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ABSTRACT

The research paper discusses the marital rights of a Hindu transgender under The Hindu Marriage Act of 1955 along with some cases. The rights of succession and adoption of Hindu transgender are discussed further as well.

Every citizen has been protected and ruled by the laws of the country. They are bound to follow it. Similarly, if any Hindu transgender wishes to marry, he/she has to follow the rules laid down by the Hindu Marriage Act. The study is based on articles, case laws, and books.

This paper also examines the family rights of transgender people from an international human rights perspective. How the European Court of Human Rights (ECHR or the Court) has responded to difficulties arising in the context of transgenders' family relations. The concentration on the ECHR illuminates both the strength and drawbacks of the Court of how it contradicts to its articles by stating the words "men" and "women" and also provide gender discrimination and inequality in its other articles.

Keywords: Transgender, Marriage, Hindu Marriage Act, Adoption,

Succession.

INTRODUCTION

Indian society believes in the concept of male and female only. The concept of the third gender or transgender is very challenging to be accepted. But from the last few years, transgenders are introduced in a positive way to Indian society. They are accepted now, but the right to marry someone of same-sex is still a challenge.

No one has yet discussed the right to marry a transgender. Being accepted as a citizen of India, they have all the rights that an Indian male or female has. Hence, they have the right to marry a person of their own choice and should be considered accordingly.

The concept of sex and gender are different concepts. Sex is allotted based on an individual's reproductive organs present at the time of birth. We divide the society into two-part i.e. male and female based on sex.

Gender, on the other side, is a broad concept. It does not only include the organs of an individual but also the understanding, feelings, and

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perception of an individual. It's the inner sense of a person who decides the gender of a person.

However, one's gender and sex assigned at birth won't always align. A person can be born with the male reproductive system, but the person may feel like a female later. This type of person can't be called a man or woman. They are called as transgender. The gender expression used for them does not match their gender.

There are many different kinds of transgender in India for a long time. Hijras are women with no female reproductive organs, but they are not men. Eunuch refers to debilitate male and inter-sex of a person whose genitals are ambiguously male-like at birth.

Aravanis identify themselves as women trapped into a male body. Jogt i hijras are male who turns into a female and they worship and serve goddess Renuka Devi. Kothis are biological males who turn to be situational females.

RESEARCH METHODS

This paper is doctrinal research. The methods involved are a collection of data through secondary sources,

which is done by collecting data and documents in the library and online articles, journals, government records, newspapers, from authors and websites based on the topic.

LITERATURE REVIEW

In India, people with a wide range of transgender-related identities, cultures, or experiences exist - including Hijras, Aravanis, Kothis, Jogtas/Jogappas, and Shiv-Shaktis. Often these people have been part of the broader culture and treated with great respect, at least in the past, although some are still accorded particular respect even in the present.

The term 'transgender people' is generally used to describe those who transgress social gender norms. Transgender is often used as an umbrella term to signify individuals who defy rigid, binary gender constructions, and who express or present a breaking and/or blurring of culturally prevalent stereotypical gender roles. Transgender people may live full- or part-time in the gender role 'opposite' to their biological sex. In contemporary usage, "transgender" has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to: pre-operative, post-

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operative and non-operative transsexual people (who strongly identify with the gender opposite to their biological sex); male and female 'cross-dressers' (sometimes referred

to as "transvestites", "dragqueens", or "drag kings"); and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender-atypical. A male-to-female transgender person is referred to as 'transgender woman' and a female-to-male transgender person, as 'transgender man'. The terms 'transgender' or 'transgender populations/people', used in this brief, while more encompassing than transgender women are used to refer to transwomen given this brief's focus. Sometimes, for brevity, the abbreviation 'TG' is used to denote transgender women

If we analyze the development in transgender law and their rights, it started in 2009, when the Delhi High Court passed a decision in Naz Foundation v. Govt. of NCT of Delhi and found Section 377 and other legal prohibitions against private, adult, consensual, and non-commercial same-sex violated fundamental rights provided by the Indian Constitution. The Ministry of Home Affairs raised its

opposition to the decriminalization and claimed homosexuality is seen as being immoral. The Central Government reversed its stance on 28 February 2012, asserting that there was no legal error in decriminalizing homosexual activity.

On 28 January 2014, the SC of India dismissed the review petition filed by the Central Government, the Naz Foundation, and several others against its 11 December verdict on Section

377. In 2015, Shashi Tharoor introduced a bill for the repeal of Section 377, but it was rejected in the House by a vote of 71-24. On 2 February 2016, the Supreme Court decided to change the criminalization of homosexual activity.

