

Personal Laws Affecting the Basic Human Rights of the Transgender Persons in India- A Bird's Eye-view

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Abstract

Problem: The transgenders are the most heedless group of persons since ages or we can say society consider them to be the invisible gender who, though exist but their existence is equivalent to non-existence as their legal rights are not being protected under the legislation absolutely. This article is going to discuss the existence of the transgenders with their different variations and their inclusion in the society via the implementation proper legislations ensuring their basic human rights. Nevertheless, India has passed the law in the year 2019 for the protection of transgender persons, which is beyond inadequacy. While studying the provision under the Act, the government need to work on the untouched area i.e., marriage, inheritance, and adoption under the personal laws. The Supreme Court in NALSA Case had directed for the recognition of 'Hijras' and other transgenders as 'third gender' and denial of the same shall be violative Article 14 and 21 of the Constitution of India. But that's not sufficient for their actual consideration. Society will consider their existence, only if the government and judiciary go beyond the constitutional rights i.e., rights under different substantive laws and personal laws. This paper will also work on the types third gender that exist in Indian society beside the only existence of the famously know 'Hijras' who reside at separate location in different areas forming their own community at large and to find out their prime source for survival. Importantly, focusing on marriage inheritance, and adoption rights for transgender persons under the personal laws in India. **Methods:** The study has adopted both qualitative & quantitative way of data collection in the form of questionnaires, where the estimated sample size is approximately 45 respondents selected from random samplings technique. **Findings:** The results shows that majority of people agree to the point that the basic human rights of transgender person is violated and denied. Also, the findings shows that the transgender persons should be given the rights under the personal laws without discrimination. **Conclusion:** Concluding this paper, the transgender persons shall have the recognition of their rights except employment and education opportunities. A persons' gender identity shall not be the anyway a reason for discrimination with regards to basic human rights. The legislative and the judiciary needs to look upon the present situations of the transgender persons.

Key Words: - Adoption, Family, Gender, Gender Identity, Hijra, Human Rights, LGBTQAI+, Marriage, Transgender.

Introduction

Existence does not imply inclusion invariably. What we meant by inclusion is to make transgender people recognizable in society by ensuring their legal rights and enforcing both substantive and personal legislation. Society, in general has visualized the existence of only binary gender i.e., 'male and female'. Understanding the concept of transgender person, a person assigned by birth (male or female) is the physical feature which may not be similar or complement to one's gender identity i.e., a person's feelings or expressions or think about the assigned gender (Castro-Peraza Maria Elisa et. al., 2019). A transgender person is the one who identifies or expresses his/her own gender identity with a different gender. A trans born in a family is considered as a curse and the research says the discrimination starts from their own family itself by disowning them or by teasing, bullying by the family members, relatives, and friends. Likewise, law in India is neglected. In this stereotypical society, when a male or a female deprive of the social as well as legal rights become the matter of concern, considering it completely normal. But when we state the matter of a trans person, the question arises that where to knock the door for justice? The three aspects – social, legal, and economical are not ensured for them (Vivek Divan et. al., 2016). Prior to 2019, the Human Rights statutes were the sources for the protection rights of this community in India i.e., the Universal declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social, and Cultural Rights (ICESCR). However, a separate piece of legislation was needed to protect their rights due to the community's particular features and challenges (Angel H. Syiem). The Supreme Court, in the case of *National Legal Service Authority v. Union of India and Ors* (2014) 5 SCC 438, recognize the 'hijras' and the other 'transgenders' under the category of 'third gender'. However, it was a path breaking but, only recognition of their gender is not enough. Though after NALSA verdict, the immediate proposal of the Transgender Persons (protection of Rights) Bill was proposed and preferably became Act, 2019 considering one of the empowering Act for the protection of the trans communities. Regardless of, innumerable loopholes have been noticed in the Act, 2019 and further it is not free from criticism by the transgender communities.

Research Methodology

The study is doctrinal and empirical in nature. The empirical research survey based on random sampling by forming questionnaires. The information gathered is based on secondary data in the form of legal evidence, particularly the primary and secondary legal documentation. The legal materials were gathered through research in libraries and online sources. Both statutory and comparative methodologies are used in this normative legal research.

