

**FREE WILL, SELF-DETERMINATION AND TRANSGENDER PERSONS ACT,  
2019**

**NIMISHA PS & PRIYANKA CHAKRABARTY \***

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\* Priyanka Chakrabarty and Nimisha PS are first-year students at St. Joseph's College of Law, Bengaluru.

### ABSTRACT

*National Legal Services Authority v. Union of India, 2014 or NALSA judgement granted the status of “Third Gender” to the Transgender community and the right of self-identification to gender non-conforming and gender fluid individuals. Followed by the NALSA judgement, Justice (Retd.) K S Puttaswamy v. Union of India held that right to privacy is a Fundamental Right under Articles 14, 19 and 21. These two judgements paved way for Navtej Johar v. Union of India, 2018 which decriminalized homosexuality by reading down Section 377 of Indian Penal Code. In NALSA judgement, free will becomes an overarching theme as it allows an individual to self-determine.*

*The advocacy around LGBTQIA rights have been centred on ideas of free choice and self-determination. Transgender Person (Protection of Rights) Act, 2019 completely shifts the narrative of self-determination and subjects members to a paternal gaze by the State. The essay attempts to understand the chasm that is created between the Supreme Court judgement which favours free will and self-determination and the recent Act which strips the community of their right to self-determine. The critical analysis is done along the axis of identity, family and employment.*

### I. INTRODUCTION

2018 marked a watershed year in Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual [LGBTQIA] activism as it decriminalized homosexuality by reading down Section 377 of Indian Penal Code in *Navtej Singh Johar and Others v. Union of India*<sup>1</sup> [**the Navtej Johar judgment**]. In 2019, the controversial *Transgender Persons (Protection of Rights) Act, 2019*<sup>2</sup> [**the Statute or the Act**] was passed through a majority in Lok Sabha and Rajya Sabha. The Statute that came after a series of historical pronouncements from the Supreme Court subverted the precedent created by *National Legal Services Authority v. Union of India*<sup>3</sup> [**NALSA judgement**], *Justice (Retd.) K.S. Puttaswamy v. Union of India*<sup>4</sup> [**Puttaswamy judgement**] and even the *Navtej Johar* judgment. The overarching theme in all these three judgments is the idea of self-determination and the freedom to make choices. In this essay the idea of self-determination and free choice will be critically analysed in the context of the Act on the basis of three criteria present in it:

- a. The first criterion being the need to procure a gender identity certificate from the State authority;
- b. The second criterion being the definition of family as presented within the Act under Section 2(c); and

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

<sup>2</sup> *Transgender Persons (Protection of Rights) Act*, No. 40 of 2019.

<sup>3</sup> *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438 (India) [hereinafter NALSA].

<sup>4</sup> *Justice (Retd.) K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).

c. The third criterion being the provisions that have been created to provide and generate employment for Transgender persons.

The first part of the essay will define free will and self-determination. This will be followed by analysis of the provisions that mandate the procurement of gender certificate. The third part will critically examine the notion of the family as it has been defined in the Act. The fourth part will examine the provisions that have been created for the employment for Transgender persons. All of these aspects will be examined against the larger theme of free choice and self-determination. The larger questions that we attempt to answer is through the various provisions of the Act- *does the State empower a Transgender person to make choices? Does the Act allow for self-determination?* The aspects of free will and self-determination are in contestation with the Statist gaze and this essay aims at analysing these contestations.

## II. FREE WILL AND SELF DETERMINATION: THE THEORETICAL FRAMEWORK

The idea of free will and self-determination has been the subject of philosophical speculation since the conception of ancient philosophy. The central question surrounding the notion of free will is, whether a decision taken by an individual is solely taken by their internal states i.e. their ideas, beliefs and character disposition or external factors influence that process of decision making.<sup>5</sup> The central belief in twentieth century western philosophy was that without free will there is little reason for individuals to act morally.<sup>6</sup> The problem known as the freewill problem is whether we are in control of how we act.<sup>7</sup>

As individuals, we make choices on a daily basis. These choices are characterised as surface freedoms which are our actions for day to day living. However, freewill runs deeper than the surface freedoms.<sup>8</sup> While we would be free to act or to choose what we will to do but do we have the ultimate power over it?<sup>9</sup> Are there other external agents that are pulling strings and manipulating us into having the wishes we want to have?