The SC unanimously ruled in 2017 that the right to privacy is an intrinsic and fundamental right under the Indian Constitution. The Court also ruled that a person's sexual orientation is a privacy issue. In January 2018, the Supreme Court referred the question of Section 377's validity to a large bench and heard several petitions on 1 May 2018 and hearing began in July 2018.

On 6 September 2018, the Supreme Court issued its verdict. The Court unanimously ruled that Section 377 is

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unconstitutional as it infringed on the fundamental rights of autonomy, intimacy, and identity, thus legalizing homosexuality in India. The Court explicitly overturned its 2013 judgment.

TRACES OF TRANSGENDER IN MYTHOLOGY

The origin of transgenders dates back long in history. Mythology has accepted and encouraged the presence of the third gender between them. There are many mythological writings where the presence of transgender has been noted.

The concept of 'Tritiya Prakriti' or 'napumsaka' had been an integral part of Hindu mythology. These were the terms used for the people who are not male or female. The term 'napumsaka' means the absence of the ability to procreate.

History talks about an incident where Lord Rama when told to leave the kingdom for 14 years, turns back to his followers and asks the 'men and women' to return to their city. The third gender feels bound by the instruction and stays back. Lord Rama gets very impressed by the act of loyalty by these people and blesses them with the confer blessings on the auspicious occasion of child birth and marriages.

Another incident has been found where Lord Krishna turns himself into a woman to marry Aravan, the son of Arjuna and Nagkanya, to fulfil his last wish to marry, before sacrificing himself to Goddess Kali. Krishna reforms himself in a beautiful woman, Mohini, and marries him. The Hijras in Tamil Nadu call themselves as Aravanis. There have been many such examples.

From time immemorial, Hijra communities were considered as a separate caste by the colonial administration. The Criminal Tribes Act, 1871 included all Hijra who were associated with any crime such as kidnapping and castrating children. The punishment awarded was two years or more or fine or both. However, the Act was repealed in 1952 and its legacy continues and many local laws still reflect the prejudicial attitudes against certain tribes, including against Hijras.

A case was filed in the year 2009 in Delhi High Court named Naz Foundation v. Govt. of NCT of Delhi. In which it was found that Section 377 and other legal prohibitions against private, adult, consensual, and non-commercial same-sex violated fundamental rights provided by the

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Indian Constitution. Many updates happened in this case from 2009 till 2017. In August 2017, the Supreme Court unanimously ruled that the right to individual privacy is an intrinsic and fundamental right under the Indian Constitution. The Court also ruled that a person's sexual orientation is a privacy issue, giving hopes to LGBT activists that the Court would soon strike down Section 377.

On 6 September 2018, the Supreme Court issued its verdict. The Court unanimously ruled that Section 377 is unconstitutional as it infringed on the fundamental rights of autonomy, intimacy, and identity, thus legalizing homosexuality in India. The Court explicitly overturned its 2013 judgment.

Sex Reassignment Surgery

Sex reassignment surgery (SRS), is a surgery that helps an individual to match their physical appearance to their sexual characters. It changes the hormones in an individual's body and matches to their physique. The goal of this surgery was to remove the hormone-producing organs; testicles and the ovaries. As time passed the surgery became complex. Now these sex organs present in a person are made active.

Many bills were also introduced and passed by the parliament for the welfare of the transgender community. The first bill was passed in 2014, then in 2017 and therecent was released a year ago in 2019. These bills gave them opportunities to flourish their rights in many aspects like education, health, sports, etc.

DOES THE SCOPE OF MARRIAGE EXTENDS FOR TRANSGENDERS?

Marriage is a relation where every human being deserves to be in. The institution of marriage is not gender-biased in its concept; it is the society that has created different boundaries of marriage and the same is being pursued by the eyes of law while making any provisions for the people under this institution. Every minute detail, whether it be bride, bridegroom, rituals, etc. are being decided by society, but 'marriage' is tie-up that is not about two people or two families. It is more about the physical and emotional interdependence of a human being on another human being for the rest of their life and since the society is undergoing different changes, it has become an important issue that should be discussed.

In India, Hindu citizens are being regulated by The Hindu Marriage Act

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of 1955 (hereinafter being referred to as HMA) for marriage related issues. In this Act many rules and regulations are described which are meant to be followed for the commencement of a valid marriage by law per-se. Sec.5 of HMA states the required conditions of marriage. In these conditions, an important aspect of marriage is that bride and bridegroom should be of marriageable age i.e. 18 and 21 respectively which is being laid down in Sec. 5(iii) of the above-mentioned Act.

