, *Arun Kumar and Shreeja v. The Inspector General of Registration, Madras*⁷¹ is the only case which strengthens the ground for the trans people. But this judgement by the Madras High Court still does not provide enough room for recognizing transsexual marriages within the Indian society. But since the judiciary has started to recognize such marriages legal and within the rights of an individual granted under the Constitution, it can be safely said that the push for the required change has been provided. In no time will the Indian society be adaptive to modern aged mindsets and the transsexuals, transgenders and other members of the LGBTQ community will have rights at par with all the other citizens.

VI. CONCLUSION

The third gender and transsexuals faced a lot of oppression and trauma and the Supreme Court came to the rescue by stating that transsexuals and transgenders should be treated with dignity⁷². Expression of one’s own gender identity is an integral part of one’s dignity, and it is a vital part of one’s fundamental right to life and freedom of expression⁷³. But even after this, the Supreme Court fell short of elevating the rights of the trans people to be at par with all the citizens because it somehow failed to stress on the principle of “equality before law”. Although through the *NALSA* judgement the Court alleviated the condition of the transgenders up to a certain extent, it did not specifically pin point the equality principle as transgenders were still not covered under Article 14 of the Indian Constitution and the right to have a marriage or a family was not ensured on their part. Neither were they effectively given “equal protection of law” as discrimination against them was and is still prevalent within the Indian society⁷⁴. It can be inferred that even though the Court realizes the gravity of the situation and the plight of the trans community, it has left it to the legislature to implement and oversee the situation.

⁶⁶ *Supra*, note 2.

⁶⁷ *Supra*, note 1.

⁶⁸ *Supra*, note 13.

⁶⁹ (2017) 10 SCC 1.

⁷⁰ *Supra*, note 53.

⁷¹ *Supra*, note 7.

⁷² Kashish Makkar, ‘Transgenders: Identity and Position in the Family Law in India’, (2018) 5(1) National Law University Jodhpur Law Review 54.

⁷³ *Supra*, note 1.

⁷⁴ *Supra*, note 70.

Although the Court has left it to the legislature to ensure equal rights and equal protection under law for the transgenders and transsexuals, it has done deplorably little to alleviate the conditions of these people. Soon after the *NALSA*⁷⁵ judgement, the Parliament came up with a new bill called Transgender Persons (Protection of Rights) Bill, 2016⁷⁶ but to the sheer disappointment of the aggrieved, it did not achieve the object that was aimed for⁷⁷. The Bill was lacking in any provisions that conferred rights upon trans people to start a family. And it contained certain provisions which were contrary to the rights laid down in the *NALSA*⁷⁸ judgement. The Supreme Court rendered the right to self-identification for a person's gender status without being pressurized by the society or family members⁷⁹; which would allow the transgenders to identify themselves as one was not even considered by the legislature. Rather the Bill proposed a District screening committee vested with the power to certify a person as a transgender. By this action, the principles laid down in the *NALSA*⁸⁰ judgement were defeated and the Bill was rendered fruitless. Among other things which were violated were that the Bill proposed gender reassignment surgeries to keep the dynamics within male and female only. The judgement specifically prohibited this practice and granted recognition and status to the third-gender. Also in the Bill, it was expressly prohibited that transgender children should not be separated from their parents; an utter disregard to the fact that these children find solace within their own communities. The Court proposed a grant of the Backward Classes status to them but the Bill even prohibits begging which is often the only means of livelihood for the; so, the grant of status does not even come to question⁸¹. Other issues like discrimination in work and employment, discrimination within families etc have also not been addressed in the Bill. On perusal of the draft Bill, it could be articulated that the people who have had intersex transition were not even considered and on several occasions throughout the Bill, there is an ambiguity in the understanding of the framers of the Bill; the difference between transgenders from birth and transgender or transsexual from operative methods. It can be well concluded that both the types of people cannot be conferred with the same rights even though the nature of both are quite similar. The magnitude of the rights conferred somewhat have to be different as the discrimination and trauma faced is different for both. This probably stems from the prejudice and faint knowledge that the framers had nurtured, which should have been addressed by consulting organizations working with transgenders⁸².

The Bill was sent back for amendments after a handful of suggestions from activists and members of the legal fraternity back in 2018 when the Bill was finally passed as final in the

⁷⁵ *Supra*, note 1.

⁷⁶ Transgender Persons Bill 2016.

⁷⁷ *Ibid*.

⁷⁸ *Supra*, note 1.

⁷⁹ *Ibid*.

⁸⁰ *Ibid*.