It is in the context of these larger questions that two categories of freedom become important to assert one's freewill. The first category of freedom is the *freedom of self-realization* which is the power and the ability to do what we want to do and which entails the absence of external constraints

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<sup>5</sup> Timothy o' Connor & Christopher Franklin, *Free Will*, STAN. ENCYCLOPEDIA PHIL. (Spring 2020), <https://plato.stanford.edu/entries/freewill/>.

<sup>6</sup> *Id.*

<sup>7</sup> THOMAS PINK, *FREE WILL-A VERY SHORT INTRODUCTION* 3 (Oxford University Press, 2004).

<sup>8</sup> ROBERT KANE, *A CONTEMPORARY INTRODUCTION TO FREEWILL* 2 (Oxford University Press, 2005).

<sup>9</sup> *Id.*

preventing us from realizing our wants and actions.<sup>10</sup> The freedom of self-realization includes all social and political freedoms that are highly valued by all citizens and such freedom from external constraints are integral to free societies.<sup>11</sup>

The second category of freedom is the *freedom of self-determination* which is the power to act accordance to our own free will. This could be an identity, motive or purpose of one's own making, that the individual is ultimately responsible for forming.<sup>12</sup> To be self-determining is to be able to determine one's actions in terms of the Real or Deep Self with which one identifies or to which one is wholeheartedly committed; or it is to be able to control one's desires in terms of one's Reason or values—as well as being able to do what one wants without hindrances or impediments.<sup>13</sup>

The freedom of self-realization and the freedom of self-determination are two frameworks that will be used to analyse the *Transgender Persons (Protection of Rights) Act, 2019* along the axis of identity, family and employment.

### III. GENDER IDENTITY CERTIFICATE: SUBVERTING SELF DETERMINATION?

Transgender is generally used as an umbrella term for persons whose gender identity, gender expression or behavior does not conform to their biological sex. Transgender may also take in persons who do not identify with their sex assigned at birth, which include Hijras/Eunuchs who describe themselves as “third gender” and they do not identify as either male or female. Transgender also includes persons who intend to undergo Sex Re-Assignment Surgery [SRS] or have undergone SRS to align their biological sex with their gender identity in order to become male or female.<sup>14</sup>

The problem with gender identity certificate is that it takes away the right of self-determination. One hand the state provides the right to self-identify, but on the other hand the need to obtain a certificate is again restricting the transgender person to the State norm. Section 4(2) of the Act states that a transgender person has the right to self-perceived identity. While the Act grants the right to self-perceived identity, the recognition of that identity is contingent upon State apparatuses as stated in Section 5 and 6 of the Act. Section 5 makes provisions for a transgender person to make an application to the District Magistrate for issuing a certificate of identity. Section 6(3) states

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<sup>10</sup> KANE, *supra* note 8, at 163.

<sup>11</sup> KANE, *supra* note 8, at 6.

<sup>12</sup> KANE, *supra* note 8, at 172.

<sup>13</sup> KANE, *supra* note 8.

<sup>14</sup> NALSA, ¶ 11.

that the certificate issued shall confer rights and proof of recognition of their identity as a transgender.

According to the provisions of the Act while a transgender person has the right to self-perceived gender identity, the right to recognition of that identity is tethered to the State and subject to State scrutiny. It is only when the certificate is issued will the transgender person be conferred with rights and proof of recognition. Hence, all the welfare measures and provisions laid out in the Act and other welfare measures that may be introduced and is applicable to transgender person as well, is subject to their recognition by the State and the subsequent issuance of the certificate. This aspect of right to self-perceived identity versus recognition by the State subverts the aspect of free will and self-determination.

The aspect of gender identity certificate as mentioned in the Act when posed against the question of freewill and self-determination as stated in Part II of the essay. The first question is whether there are external agents and constraints that determine what transgender persons as a community can and cannot have? The State being the external agent in this case and the gender identity certificate being the external constraint in this case. The main issue arising out of the provision of the gender certificate is the dependence on external factors for recognition of identity.

