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**ANALYSING THE LEGAL STATUS OF THE TRANSGENDER SOCIETY IN LIGHT
OF TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2016.**

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I. ABSTRACT:

India, renowned for maintaining unity among its diverse population is a hub of different religious and cultural groups. Post-independence many policies have been made for the upliftment of the minorities, but none involves the Transgender community. As a result of constant disregard and discrimination, most people of this community turned towards flesh trade and begging for survival. Despite enjoying an auspicious status in India's glorious past, the transgender community has been denied its basic rights. In absence of any legislation for the protection of this community, it was time for the judiciary to step in. Finally, in the case of NALSA v. Union of India, 2014, the apex court recognized the transgender community as the third gender.

Thereafter, in light of numerous efforts by the human rights and transgender activists, the government finally brought the Transgender Persons (Protection of Rights) Bill, 2016. This paper embarks upon a detailed study of the evolution of the legal status of the transgender community through centuries, exploring its historical evolution from the ancient to the contemporary era and how various judgments have recognized the transgender persons in different spheres of life; yet enumerating the various problems faced by this community in the present day. The paper seeks to critically analyze Transgender Persons (Protection of Rights) Bill, 2016, in the context of previous judgments, the constitution and existing laws while suggesting suitable amendments. Though the bill is aimed at providing benefits to the third gender, it has a profuse amount of flaws which disparage its basic purpose.

II. INTRODUCTION:

India is considered as the biggest democracy of the world, boasts of a strong constitution based on the principle of equality, liberty and fraternity. Article 37 of the Indian constitution, directs the lawmakers to ensure that India acts as a welfare state. However, since the end of

the Mughal era, one community which has failed to receive any major benefits of the government policies is the transgender community. They face a regular battle against the society, police and even their own family. The trans-community is often ridiculed at public places. India believes in the notion that, the rule of law is supreme and in eyes of the law, everyone is equal. Yet the transgender community is deprived of their various basic rights and privileges restricting their access to quality education, health care and a safe work environment.

Due to the social boycott of the Transgender community in our society, the majority of this social group is hardly left with any employment option, thereby indulging in acts of prostitution and begging to sustain their lives. Further, they are often neglected at the hands of government authorities such as doctors at public health care facilities and the police who downplay their concerns. Even after a series of judicial decisions and the pronouncements like the much-celebrated NALSA judgment which officially recognized the trans-community as the third gender and decriminalization of homosexuality in case of *Navtej Singh Johar & Ors. v. Union of India*, the situation has not much improved. However, in recent years various steps have been taken at the centre and state level to improve the living standards of the transgender community.

Perhaps, the most recognisable effort includes the ***Transgender Persons (Protection of Rights) Bill, 2016*** drafted by the BJP led central government which gives a legislative support to the well-being of the trans-community. Despite being a step in the right direction, the bill has come under attack from transgender activists and human rights advocates who claim it to be an incomplete bill. Further on critical analysis of the proposed bill, one can observe quite a few shortcomings which diminish the entire purpose of the bill.

However, what one must keep in mind is the fact that in order to improve the current situation of the Transgender community, relying on legislative and judicial provisions is not sufficient. The success of any Transgender related policy will depend more upon the people's acceptance of this community.

Therefore, it becomes important for the Indian Society to have a better understanding of the scientific and social standing of the transgender community.

In order to understand the root cause of all the problems faced by the trans-community in our country, it is important to first understand how their status has changed over the centuries.

III. HISTORICAL RECOGNITION:

There had been a tremendous global movement in recent years to accord a legitimate status to the transgender rights. India, with her rich historical and cultural heritage, was much ahead in recognizing the third gender and giving them the due importance in society.

