

## **RIGHT TO BE A PARENT AND HETERONORMATIVE LAWS – AFTERMATH OF NAVTEJ SINGH JOHAR JUDGMENT**

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### **ABSTRACT**

If we look into the post-2018 laws related to adoption and surrogacy, they have failed to incorporate the rights of the LGBTQ community. Whether it is CERA's decision not to legally allow gay couples to adopt or the new Surrogacy (Regulation) Act, 2021, homosexual couples are prohibited from having children through a surrogate mother. This raises questions beyond the traditional framework of parental rights and obligations towards children. For the protection of Transgender rights, The Transgender Persons (Protection of Rights) Act, 2019, was enacted, which has been opposed by the transgender community since then. The Act does not mention basic rights like marriage rights, adoption rights, property rights, social security, or pension. This deprives the transgender community of some of the most fundamental rights. They are being deprived of parenthood based on their sexual orientation. These legislations only reinforce the stigmas against the LGBTQ community, which Article 377 wanted to obliterate.

***Keywords:** LGBTQ, Fundamental Rights, Civil Rights, Parenthood, Discrimination, Adoption and Autonomy.*

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## I. Introduction

*History owes an apology to the members of this community and their families for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality.<sup>1</sup>*

- J. Indu Malhotra

THE LGBTQ community of India has been struggling to claim their rights as a citizen of India since its independence. Their struggle started in the British era, where their identity was oppressed, and they were denied to lead a normal life and to be a homosexual or transgender was criminalised.<sup>2</sup> Gender fluidity for humans and yakshas is a well-known notion in ancient India. These records have been turned into art, paintings, and sculptures all around the Country. The Khajuraho temple sculptures (950 to 1050 AD), for example, serve as a statement of men, women, and the third gender's sexual fluidity. Similar imagery can be seen in the thirteenth-century Sun temple in Konark, Orissa. One can find images of men and women engaged in lovemaking with the same sex in Buddhist caves at Ajanta and Ellora.<sup>3</sup> Once considered a part of Hindu history and culture, homosexual relationships and transgender became taboo with the arrival of Western culture. Around the turn of the century, when the colonial era began, the British administration criminalised the hijra community and deprived them of all civil rights. The 1871 Criminal Tribes Act classified the community as a distinctive tribe that threatened civilisation. Even though the Act was repealed after independence, the social stigma within the community persisted.

However, in the *Navtej Johar* case,<sup>4</sup> the Supreme Court of India upheld the right to equal citizenship to the community representing the LGBTQ. Section 377 of the Indian Penal Code that read the consensual relationship between adults of the same sex or otherwise as a criminal act was held unconstitutional. The Court recognised the Yogyakarta Principle<sup>5</sup>, to which India

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<sup>1</sup> *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1.

<sup>2</sup> The Criminal Tribes Act, 1871.

<sup>3</sup> Meenakshi Da, "LGBTQ rights and the role of civil society in repealing of the laws in India: section 377", 7 *International Journal of Mechanical Engineering* 373–377 (2022).

<sup>4</sup> *Supra* note 1.

<sup>5</sup> M. Carpenter, "Intersex Human Rights, Sexual Orientation, Gender Identity, Sex Characteristics And The Yogyakarta Principles Plus 10", *Culture, Health & Sexuality* 1-17 (2020).

is a signatory. Section 377 does not conform to India's International obligations<sup>6</sup>, which prohibit discrimination on sexual orientation and gender identity.

Same-sex marriage is still not recognised in India; the community faces different problems related to civil rights. Most of the laws pertaining to civil rights do not include them and are based on a person's marital status. Personal laws do not recognise same-sex couples. Any amendment in the personal laws would be another issue as these laws have always been conservative and recognise the only binary definition of gender.

Further, if we look at the changes brought or proposed related to adoption and surrogacy, they have also failed to incorporate the rights of the LGBTQ community. This raises questions beyond the traditional framework of parental rights and obligations towards children. Post-2018 judgment, homosexuality has been recognised, but same-sex couples cannot adopt a child or opt for surrogacy. They are being deprived of parenthood based on their sexual orientation. Adoption by single LGBTQ people is recognised, but not by same-sex couples.

The Central Adoption Resource Authority (CARA) is a government of India's statutory entity under the Ministry of Women and Child Development. It serves as the main organisation for Indian child adoption and oversees as well as regulates domestic and international adoptions. As per guidelines/regulations issued by CARA<sup>7</sup>, even heterosexual couples in a live-in relationship are also not allowed to adopt. These legislations only reinforce the stigmas against the LGBTQ community, which article 377 wanted to obliterate.

While there is a discussion about the need for such a law, there appears to be minimal political consensus towards enacting such a law. This article's primary objective is to discuss the parenthood rights of same-sex couples and the transgender individuals who choose to be identified as a third gender. The paper aims to highlight the lacunae in the several adoptions and surrogacy statutes when it comes to LGBTQ couples and individuals identifying as the third gender. The other objective is to establish valid and legal arguments in favour of the

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<sup>6</sup> *Supra* note 1 at 116-117.

<sup>7</sup> The Adoption Regulations, 2017, Rule 5- Eligibility criteria for prospective adoptive parents. –

(1) The prospective adoptive parents shall be physically, mentally and emotionally stable, financially capable and shall not have any life-threatening medical condition.

(2) Any prospective adoptive parents, irrespective of his marital status and whether or not he has biological son or daughter, can adopt a child subject to following, namely: -

(a) the consent of both the spouses for the adoption shall be required, in case of a married couple;

(b) a single female can adopt a child of any gender;

(c) a single male shall not be eligible to adopt a girl child;

(3) No child shall be given in adoption to a couple unless they have at least two years of stable marital relationship.

LGBTQ community based on equality and non-discrimination to recognise their right to have a family and enjoy parenthood, same as the binary gender set.

## II. Parenthood Beyond Marital Relationship

The ideal family in society consists of a couple, heterosexual, of course, with a possibility to bear a child and upbringing this child according to society's norms. The basic idea of having a child and the desire for parenthood is related to the biological process of giving birth to children. The parents' rights and obligations are based on the genetic contribution where the wife has to be the bearer of the gametes of the two parents. This is the fundamental nature of parenthood based on the biology of reproduction. Nevertheless, if we see beyond of the natural ways of parenthood, a person's desire to become a parent can have other possible ways- Surrogacy and adoption. These ways have given ample opportunities to people to become a parent other than from the natural and accepted practices. They can adopt the child or choose a surrogate mother to bear their child.