In the *NALSA* judgment, the Supreme Court laid down that the transgender and intersex persons have the constitutional right to self-identify their gender as male, female or transgender, even without a medical intervention.<sup>15</sup> The Court held, “*Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.*”<sup>16</sup>

Section 6 of the Act, only allows for an identity certificate as ‘transgender’. It does not allow for recognition of gender identity as ‘male’ or ‘female’, unless a SRS has been undergone. This is clear violation of the *NALSA* judgment, which recognised the right to self-identify oneself as male, female or transgender”.<sup>17</sup>

Section 7 of the Act requires that if a transgender person obtains a certificate under Section 6 and undergoes SRS after that, to obtain a revised identity certificate, application shall have to be made to the District Magistrate, along with a certificate to the effect that the transgender person has

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<sup>15</sup> *NALSA*, ¶ 20.

<sup>16</sup> *NALSA*, ¶ 20.

<sup>17</sup> *NALSA*, ¶ 19 & 20.

undergone surgery either as a male or a female by the Medical Superintendent or Chief Medical Officer of the medical institution in which the transgender has undergone SRS. Medical procedures should not be required as a pre-condition for any identity documents for transgender and intersex persons. The clause mandating a transgender person to submit proof of medical treatment in order to prove their gender identity, violates their free will.<sup>18</sup>

Any law that produces a relation between the individual and the State that produces an impermissible government control over individuals is totalitarian and does violence to the letter and spirit of the Constitution.<sup>19</sup> In this case, the Act takes away the element of self-determination from the hands of the transgender person, and vests the decision making on the State according to its prerogative.

At the time of birth of a child, it is assigned a gender based on genital appearance. This “male” or “female” identity recorded on a birth certificate, becomes the child's legal gender, and helps structure the individual's life.<sup>20</sup> This identity affects how the individual navigates sex-segregated facilities, legal documentation, gendered expectations and interactions with state and non-state entities.<sup>21</sup> For most people, this assigned legal gender will raise little to no concern because most people identify with their assigned legal gender.<sup>22</sup>

In the context of legal gender, transgender people are the ones who find themselves most encumbered. Specifically, transgender people who do not identify with their legal gender experience intense expressive and dignitary harm and are often subjected to violence, harassment and insult when they try to change their legal gender in the documents.<sup>23</sup> They suffer through harassments so often that it becomes necessary for them to get their legal gender as the gender they identify themselves with, else surviving becomes a daily struggle. The process is tedious and extremely derogatory, especially when it comes to medical examinations.

Revathi, a Transgender activist recalls the struggle she had to endure to get a passport in the year 2003. “*Getting a passport was an affirmation of my rights as a citizen of India. But being a Trans-woman made it even more complex and difficult. There are only two boxes in the passport form: Male or Female*”<sup>24</sup>. When she

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<sup>18</sup> Jayna Kothari, *A law that defeats its purpose*, THE HINDU (Dec. 29, 2018), <https://www.thehindu.com/opinion/op-ed/a-law-that-defeats-its-purpose/article25854190.ece>.

<sup>19</sup> Brian T. Ruocco, *Our Antitotalitarian Constitution and the Right to Identity*, 165 U. PA. L. REV. 193 (2016).

<sup>20</sup> Dean Spade, *Documenting Gender*, 59 HASTINGS L. J. 731 (2008), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1349&context=faculty>.

<sup>21</sup> Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731,737,752.

<sup>22</sup> *Id.*

<sup>23</sup> Ruocco, *supra* note 19, at 193-226.

<sup>24</sup> A. REVATHI, V. GEETHA, *THE TRUTH ABOUT ME: A HIJRA LIFE STORY* 21 (Penguin Global, 2010).

landed at the passport office in Bengaluru, the authorities pointed out the discrepancy in the name in her school leaving certificate, which was Doraiswamy which did not match her female name “Revathi”. Despite insisting that she was a trans-woman who had undergone a sex change surgery she was asked to get a medical certificate proving the sex change. She endured so much humiliation, as she was treated as an object of curiosity, looked in with voyeuristic delight.<sup>25</sup>

Almost two decades later, The Transgender Person (Protection of Rights) Act, 2019 still demands for a certificate issued by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery. If transgender persons had no right to self-identify their gender back in 2003, and in the year 2019 and if the Act still only provides the provision to get the status of “transgender” and only further allows to be identified as “male” or “female” after the SRS and after the scrutiny by the District Magistrate, then the purpose proves to be self-defeating. If it does not provide for self-determination then on what grounds are their interests being protected? How can transgender persons exercise their free will and freedom of self-realization, if they are forced to go through a medical examination in order to obtain a certificate proving their gender? This provision of the Act violates the *NALSA* judgement, which unambiguously stated that the right to self-identity is a Constitutional right.<sup>26</sup>