The strong historical presence of the transgender community is evident from several names that include “Hijras, Arvanis, Jogaapas, Shiv-shakti etc. The third gender is also mentioned in the Vedic and Puranic Indian literature as well as other religious texts, making them an integral part of the Hindu Culture. Literary reference to the third gender can be traced to the ancient Indian text of ‘Kama Sutra’ that mentions about “Tritiya Prakriti,” a performance of fellatio by men having feminine orientation.¹ It also gives details of the sexual intercourse performed by men acting like women or vice versa² and sexual pleasures obtained by the persons of the same gender with one masquerading as a male and the other as a female.³

The Manu Smriti, (c. 200 BC -200 AD) while explaining the origins of biological sexes states that a male child is born when the male seed is more prolific whereas a female child is born when the female seed is more prolific. However, when both seeds are equally potent a third sex child or twins are born.⁴ In Ramayana on being exiled, Lord Rama turns around to his devotees and edified all the “men and women” to return to the city of Ayodhya. Hijras, being neither men nor women, do not feel obligated by the instruction. Eulogized by their individuality and self-esteem, Lord Rama confers them with the power to bless people on auspicious occasions⁵. This practice is being continued by the third gender community even today during the Hindu marriages or childbirth indicating their importance in the traditional Hindu society. On the contrary, in one episode of the Mahabharata, Arjuna is banished into an exile where he transforms himself as a eunuch and performs the customary ritual of on various auspicious occasions⁶. In another episode, Irvan sacrifices himself to goddess Kali by immolation in order to ensure victory for Pandavas. When Irvan expresses his wish to solemnize his marriage before he dies, no woman comes forward to marry him.

¹ Richard Burton, *Of the Auparishtaka or Mouth Congress* in THE KAMA SUTRA OF VATSYANANA , (1883)

² Artola, George, *The Transvestite in Sanskrit Story and Drama*, 25 AOR 56 (1975).

³ Sweet, Michael J and Zwilling Leonard, *The First Medicalization: The Taxonomy and Etiology of Queerness in Classical Indian Medicine*. 3 JHS 600 (1993)

⁴ Preeti Sharma, *Histroical Background and Legal Status of Third Gender in Indian Society*, 2 IJRESS 64, 68 (2012).

⁵ Supra note 3, para 13.

⁶ Nanda, S., *Hijra and Sadhin* in CONSTRUCTING SEXUALITIES. 197 (Suzzane LaFont ed., 2003)

So, Arjuna transforms himself into Brinhala and marries him. In some parts of south India, the third gender community claims Irvan to be their ancestor and call themselves “Aravanis”⁷. The Koovagam village in Tamilnadu has an “Arvani temple” that holds an annual three-day long festival attended by the transgender from all over India.

In North India, the Pavaiyaa Community worships the goddess of Bahurchara Mata who is considered as emblematic of Third-Gender community. As per the popular lore, it is believed that a man tried to rape her, furious with rage, she cursed him with impotence. After the man adjured for mercy to revert the curse, she abated on the condition that he stays in wood and acts like a woman. The cultural ties of this community are deeply embedded in the Indian culture as manifested by temples scattered all over India solely devoted to them.⁸

During the Mughal Period, the Hijra community played a very important role in the political dynamics of the society. The members of the Hijra community occupied very high positions in the royal courts of the Ottoman Empire. They were often appointed as advisors to the king, guardians of the harem or as administrative generals. The Hijras were treated with such respect and reverence that they were also the guardians of holy places such as Mecca and Medina. They were seen as persons of trust, their opinion was of high value and those close to the king could influence every decision he took.⁹

However, with the onset of the colonial rule, the Hijra community was drastically marginalized. The Hijra community was seen as a separate caste altogether by the colonizers. By the 19th century, various Anti-hijra laws were put in place by the British administration in order to deny the Hijra community any civil rights. The Criminal Tribes Act, 1871, included all the members of the Hijra Community and sought to penalize acts such as cross-dressing, and males dressed as women dancing in public.¹⁰ Such act of the British administration instilled pre-judicial beliefs in the Indian minds against many tribes including the Hijra community. Post-independence; however the Criminal Tribes Act, 1871 was repealed in the year of 1952, yet the notions of hatred and fear against the Hijra community continued to

⁷Narrain, Siddharth, *In a twilight world*, Frontline, Oct.11, 2003,
<https://www.frontline.in/static/html/fl2021/stories/20031024002509800.htm>

⁸ Bradford, Nicholas J., *Transgenderism and the Cult of Yellamma: Heat, Sex, and Sickness in South Indian Ritual*, 39 JAR, 307 (1983)

⁹M. Michelraj, *Historical Evolution of Transgender Community in India*, 4 ARSS 1 (2015).