Today the State has come up with different statutes governing these other possibilities to be a parent. In India, Hindus can only adopt a child legally according to The Hindu Adoption and Maintenance Act, 1956. People belonging to other religions who want to adopt a child can only take the child as a 'guardian' under The Guardians and Wards Act, 1890.<sup>8</sup>

Another statute that facilitates adoption by individuals is The Juvenile Justice (Care & Protection of Children) Act 2000, which tends to be secular and applies universally to the single parent desiring the adoption of a child in need of care and protection. Unlike the Guardians and Wards Act, 1890, this statute establishes a relationship between parent and child and is not merely limited to guardians. This legislation aims at the care, protection, development and rehabilitation of a child who has been abandoned or is an orphan.<sup>9</sup> The Act nowhere mentions the individual's marital status as a mandatory condition, and anyone who fulfils the criteria under this Act and CARA guidelines can adopt a child.

People who want a biological child to enjoy parenthood can opt for Surrogacy. According to the Surrogacy (Regulation) Act, 2021, all single/unmarried persons have been completely disqualified for the commissioning of Surrogacy in India. Likewise, couples living in live-in

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<sup>8</sup> Niraj Meena, "Adoption Laws in India: Challenging Existing law", available at: <http://docs.manupatra.in/newsline/articles/Upload/E8EFE493-114B-4E5B-A014-682EB1729301.pdf> (last visited January 31, 2021).

<sup>9</sup> *Shabnam Hashmi v. Union of India* (2014) 4 SCC 1.

relationships are still exempted, though they found constitutional recognition under the Protection of Women from Domestic Violence Act, 2005.<sup>10</sup> A single female cannot opt for surrogacy; however, modifications are being made for widows and divorcees. The Surrogacy (Regulation) Act, 2021, states that unmarried and widowed women between the age of 35 and 45 could be single mothers.

### III. Denial of Parenthood to LGBTQ Community in India

Before discussing how the laws relating to adoption and surrogacy indirectly discriminate among the group, we must understand that sexual orientation and gender identity are different. Sexual orientation is an inherent or immutable enduring emotional, romantic or sexual attraction to other people.<sup>11</sup> On the other hand, gender identity is one's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from the sex assigned at birth.<sup>12</sup> Transgender people may be straight, lesbian, gay, or bisexual. E.g., a person who changes from male to female and is attracted exclusively to males will usually be classified as a straight woman.<sup>13</sup> Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category. However, the legislature brought the Transgender Act of 2019 providing certain rights to transsexuals, but no such law or changes were made to recognise the right of the LGBTQ community. The rights of the individuals are still being discriminated based on their sexual orientation.

Coming to the right of parenthood, the Hindu Adoption and Maintenance Act, 1956 has no mention beyond the binary genders of male and female. The Act does contain provisions for unmarried males and females to adopt a child based on the mechanism and procedure stated under the Act. The CARA guidelines, the Adoption Regulations, 2017, have no mention of prohibiting the LGBTQ community in their rules. However, the form to be filled by the parent applying for the adoption does not contain the third gender option when asking about the single parent applying for adoption, making it clear that the LGBTQ cannot adopt a child.<sup>14</sup> One

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<sup>10</sup> *S. Khushboo v. Kanniammal*, AIR 2010 SC 3196.

<sup>11</sup> LGBTQ terms and definitions, Multicultural and Diversity Affair, available at: <https://lgbtq.multicultural.ufl.edu/programs/speakersbureau/lgbtq-terms-definitions/> (last visited on January 27, 2021).

<sup>12</sup> *Ibid.*

<sup>13</sup> How Is Sexual Orientation Different from Gender Identity? GLAAD, available at: <https://www.glaad.org/how-sexual-orientation-different-gender-identity> (last visited on January 27, 2021).

<sup>14</sup> Online Registration Form, Central Adoption Resources Authority, Ministry of Women and Child Development, Government of India, available at: <https://carings.nic.in/Parents/parentregshow.aspx> (last visited on February 2, 2021).

interesting thing which can be derived from the application form is that it does not ask for the sexual orientation of the person, at least respecting the personal autonomy, so it can be inferred single LGBTQ community can adopt. Still, they cannot adopt if they are a couple living together.<sup>15</sup> The transgender community remains out of the adoption right if they represent themselves as a third gender and not within the binary gender sets.

If we look into the Surrogacy (Regulation) Act, 2021, there is expressed provision for who can avail surrogacy. The Act does not include LGBTQ couples. The bill has proved to be discriminatory and arbitrary on various grounds. The Act excludes single men, women and LGBTQ couples without any explanation. So far, the surrogacy Act has not received a positive response from the people and is already taking backlash for putting women's autonomy on the back foot as it fails to protect reproductive rights and the right to parenthood. In addition, it has been unable to cater to the demands of the transgender community and LGBTQ couples to have a family.

Navtej Singh Johar's landmark decision authorised and validated same-sex relationships. The prohibition of particular communities based on their sexual orientation under Adoption and Surrogacy laws has no reasonable classification. We can always argue that the right to equality is not absolute, and not all laws apply to everyone equally. Therefore, the test of reasonable classification has been introduced.<sup>16</sup> Even the NALSA judgment extensively dealt with the principle of non-discrimination and equality to be applied to everyone irrespective of their gender identity and sexual orientation.

The true picture is disappointing in the present situation regarding civil liberties given to the LGBTQ community in India. The primary purpose of discussing the right to be a parent independent of marital status is to bring the individual's civil rights to the centre of the discussion. Even if the laws have not yet recognised same-sex marriage, we must not deny the rights of adoption and surrogacy of individuals who choose to be identified as the third gender and same-sex couples only because they do not conform to a binary understanding of gender, *i.e.*, men and women. This will not only open the doors for the LGBTQ community but also force the legislature to recognise the right of parenthood of live-in couples.