The existence: Transgender Persons from Vedic Period

If we try to understand the Vedic literature, these people were very much part of the ancient time and were allowed to live according to their own conduct. Neither of them were punished for their own conduct nor treated different or unequal in the ancient society. To understand their existence, the research says according to prakriti (nature), there are three different group of sex and gender of human person in every part of Vedic literature i.e., *pums-prakriti* (male), *stri-prakriti* (female), and *tritiya-prakriti* (third sex). These genders are not only determined their existence by the physical characteristics but also includes gross body i.e., physical body, subtle body i.e., psychological body and the social interaction i.e., procreative status which is considered to be quirky (Wilhelm Amara Das,). The structural society build up the human body as *pums-prakriti* i.e., the male and *stri-prakriti* i.e., the female, which is called the 'sex' of a person whereas 'gender' indicates a human body as masculine or feminine. So in general, the word "sex" refers to biological sex and the word "gender" refers to the psychological behaviour and identity in a social framework (Anuja Agrawal, 2009). The concept of third sex can be well described putting an example of mixture of black and white colour. The combination of these two colours would result in many shades of

grey colour but, it will be no longer consider either black or white. Similarly, third sex are those who are considered to be the mixture of both male and female. They are neither in category of complete male nor female.

The 'transgender' persons are the prominent group of people under 'third gender'. Third gender is an umbrella terms which cover rest all homosexual, bisexual, transgender, queer, intersex, asexual and plus(+). For a clear understanding, the term 'transgender' is used to describe people who reject rigid, binary gender constructs and who express or exhibit a blurring of socially accepted gender categories or we say 'transgender' are those who defy social gender conventions(N. Gayathri et. al., 2016). People who identify as transgender may live fully or partially in the gender role that is opposite to their natal one. We can also use transgender as an umbrella term as it consist of many categories and sub-categories these are 'male-to-female' and 'female-to-male'. Transgender identifying as male-to-female are 'trans women' and transgenders identifying as female-to-male are 'trans men'. Sometimes, they are also called as transvestites or transsexuals who do not identify as homosexual (Angel H. Syiem).

Human rights violation of transgender persons

All Human beings are born free with equal in rights and dignity.As they are enriched with reason and conscience, there should be a brotherhood behaviour towards one another stated by Article 1, of UDHR. Article 2 of the same, states that Every Individuals have the all the freedoms and rights, without any exception based on colour, sex, race, language, religion, political or including other opinion, national or social origin, wealth, birth, or any other status. Regardless of the fact, there should not be any distinctions on the basis of its political, juridical or international status, whether a country or territory is independent, a trust, non-self-governing, or subject to any other restrictions on sovereignty. Elucidating the above Articles of UDHR, the mere words "All Human Beings" includes all human beings irrespective of their gender expressions, gender identity and sexual orientation. Under Article 2, it is stated "All Rights and Freedoms" which includes the rights guaranteed under the India Constitution. Likewise, Article 15 of the Indian Constitution guaranteed that there should not be any discrimination to any citizens on grounds religion, caste, race, sex or place of birth. Article 2 of UDHR and Article 15 of the Indian Constitution pledge that everyone shall be entitled to no discrimination with regards to their sex. This shall be the utmost importance of the nation for the inclusion of LGBTQ+ persons and granting them the protection from discrimination.According to Yogyakarta Principle, every human being is born free, with equal rights to dignity and protection. Universal, interrelated, indivisible, and interdependent are all characteristics of human rights. Sexual orientation and gender identity have an impact on every individual's humanity and dignity, but they are not appropriate as the basis for discrimination or abuse(The Yogyakarta Principles).

The Yogyakarta Principles discuss numerous human rights principles and how they relate to questions of sexual orientation and gender identity. The Principles uphold states' fundamental responsibility to uphold human rights. Each Principle is followed by comprehensive state-specific advice. But the experts also underline that everyone has a duty to advance and defend human rights. Other actors, such as the UN human rights system, national human rights groups, the media, non-governmental organisations, and financiers, are also given further advice. The Yogyakarta Principle + 10 added ten additional principles, including Principle 32, which guarantees "The right to bodily and mental integrity," Principle 31 concerning "The right to legal recognition," and Principle 33 concerning "The right to freedom from criminalization and sanction on the basis of sexual orientation, gender identity, gender expression, or sex characteristics"(The Yogyakarta Principles + 10).