When transgender persons are not allowed to record their true identities on legal documents, or opt out of legal gender altogether, they are compelled to affirmatively identify with a gender that is contrary to their core identity.<sup>27</sup> People whose gender identity matches their legal gender are often unaware of the insidious ways in which legal gender affects transgender people.<sup>28</sup> It is a common misunderstanding that all transgender persons want or need genital surgery or SRS.<sup>29</sup> Such misconception objectifies transgender persons and has led to the notion that genital surgery must be a requirement for legal gender reclassification. However, transgender persons have different “aims and desires for their bodies,” and they express their gender identity accordingly.<sup>30</sup> The State causes expressive harm by meaningfully repudiating transgender person's identities. Moreover, state restrictions on gender reclassification deny individual autonomy and self-definition.<sup>31</sup>

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<sup>25</sup> A. NANDINI REVATHI MURALI, *A LIFE IN TRANS ACTIVISM XXVII* (Zubaan Books, 2010).

<sup>26</sup> *NALSA*.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Lenny Bernstein, *Here is how Sex Reassignment Surgery Works*, WASHINGTON POST (Feb. 9, 2015), <https://www.washingtonpost.com/news/to-your-health/wp/2015/02/09/heres-how-sex-reassignment-surgery-works/>.

<sup>30</sup> *NALSA*.

<sup>31</sup> *Id.*

#### IV. FAMILY: NATURE OR NURTURE?

All of us inhabit a normative world. The law and the legal systems are a part of the normative world, which construct the systems and also give meaning to it<sup>32</sup>. If law is closely connected to the narratives that add meaning in a social context, then it is worth extrapolating the social narratives perpetuated by the Act, especially in relation to the institution of family.

The dominant social narrative always has the family created within the norm of heterosexuality, as the bedrock for sustaining patriarchy, communities and the nation<sup>33</sup>. The dominant social narrative of heterosexual family as the acceptable form of expressing sexuality and desire creates a process of “othering”. The individuals who fail to comply with this framework of heterosexuality become the “others”. The cornerstone of queer activism has been to contest this idea of gender as a mutually exclusive category. It challenges the idea of “normal” and “abnormal”, not as naturals but rather as social constructs which can be subverted.<sup>34</sup> It pushes the envelope of gender beyond biology.

Section 2(c) of the Act defines family as a group of people related by blood or marriage or by adoption made in accordance with law. It is in this definition of the Act that the notion of family linked to biology is reiterated. This notion is problematic because it does not acknowledge the family like structures that transgender people have traditionally been part of which serves both as an economic and social unit. Further, biological families are often a site of violence for transgender people because of the social stigma attached to their gender non-conformity. The definition of family within the Act is self-defeating because it reiterates the same heteronormative idea of family that the LGBTQIA activism has tried to challenge.

The problematic notion of tethering a gender non-confirming individual with their biological family is further reiterated in Section 12 of the Act which states that, “*No child shall be separated from parents or immediate family on the ground of being a transgender, except on an order of a competent court, in the interest of such child*”. Section 12 (3) further states, “*Where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in rehabilitation centre*”. In these two sections, two aspects are emerging, the duty and care of a gender non confirming child is solely with the biological family, in the event that the biological family fails

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<sup>32</sup> Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1995).

<sup>33</sup> NIVEDITA MENON, *SEEING LIKE A FEMINIST* 39 (Penguin Books, 2012).

<sup>34</sup> Ruth Benedict, *Anthropology and the Abnormal*, 10 J. GEN. PSYCHOL. 59-82 (1934).



to provide care the legal system steps in. The clauses systematically exclude the transgender community and their *gharana* system of living.