As a layman, anyone will think that it mentions the two prominent genders of society, 'male' and 'female' or 'man' and 'women' and mostly it is interpreted as same only. But what about the third gender which is also an equal and respectable part of the human community. They also have the right to get married and have a family and live as settled life. HMA talks about husband and wife; man, and women only. The rules and concepts laid down are very rudimentary. They need to be changed by the changing structure of society and generation.

The preliminary part of HMA which talks about the application of the Act, says that this Act applies to any 'person' of Hindu religion and the

extent says that it applies to every Hindu domiciled in the territory of India, i.e. citizens of India following Hindu religion and the transgenders are included in both sections. Therefore, HMA applies to them too. Every full citizen is a person. An individual human being subjected to attributes of rights and duties is called a natural person¹.

Sec. 2 of HMA where applicability is given, states that "the Act applies to any person who is a Hindu by religion in any of its forms or developments, including a Virashavia, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj²." The above Statute does not define any specific gender and uses the term 'person'. As mentioned above, the definition of a person includes every human being or an individual. Therefore, transgenders should be included in the ambit of marriage, though they do not have any specific gender being assigned to them by birth they are enough qualified to be looked upon as humans or a person in the eyes of law.

Moreover, in **National Legal Services Authority v. UOI**³ judgment which was

¹ Pollock, First Book of Jurisprudence. 110. Gray, Nature and Sources of Law, Ch. II.

² The Hindu Marriage Act, 1955

³ (2014) 5 SCC 438.

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passed in the year 2014, Hon'ble Supreme Court has also mentioned that transgenders should be identified as the third gender in the country and they have all the rights and duties which are guaranteed to every citizen of the country by the Constitution. In this judgment, the Hon'ble Supreme Court upheld the transgender person's right to decide their self-identified gender and recognized them as a "Third Gender". The Central and State governments were directed to grant legal recognition of their gender identity such as male, female or third gender. This judgment has been cited in Justice K.S. Puttaswamy v. Union of India⁴ and again by the Constitution Bench in the decision reported in Navtej Singh Johar v. Union of India⁵.

This path-breaking judgment has been cited with approval in the Nine Judges Bench of the Hon'ble Supreme Court in the decision reported in the judgment of Justice K.S. Puttaswamy v. Union of India⁶, the SC Court held that: "The autonomy of the individual is the ability to make decisions on vital matters of concern to life. The intersection between one's mental integrity and privacy entitles the individual to

freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. The family, marriage, procreation, and sexual orientation are all integral to the dignity of the individual." which means that the ability to make decisions on matters close to one's life is an inviolable aspect of the human personality.

The Hon'ble SC has also defined the Right to self-determination in Joseph Shine v. Union of India (UOI)⁷ which connotes that "the right to sexual self-determination that is the freedom to choose sexual activities and partners, implying that the provision at issue restricts the right to sexual self-determination of individuals". Further, in Shafin Jahan v. Asokan K.M.⁸, "right to marry a person of one's own choice is recognized as an integral part of Article 21 of the Constitution of India". Thus, the ambit of Article 21 also includes the right to self-determination and the right to marry in it.

Many judgments are also being given upon this matter that can be very helpful for people to understand the depth of this topic. A recent judgment

⁴ 2017 (10) SCC 1.

⁵ (2018) 10 SCC 1.

⁶ 2017(10)SCC 1.

⁷ 2018 SCC Online SC 1676. Para no 113.

⁸ AIR 2018 SC 357.

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passed by the Madurai High Court in

ArunKumarandShreejav.Inspector GeneralofRegistration⁹,whereinthe question that whether a trans-woman can be called as a bride or not was discussed and it was held that trans- women also comes under the term bride. It was mentioned that “To understand the meaning of expression ‘bride’, in the order impugned in this writ petition, Oxford Advanced Learner's Dictionary of Current English was referred to. The term “Bride” usually refers to a “Woman on her wedding day”. In this landmark judgment, Justice G.R. Swaminathan held that a marriage solemnized between a male and a trans-woman, both professing Hindu Religion is a valid marriage in terms of Section 5 of theHMA.