The legislative view

A significant portion of laws in India only acknowledges the binary genders, which are assigned by a person's given sex at birth i.e., male or female. This opens the door for a gender-based legal system, which includes laws governing marriage, adoption, inheritance, succession, taxation, and social welfare. Regrettably, there is no provision under Personal laws in our Nation that protects the rights of the transgender people. The lack of adequate legislation defending the rights of transgender people has led to widespread discrimination against them, necessitating adherence to the international conventions to which India is a party as well as respect for other non-binding international conventions and principles (Dr. Seema Garg et. al.,).

NALSA Judgement Analysis

In a historic ruling issued in 2014, the apex court extensively explored "gender identity" and first acknowledged "third gender" people legally. The National Legal Services Authority of India (NALSA) implores the Court for legal recognition to persons who identify under "third gender" and persons not falling under the gender binary i.e., male or female (AIR 2014 SC 1863). The court acknowledged that third-gender individuals had a claim to fundamental protections under both international and constitutional law. Additionally, it instructed the state governments to create systems for recognizing the rights of "third gender" individuals.

It is emphasized by the apex Court that the gender expression/ identity refers to an inherent perception of a persons' gender rather than biological traits. As a result, it was decided that persons fitting under "third gender" are not put through any tests or procedures which would violate their privacy rights. The gender identity of an individual is included in the definition of "dignity" under Article 21 of the Constitution, which also covers a variety of self-expression which enables for a dignified existence.

Further, it is pointed that because of the rights to freedom of speech and equality rights were expressed in gender-neutral terms, they applied to transgender people as well. It brought to light how "extreme discrimination in all spheres of society" infringed on transgender people's right to equality. Additionally, the idea of freedom of expression was expanded to include the right to express one's gender "through dress, words, action, or conduct."

Articles 15 and 16 expressly prohibit discrimination based on "sex." The Court determined that in this context, "sex" encompasses "gender" in addition to biological characteristics. The Court concluded that discrimination based on gender identity qualifies as "sex" discrimination as a result. Because of this, the Court decided that transgender people possessed a constitutional right to fundamental rights under Articles 14, 15, 16, 19(1)(a), and 21. In order to recognize the human rights of transgender people, the Court also cited important international human rights conventions and the Yogyakarta Principles.

Hence, the Court suggested that there is the need of efforts towards fighting stigma against the transgender person community. Both the central and state governments were also instructed to take a number of steps to support the transgender community, such as: Making provisions for the legal recognition of "third gender" in all papers; acknowledging third-gender individuals as a "socially and educationally backward class of citizens" who are entitled to accommodations in educational settings and in the hiring of public employees; and deciding to create social welfare programs for the residents of the area.

Interpretation of Personal laws in India

Undoubtedly, after NALSA (National Legal Service Authority v. Union of India and Ors, (2014) 5 SCC 438) verdict there has been a change in protection of transgender persons, but the changes are not in inclusiveness. A self-perceived gender identity is a fundamental freedom protected by the right to life. Though, the transgender persons have a right to recognize their identity but the above discussion in analysis of the Transgender persons (Protection of Rights) Act, 2019 gives the intelligibility about the

untouched area. Similarly, when we are debating the protection human rights of transgender persons, the personal laws relating to the legality of different rights like marriage, adoption, inheritance, and succession are unclear.