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<sup>15</sup> Harshil Shah, *Pride and Privilege -An Exposition on Adoption Laws That Affect Queer Parenting* (October 5, 2019), available at: <https://onefuturecollective.org/pride-and-privilege-an-exposition-on-adoption-laws-that-affect-queer-parenting/> (last visited on February 2, 2021).

<sup>16</sup> *The State of West Bengal v. Anwar Ali Sarkar* *habib Mohammed*, AIR 1952 SC 75.

#### IV. LGBTQ'S Right to be a Parent in South Africa

In this section of the article, a light has been thrown on South Africa's approach on civil rights related to LGBTQ community. The Indian and South African constitutions arose after long battles against colonialism and imperialism. Both countries studied the Constitutions of other countries while drafting their own, claiming theirs to be the greatest in the world. Every citizen has equal rights and opportunities under both constitutions. Fundamental Rights and the Bill of Rights, in the Indian and South African Constitutions, respectively, form the core of the Constitution and democracy. Both provide the government with some duties and obligations in working to improve the lives of the underprivileged.

Because the South African Constitution was drafted in 1996, it benefited from hindsight and was able to learn a great deal from the experiences of other vibrant democracies such as India. This experience is evident in the fact that the Bill of Rights is the most detailed and comprehensive list of rights granted to citizens anywhere on the planet, including India. In the South African Bill of Rights, the right to equality is more expansive and covers more ground, as discrimination is prohibited for a variety of reasons, including marital status, gender, sex, sexual orientation, pregnancy, and so on. However, just five grounds are stated in India: religion, race, caste, sex, and place of birth. The struggle against racism in South Africa does include a vision of the fight against discrimination based on sexual orientation. As a result, the Country's Constitution explicitly recognises sexual orientation as a forbidden ground for discrimination.<sup>17</sup>

Unlike India, South Africa adopts a much wider approach to LGBTQ rights. The Constitutional Court of South Africa has adopted the transformative approach to address the sufferings of the LGBTQ community. The South African Constitution retains from the past the suffering of its people due to *"racism, repression, authoritarianism and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirational egalitarian ethos expressly articulated in the Constitution."* The contrast between the past, which it repudiates, and the future it seeks, is dramatic and stark.<sup>18</sup>

In 1998, the Constitutional Court of South Africa struck down the restrictions on homosexual male sodomy, stating that the restrictions violated the principle of equality, dignity and right to privacy. The Court further explained that restricting the sexual intimacy between same-sex men

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<sup>17</sup> The Constitution of South Africa (Chapter 2) of Bill of Rights, s. 9.

<sup>18</sup> *S v. Makwanyane*, 1995 (3) SA 391 (CC).

violated the right to equality. Gay men have been discriminated based on their sexual orientation. The Constitution of South Africa expressly prohibits any discrimination based on sex.<sup>19</sup>

The Court in the *Immigrant same-sex partner* case,<sup>20</sup> Justice Ackerman ruled that unequal treatment leads to discrimination. The Court further ruled that the unfair discrimination based on sexual orientation limits the right to equality and further extends the right to live with dignity. This limitation cannot be reasonable in any democratic society based on the principle of human dignity, equality and freedom. The mention of the word ‘spouse under section 25(5) of the Aliens Control Act of 1991 can now be read in extension as ‘or partner in a permanent same-sex relationship.<sup>21</sup> The Court made a significant point stating that the procreative potential is not a defining characteristic of conjugal relationships and shredded the argument that allowing same-sex marriage will endanger traditional marriage.<sup>22</sup>

The most prominent ruling that gained international praise was *Minister of Home Affairs v. Fourie*<sup>23</sup>, which legalised gay marriage. This judgment paved the path for South Africa to legalise gay marriage, and the enactment of the Civil Union Act, 2006 allows adult couples of any type to marry or enter into civil partnerships. South Africa now has three marriage laws, giving equal rights to same-sex couples and heterosexual couples. The judgment stated that there should be no problem in pronouncing the vows of marriage by the same-sex couple. There must be a paradigm shift in the idea of marriage because marriage provides security. If not granted in a society that considers marriage as validation will leave couples in the State of legal blankness, as stated by Justice Sachs.<sup>24</sup>

The Constitutional Court of South Africa, playing the role of reformer in the case of *Du Toit v. Minister of Welfare*,<sup>25</sup> ruled that the statute banning gay couples from being guardians was unconstitutional and emphasised that such statutes not only deprive the individual of family life but also, they are not in the interest of the child. The Court ruled that the statute “*surely defeats the very essence and social purpose of adoption which is to provide stability,*

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<sup>19</sup> *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1999 (1) SA 6 (CC).

<sup>20</sup> *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* (1999) ZACC 17.

<sup>21</sup> *Ibid.*

<sup>22</sup> H De Ru, “A Historical Perspective on The Recognition of Same-Sex Unions in South Africa” 19 (2) *Fundamina* 221-250 (2013).

<sup>23</sup> 2006 (1) SA 524 (CC).

<sup>24</sup> *Supra* note 16.

<sup>25</sup> 2002 (10) BCLR 1006 (CC).



*commitment, affection and support important to a child's development, which can be offered by suitably qualified persons”* including gay couples.

In 2010, the South Africa Children's Act 38 of 2005 made Surrogacy for same-sex couple legal. The gay couple in South Africa can opt for Surrogacy with the condition that at least one of the commissioning parent's gametes must be used in the IVF process. The right to Surrogacy has been granted the same as the heterosexual couple.

These judgments and statutes tell us the story of the apartheid and authoritarian era of South Africa that has seen oppression and denial of human rights and what the Country has learnt from it. The post-apartheid Constitution promises to protect human rights based on the respect and dignity of all, and the Court is helping in keeping that promise. *“The transformative aspect of a constitution may come not from its official interpretation, but rather from ‘the voices of human and social suffering of the right-less’ or ‘communities of resistance’ once they become interpreters of the Constitution.”*<sup>26</sup> India, when compared to South Africa, it becomes evident that India is way back in providing equal rights to all its citizens. The present South African attitude toward gay and lesbian populations stands in contrast with India's legal status of same-sex relationships. Therefore, their approach can be studied as a model in order to assimilate the LGBTQ community with the society.