But to our disappointment, now alsoin the 21stcentury, people are not ready to accept the marriages’ that are done between two transgenders. By doing this, we are violating the fundamental rights of the transgendercommunity i.e. Art 14 and 21 of The Indian Constitution which deals with theRight toEqualityandequalprotectionbefore lawandRighttoLiferespectively.

⁹ WP (MD) NO. 4125 OF 2019.

Transgenders are not treated with respect in society. Right to Life also talks about the way one should live, mereexistenceisnotonlyimportant.

It shouldbewithdignity.Often,theyhave to face discrimination based on their ‘sex’ which is strictly being prohibited by the law of the country. There had beenmanyincidentswheretheyhave faced laughs and mockery coming by theirpeopleonly,onthewayofliving and they have also been abused because of their gender. Asdiscussed aboveeveryindividualhastherightto f self-determination.

No one can stop a person by identifying one’s gender as being a male or a female member of society.

Through the changing face of society, as modernism is developing in India our old values also need a change in them. It is high time that changes should be brought in terms of the statute of marriage in law and also in minds of people regardingtransgender marriage. India has seen many changes regarding personal laws like the Hindu Succession Act of 2005, Shayra Bano Begum's case, and the latest amendment about the abolition of triple Talaq and many more. These changes show us that we cannot stick to the strict interpretation ofstatutes.

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We need to apply a liberal interpretation of the statutes and the legal terms mentioned in HMA of 1955. Many umbrella terms like bride and bridegroom need to be seen with a wider meaning.

Many foreign countries have recognized the definition of marriage as a union of two people who can be of any gender. Marriage may be concluded between husband and wife, but it may also involve two persons of the same sex who wish to found a family through the means of adoption.¹⁰ Likewise, many provisions have been made in Common Law Countries such as Canada, New Zealand, and England and Wales like Civil Marriage Act, 2005, Marriage (Definition of Marriage) Amendment Act, 2013, and Marriage (Same-Sex Couples) Act, 2013 respectively.

In many cases, the liberal interpretation of marriage has been done to provide justice. **SGH Ltd. v. Federal Commissioner of Taxation**¹¹, **Attorney General (Vict) v. The Commonwealth**¹² and **Union Label Case**¹³ are some of the cases where the liberal interpretation of the

definition of marriage has been done.

In **SGH Ltd v. Federal Commissioner of Taxation**, it is held that "The utility of adopting or applying a single all-embracing theory of constitutional interpretation has been denied." In **Union Label Case** it is held that "marriage law is not a matter of precise demarcation". It is, instead, "a recognized topic of juristic classification".

Therefore, liberal interpretation of the word marriage should be done and its scope should also be widened as per the new demands of the society and transgender should also be included in the ambit of the marriage u/s 5 of HMA of 1955.

WHETHER THE TRANSGENDERS' COUPLE MARRIAGE HAVE ADOPTION RIGHTS?

Marriage may be concluded between husband and wife, but it may also involve two persons of the same sex who wish to found a family through the means of adoption. Marriage can be defined as: 'The legal union of a couple as a spouse'. The basic elements of a marriage are: (1) the parties' legal ability to marry each other, (2) mutual

¹⁰ J. Eekelaar, *Family Law and Personal Life* (Oxford University Press, 1st edition, 2007).

¹¹ [2002] HCA 18.

¹² [1962] HCA 37.

¹³ [1908] HCA 94.

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consent of the parties, and (3) a marriage contract as required by law.

Many Common Law countries such as Australia, the United States of America, New Zealand, etc. have identified and legalized the adoption rights of transgenders.

Since there are no provisions in India for these rights under Law in our country, we should take the International provisions as a reference for doing this amendment and making new laws for the welfare of the transgender community.

If there are no such laws for them then it will be discrimination against them and as they are the legal citizens of the country, it will violate their fundamental and legal rights guaranteed to them by the Const. of India. Also, Transgenders have the right to found a family that can be recognized as India is a member of UDHR which guarantees freedom from discrimination and provides that no one shall be subjected to arbitrary interference with their privacy. They cannot be discriminated against from any of their rights based on sex and gender as these Articles guarantee them non-discrimination and Equality.

- Article 2 of UDHR and Article

2 of ICCPR guarantees non-discrimination on any basis to humans.

- Article 7 of UDHR and Article

26 of ICCPR guarantees Equality before the law (Article 14 of the Indian Constitution.)