¹⁰ Id. at 18

foster in Indian hearts. It was not until 2014 that the Supreme Court recognized the transgender as the third gender. The Section 36A of the Kerala Police Act was repealed since it was not in sync with the Supreme Court judgment and more on the lines of the Criminal Tribes Act.

The MGNREGA started providing employment opportunities to the third-gender community. The Kerala Metro Rail Limited became the first of its kind to provide employment to as many as 23 transgender persons in order to promote their welfare. The government of India also implemented many welfare policies and schemes such as census documentation, citizenship identification proofs, issuing of passports etc.¹¹

Transgender persons have emerged as a strong faction of people in the LGBT rights in India. After years of struggle and discrimination faced by this community, the Indian legislature and judiciary are finally making combined efforts for giving them proper recognition and acceptance in the society.

IV. LEGAL RECOGNITION THROUGH JUDICIAL PRONOUNCEMENTS:

***Illyas and Others v. Badshah Alias Kamla*¹² (1990):**

It was one of the earlier cases where the court recognized the TG community and its customs. The Madhya Pradesh High Court held that owing to the Guru-Chela relationship the Chela (eunuch) is entitled to inherit the property of the Guru and that the Hijra community cannot transfer such property outside their community. Basing its decision on the principle that the customs and beliefs of the TG community should be respected, the court held that aforementioned custom did not violate the right to execute a will but only qualified the choice of the legatee.

***Jayalakshmi v. The State of Tamil Nadu & Ors*¹³ (2007):**

In this case, the writ petition was filed by the petitioner against the order of the learned single Judge dated 01.07.2006 made in M.P.No.1 of 2006. The petitioner's brother had doused

¹¹ Ashmita Banerjee, *Transgender: Discrimination, Issues, and Reforms* in BHU HUMAN RIGHTS PERSPECTIVE 1 (Prof. Tej Pratap Singh, Dr. Raju Majhi & Mr. Saransh Chaturvedi eds., 2017)

¹² *Illyas v. Badshah Alias Kamla*, (1990) 1 AIR, 334 (India)

¹³ *Jayalakshmi v. The State of Tamil Nadu*, 4 L.W. 404, (India)

himself with kerosene and committed suicide after being subjected to brutal sexual harassment by police officers. The facts of the case indicate that the deceased was forced to have oral sex with the police officers owing to the fact that he was a transgender. Such actions of the police officers were held to be gross violations of human rights and the court awarded compensation to the petitioner and her family and directed that interdisciplinary proceedings shall be initiated against the accused.

National Legal Services Authority v. Union of India¹⁴(2014):

On 15th April 2014 the Hon'ble Supreme Court of India, tearing the veil of neglect and discrimination which covers the third-gender community since time immemorial, ruled that the members of this community are entitled to equal rights under Articles 14, 15, 16, 19 and 21 of the Indian Constitution. Basing its judgment on the principle that the Constitution does not discriminate against any person on the basis of their sex, race, religion or caste, the court held that transgender persons are as much a part of the society like any other citizen of India.

Thus, they should not face any kind of discrimination or abuse due to their gender identity. Recounting the historical background and the challenges faced by this community, the court declared that the Central and State governments need to recognize the third gender and directed them to make policies for their betterment. The court also recognized the Transgender community as an educationally and socially backward class of citizens and thus enabled them to claim the status of Other Backward Classes (OBC) and its consequent benefits. The court also recognized persons who undergo sex reassignment surgery (SRS) for changing the sex assigned to them at birth by giving them the right to determine their gender themselves after such reassignment.

S. Swapna v. State of Tamil Nadu¹⁵ (2014):

In this case, the petitioner tried to get her name and sex changed in relevant documents after undergoing an SRS. The Joint Director (Examinations) to the Government had passed an order stating that the petitioner's request cannot be processed as there is no such provision in the prevailing rules. On the petitioner's appeal against the impugned order, Madras High Court observed that the impugned order was passed on the ground that the prevailing rules did not allow such change. The fact to be taken into consideration is that such rules were laid

¹⁴ National Legal Services Authority v. Union of India, (2014) 5 S.C.C 438

¹⁵ S. Swapna v State of Tamil Nadu, W.P. No. 10882 (W) of 2014, (India)

down years ago without giving any regard to future developments. It was held by the court that when a person undergoes SRS and applies for a change of name and sex in relevant documents, along with a certificate by the medical officer and a proof of identity, such changes ought to be made after proper verification.