Marriage

Marriage is a private transaction as well as a social institution of significant importance to the public. The idea of marriage is a mainspring of a family. The concept of marriage is governed by the personal laws related to validation of marriage with the certain conditioning clause for its validity. It is based on union of men and women as soul mate which includes certain social functions. In addition, we can say that marriage creates specific spousal obligations and mutual rights for the parties to the marriage as well as the status of husband and wife for the parties to the marriage's children (Paras Diwan, Family Law (8th Ed)). Now, in depth study of the Hindu Marriage Act, 1955, the provision recognizes the binary gender i.e., male and female excluding the third gender. Section 5 of the Act, provides the conditions of a valid marriage which says marriage between a bride and bridegroom implicitly consider bride as female and bridegroom as male. Under Section 5(iii), the age permitted for valid marriage for a bridegroom i.e., is 21 and bride i.e., 18. This interpretation shows that the transgender persons are restricted from marriage. Likewise, the whole provisions Act, 1955, provides rights and legality of marriage only to the binary gender persons. Similar to Hindu Personal Law, Muslim marriages doesn't include the non-binary persons and the provisions under Muslim Personal Law clearly doesn't provide the rights of marriage to the transgender persons.

Section 4 of the Special Marriage Act addresses the legality of marriage. This Act's key justification is to provide lawful security to interfaith unions that are not acknowledged by the pertinent Personal Laws. According to Section 4(b)(ii), neither party has a mental disease of a such a kind which make them unfit for marriage and procreation of children, although being able to give a legal consent. For the mandatory procreation of children clause, leaves no rooms for the LGBTQ+ marriages. Therefore, securing marriage rights in objection to the sole purpose of the concept of marriage is to procreation of children, is the utmost difficulty which the transgender community and the LGBTQ+ community in general has to face. The only way to solve this is for society to acknowledge that marriages are not just for starting families and having kids. The stigmatization by the society is the major issue for transgender persons to obtain the marriage rights. Despite the fact that the liberalization of society has helped them grow, there is still a long way to go.

In the case of, Arun Kumar (WP(MD) NO. 4125 OF 2019) the Madurai bench of Madras High Court while holding the meaning of the word "Bride" and the transgender women falling under the same, assumes a great significant. The Madurai Bench Court narrated the description of Supreme Court in NALSA case with regards to existence of transgender persons in the Hindu epics. The Supreme Court ruled in the same case that discrimination based on gender is against Article 15 and each individual has the right to self-identify. While holding that state cannot object to the gender that a person has identified for themselves, the Madras HC stated that The second petitioner in this case has decided to express her genders as a female. According to the Hon'ble Supreme Court, this pertains to her right to privacy and dignity falling within the category of her personal self-determination. The State authorities are under no right to create doubt on the second petitioner's right to self-determination.

Further, the Court observed and stated that the Hindu marriage law is a personal law confined to Hindus and the transgender persons who are Hindus cannot be excluded from the domain of the Act, regardless of the fact that the Apex Court upheld the right of transgender persons to marry. The Court further emphasized the fact that marriages celebrated in a religious setting are equally lawful under the Act. It is considered by the court that the marriage that is solemnized in temple is deemed to have violate the partitioner's fundamental rights under Article 25 of. In addition to Article 25, the court finds that the registration authorities' actions infringed the petitioner's rights under Article 19(1)(a) by preventing her from expressing her gender identification. Second, by denying her gender identification, the Supreme

Court violated her right to personal autonomy and dignity, both of which were upheld in the historic decision *Navtej Singh Johar v. Union of India*(AIR 2018 SC(CRI) 1169)

The landmark decision in Arun Kumar case by the Madras High Court is an important step in recognizing and upholding transgender people's rights. The Supreme Court paved the way for more inclusivity and equality by upholding their right to marry and practice their religion guaranteed under the Constitution of India. The decision serves as a reminder that personal laws must be enforced and elucidated in a course of action that ensures the preservation of rights for all people, regardless of gender or sexual orientation.