Transgender's right to a family can be recognized under the Right to life as it covers within its ambit the right to social security and protection of a family. K. Ramaswamy J., in **Calcutta Electricity Supply Corporation (India) Ltd. v. Subhash Chandra Bose**¹⁴, held that "right to social and economic justice is a fundamental right under Art. 21. The learned judge explained that the right to life and dignity of a person and status without means were cosmetic rights. Socio-economic rights were, therefore, basic aspirations for meaning the right to life and that Right to Social Security and Protection of Family were an integral part of the right to life"¹⁵

Further, Right to Life is guaranteed by the Article 6 of ICCPR and Article 3 of UDHR and recognize that every human

¹⁴(1990)ILLJ148Cal

¹⁵ 1967 AIR 1643

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being has the inherent right to live and this right shall be protected by law and that no one shall be arbitrarily denied of that right

Thus, as they have the right to life which includes family as held under **Calcutta Electricity Supply Corporation (India) Ltd. v. Subhash Chandra Bose.**

Article 12 of the UDHR, 1948 and Article 17 of ICCPR, 1966 provides

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

Article 16(3) of UDHR recognizes the right to family as it states

16 (3) “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”.

Article 12 of UDHR and Article 17 of

ICCPR recognize that no one's private life shall be subjected to arbitrary interference. (Art 21 of the Indian Constitution.) But transgender person's private life or family life is being interfered with by the state by not providing them their right and being unequal towards them. Thus,

their right is being breached and the article specifically uses the words “no one” and does not specify any gender or sex and thus applicable to transgender persons and identifies their “Right to Family”

In *Goodwin v. the United Kingdom*, App. concerning the right to marry, the Court relied on the fact that the European Human Rights Convention is a "living document" and on the importance that "it is interpreted in a manner which renders its rights practical and effective" to overturn its earlier decisions. The Court acknowledged that "the exercise of the right to marry gives rise to social, personal and legal consequences." It pointed out that while the wording of the first sentence of Article 12 refers in express terms to "the right of a man and a woman to marry," the social and medical developments that have occurred demand that the determination of sex would not be made by purely biological criterion., The Court also observed that one's infertility (hence, inability to biologically found a family) does not take away one's right to marry, regardless of the reason for such a condition." Finally, the Court relied on

Article 9 of the Charter of Fundamental

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Rights of the European Union to reach its conclusion.¹⁶ The article states that "the right to marry and the right to found a family shall be guaranteed by the national laws governing the exercise of these rights," leading the Court to conclude that the deliberate removal of the reference to men and women was meant to expand the right to marry is guaranteed under Article 12 of the Convention.

ADOPTION RIGHTS

In the case of **X, Y, and Z v. the United Kingdom**, the ECHR denied the joint request of a social family comprised of a biological mother, a female-to-male transgender father, and an anonymous donor-IVF child that the (new) man be registered as the father of the child.¹⁷ Although both the father's sex reassignment surgery and the IVF procedures were funded by the state, and the IVF procedures took place, according to the national law, with the father's formal legal acknowledgment

of the term but his original physical birth. Id. 11 37, 50.

¹⁶ Goodwin v. United Kingdom, supra note 52, 74; 1 v. United Kingdom, supra note 52, 154.

¹⁷ X, Y and Z v. United Kingdom, App. No. 21830/93, 24 Eur. H. R. Rep. 143 (1997). In this case, the couple began living together and shortly thereafter the father had a re-assignment surgery. The couple had cohabited for over ten years by the time of the petition. The father has had his own identity documentation changed and there was no doubt that he acts as the father in every meaning

of the child, the majority of the Court (in a decision of 14 to 6) granted the state a "wide margin of appreciation." The Court dismissed the claimants' concern that the lack of legal recognition would affect the child's sense of personal identity and security, noting that the new man was not prevented from acting as the social father. The Court pointed out that, "although the technology of medically assisted procreation has been available in Europe for several decades, many of the issues to which it gives rise, particularly about the question of filiation, remain the subject of debate." It thus found no breach of the applicants' right to privacy (and therefore also no need to examine their claim about improper discrimination under Article 14 of the European Convention).

Earlier, the justices had previously tied one's right to (heterosexual) marriage to procreation. The assumption has been, as clearly expressed in the Corbett case and accepted by the Court¹⁸, that founding a family is so integral to marriage that if procreation is impossible, the union loses its

¹⁸ Justice Ormrod in Corbett, supra note 25, stating with regard to the importance of sex and procreation for the legal recognition of the relationship:

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validity as a true marriage. Indeed, the "rule of consummation" of marriage has been incorporated in various legal systems, whereby infertility or the inability to perform one's sexual role have been recognized as giving cause for the dissolution of marriage that otherwise would have been complete.¹⁹ The court's explicit dismissal of the connection between one's right to marry and one's physical ability to procreate in the cases of *Goodwin v. the United Kingdom* thus marks an important shift in the conceptualization of one's "right to found a family." Undoubtedly, such broader conceptualization also makes sense.