The reason why we are still behind in ensuring the human rights of our citizens has been discussed in the subsequent sections where the role of the Supreme Court and The Legislation has been discussed at length. The section also attempts to know why just the transformative constitutionalism by Court alone is not enough and the need for transformation by the policy-makers.

## **V. Transformative Constitutionalism and Heteronormative Approach**

The framers of the Constitution intended to create a constitution living in nature. The Constitution is founded on principles that will be consistent in the future. Transformative constitutionalism is the process through which the Constitution's goal can be realised. It plays a critical role in protecting and promoting equality, liberty, and fraternity in society to establish the Constitution as a living document. In this approach, we move forward to the

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<sup>26</sup> Upendra Baxi, “Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa”, *Pretoria University Law Press* 19-47 (2014).

section where transformative constitutionalism is used as the tool to explain the need and importance of civil rights in case of the LGBTQ community.

The previous section of the paper discussed the primary statutes related to adoption and Surrogacy. The lacunae have been pointed out. The sections draw our attention to the heteronormative approach of the State against the idea of gender fluidity. Suppose we say that these laws are discriminatory against the LGBTQ community; any counter-argument that will be expected to be presented by the central Government will be backed by the Transgender Persons (Protection of Rights) Act, 2019. The Act states that the trans community can be identified according to self-perceived identity by getting themselves certificate issued by the District Magistrate.<sup>27</sup> In further discussions, we will analyse whether the Transgender Act of 2019 will give the community the right to parenthood when they identify themselves differently from the binaries accepted in society.

## VI. Right to Choose and Normative Autonomy

We recognised the right to privacy as a fundamental right in *J S Puttaswamy v. Union of India*<sup>28</sup>. This case dealt with the detailed analysis of a person's autonomy, right to choose and privacy. The Supreme Court unanimously ruled that the right to privacy is fundamental. Every person has the right to choose their way of living, which could not be interfered with by the State without any necessity. The restriction must be reasonable and proportionate. Equality is not limited to the recognition of individual dignity. It also includes the civil rights to advance and develop each individual's legal, social and economic rights irrespective of their gender identity.<sup>29</sup>

The right to privacy is structured on the individual's dignity that finds a mention in the Constitution's Preamble. It is an intrinsic part of the right to life, and the Court has provided expanded interpretation. There are minimum conditions that must exist to live with dignity, which no government can take action to take it away.<sup>30</sup> The concept of human dignity developed as in the *Common Cause* judgment in general, based on the right to autonomy and right of choice. It has become a constitutional value.<sup>31</sup> The right of choice and self-determination is an accepted facet of dignity; here, we must quote the part of Puttuswamy's

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<sup>27</sup> The Transgender Persons (Protection of Rights) Act, 2019, s. 4.

<sup>28</sup> (2017) 10 SCC 1.

<sup>29</sup> *Supra* note 1.

<sup>30</sup> *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SCC 802.

<sup>31</sup> *Common Cause (A Regd. Society) v. Union of India*, 2014 SCC 5 338.

Judgement where the transformative constitutionalism puts forth the transgender rights jurisprudence:

Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and liberty. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual.

Article 14, 19 and 21, forming the golden triangle, gives the person to form an association of her choice and exercise his autonomy. The concept of 'self-perceived identity' can be understood as a facet of normative authority. The normative authority means the individual has control over the things she considers necessary in life- it can be a choice to marry, procreate, decide on a partner, and have a family. Any State action must not obstruct such autonomy unless there is reason to do so.<sup>32</sup>

The liberty rights on their own cannot protect the normative authority of the individuals; there must be social and cultural human rights. It might help to determine the content of human rights; it might also provide us with the reasons we have to assign rights to humans at all. The concept of dignity is there to justify the human rights claimed.<sup>33</sup> The privacy to have family and home is one of the most valuable rights guaranteed by the Constitution embedded under the right to life. Privacy at home is inviolable.<sup>34</sup>

It is not necessary to delve into all the legalities and prove that decision to parent has nothing to do with the sexuality or the gender identity of the person. It is a fundamental civil right that a person has to have to keep society alive. On the Right to Adopt in *Shabnam Hashmi v. Union of India*<sup>35</sup>, the Supreme Court has decreed those prospective parents, irrespective of their religious background, are free to adopt children after the prescribed procedure. In its order, the Court said that 'personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. In this notable judgment, the

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<sup>32</sup> P Schaber, "Human rights and human dignity: A Reply to Doris Schroeder", 17 (1) *Ethical Theory and Moral Practice* 155-161 (2014).

<sup>33</sup> *Ibid.*

<sup>34</sup> R. Taneja and S. Kumar, *Privacy Law: Principles, Injunctions and Compensation*, 129 (EBC Reader, 2014).

<sup>35</sup> (2014) 4 SCC 1.

Supreme Court of India declared that the right to adopt a child by a person as per the Juvenile Justice Act provisions would prevail over all personal laws and religious codes in the Country.

This case could be used to open the door for the discussion of the inclusion of every person, irrespective of his gender identity, to adopt. We can build an argument on the premise that the decision to be a parent is a person's normative autonomy and has nothing to do with gender or sexual orientation. There was no uniform law for the adoption until this judge ruled that the Juvenile Justice Act would act like secular law for adoption. A similar amendment can be brought to add LGBTQ couples and transgender individuals to this to provide homes to as many children in need of care and protection as the Preamble of the Act suggests.

Adoption and Surrogacy are part of the decision when a person thinks of starting his family. How the person perceives his identity or sexual orientation has nothing to do with raising a child. There is no reason to believe that someone's sexual orientation or gender identity impacts raising a child and having a family. The person has every right to conduct his family's affairs following his personal belief and choices. The State ought to recognise the individual's autonomy in marriage, education, adoption and other such personal matters to the extent possible.<sup>36</sup>

However, the legislature has failed to provide any explanation for not including the LGBTQ community under adoption and surrogacy laws. This State's action has affected the rights of the LGBTQ community and the right of the children. The child's rights to have a family have been limited due to this action of the Government. According to CARA, there are 20,000 prospective parents in India, and the number of abandoned children in India is 31 million.<sup>37</sup> So to the statistics, most children will never be adopted into a family and remain unwanted. Restricting the adoption procedure to the heteronormative idea of gender discriminates among the individuals and affects the children's rights, where the State is duty-bound to protect them. In 2019 Act was enacted to grant the rights to the transgender community based on the guidelines given in the NALSA judgement. The Act provides the freedom to perceive the identity of choice, which is praiseworthy. Nevertheless, at the same time, the Act has unconsciously formed the sub-classification among the transgender discriminating based on

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<sup>36</sup> *Ibid.*

<sup>37</sup> C Nar, "2020 Orphan Report", Human Rights (2020).

preference, which will be discussed next. In addition to this, nothing has been brought to legalise same-sex couples' rights other than their relationship being recognised by the Court.