⁸¹ DHNS, 'Transgender Bill: remove drawbacks', *Deccan Herald*, 24 December 2018, (May 02, 2024, 09:20 AM) <https://www.deccanherald.com/opinion/second-edit/transgender-bill-remove-709703.html>.

⁸² Vyjayanti Vasudha Mogli, 'Responses From Trans & Intersex Communities On The Transgender Rights Bill 2016', *Feminism In India (FII)*, 9 August 2016, (3 May 07, 2024, 10:20 AM), <https://feminisminindia.com/2016/08/09/trans-community-response-transgender-rights-bill-2016/>.

House. In 2019, the Bill was passed once again by the Parliament with the nomenclature Transgenders (Protection of Rights) Bill 2019. But this time it was presented with even more discrepancies and the previous suggestions were also not taken into consideration. In addition to the previous inconsistencies, this time the Bill comes up with another major problem, i.e., right to choose a family of their own⁸³. In the *Navtej Singh Johar*⁸⁴ judgement, it was held that right to family was an indispensable part of the right to life under Article 21 for the LGBTQ community. Thus, the provisions of the Bill defeated the principles laid down in the judgement. A particular section criminalizing violence and forced sexual behaviour against a transgender have been reproduced as it is from the previous faulty drafts, without taking much cognizance in the matter. The punishment for rape, which is ultimately a forced sexual violation, is a minimum of 7 years of imprisonment in India⁸⁵. But in the Bill it has been watered down to a period of 2 years of imprisonment even though the offence is same⁸⁶.

Thus, it becomes clear that as far as trans people's rights are concerned, the legislature cannot be considered as the rescuer. And also, the lack of political will by the representatives of the people or whom we refer to as politicians to ensure the rights and the safeguarding of the community deteriorates the situation to a greater extent. And it is a harsh fact that some amount of political unwillingness will continue to be there. The community has been given some additional rights by the *Navtej Singh Johar*⁸⁷ but they neither have the circumstances to exercise them nor any authority to look after their rights. It was anticipated that the Bill would bring a plethora of rights for the trans community but instead the rights were sporadic in nature and without proper implementation were fruitless. Therefore, the relief has mainly come from the judiciary to the community. The fight for a firmer ground still continues and remains a distant goal as of now.

So as far as marriages are concerned for the transsexuals it can be suggested that certain changes be brought to the personal laws. The ambit of Section 5 in the Hindu Marriage Act⁸⁸ could be widened to accommodate the trans community so as to work within the principles laid down by the Supreme Court on rights of the transsexuals⁸⁹. The same should be done for other personal laws too and transgender children should also be brought within the fold of coparcenary and succession so that they get their share of the property. All this although would not happen overnight, and the same is not recommended as well. The Indian society is very sensitive to any change and may vehemently oppose any changes, so there should be a step-by-step process for doing the aforementioned changes. First of all, awareness about the plight of the community should be spread; secondly, people should be made known about how our

⁸³ Rachana Mudraboyina *et al.*, 'A Critique Of Transgender Persons (Protection Of Rights) Bill, 2019', *Feminism In India (FII)*, 5 August 2019, (May 04, 2024, 11:23 PM), <https://feminisminindia.com/2019/08/05/critique-transgender-persons-protection-of-rights-bill-2019/>.

⁸⁴ *Supra*, note 2.

⁸⁵ The Indian Penal Code 1860, Section 376.

⁸⁶ *Supra*, note 73.

⁸⁷ *Supra*, note 2.

⁸⁸ The Hindu Marriage Act 1955, Section 5.

⁸⁹ *Supra*, note 1; *Supra*, note 2.

Western counterparts and other developed countries have started to perceive the LGBT community in appositive way and finally; when an undercurrent of tolerance for the transgender community flows within the society, then such amendments to the personal laws could be made.

At the moment how the social setting is, it would be advisable for the authorities to facilitate the execution of at least certain minimal rights that can be provided to the community by legitimizing adoption of children for them and starting a family. From these two objectives can be achieved; first, the orphans will be getting a better life and second, the desire for a family gets fulfilled. And in the case of marriages, the *Arun Kumar and Shreeja*⁹⁰ case should be held as a milestone for legitimising transsexual marriages and a basis for the society to change its mindset and not become intolerant to the community. From the masses have emerged certain NGOs which are lone warriors fighting for the rights of transsexuals and the LGBTQ community at large. The authorities should formulate laws in consultation with the pioneers and organizations engaged in trans community support and augment the NGOs in helping create awareness among the people. With time a society can, be envisaged where a trans man will have all rights equivalent to a man and a trans woman shall have all rights equivalent to a woman.

⁹⁰ *Supra*, note 7.