## V. THE SOCIAL STRUCTURE OF THE TRANSGENDER COMMUNITIES

*Gharana* system, which is a “structural principle of organization; they do not have a spatial dimension”<sup>35</sup>. There are two parts of this definition. First, there is the structural principal of organization where every *gharana* has a hierarchical organization with the *Naik* or the head of the *gharana*. Under the *Naik* there are *gurus* and every *guru* has their own set of *chelas*. It is the relationship with a *guru* that legitimizes a hijra identity. When a hijra gets associated with a *guru* she is getting associated with an entire kin the link of which is through the *guru*.<sup>36</sup>

There is an idealization of the *guru-chela* relationship as being equivalent to a mother daughter relationship. Reddy elaborates on this point by stating that the authenticity of the hijra identity within the community is gauged by the *gharana* with which a hijra is associated with. The ones with a *gharana* identity are considered to be higher in the hierarchy than the ones who choose to live without *gharana* identity.<sup>37</sup> Living without a *gharana* identity is considered to be a “social suicide” because being expelled from one community implies that the hijra will not be accepted in any other *gharana*.<sup>38</sup> Definition of family in the Act is rooted to the idea of family either by birth, marriage or adoption i.e., it is rooted in the idea of a “normal” family. Whereas, traditionally transgender communities have lived in the *gharana* system which serves both as a social and as an economic unit. This finds no acknowledgement in the Act.

Revathi in her book ‘A Life of Trans Activism’ recalls an incident where she was severely beaten by her middle brother with a cricket bat for being around other transgenders in her locality. He threatened her for wearing a sari and dancing. He beat her up mindlessly and said that he would kill her. Revathi tried to protect her face and head from the blows, but they kept coming and her brother finally brought the bat down heavily on her head. Her skull cracked and blood flowed everywhere.<sup>39</sup> In yet another incident her family rounds her up and questions her “*Have you ever thought what people will say about our family? What is it you lack here? Don’t you have enough to eat and good clothes to wear?*”. This was after she was beaten up by her brother.<sup>40</sup> Literature of lives of transgender

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<sup>35</sup> SERENA NANDA, NEITHER MEN NOR WOMEN: THE HIJRAS OF INDIA 39 (Cengage Learning, 1998).

<sup>36</sup> GAYATRI REDDY, WITH RESPECT TO SEX: NEGOTIATING HIJRA IDENTITY IN SOUTH INDIA 145 (University of Chicago Press, 2005).

<sup>37</sup> *Id.*, at 31.

<sup>38</sup> *Id.*, at 30.

<sup>39</sup> *Supra* note 24.

<sup>40</sup> *Supra* note 24, at 10.

persons and the biographies narrate incidents of violence that they have faced from their biological families for their explicit gender non-conformity.

The Act strips the transgender persons of the right to live safely within the transgender community because such social arrangements do not find recognition within the definition of family. It further subjects the members of transgender community for police and State scrutiny for admitting new members who maybe fleeing family violence or looking for similar communities to understand and assert their identities.

## VI. PROVISION FOR EMPLOYMENT AND ITS IMPLICATIONS

The Act in Section 18 states, “*Whoever,— (a) compels or entices a transgender person to indulge in the act of forced or bonded labour other than any compulsory service for public purposes imposed by Government*”. The terms “forced and bonded labour” has not been defined in the Act, which leaves it open to interpretation. Two areas which has been historically used to criminalise transgenders has been begging and sex work. Forced labour could be interpreted to include begging and sex work. This comes with its own downside and has serious implications. A large number of people from the transgender and intersex community are engaged in begging and sex work due to discrimination they face when pursuing ‘normal’ work. They do not have many other employment opportunities. This provision of the Act could lead to members of the transgender community being criminalised for making a living.<sup>41</sup>

“Sex work” is a broad term used to describe exchanges of sex or sexual activity. Sex work is also used as a non-stigmatizing term for “prostitution”.<sup>42</sup> Many transgender people participate in the sex trade in order to earn income or as an alternative job to earn a living. The criminalizing and stigmatizing of sex work can worsen the discrimination and marginalization that transgender people already face in society. Transgender sex workers experience harassment and violence for being out in the streets and in public, often at the hands of police.<sup>43</sup>

Revathi, a transgender woman narrates an incident where the police arrested her and illegally detained her for two days at the Cubbon Park Police Station. She was physically and verbally abused. She was forced to eat off the floor and then wash and clean the floor. She kept wondering as to why she was suffering like this and whether of all this was because she was into sex work. “*If*

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<sup>41</sup>John. L. Paul *Metro Brings More Transgender on Board*, THE HINDU (Jan. 27 2018) <https://www.thehindu.com/news/cities/Kochi/metro-brings-more-transgenders-on-board/article22538071.ece>.

<sup>42</sup>ERIN FITZGERALD ET AL., MEANINGFUL WORK, TRANSGENDER EXPERIENCES IN THE SEX TRADE 8 (2015).