## VII. Indirect Discrimination

*Whatever the differentia, and whatever the nexus, the State is not permitted, under Article 14, to disadvantage groups on the basis of an "intrinsic or core" trait.*<sup>38</sup>

As discussed in the previous section, there is a difference between sexual orientation and gender identity. Even if a man perceives himself as something different from what he was born with, he does not need to go through the transition. It is imperative to acknowledge that there can be situations where gender dysphoria is absent. A trans person can choose to be identified neither as male nor female. There might be people who are comfortable being recognised as a third gender and deny being placed in binaries. The transition certainly does not mean the change in male or female through surgery or hormone alterations. It is not always what we perceive rather, it is who we are, and sometimes it is more than the medical transition. It is the transition of human experience and emotion attached to identity.

Even if the legislature believes that the current adoption and surrogacy laws are not discriminatory, the question of whether the current laws are compatible with the Transgender Act of 2019 emerges. Here, the argument would be on the presumed notion of perceiving identity as men or women; that once a person perceives his identity and obtains the certificate for his identity, he will certainly come under the binary gender concept and thus can apply for adoption or maybe for Surrogacy as any other individual who has been provided with the right according to the laws.

The Madras High Court, in one of the landmark judgments, while referring to the NALSA judgment, ruled that the marriage between a man and a trans woman is a valid marriage under section 5 of the Hindu Marriage Act. The Court relied on the *Puttaswamy* (Privacy Judgment) and *Navtej Singh Johar* judgment and observed that the expression 'bride' under Section 5 could not have a static or immutable meaning. The term will include the person/transgender person who identifies herself as a woman.<sup>39</sup>

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<sup>38</sup> *Supra* note 1.

<sup>39</sup> *Arun Kumar v. Inspector General of Registration*, WP(MD) No. 4125 of 2019.

We must also read the recent Judgment of the Maharashtra High Court in the case of *Anjali Guru Sanjana Jaan v. The State of Maharashtra*<sup>40</sup> where the Court held:

The Government of India has introduced the Transgender Persons (Protection of Rights) Act, 2019 and has permitted a transgender person to have a right to be recognised and such transgender is permitted to have a right to self-perceived gender identity. In the present case, the petitioner has opted for the female gender as her self-perceived gender identity and makes a solemn statement, which is recorded as the statement made to the Court, that henceforth in her lifetime she would not switch over to the male gender driven by opportunism and would continue to opt for the female gender, in future, save and except if there is a reservation provided for transgender in public life.

Let us read the above rulings in the light of the newly enacted statute to understand the complexity that will be created in the future when transwomen and transmen start applying for adoption after going through a transition. If a person perceives his identity according to Section 5 and obtains a certificate as a transgender under Section 6, he will be protected under this Act. Similarly, suppose a person, a man perceives his identity as a woman as per Section 7, he will be treated as any other woman. In that case, he will certainly fall under the category of women under the adoption laws. The procedure will be applied either under the personal laws or the secular laws, whatever the situation. The person will have the right to adopt, and CARRA will consider the transgender as a woman.

Now let us see some illustrations-

- In a situation where X, who has now perceived his identity as a woman, if marries a man, they can adopt a child as a couple, also retaining the right as a transsexual. If we go by the above-discussed reasoning in the case, they can even opt for Surrogacy.
- Suppose X, who opts for the female gender, is sexually committed to the same gender. They will then be considered a same-sex couple, and no right to be a parent will be available. However, X can still adopt as a single woman.
- It is not always the case; there may be a situation where transgender does not perceive any gender identity and want to be recognised as the third gender. Now CARRA does not have

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<sup>40</sup> Writ Petition (Stamp) No.104 of 2021.

a column for the third gender; they recognise only binary gender. This makes the third gender deprived of their civil right—section 5.

The Transgender Act of 2019 gives every individual a right to perceive their identity according to their choice. Once the identity is perceived, this will differentiate between individuals of the community. The discrimination will be between those who choose to be a third gender and those who want a transition from men to women or *vice-versa*. The CARA guidelines and Surrogacy (Regulation) Act, 2021, when read with Transgender Act 2019, form two eligibility criteria:

- The person who perceives identity different from what they were given by birth.
- The perceived identity conforms with the heteronormative standards, *i.e.*, male and female and has an identity certificate issued as a man or a woman.

The contention can be framed that the Act of 2019 gives the transgender the right to choose their perceived identity. So, when we read law independent of the other laws, in the context of self-perceived identity, there is no discrimination *prima facie* as the Act allows any person who does not conform with his/her identity to adopt the identity that he/she perceives. However, its impact might extrapolate to other laws granting civil rights that would lead to discrimination based on choice.

The illustrations stated above take us to the point where Gautam Bhatia<sup>41</sup>, in one of his articles, while analysing the *Navtej Johar* judgment, draws our attention to the indirect discrimination discussed by Justice D.Y. Chandrachud for the first time in an explicit manner:

A provision challenged as being *ultra vires* the prohibition of discrimination on the grounds only of sex under article 15(1) is to be assessed not by the objects of the State in enacting it, but by the effect that the provision has on affected individuals and on their fundamental rights. Any ground of discrimination, *direct or indirect*, which is founded on a particular understanding of the role of the sex, would not be distinguishable from the discrimination which is prohibited by article 15 on the grounds only of sex.

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<sup>41</sup> Gautam Bhatia, “Civilization has been brutal: Navtej Johar, Section 377, and the Supreme Court’s Moment of Atonement”, *Indian Constitutional Law and Philosophy* (September 6, 2018), available at: <https://indconlawphil.wordpress.com/2018/09/06/civilization-has-been-brutal-navtej-johar-section-377-and-the-supreme-courts-moment-of-atonement/> (last visited on February 2, 2021).