Adoption

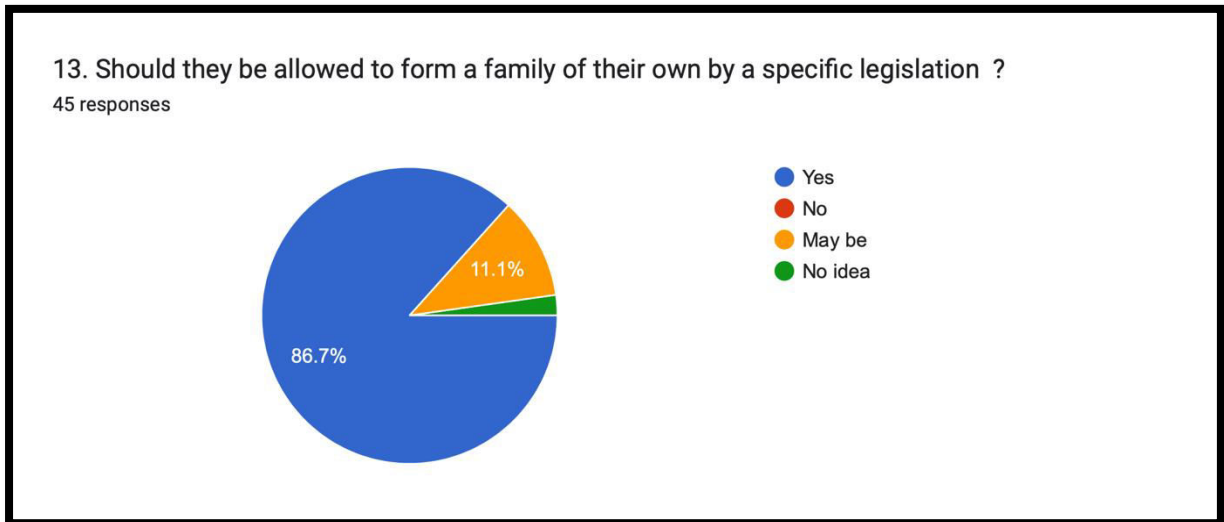
Like the other binary laws, adoption laws governed by Hindu Adoption and Maintenance Act, also do not recognize the non-binary persons. While interpreting the legislation, inclusion of only two recognized genders i.e., the binary gender, excludes the transgender persons. Under Section 7 and Section 8 of the Act provides that "male" Hindus can adopt children, and "female" Hindus are also capable of adopting children, which is an explicit discrimination against the non-binary persons. The legislation in nowhere have mentioned transgender persons/ third gender's capacity to take in adoption. The reason behind availing adoption rights provision under the Law for the transgender persons is to provide equality among the citizen and no discriminations regarding gender identity. A person shall be guaranteed of equal rights under Article 14 of the Constitution irrespective of their gender identity. All individuals shall have the right to adopt and right to parenthood. The gender of person should not be the question forming a cleavage. Nutshell, these rights will provide names to many children who are parentless.

Howsoever, adoption is directly related to inheritance laws in India. An adoptive child has the legal rights to inherit the property of his adoptive parents. So, when inheritance flows with adoption, the query on adoption by non-binary gender remains on doubt. Moreover, if a transgender person doesn't have a legal right to adopt a child, the rights of the adoptive child in inheriting the property is shut. Likewise, the transgender adoptive parents do not have legal rights on the adoptive child neither can they be the legal heirs of the adoptive child. Henceforth, these are the area that are remained silent and untouched by the Judiciary and the union government, which needs to be viewed for the beneficial and lead out to equality among persons gender binary and non-binary.