K Prithika Yashini v. State of Tamil Nadu¹⁶ (2015):

In a case similar to Swapna, the petitioner was born a male. During the year 2011, he underwent SRS. Subsequently, in the year 2012, the petitioner completed her PG Diploma in computers. Owing to SRS, the petitioner wished to change her name and sex in relevant documents for which she made representations to the Director (Examination) to the Government. The representations made by the petitioner in person were not considered. The court upholding the S Swapna judgment, remanded the matter to the Controller of Examination, Bhartiya University, Coimbatore (Respondent no.3) for fresh consideration along with directions to accept the certificates as identity proof of the petitioner.

Ram Singh and Ors. v. Union of India¹⁷ (2015):

The court held that by recognizing the third gender as socially and educationally backward class of citizens, the Supreme Court in its judgment **National Legal Services Authority v. Union of India¹⁸** has made a significant observation that cannot be ignored. The court expressed its opinion upon backwardness as an outcome of several elements of our society such as social construct, culture, education and even political environment. It has been a judicial approach to not let caste be the decisive criteria for backwardness though it is an easy and distinguishing factor for the identification of a social group. The state, therefore cannot blind itself to the other forms of existences and instances of backwardness. Thus, the court held that under Articles 14, 15(4) and 16(4), social class is a perceptible section of a community which can either be internally homogenous (based on caste or occupation) or heterogeneous (based on disability or gender).

Atri Kar v. Union of India¹⁹ (2017):

In the present case, the petitioner had applied for the position of a probationary officer with State Bank of India through its online application portal. While filing the form, the petitioner

¹⁶ K Prithika Yashini v. State of Tamil Nadu, W.P. No. 7210 (W) of 2015, (India)

¹⁷ Ram Singh and Ors. v. Union of India, (2015) 4 SCC 697

¹⁸ National Legal Services Authority v. Union of India, (2014) 5 SCC 438

¹⁹ Atri Kar v. Union of India, W.P. No. 6151(W) of 2017 (India)

found that the form did not provide for a third option under the gender column thus preventing him from applying. The petitioner made a representation about the same to the respondent bank which was ignored. The petitioner contended that the online application form had discriminated against transgender persons. In its response, the respondent bank stated that the directions laid down by the Hon'ble Supreme Court in paragraph 135 were only binding upon the Central and State government and not on the bank itself. It was held by the Apex Court that the respondent bank was an entity recognized under article 12 of the Constitution of India such that the directions laid down in paragraph 135 of the NALSA judgment were binding upon it. Also, it was held that the online form which did not allow a third option under the gender column actively discriminated against transgender persons and violated Article 15.

Navtej Singh Johar & Ors. v. Union of India (2018)²⁰:

In a historical judgment, the Apex Court has recognized the right to love between two consenting adults. On September 6 2018, a 5 judge constitutional bench including, Deepak Mishra, CJI, held that part of section 377 of the IPC which criminalizes homosexuality as an unnatural sex to be illogical and defenseless. The court further stated that the popular majority cannot take precedence over constitutional morality. Thus, homosexuality was declared no longer to be an offence.

The court further acknowledged that each individual has the right to choose his or her own sex partner by their own free will. Relying on the NALSA judgment and the Right to Privacy under Article 21 of the Indian Constitution, the court overruled its judgment delivered in the case of **Suresh Kumar Koushal v. Naz Foundation**²¹.

Thus, a consensual relationship between any two consenting adults has been ousted from the ambit of being a crime under the Indian Penal Code. This decriminalization of homosexuality is a big step towards recognition of the right of the LGBT community as a whole and paves way for them to obtain complete legitimate rights like any other Indian citizen. However, despite various judgments recognising the trans-community, the hurdles faced by the community seem worse than ever. These judgments do not even begin to encompass the huge expanse of issues and discriminatory practices that the community faces each and every day.