There is no question that the marriage institution entails social and cultural benefits, such as a sense of security, belonging, etc., that go beyond procreation and that is not dependent on it. Some couples consciously decide not to have children although they happily maintain their marital status. Others who cannot have children may still have an interest in remaining in their marriage. The disconnection between one's right to

marry and one's ability to procreate is all the more but if one considers the

¹⁹ SHARPE, *TRANSCENDER JURISPRUDENCE*, supra note 72, at 92

scientific developments in the family context. Today, "founding a family" maybe not only by biological, natural procreation, as was conventionally expected, but rather, a family can be founded by options such as adoption, IVF, gametes donation, and surrogate mothers. Moreover, science has given families the option of determining what sort of family they would find, i.e. children without neonatal (genetic) disabilities or specific sex.²⁰ Scientific developments thus inherently cut off the presumable ties between biology and procreation, giving much moresay to the individuals and the relationships that are involved. Notwithstanding these developments, the extent to which such a reconceptualization of the right to found a family applies also to transgender individuals is yet to be seen in the Law of India.

NEGATIVES OF ADOPTION AND FAMILY RIGHTS

The right to health is an inherent part of the right to life under Article 21, it is recognized by the ICESCR which has been domesticated through Section 2 of the Protection of Human Rights Act 1993. Article 12 of the ICESCR requires

²⁰ For a critique on the possible prices of such developments, particularly with respect to women, see Immaculada De Melo Martin, *On Our Obligation to Select the Best Children: A Reply to Savulescu*, 18 *BIOETHICS* 75-80 (2004).

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states to take measures to protect and fulfill the health of all persons. States are obliged to ensure the availability and accessibility of health services, information, education facilities, and goods without discrimination especially to vulnerable and marginalized sections of the population. The Govt. has committed to addressing the needs of those at the greatest risk of HIV including MSM and transgendered persons. The risk of contracting HIV through unprotected penile-anal sex is higher than through penile-vaginal sex. The HIV prevalence in MSM is 7.3% which is disproportionately higher than in that of the general population which is less than 0.5%. The prevalence continues to rise in many States and this is because of the stigmatization of the MSM population due to which they are not provided with sexual health services including preventive services such as condoms. Due to pressure, some MSM also marry women thus acting as a bridge population. Criminalization increases stigma and discrimination and acts as a barrier to HIV prevention programs²¹. If they are

given family rights which include adoptions as well, due to these high chances of developing such sexually transmitted diseases in the future so adopting a child is a major concern since the child won't get a healthy family environment to grow up.

CONCLUSION

The Hindu Marriage Act of 1955 violates FRs of the transgender community which is guaranteed to them by the Indian Const. as they are the citizens of the country. The Act violates the fundamental rights of the people i.e. Art. 14, Art. 15 and Art. 21 of the Const. of India.

It discriminates them based on their 'sex' which is been prohibited by the State in Art. 15(1) of the Const. It also violates Art 14 of the Const. which guarantees the Right to Equality and equal protection before the law in the sense that they are distinguishing transgenders from 'male' and 'female' citizens of the country. It also violates Art 21 of the Const. which guarantees Right to Life and Personal Liberty. This Article includes the right to livelihood which secures a person's right of

²¹ Suresh Kumar Koushal and Ors. vs. NAZ Foundation and Ors. (11.12.2013 - SC): MANU/SC/1278/2013

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having a family and protecting it.

It may happen that the enabling Act may not be ultra vires the Const., yet the rules and regulations framed thereunder may violate any provisions of the Constitution. In such a situation, the Hon'ble Supreme Court has held that even if the enabling Act is intra vires, the constitutionality of the delegated legislation can still be considered because the law cannot be presumed to authorize anything unconstitutional.²²

Other than Fundamental Rights, Human Rights are also being violated because, after marriage, it is quite natural to start a family by having children. Since transgenders cannot reproduce on their own, the only option left with them is about adoption only.

And if they don't have such basic rights like right to family or right to adopt then natural justice is not being done with them. Therefore, they should have both the rights i.e. Marital and Family rights also.

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²² Narendra Kumar v. UOI AIR 1960 SC 430.