Findings

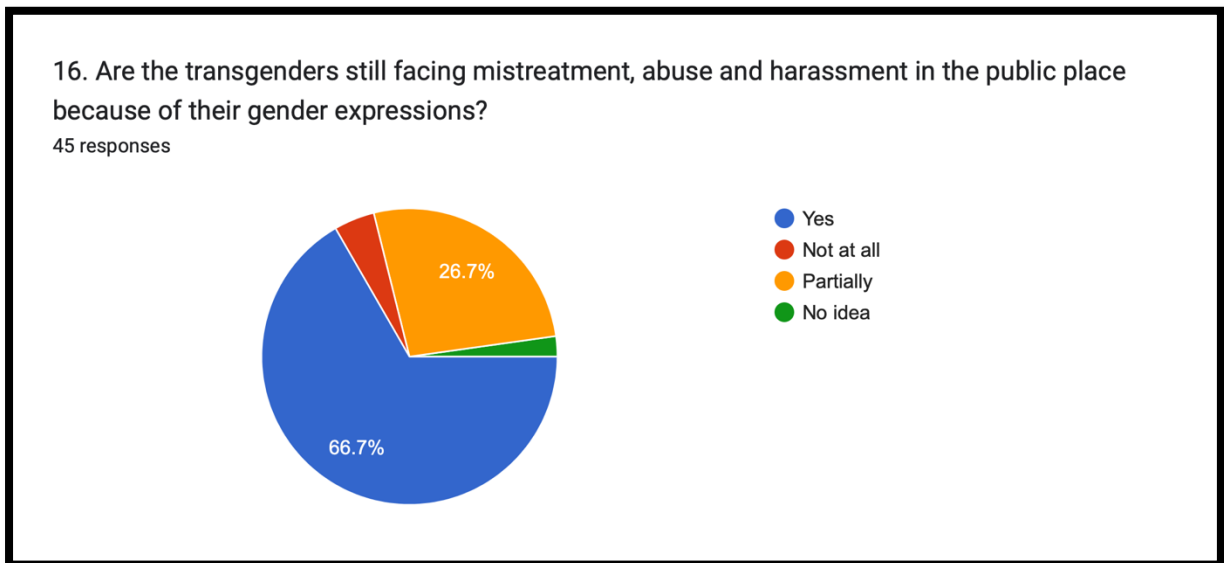
The data collected from questionnaire of 20 by random sampling analysis of total 45 people, the result shows below: -

Figure 1: Formation of Transgender Persons family



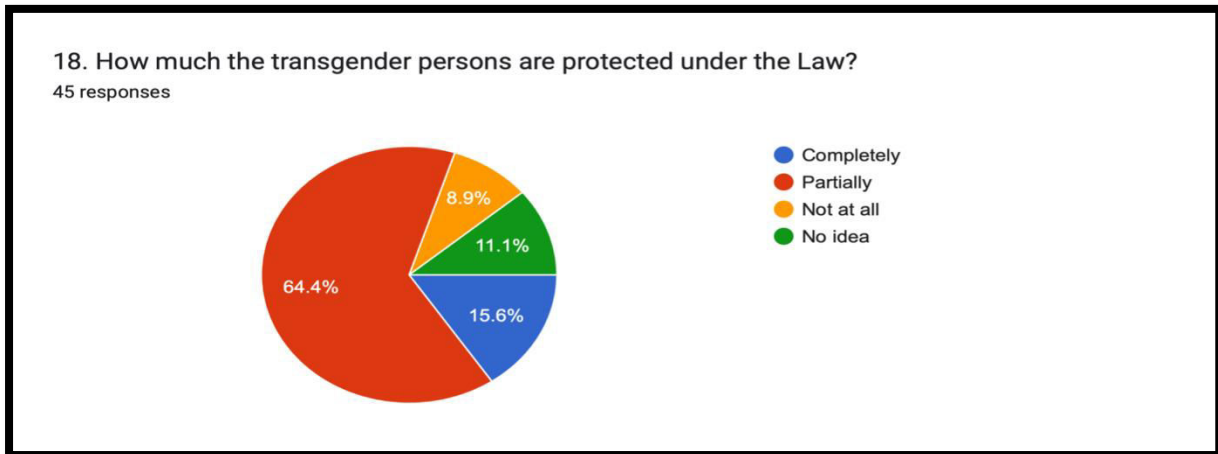
From, the above figure 86.7 per-cent out of 45 people agree to the outlook of transgender persons forming family of their own under specific legislation. 11.1 per-cent have conceivable view for formation of transgender family.