²⁰ Navtej Singh Johar v Union of India, W.P. (Cri) No. 76 OF 2016 (India)

²¹ Suresh Kumar Koushal v. Naz Foundation, (2013) 1 SCC 1 (India)

V. PROBLEMS FACED THE TRANSGENDER COMMUNITY:

The root cause of all the problems faced by the members of the transgender community is the stigma associated with them. The members of the transgender community have been pushed to the lowest rungs and their acceptance in the society is the biggest issue faced by them. A part cause of this is ignorance displayed by the Indian society which refuses to even acknowledge the existence of any other sex except for the binary genders.²² The third gender has been marginalized and ostracized to such extents that they have been denied equal rights in almost all fields of life whether it is health, education, employment or even right of passage to public places. They face discrimination at the hands of bureaucrats in cases even when they have to get their name or sex changed in official documents.²³

False myths around the transgender community are creating a social stigma, prevalent even in educated masses of the Indian population. The negative impact of such notions is evident on the healthcare of the transgender persons whereby they have to face constant refusal of treatment by doctors.²⁴ Due to lack of education and poor access to quality healthcare, this community is one of the most prominent victims sexually transmitted diseases. Despite having provisions like the establishment of HIV Sero-Surveillance Center and already existing HIV testing centres, access to HIV-AIDS testing or its treatment remains a distant dream for the transgender community. Binary classification of gender also leads to sexual abuse among those transgender persons who are admitted into male wards of hospitals. However, no police action is taken due to the grey area of law towards the third gender when it comes to the application of laws against sexual offences. Formal education is a fundamental right. Yet the third gender is deprived of it. There have been instances where the transgender student has been refused admission by the school authorities. It has been observed that the provisions of positive discrimination often fail due to the voluntarily drop out of the trans-community as a result of ill-treatment by peers.²⁵ Further, due to the lack of employment opportunities transgender persons are forced into begging and prostitution thus

²² Shobha Shukla, *The Third Gender Does Not Deserve A Third Grade Treatment*, MORDERN GHANA, (June 5, 2015) <https://www.modernghana.com/news/399668/1/the-third-gender-does-not-deserve-a-third-grade-tr.html>

²³ Sudeshna Chowdhury, *The Case For The Third Gender*, MID-DAY, (December 08, 2011, 07:02 AM) <https://www.mid-day.com/articles/the-case-for-the-third-gender/145238>

²⁴ Elizabeth Soumya, *Indian Transgender healthcare Challenges*, AL-JAZEERA, (June 18, 2014, <https://www.aljazeera.com/indepth/features/2014/06/healthcare-distant-india-transgenders-201461882414495902.html>

²⁵ Devanshi Verma, *Why Indian schools have so few transgender students*, WION, (August 01, 2017, 05:51 AM) <http://www.wionews.com/south-asia/why-indian-schools-have-so-few-transgender-students-18451>

further deteriorating their position in the society. Even while practising prostitution livelihood doesn't come easily to these people. They are ranked lower than other prostitutes owing to their physical structure and even refused shelter in the red-light areas.²⁶ Many government schemes recognize only two genders thus preventing the third gender from reaping benefits under these schemes. It wasn't until 1994 that voting rights were granted to the transgender community.

Current public as well private washrooms do not have the segregated infrastructure for the third gender²⁷. This often leads to confusion and petty fights between the trans-community and rest of the population. The Hijra community faces two cleft problem. Firstly, there is a lack of knowledge of health problems related to the transgender persons and the second is the fear of humiliation and discrimination while visiting public hospitals. Due to rampant illiteracy and lack of public health services, the transgender community is plagued with several health issues such as HIV-AIDS. For transgender persons to get tested for HIV-AIDS is also a big task. A lot of counselling is required to create awareness among the members.

In order to resolve these issues faced by this community, the Ministry of Social Justice and Empowerment through Thaawarchand Gehlot, tabled the Transgender Persons (Protection of Rights), in August 2016 at the Lok Sabha. Various provisions of this bill are centred at alleviating different forms of discrimination against the TG community.