Justice Chandrachud further cites the Constitutional Court of South Africa in *City Council of Pretoria v. Walker*<sup>42</sup> where it was observed:

The concept of indirect discrimination, ... was developed precisely to deal with situations where discrimination lay disguised behind apparently neutral criteria or where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not overtly intended to prejudice them.

In many cases, particularly those in which indirect discrimination is alleged, the protective purpose would be defeated if the persons complaining of discrimination had to prove not only that they were unfairly discriminated against but also that the unfair discrimination was intentional. This problem would be particularly acute in cases of indirect discrimination where there is almost always some purpose other than a discriminatory purpose involved in the conduct or action to which objection is taken.

Indirect discrimination occurs when legislation or rule that is impartial in its entirety puts the citizens of the protected community at a disproportionate advantage relative to the members of the cognate group.<sup>43</sup> Indirect discrimination occurs when an otherwise neutral rule, criteria, or procedure places a person of one sex at a distinct disadvantage when compared to a person of the other sex unless the provision, criterion, or practice is reasonably supported by a valid purpose and the means to achieve that objective are reasonable and essential.<sup>44</sup> The two steps to see whether there has been indirect discrimination-

- Whether the enacted law distinguished based on a protected ground?
- Whether such distinction perpetuates disadvantage and is discriminatory?

It will be too early to jump to a conclusion, but the Judgment of the Maharashtra High Court gives a point to ponder. The above illustrations can be analysed based on the same judgment and the steps provided to test the disparate impact that a transgender person having an identity certificate under section 7 will have different rights from that of the person who chooses his identity as a transgender person under section 6. This certainly has a disproportionate impact on the third gender.

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<sup>42</sup> 1998 (3) BCLR 257 (CC).

<sup>43</sup> *Supra* note 40.

<sup>44</sup> European Commission, Report on EU Gender Equality Law (European Network of Legal Experts in the Field of Gender Equality 2010).



Here, the reference must be made to Tarunabh Khaitan's article, whose works are prominent in the field of indirect discrimination. While analysing the indirect discrimination in the case of *Griggs v. Duke Power Company* he points out that how while establishing the disparate impact, we refer to the statutes, policy and practices and the impact they are having on a particular group and not the root cause of the discrimination such as race, sex, class, etc.<sup>45</sup> He further says:<sup>46</sup>

Indirect discrimination occurs due to existing socio-cultural, political, and material disadvantages faced by a group. These disadvantage-based factors tend to be multiple, diffused, and affect everything we do but in a subtle way. The indirect discrimination is structural in nature.

This is true for Indian society as well. The division of gender roles in our society is part of the social structure where the inequality is based on assigned roles to be practised every day. The male and female are expected to share parental responsibilities. The recognition of family in society is based on this parameter.

The Transgender Act, 2019, though, ensures to give rights according to the perceived identity and seems neutral to transgender groups, and it has the potential to discriminate according to the choice made by them, which may grant some rights according to heteronormative laws to some along with the rights and entitlements under the Act.<sup>47</sup> This places the transgender person at disadvantage who perceives identity as the third gender. The policy of self-perceived identity is advantageous for every transgender, but it certainly affects the right of eunuchs disproportionately compared to transmen and transwomen. They are unable to conform to the binaries accepted and recognised by the State, creating barriers to their right to adopt or opt for Surrogacy and making their rights limited to the Act of 2019.

This could be said the foreseeability of the Supreme Court of India in the NALSA case,<sup>48</sup> where it thoroughly stated that Eunuchs are different from those who perceive their identity as men and women. They are not men by virtue of anatomy, and they are neither female as they lack reproductive organs. Psychologically, as well they do not perceive themselves as men or

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<sup>45</sup> Tarunabh Khaitan, "Indirect discrimination", *Routledge Handbook of The Ethics of Discrimination*, 30-41(2018).

<sup>46</sup> *Ibid.*

<sup>47</sup> The Transgender Persons (Protection of Rights) Act, 2019, s. 7(3) provisos.

<sup>48</sup> *National Legal Services Authority of India (NALSA) v. Union of India*, AIR 2014 SC 1863.

women. They strongly claim their rights as a third gender. Thus, while offering clarification, the Court held that legal recognition and the absence of uncertainty in the existing procedures for granting identification documents to Hijras/Transgender persons are important as they relate to basic human liberties and civil rights such as access to health and public services, the right to vote, the right to challenge elections, the right to citizenship, the right to inheritance, marriage and adoption.<sup>49</sup>

However, the Transgender Act 2019 failed to completely acknowledge the importance of the guidelines leaving the transgender community in the *if* and *but* situation where they are again looking at the Court to give judgment to claim their rights based on the several interpretations.

### VIII. The Journey from Recognition to Misrecognition

The drawback with transformative constitutionalism is the undesirable outcome ahead of the political mindset and activity. However, when compared to India, transformative constitutionalism is strongly welcomed by the majority government of South Africa. The decision of the Court enjoys broad consensus from the citizens that Government should implement the directions by the Court for the greater good, providing the political cover to the reform suggested. This is why there is significantly less disagreement between the Constitutional Court and the Government about the substantive issues.<sup>50</sup>

To support the above point, we can compare the activities of both governments after passing the judgments by respective Supreme Courts, *i.e.*, *Fourie by South African Constitutional Court*, *Naz* and *Navtej Johar by Indian Courts*. All three decisions relate to the history of oppression and discrimination of a particular community. They advocate for the law recognising equality for the LGBTQ community. These decisions proved to be extraordinary constitutional moments promoting inclusivity in both countries. This is the turning point in the long road from the ethical obligation of law to social change, in such a manner that the ideals that motivate the Constitution ultimately transform heteronormative social systems. If not wholly achieved, it continues to transform.<sup>51</sup>

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<sup>49</sup> *Ibid.*

<sup>50</sup> J. Fowkes, 2015, "Transformative Constitutionalism and the Global South: The View from South Africa Transformative Constitutionalism in Latin America: A New Latin American Ius Commune" *Oxford University Press, Forthcoming* (2015).