<sup>43</sup>*Id.* at 40.

*other job opportunities were available, I could live like other women*".<sup>44</sup> The fact finding and incident reports by People's Union of Civil Liberties, Alternative Law Forum, Sangama and other organizations working in the sphere of transgender rights show us a picture of antagonistic relations between police and transgender people. There are a few incidents which have brought to attention the violence faced by the community at the hands of the legal system, especially by the local police officers.

In 2002, four Kothi sex workers Seetam Sheela, Vimla and Malathi were taken to Sampangiramanagara Police Station in Bangalore, where they were illegally detained and physically harassed and beaten up.<sup>45</sup> No charges were pressed against them and they were let go with a warning that they should not be seen on streets. In 2004, a transgender named Kokila was raped and subjected to brutal physical assault at the hands of the police. Kokila was being gang raped when the police walked into the site. While the goons ran away, Kokila was arrested and illegally detained. During detention she was subjected to rape and physical assault by the police officers.<sup>46</sup>

Such atrocities are faced by the transgender persons regularly at the hands of the police. The Kochi Metro Rail Limited [KMRL] takes credit for recruiting 23 members of the transgender community in June 2017, and is also the first Government owned company in India to formally appoint them.<sup>47</sup> However, 8 out of them quit their jobs within a month due to refusal by several landlords to give them accommodation. They were left with no remedy but to quit their jobs since their employer had no legal obligation and/ or incentive to step in and help them fight against such discrimination.

Under such cases, transgender persons are forced to take up other jobs like begging or sex work.<sup>48</sup> One such transgender employee walked out of the office of KMRL after her first day at work and had to find a customer for sex because she did not have enough money to pay the house rent the next day. "*It was the first time I was doing it, I had no other option,*" she says. Her stay was in the terrace of a lodge, covered with a tin sheet, for which the owner charged her INR 600/- daily. It was a steep price to pay but people are unwilling to rent to transgender persons.<sup>49</sup>

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<sup>44</sup> REVATHI MURALI, *supra* note 25 at 28.

<sup>45</sup> PEOPLE'S UNION OF CIVIL LIBERTIES, HUMAN RIGHTS VIOLATIONS AGAINST THE TRANSGENDER COMMUNITY, (2003).

<sup>46</sup> *Id.*

<sup>47</sup> John. L. Paul, *Metro Brings More Transgender on Board*, THE HINDU, (Jan. 27, 2018), <https://www.thehindu.com/news/cities/Kochi/metro-brings-more-transgenders-on-board/article22538071.ece>.

<sup>48</sup> Nidheesh M.K. *Transgenders in Kochi Metro: The Untold Story*, LIVEMINT, (Jun. 23, 2017), <https://www.livemint.com/Leisure/hAxjCCa2Ovvnv9DJSULDQHP/How-Kochi-Metro-is-making-a-difference-in-the-lives-of-trans.html>.

<sup>49</sup> *Id.*

The Yogyakarta Principle number 12 states that everyone has “The Right to Work”. The kind of work that is decent and productive in just and favourable conditions, without discrimination on the basis of sexual orientation or gender identity. In light of this right, the States are required to take necessary legislative, administrative and other measures to eliminate and prohibit discrimination on the basis of sexual orientation and gender identity.<sup>50</sup>

It also states that State must eliminate any discrimination on the basis of sexual orientation or gender identity to ensure equal employment and advancement opportunities in all areas of public service.<sup>51</sup> Hence, it is up to the State to make arrangements to provide the gender minority with employment opportunities, and also take steps to curb the discrimination they face at workplace. Without taking these measures, criminalising begging or sex work by transgender persons would only do more harm than good. Criminalising their only means of livelihood without providing them with alternate means is highly counterproductive and would lead to more transgender persons being oppressed by State machinery and further social marginalization.

We had filed an Right To Information [**RTI**] with the Ministry of Labour & Employment to find out the exact number of transgender persons employed by the Central Government.<sup>52</sup> Our request was transferred to the Department of Personnel and Training, who further designated it to 9 other organisations including the Union Public Service Commission [**UPSC**], State Selection Commission [**SSC**]. The response from the concerned departments shed some light upon the nature of Transgender person employment data available with the State and its various departments.