VI. CRITICAL ANALYSIS - TRANSGENDER PERSONS

(PROTECTION OF RIGHTS) BILL, 2016²⁸

A) PROMINENT FEATURES OF THE BILL:

The Bill classifies a transgender as a person who does not associate with the gender assigned at birth, i.e. a person partly male or female, or neither male nor female, or a combination of male and female. The definition transgender includes persons with intersex variations, gender

²⁶ Maninder Dabas, *LGTBQ: 90% of Transgenders Are Forced Into Prostitution, But Healthcare Still Remains A Distant Dream*, I.T. TIMES, (July 10, 2016, 17:54 PM) <https://www.indiatimes.com/news/india/lgtbq-90-of-transgenders-are-into-prostitution-but-healthcare-still-remains-a-distant-dream-257526.html>

²⁷ Mrinalika Roy, *India's transgender community still waiting for toilets it was promised*, REUTERS, (August 08, 2016, 02:41 PM) <https://in.reuters.com/article/india-transgender-toilets/indias-transgender-community-still-waiting-for-toilets-it-was-promised-idINKCN10J0VL>

²⁸ Transgender Person (Protection of Rights) Bill, 2016, 210 of 2016

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queers, trans-men and trans-females.²⁹ Working alongside the Supreme Court guidelines, the proposed bill in its Chapter II provides for prohibition of all forms of discrimination against any transgender person in the areas of education, occupation and healthcare services. It also provides the transgender community, the right of movement, right to purchase, reside or rent any property and opportunity to stand for or hold any government office.

The Bill proposes to set up the National Council for Transgender Persons (NCT) as an advisor to the Central Government regarding policies and legislation related to transgender persons. Chapter VII of the bill penalizes acts such as compelling a transgender person into begging or any form of forced labor, denial or obstruction of their right of passage to public places, forceful eviction of transgender people from villages and communities and any act including and causing physical, mental, sexual verbal or economic abuse by proposing a maximum of 2 years imprisonment and fine. Clause 14 of the Bill provides for all educational institutions, recognized by the Government to provide inclusive education for the transgender community.³⁰

This system aims to provide an educational environment cohesive to growth and adaptability of the transgender community by ensuring their active participation so that they don't feel marginalized.³¹ As per clause 16, the Bill seeks to introduce trans-health care as part of the medical curriculum. It also directs the Government to create insurance cover for medical expenses for the transgender persons.³² The Bill also aims at securing medical facilities including SRS, hormonal therapy, and establishing separate HIV Sero-Surveillance Centers. It calls for mandatory pre and post counselling sessions before availing medical facilities.³³ Lastly, the bill proposes to grant recognition to the transgender community by enabling them to obtain a certificate of identity. This certificate would be necessary for a transgender to invoke rights under this bill. The certificate of identity will be provided by the District Magistrate upon an exhortation from a Screening Committee consisting of a medical officer, a psychologist/ psychiatrist, a transgender representative and a district welfare officer.³⁴

²⁹ Transgender Person (Protection of Rights) Bill, 2016, 210 of 2016, Cl. 2(i)

³⁰ Transgender Person (Protection of Rights) Bill, 210 of 2016, Cl. 14

³¹ Transgender Person (Protection of Rights) Bill, 210 of 2016, Cl. 2(c)

³² Transgender Person (Protection of Rights) Bill, 210 of 2016, Cl. 16 (g)

³³ Transgender Person (Protection of Rights) Bill, 210 of 2016, Cl. 16(a), 16(b), 16(c)

³⁴ Transgender Person (Protection of Rights) Bill, 210 of 2016, Cl. 4-7

B) KEY ISSUES:

i) DEFINITION OF THE TERM "TRANSGENDER":

It is an umbrella term to describe persons whose gender identity, behaviour or gender expression does not conform to their biological sex. As per international standards, a transgender is a person whose gender identity is not fully aligned with the gender assigned at birth.^{35, 36} Thus, there can be a person who is born as a male but later chooses to identify as a female, in medical terms commonly known as Gender Dysphoria³⁷.

The Bill (2016) provides certain criteria in addition to this mismatch which has to be fulfilled by a person to be recognized as a transgender. The additional criteria include within its ambit being neither male nor female; or a combination of male and female, or partly male or partly female.³⁸ But the current bill does not include people who identify themselves with the opposite gender without SRS such as Male to Females (MTF) and Female to Males (FTM).