<sup>51</sup> A. Narain, "A new language of morality: From the trial of Nowshirwan to the judgment in Naz foundation" 4 *Indian J. Const. L.* 84 (2010).

The South African Law Reform Commission (SALRC) provided a memorandum to Constitutional Court regarding same-sex domestic partnerships and civil unions. The recommendations in the memorandum were based on the understanding of the requirements set out in the *Fourie* Judgment. The Court has provided a clear set of guidelines to assist with drafting the new legislation, and the Court made sure that there must be public participation in the matter. It nevertheless noted that one of the principal functions of Parliament was to ensure that the values of the Constitution, as set out in the Preamble and section 1, permeate every area of the law. In this context, it encouraged Parliament to consult widely before adopting legislation in this regard.

The Court was clear in stating that it would be utterly unacceptable for Parliament to adopt a ‘separate but equal’ approach because this would serve “*as a threadbare cloak for covering distaste for or repudiation by those in the power of the group subjected to segregation*”.<sup>52</sup> In the light of the above, Parliament had to be “*sensitive to the need to avoid a remedy that on the face of it would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation.*”

The South African Constitutional Court has long projected that enacting separate legislation will have no effect and that assimilation is required so that people can regard the group as any other citizen in the Country. The Transgender Act of 2019 has proven compatible with the Constitutional Court of South Africa’s reasoning. Rather than granting special rights, it is required to read their rights into the existing statute, just as it is for legally recognised couples.

“Transgender person” means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.

While framing such an exhaustive definition based on the definition given by Supreme Court in NALSA, the legislature failed to understand what was the intention behind giving someone the right to identify themselves and including genderqueer, intersex variations, etc., in the definition. They also failed to understand that they will have to be treated differently from transwomen or transmen. NALSA judgment was very clear in their guidelines, but the

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<sup>52</sup> *Fourie and Bonthuys v. Minister of Home Affairs and Another*, CCT 25/03.

lawmakers failed to abide by it. This shows the lack of expertise among lawmakers on specific issues.

The Supreme Court of India has adopted transformative constitutionalism while protecting the autonomy of the individual. But can Supreme Court alone bring the reform in India? The answer is NO. The reform can only be brought through laws and policies to implement the reforms to protect the rights. The legislative reversals are not unknown in India, but the State frequently adopts the legislative ignorance to delay judicial decisions' implementations. The moral failure lies in society's unwillingness to contain or embrace different gender identities and expressions, a mindset that we have to change.<sup>53</sup> The Government can only bring this change through laws and policies.

Undoubtedly the *Navtej Singh Johar* case and *NALSA* judgment attempt to guide the legislature to legitimise LGBTQ groups into cultural nationhood and civic equality without making them friction with other genders, classes and communities.<sup>54</sup> The judgments promoted the self-determination of identity and non-discrimination based on sexual orientation. This judgment came in the times when the majoritarian impulse was strident in India. However, the Government did try to recognise at least half of the community by introducing the Transgender Act, 2019, which circumscribes itself to the idea of self-perceived identity and fails to recognise the community's incidental issues.

The last three years show how the Indian legislatures have misunderstood the concept of gender identity and personal autonomy. It would be better to say that they have misrecognised the identity of the LGBTQ community. The idea of recognition as understood by them is very different from those claiming it. The demand for recognition during the queer movements was never limited to being identified as a gender. The idea of recognised identity was the first step towards claiming to have civil rights and being treated the same as the binary gender. Even after the three judgments holistically discussed the idea of autonomy, dignity and equality of the LGBTQ community, the State has failed to protect the community's rights.

This is not the first case of ignoring the Supreme Court's expressed guidelines of the Supreme Court. In the case of Prisoner reforms, we have seen that most of the guidelines are not applied

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<sup>53</sup> *Supra* note 47.

<sup>54</sup> A Dutta, "Claiming citizenship, contesting civility: The institutional LGBTQ movement and the regulation of gender/sexual dissidence in West Bengal", 4(1) *Jindal Global Law Review* 110-141 (2012).

yet.<sup>55</sup> In the case of *Madras Association*, the Court pointed out that we have noticed a disturbing trend of the Government not implementing the Court's directions.<sup>56</sup> In *Prakash Singh*,<sup>57</sup> the Court has directed for the Constitution of State Security Commission and Police Complaints Authorities at the state and district levels to inquire and control the cases of misconduct and abuse of power by police personnel. However, after a decade, another application has been filed stating that the judgment is unimplemented or partially implemented. The application seeks the Supreme Court to suggest measures for speedy and effective implementation of the directions.

We can take another case of *Jallikattu*, where the Supreme Court had overturned the laws to stop the practice. However, it had to depend on the Tamil Nadu government for the implementation. However, the Tamil Nadu government's reaction was not as expected; the Chief Minister himself ensured that Jallikattu held. The Supreme Court might expand the interpretation of the Fundamental Rights and suggest reforms, but it has to depend on the legislative and executive branches of the Government for those reforms to be brought on the ground.

The legislature's intent to not include the LGBTQ community also impacts the children's rights under the Constitution. Simultaneously, the Convention on the Rights of the Child recognises that children's status in society, as dependent on adults, gives rise to interests different from adults and specific forms of vulnerability requiring superior protection. The Convention obliges the State and other responsibility holders (parents, guardians, caregivers, civil society, etc.) to address the needs and interests of children as entitlements or rights.<sup>58</sup>

Section 35 of the Juvenile Justice (Care and Protection of Children) Act, 2015 states that if the parents or guardians are unable to take care of the child can surrender the child and give her for adoption to the agency. So, according to the law, one can surrender their child based on their incapability to raise their child, but one from the LGBTQ community cannot adopt the child even if capable enough to raise it. In India, there are same-sex couples who have revealed that they have the resources to raise a child and provide a healthy life. However, CARA does not allow them to do so.<sup>59</sup> In 2018, CARA abruptly removed the option of adopting as a live-

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<sup>55</sup> Status Note on Police Reforms in India, available at: [http://dfs.nic.in/pdfs/PoliceReforms\(E\)181013.pdf](http://dfs.nic.in/pdfs/PoliceReforms(E)181013.pdf) (last visited on February 2, 2021).