The response for the enquiry from UPSC was, “No such data were available with the Central Public Information Officer [**CPIO**].” The response from SSC was, “No recorded information is available with CPIO being not compiled and maintained in the desired format” and also, “Such particular information is not maintained by CPIO”. The Department of Personnel and Training replied with, “so far as (Reservation-II) section, Department of Personnel and Training [**DoPT**] is concerned, no such data is maintained.”<sup>53</sup> As per the RTIs filed, the Government has no clear records of how many transgender persons are employed by it, if at all there are any. Hence, the Government’s role in increasing their employment opportunities is little to none. In situations like

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<sup>50</sup> *The Yogyakarta Principles - How International Human Rights Protect LGBTI People*, Transgender Europe (Jan. 31, 2018), <https://tgeu.org/yogyakarta-principles/>.

<sup>51</sup> *Id.*

<sup>52</sup> The copies of RTI filed by the authors are verified and available with the Indian Journal of Legal Theory. Readers may contact IJLT in case they need the same. This is subject to the consent of the authors.

<sup>53</sup> Response received for the RTI filed.

these, introducing a provision which would result in punishing transgender person for taking up other forms of employment is quite disturbing. Often times transgender person opt for begging and sex work as a last resort.

Transgender persons are believed to be endowed with the power to confer fertility on newlyweds or new born children. They see this as their “traditional” ritual role, although at least half of the current *hijra* population (at least in Hyderabad) engages in prostitution, which hierarchically senior “ritual specialists” greatly disparage.<sup>54</sup> The pattern of employment and livelihood of transgender people in Delhi and UP from a field survey conducted by the National Human Rights Commission [NHRC] tells us that .<sup>55</sup>

6% of transgender people from Delhi and UP are employed in private/NGO sector. Majority of transgender people are engaged in the informal sector. The results showed that nobody is employed in the Government sector. 24.44% of them are engaged in badhai, blessings, singing and dancing, while 4.56% of Transgender persons are sex workers. About 10.44% are engaged in begging and 13.11% are engaged in sale of food items, fruits, flowers, vegetables etc.<sup>56</sup>

From the above statistics it is evident that there are no measures put in place to provide job security to transgender persons, or even provide them with adequate job opportunities to begin with. In such a scenario, it would be counter-productive to criminalise transgender persons for taking up other means of livelihood. Dire economic situations and a combination of discrimination in education and the workplace pushes many transgender people to engage in sex work. It is sometime necessary and vital means of survival for many, when they lack steady income or access to other employment opportunities.<sup>57</sup>

## VII. CONCLUSION

Freewill and self-determination are crucial aspects and have been the overarching themes in *NALSA*, *Puttaswamy* and *Nanjet Jobar* judgements. The Act in many ways fails to take the spirit of the judgement or even some of its mandates. In certain cases contradicts the judgement. This aspect is evident in the provision for the gender identity certificate. While it allows a Transgender person to have the right to a self-perceived gender identity, it tethers the recognition of that identity on State apparatuses. Transgender persons as a community are not free from external impediments

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<sup>54</sup> *Supra* note 33, at 2.

<sup>55</sup> Jacob John, *Study on Human Rights of Transgenders as a Third Gender*, NATIONAL HUMAN RIGHTS COMMISSION 29 (2018), [https://nhrc.nic.in/sites/default/files/Study\\_HR\\_transgender\\_03082018.pdf](https://nhrc.nic.in/sites/default/files/Study_HR_transgender_03082018.pdf).

<sup>56</sup> *Id.*

<sup>57</sup> *Supra* note 24.

taking them further away from the freedom to self-realization by mandating the need of a Medical certification to prove their identity.

The essay further tells how by restricting the meaning of “family”, the Act tries to avoid the existence of the Community and their *gharna* system of living. Transgender literature and narrations of stories by members of transgender community has shown family as an institution that perpetuate violence to uphold social norms around gender and sex. This leads to physical, emotional and sexual violence of the transgender. Historically, they have found occupation, safety and acceptance within the *gharana* system of living. This community finds no mention or recognition in the Act, reducing family to be only biological family.

Further the Act could be used to criminalising the livelihood of transgender persons with which they earn a living, without supporting it with the required employment opportunities or vocational training seems to be serving no purpose for the transgender persons. The Act which was primarily meant for the protection of transgender rights further subjects them to the mercy of the State and its machinery.