

BREAKING BARRIERS: THE QUEST FOR EQUALITY IN TRANSGENDER MARRIAGE AND ADOPTION RIGHTS

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ABSTRACT

In recent years, the recognition and acceptance of transgender individuals have gained significant momentum worldwide. Prohibition of discrimination is a right that all citizens enjoy. Such prohibition of discrimination extends to even discrimination in marriage and adoption. These represent two areas where the transgender community does not enjoy equal rights, solely on the basis of their gender. This remains a lingering issue that is yet to be solved. As society becomes more inclusive, it is imperative to examine the legal framework surrounding marriage and adoption by transgender individuals in India. This article aims to explore the provisions of The Transgender Persons Act 2019, the Special Marriage Act, 1954 and various other provisions that provide the rights of marriage and adoption to transgender persons in India. By throwing light on these legislations, this article attempts to shed light on the problems and challenges faced by transgender individuals in the context of marriage and adoption. Further, this article aims to analyse the current laws and their limitations in addressing these rights, urging for legislative reforms that promote inclusivity, dignity, and equality.

Keywords: Transgenders, Inclusivity, Discrimination, Marriage, Adoption.

INTRODUCTION

Nelson Mandela wisely remarked, “To deny people their human rights is to challenge their very humanity.” India, with its rich cultural heritage, diverse traditions, and complex social fabric, is constantly grappling with the issue of equal rights for the transgender community. Transgender persons have always been a part of society. History and mythology are proof of this. The story of Shikhandi and Arjuna as trans male men in the Mahabharata¹ and King Ila in Ramayana² are some mythological examples. The praise of God Ardhanarishvara and

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¹ *The Mahābhārata. Vol. 3: Book 4. The Book of Virāta*, vol 3 (6. Dr., Univ Press 1999)

² ‘The Genderfluid Deity’ (*Amar Chitra Katha*) <<https://www.amarchitrakatha.com/mythologies/ila-the-genderfluid-deity/>> accessed 19 December 2023

Bahuchara Mata, a Hindu goddess who is considered the patron of the Hijra community and the continued presence of Aravanis, Hijras, Kothis and Jogta communities show us that they have always been a part of society. Then, why discriminate against a community that has been accepted and praised in history?

Amidst numerous strides being made for gender equality, the rights of transgender individuals in the realms of marriage and adoption remain largely neglected. India has made incredible strides in acknowledging the third gender, through the landmark judgement given by the Apex Court in the case of *NALSA v. Union of India (2014)*³ and The Transgender Persons (Protection of Rights) Act, 2019⁴. The NALSA judgement along with a host of other cases has paved the way for the rights of the third gender. The Transgender Persons Act, 2019 prohibits discrimination against the trans community in workplaces, in education, in healthcare and so on. One cannot deny that India is moving towards the path of inclusivity of transgender, however, there still exist gaps in several statutes and legislations that deny the transgender community their basic human rights.

Despite the 2019 Act's inclusive and progressive provisions, the legislation has faced backlash due to the exclusion of self-affirmation of gender and the lack of clear provisions regarding marriage and adoption. It is paradoxical that despite being progressive enough to acknowledge the existence of a third gender, the nation remains regressive enough to lack gender-neutral marriage and adoption rules.

CHALLENGES SURROUNDING MARRIAGE RIGHTS

Section 5 of the 2019 Act explicitly states that "no person shall discriminate against a transgender person in relation to matters relating to marriage." This provision ensures that transgender individuals have the same rights and privileges as any other citizen when it comes to marriage. However, the Act does not specifically mention marriage between transgender persons or transgender and cisgender individuals. Due to the lack of proper legislation in India pertaining to transgender people's right to marry, the transgender community faces obstacles and prejudice while attempting to exercise this right.

Same-sex marriage is banned in India and marriage is only allowed between a 'conventional biological' man and a 'conventional biological' woman. This forces persons who are

³ *NALSA v. Union of India* [2014] SCC 438 (SC)

⁴ The Transgender Persons (Protection of Rights) Act 2019

transgender to forcefully identify themselves as male or female. Such an act becomes discriminatory under Article 15 of the Constitution⁵. It also impinges on their ability to access essential legal protections, property rights, and inheritance rights, which are inherently connected to the institution of marriage. This legal vacuum creates an environment of uncertainty and often forces transgender individuals to lead lives devoid of legal recognition and societal acceptance.

Recently, the Supreme Court in one of its judgements gave the verdict that heterosexual transgender marriages are allowed to be registered under Special Marriage Act or any other personal law. This judgement prima facie looks very promising and progressive but once we go deep into the actual procedure and essential requirements for a lawful marriage of transgenders in India, it shows that it not only is discriminatory but also a gross violation of the Fundamental Rights of the individual. As per the judgement given by the 5-judge constitutional bench, a transgender can marry their opposite gender only if the trans person possesses a gender identity certification that certifies that the individual is male or female.⁶ By deep examination of the judgement along with the Transgender Persons Act 2019 and Transgender Rules 2020, it can be understood that the Indian legal framework does not allow the marriage of transgender persons and only allows the marriage of those transgender persons who have identified as male or female by medical procedure.