Figure 2: Mistreatment, Abuse and Harassment in public space



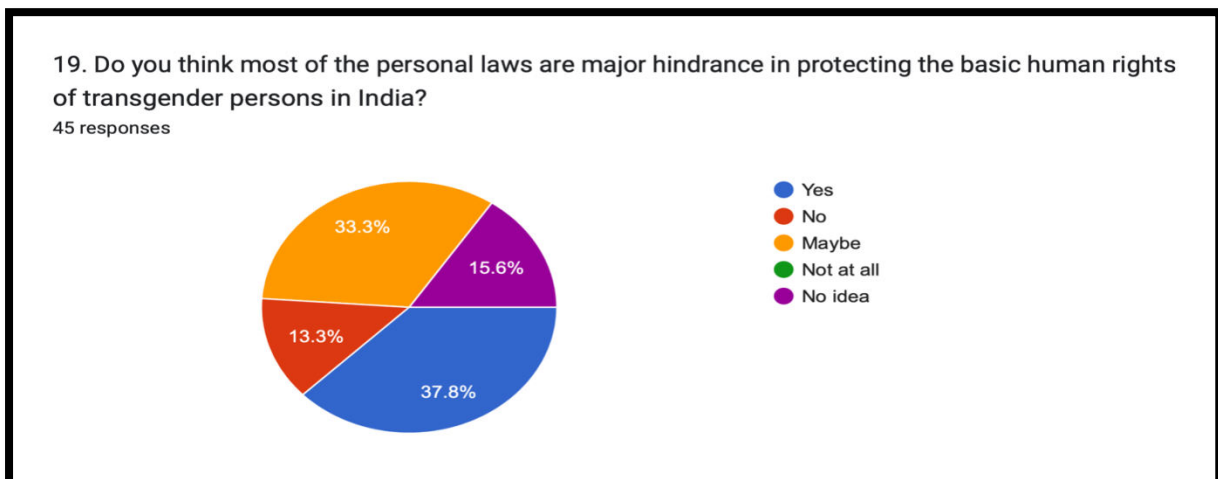
The above figure shows 66.7 per-cent out of the total agree that the transgender persons face mistreatment, abuse, and harassment because of their gender expression. 26.7 per-cent partially agree to the point.

Figure 3: Legal protections of transgender persons



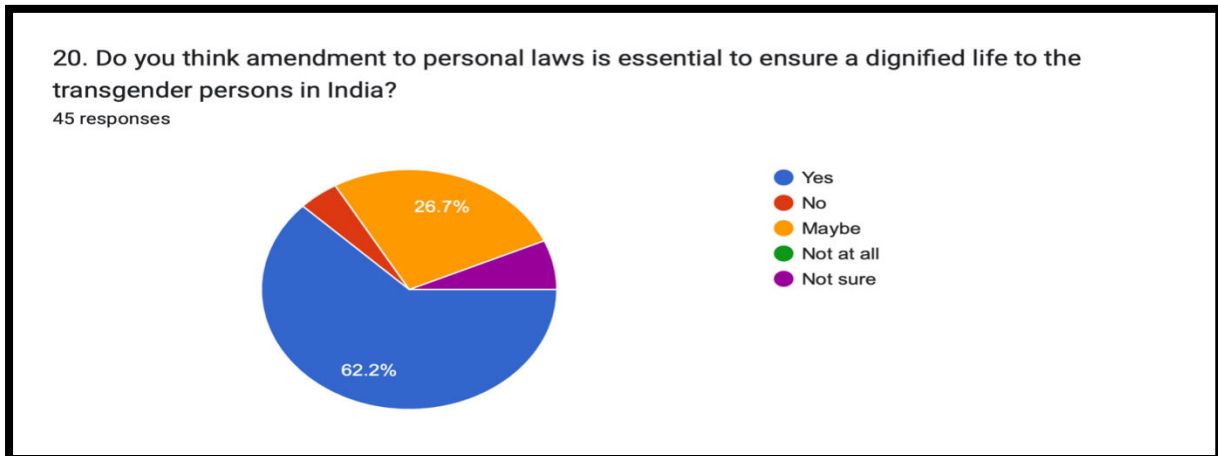
From, the above figure 15.6 per-cent fall under the view that the transgender persons are completely protected under the law. Whereas 64.4 per-cent agree partially to the point. Rest 8.9 per-cent do not agree that the transgender persons are protected under the law.

Figure 4: Personal laws as impediment for basic human rights



The above figure shows that 37.8 per-cent out of total believe that personal law is an impediment for protecting basic human rights of transgender persons in India. Rest 33.3 per-cent fall under the partial view. Whereas 13.3 per-cent disagree to this.

Figure 5: Amendment to Personal Laws



The figure shows that, majority i.e., 62.2 per-cent out of total approve that amendment to personal law is essential to ensure a dignified life to the transgender persons in India. Rest fall under partial agreement and complete disagreement.