<sup>56</sup> *Madras Bar Association v. Union of India*, Writ Petition (C) No.804 of 2020.

<sup>57</sup> *Prakash Singh v. Union of India*, (2006) 3 SCC (Cri) 417.

<sup>58</sup> R. Seth, R., "Child abuse and neglect in India", 82 (8) *The Indian Journal of Pediatrics* 707-714 (2015).

<sup>59</sup> Niharika Lal, "Saving Chintu' highlights issues like adoption by same-sex couples in India and HIV-AIDS, to be screened in 10 film fests in October", *Times of India*, October 5, 2020.

in couple from the application form. They now have to write a personal email to the applicable authorities, making the process less efficient and transparent.

By recognising the community and legalising same-sex relationships will not integrate the group into the mainstream. In fact, after the introduction of the Act of 2019, the situation has become more complex. This may push the transgender community to go for medical transition to have a family, even if their inner self does not permit that. The legislation is a complete failure to understand the whole intention behind the Supreme Court's guidelines.

Merely decriminalising homosexual conduct will not result in the integration of the community into the society unless some positive rights are ensured. The *Navtej Johar* judgment was the first step toward enhancing the status and position of the homosexual community in society. The Court had deliberately left it to the Government to provide the positive rights to the community, maybe with the idea of not encroaching on the affairs of the legislature. However, the Court should have expressly directed the Government as in the NALSA judgment so that the legislature could have been clearer about what the Court intended to do through the transformative approach.

The Supreme Court of India has never attempted to create judicial supremacy. Instead, with the aid of Parliament, the Supreme court of this nation has promoted the protection and advancement of people's rights.<sup>60</sup> The emphasis has always been on the principle of positive constitutionalism, according to which the State is supposed to have the capacity to protect and strengthen the interests of its citizens.

The Government is the democratic aspect of constitutionalism which has the constant charge of the Country and without which the protection of the Constitutional rights by Courts could not be able to sustain constitutionalism.<sup>61</sup> Transformative constitutionalism is nevertheless restricted to the recognition of human rights, equality and identity. It also applies to the growth of society, where every person can thrive without discrimination. When propelled by transformative constitutionalism, government and lawmakers are discouraged from engaging in discrimination, so the society is steered towards a glorious future.

A society cannot transform independent of its government. All the principle of constitutionalism finds their way to the institutional structure of the State, which make policies

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<sup>60</sup> J Gireesh Kumar, "Judicial Accountability and Judicial Self Restraint", 2 *Journal of Parliamentary Studies* 72 (2011)

<sup>61</sup> M.P. Singh, "Constitutionalism in the Indian Comparative Perspective", 11 *NUJS L. Rev.* 647 (2018).

for rights and equality. The transformative constitutional cannot sustain independent of political constitutionalism, which ensures the best institutional arrangements which are committed to implementing the individual rights.<sup>62</sup>

Klare described the South African Constitution as a “transformative” project in the following terms:<sup>63</sup>

A long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.

To achieve the reform, there always needs a collaborative effort. The judiciary, the legislature, the executive and all other organs of the State are bound to come together to bring a change that will integrate the society to the next level. This is an obligation on the State to respect, protect and promote the mandates of the welfare state. For transformation to have a real impact on the lives of marginalised people, the development of law and policy and administrative efficiency is required. The ignorance of the Supreme Court’s directive will not address the solution to the inequality faced by the LGBTQ community.

The political dialogue in South Africa on responses to human rights problems has developed from a “welfare state” approach to a “development state” approach, which must have the political ability to organise society behind the development plan and put technological and operational capacity to work in order to bring about transformative change.<sup>64</sup> This approach is definitely helping the nation to adopt policies to include the LGBTQ community. India really needs to understand and adopt this approach.

In India, the Constitution provides for affirmative action on the part of the State to guarantee equality. The concepts of fundamental rights expect the legislature to make legislative decisions that would eliminate inequality and foster the idea of greater social equity. This

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<sup>62</sup> M. Tushnet, “The Relation Between Political Constitutionalism and Weak-Form Judicial Review” 14(12) *German Law Journal* 2249-2263 (2013).

<sup>63</sup> Karl E Klare, “Legal culture and transformative constitutionalism”, 14 *South African Journal on Human Rights* 146 (1998).

<sup>64</sup> S. Rosa, “Transformative Constitutionalism in A Democratic Developmental State”, 22 (3) *Stellenbosch Law Review* 452-565 (2011).

explicitly indicates that affirmative action in India has been integrated into the Constitution of India for the purpose of unification of individual and societal interests, respectively. It aims to focus on the purposive form of law making under jurisprudence, addressing the needs of Indian society at large, reducing inequality and inaccessibility to opportunities. So, in essence, affirmative action would contribute to the abolition of sex-based discrimination, which would lead to social change.<sup>65</sup>

### IX. Conclusion

The Act will not help to mainstream transgender people into society. It is a social and cultural issue, not just a legal matter. Law framers indeed failed to differentiate between sexual orientation and gender identity. They have misconceived the idea of self-identification, which is not limited to the gender of the person. However, it extends to how the person wants to associate himself with society.

In-country like India, where there are problems in applying the laws in isolation, it would not have been challenging to amend the adoption laws and include them in the Surrogacy Act when it was being formulated. This task is not burdensome but mere the ignorance of the legislature to foresee the real issues. In 2016, when Insolvency and Bankruptcy Code came into force, a number of amendments were brought to the Companies Act, 2013 and other related statutes to make them consistent and co-exist without any conflict and overlapping. So, few amendments in the statutes governing civil rights can be made to ensure the inclusion of the LGBTQ community efficiently and without any discrimination.

The major problem that we will face in the coming future will be the discrimination that has not arisen directly from the legislature's intention but from the facially neutral Act. The transgender Act would undoubtedly have an indirect and disproportionate impact on the lives and dignity of the LGBTQ community. The denial of adoption will also adversely impact the children's rights who need care and protection—the discrimination based on sexual orientation and gender identity will persist in society.

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<sup>65</sup> M. Galanter and R. Dhavan, *Law and Society in Modern India* 279 (Oxford University Press Delhi, 1989).