In this context, the report of the Standing Committee on Social Justice and Empowerment on the Transgender Persons (Protection of Rights) Bill, 2016, (SCR) states that the definition given by the bill violates the right to self-determination of gender identity and is against international standards. The SCR suggested that the bill should be amended so as to include a person who chose to identify as a man, woman or a transgender irrespective of the SRS and other socio-cultural identities.³⁹

The Supreme Court's judgment, Standing Committee on Social Justice and Empowerment's report and the pending Bill regarding the rights of transgender people, base their definition of the term on the phenomenon of mismatch. The bill's definition has thus created confusion with respect to the necessary element for being recognized as a transgender. Whether being a mismatch is enough or satisfying one of the additional criteria is a sine qua non for obtaining recognition under the Bill.

³⁵ American Psychological Association, "Guidelines For Psychological Practice With Transgender And Gender Nonconforming People", 70 AP 832 (2015)

³⁶ Nivedita Rao, *Explained: The Transgender Persons (Protection Of Rights) Bill, 2016*, THE PRS BLOG, (December 15, 2017) <http://www.prsindia.org/theprsblog/?p=3938%20accessed>.

³⁷ Overview, *Gender Dysphoria*, NHS

³⁸ Transgender Person (Protection of Rights) Bill, 2016, 210 of 2016, Cl. 2(i)

³⁹ Standing Committee on Social Justice and Empowerment, *Persons (Protection of Rights) Bill, 2016*, Report No. 43 (July, 2017)

ii) TREATMENT OF TRANSGENDER UNDER EXISTING LAWS:

The existing laws including and not limited to the Indian Penal Code, 1860 (IPC) and the Hindu Succession Act, 1956, recognize only male and female categories of gender. These laws enumerate different provisions with respect to the binary classification of genders. The proposed bill seeks to introduce the third gender but at the same time, it does not provide for the status of the persons under other existing laws. The Bill fails to safeguard the TG community from rape and other sexual offences. Further, they remain at a great danger for being prosecuted under section 377 of the Indian Penal Code, 1860, which criminalizes unnatural intercourse.

It would be pertinent to mention here, that the Hindu Adoptions and Maintenance Act, 1956, provides for separate provisions for the adoption of a child by a male or female. The Hindu Succession Act, 1956 recognizes “heir” either as a male or female for succession. In the same context, the IPC under section 317 states that it is a criminal offence to abandon a child and the child is defined as someone below 12 years of age. However, maximum cases of abandonment occur within the age group 12-18 years in the transgender society effectively leaving the abandoned children with no remedy. The disparity in the quantum of punishment under the IPC, 1860 and the Bill, 2016 is strikingly obvious. The sexual harassment under section 354 A of the IPC, 1860 is punishable with rigorous imprisonment for 3 years or fine or both, the Bill, on the other hand, provides for simple imprisonment up to 2 years or fine or both for the offence of sexual harassment against a transgender.

To mention a few more instances of omission include, the NREGA act that provides for beneficial legislation only for women by giving them a priority over men when they request for work under the act. The Companies Act, 2013 provides that there should be one seat reserved for women on the Board of Directors of the company.

iii) RESERVATION POLICY:

The NALSA judgment makes it clear that the members of the transgender society can claim backward class OBC status. Another judicial pronouncement⁴⁰ by a division bench headed by Justice Ranjan Gogoi reaffirmed the OBC status of transgender persons by recognizing them as a separate social class under Articles 14, 15(4) and 16(4) of the Constitution of India.

⁴⁰ Ram Singh and Ors. v. Union of India, (2015) 4 S.C.C. 697(India)

However, the bill provides for no OBC reservation to the TG community. Instead of being a protective shield to the TG community, the bill with its obvious lacunas creates several limitations on the rights of the transgender persons.

iv) SELF-DETERMINED IDENTITY V. SELF-PERCEIVED

IDENTITY:

The Apex Court was very clear in its ruling that the gender identity is the fundamental right of a person and it gave the right to determine the self-identify gender in order to protect the integrity, respect and dignity of the person. Such a right is inherent to the human nature as no social construct can force persons to be something that they are not. Imposition of a gender that the person does not identify with is cruel and inhuman in its very essence and it resonates well with the court ruling that a person should be given the right to choose a gender.