Suggestions and Conclusion

The sexual orientation and gender identity of a person should not be a reason to deprive one's Human right and the non-recognition of same sex marriage is violative of right to privacy guaranteed under Article 21 of Indian constitution. Transgender persons are the heedless group of people in the society. Though they exist but their existence equivalent to non-existence. As this paper has elucidated the very discrimination and violence against them and their exclusion from the society. The battle for their inclusion is the prolonged and rigid. After the NALSA verdict, the first and important step being taken is their legal recognition but the battle does not stop here. The above discussion on analysis of the Transgender Persons (Protection of Rights) Act, 2019, clears the loophole in the Act. The binary genders (male and female), which are established by a person's given sex at birth, are only acknowledged by a substantial amount of legislation in India. As a result, regulations governing marriage, adoption, inheritance, succession, taxation, and social assistance might be based on gender. The transgender people are denied of their basic rights owing to the fact that exclusion from personal law which is specifically includes gender binary. The principle 24 of Yogyakarta principle provides that " all individual irrespective of their sexual orientation and gender identity, has the right to find a family". The right to marriage and formation of family is persons' legal Right to Life guaranteed under Article 21 of the Indian constitution and Principle 4 of the Yogyakarta principles.

Henceforth, I conclude that a persons' gender identity shall not be a reason for denial of basic human rights of formation of family recognised by marriage , inheritance and adoption. The random sampling data collection of this research reports that maximum out the 45 responses agrees that personal law is the major impediment to protect the transgender persons' elemental rights and the amendment to personal laws would ensure their dignity.

Reference

1. Adhira, AA. (2023), Adoption Rights for LGBTQIA+ Community in India: Critical Analysis of the Family Law System. *Indian Journal of Law and Legal Research*, 5, 1-5.
2. Agrawal Anuja (2009) , Gendered Bodies: The Case of the 'Third Gender' in India, *Contributions to Indian Sociology* 1997; 31; 273
3. Castro-Peraza Maria Elisa et. al.(2019), Gender Identity: The Human Rights of Depathologization, *Int. J. Environ. Res. Public Health*, 16, 978
4. Divan Vivek, Cortez Clifton, Smelyanskaya Marina, and Keatley JoAnne (2016)Transgender social inclusion and equality: a pivotal path to development *Journal of the International Aids Society (Jias)* 19(Suppl 2):20803
5. Dr. Garg Seema, Mittal Kunjana, *Transgender in India: New developments and enactments*, *International Journal Of Multidisciplinary Research And Development*, Volume 2; Issue 11
6. Gayathri N., & Dr Karthikeyan P (2016), Inclusion and Exclusion of Third Genders – Social Hinderance in India, *Asian Journal of Research In Social Sciences And Humanities*, Vol. 6, No.3, pp. 20-30.
7. Liberty Matthyse (2020), Achieving gender equality by 2030: Transgender equality in relation to Sustainable Development Goal 5, *Agenda*, 34:1, 124-132
8. Robert Wintemute(2019), Lesbian, Gay, Bisexual And Transgender Human Rights In India: From Naz Foundation To Navtej Singh Johar And Beyond, *NUJS Law Review* 12 *NUJS L. Rev.* 3-4
9. Satheesh Ashwin and Thomas Lilian Grace, Legal Or Impracticable? The Unanswered Questions Of Marriage And Adoption Laws For The Transgender Community In India, *Indian Journal of Law and Legal Research* Volume II Issue II | ISSN: 2582 8878
10. Syiem Angel H. &Dr. Kumar Priya Ranjan,Trans- Rights Are Human Rights: An Evaluation of Law on the Protection of Transgender Rights in India, *Indian Journal of Law and Justice*, Vol.13 No.1
11. The Yogyakarta Principles, Principles on The Application of International Human Rights Law in Relations to Sexual Orientation and Gender Identity.
12. Wilhelm Amara Das, *Tritiya-Prakriti: The people of Third Sex; Understanding Homosexuality, Transgender Identity, and Intersex conditions through Hinduism*, Xlibris Corporation Philadelphia, Pa.