But in order to prevent the misuse of this right, the Bill introduced the provision for obtaining a Certificate of Identity to be issued by the District Screening Committee. A person cannot claim any benefit under the Bill without such a certificate. Thus, the provisions for self-perceived gender, as well as a screening process in the Bill, have resulted in a massive confusion. The Bill is unclear about the term 'self-perceived identity' and the amount of force it carries along with it. There is no provision for appealing against the decision of the screening committee if the certificate is not granted or rejected. The legislative action as presented through this Bill makes it a paper-tiger that does not follow the theme of "*Sabka Saath Sabka Vikas*". It is largely left to one's imagination as to how the Government plans to achieve the goals as laid down in the Bill.

Thus, there is a drastic need to address the shortcomings in its present form of the Bill to make it more relevant.

C) RECOMMENDATIONS AND SUGGESTIONS:

The government has taken the right step by introducing this Bill. Although a legal status to the third gender has been provided, erasing a past of unscientific notions on the transgender community requires more than judicial precedents or legislative provisions to bring them at par with the rest of the society. There is an urgent need to take steps towards the social

integration of the transgender community. The simplest way would be imbibing non-discriminatory practices for the transgender community in a different sphere of life.

1. EDUCATION:

The first and foremost reform should be brought in the educational system with the provision of free and mandatory primary education to the transgender community with the application of 25 per cent reservation held in private schools under the ambit of Right to Education Act, 2009. Also, mass awareness programs should be introduced in the educational curriculum at various levels so as to facilitate a better understanding of issues and problems faced by the transgender community. This would ensure that right from the tender age, the school going children would be sensitive towards this section of the society. It may also lessen the inhibitions of the parents who try to overprotect the transgender children and do not allow them into the schools fearing discrimination. NGO's can be roped in for the volunteering and designing the campaigns. It may be mentioned here that, a transgender run NGO by the name Astitva is creating awareness among schools through student interactive sessions.⁴¹

2. HEALTH CARE:

On critically analyzing the various health benefits provided by the Bill, it can be observed that there is an ambiguity regarding the guidelines for establishing trans-healthcare centres. However, earlier these guidelines were clearly stated in the draft Bill of 2015. A reconsideration of the previous guidelines does not seem far-fetched under the given circumstances. Further, the Bill should have taken into account the need for creating separate wards in the hospital for transgender as it was provided for in the private member bill passed by Rajya Sabha in 2014 which now stands diluted.

3. EMPLOYMENT:

It is observed that even if the third gender community is provided with job opportunities, failure to obtain residence, transportation and establishing communication with colleagues have resulted in the failure of continuity of employment in the formal sector. The Bill also fails to provide reforms in the unorganized sector that has rendered most of the transgender community with a lack of employable skills. It would be worthwhile to bring this community

⁴¹ Astitva, *Employment opportunities for Transgenders; Transgender community project*, ACIIE START-UP PROJECT

under the “Skill India” mission with assistance from NGO’s and self-help groups to impart vocational training.

4. SANITATION:

Another hurdle faced by the transgender community is that of proper sanitation facilities. Proper sanitation facilities including separate bathrooms for transgender should be provided at all public and private places including government, educational and commercial buildings. Some general reforms that would go long way in putting the transgender community at ease while initiating a well-knit social integration include, the use of derogatory names like “hijras” should be made an offence.

VII. CONCLUSION:

The term transgender includes people with a different sexual orientation such as lesbians, gays, intersexes, Female to Males and Male to Female. Historically, India has recognized transgender as an integral part of their culture associating them with auspicious occasions. Years of marginalization resulted in utter poverty and alienation of the third gender in India. Extensive deprivation from education and healthcare rendered the majority of the transgender community with low literacy and a victim of sexually transmitted diseases.

It was only in the year 2014 that the Supreme Court recognized transgender as an individual gender identity in its landmark judgment of *National Legal Services Authority v. Union of India*. Since then the government has increased its effort towards the trans-community by drafting the proposed Bill which gives legislative recognition and showers plethora of benefits to this community.

However, the Bill has a number of limitations of its own and its implementation remains in the major shadow of the doubt. With slight amendments to the proposed bill, the government can ensure equal rights in education, healthcare and job opportunities for the transgender community. It is observed that there is an urgent need for intervention by the government and the citizens to safeguard and protect the constitutional and human rights of the transgender community.