As per the Transgender Persons (Protection of Rights) Act, 2019, if a person wants to get gender identification of male or female, then that person must go through a gender affirmation procedure or sex reassignment surgery, further the same procedure will be examined by the authorities.⁷ This provision necessitates a transperson to go through a medical procedure for gender identification.⁸ This provision in law must be declared unconstitutional as every citizen has the Fundamental Right of recognition of gender identity under Article 21 of the Indian constitution⁹, which was upheld by the Supreme Court in its landmark judgement of *NALSA v. Union of India*. It was held in this case that every transgender person has the right to gender identity and there should not be any physical examination for recognition of gender and gender identity should be based on a psychological basis not on a physiological basis.

⁵ Constitution of India 1950 art. 15

⁶ *Supriyo v. Union of India* [2023] SCC 1348 (SC)

⁷ Transgender Persons (Protection of Rights) Act 2019

⁸ Transgender Persons (Protection of Rights) Rules 2020

⁹ Constitution of India 1950 art. 21

Reading the judgment given by the 5-judge constitutional bench of the Supreme Court of India in *Supriyo v. Union of India (2023)* along with Transgender Persons (Protection of Rights) Act, 2019 and Transgender Persons (Protection of Rights) Rules, 2020, in order for a transgender person to marry lawfully (heterosexual marriage) then the individual will have to go through a medical procedure to identify as either male or female. This necessitates the medical procedure of sex change (gender reaffirmation procedure or gender reassignment surgery) which is extremely complicated and costly, making it impossible for most transgender persons to go through it. It also strips the person's right to self-identity of gender and right to have desired gender physiological features. As an example, a trans person having a psychological identity of female, but physiological features of man, cannot marry a man until they go through the specified medical procedure of a gender-affirming procedure (gender reaffirmation procedure or gender reassignment surgery) to have physiological features of a female. So, for a transgender to have a lawful heterosexual marriage, they will have to strike a bargain between their choice of bodily autonomy and marriage.

Even if we leave out the question of same-sex marriage of transgender, it is very disheartening to see that even heterosexual marriages between transgenders have so many complications and necessities under the provisions of law that are not only unconstitutional but also a gross violation of human rights.

CHALLENGES SURROUNDING ADOPTION

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The laws under the Juvenile Justice Act¹⁰ state that any person can adopt a child. The term person is not gendered and therefore transsexuals fit in the definition and can therefore adopt a child. However, this is misconstrued in a way where due to the lack of proper definition, transgenders are excluded, as they do not fit the ideals of a 'conventional parent'. They are also not allowed to adopt children since it is thought that a transgender parent's child will not have a stable upbringing and will probably encounter prejudice.

Under the Adoption Regulations, unmarried men and women can adopt provided they are intellectually, emotionally, and financially sound and do not have a life-threatening condition, similar to HAMA. Apart from that, the Regulations prevent a single guy from adopting a girl child but allow a woman to adopt a boy child. Further, the problem with this regulation is the term "financially sound". Transgender individuals face large-scale economic marginalization.

¹⁰ Juvenile Justice (Care and Protection of Children) Act 2015

They still encounter difficulties in securing jobs due to societal prejudice and lack of awareness among employers. As a result, some transgender individuals may be forced to resort to alternative means of income, such as begging, due to the lack of access to formal employment opportunities.

The Hindu Adoption and Maintenance Act, 1956¹¹ allows men, women or couples to adopt. Again, if a trans person wants to adopt a child under HAMA, then the person will have to identify as a male or female or be a couple and all of these eligibility criteria can only be fulfilled if a person goes through the medical procedure of sex change (gender reaffirmation procedure OR gender reassignment surgery) as per Transgender Persons (Protection of Rights) Act, 2019, Transgender Persons (Protection of Rights) Rules, 2020. This is again preventing a transgender person from adopting under HAMA (without being through the medical procedure) and the same law should be considered unconstitutional and a violation of the Fundamental Rights of a person under Article 14, 15 and Article 25 as it restrains persons to adopt under its own personal law hence preventing practice of own religion.

The adoption laws in India currently ignore the rights of transgender individuals who wish to adopt children. The Hindu Adoption and Maintenance Act, 1956, which is one of the primary laws regulating adoption among Hindus, is silent on the eligibility of transgender individuals as adoptive parents.

INTERNATIONAL COMPARATIVE ANALYSIS

International standards and a comparative analysis of the laws of different countries are important to ascertain whether India is performing according to benchmarks set in legal frameworks. A comparative analysis can aid in the formulation of a more uniform and consistent strategy for defending the rights of transgender people by revealing the disparities in how transgender rights are treated in different countries. Countries such as Denmark and Argentina have fared quite well in recognising transgender rights.

Examining the rulings made by the European Court of Human Rights (ECHR) regarding same-sex adoptions illuminates the worldwide inclusivity movement. Gender identity or sexual orientation should not be used to determine a child's eligibility for adoption, as the European Court of Human Rights has repeatedly stressed.

¹¹ Hindu Adoption and Maintenance Act 1956

Progressive nations like the Netherlands and Sweden have enacted laws recognising transgender people's right to parent. These countries put the child's best interests first, emphasizing that individuals should be able to nurture their children instead of upholding discriminatory conventions.

WAY FORWARD

Transgender Persons (Protection of Rights) Act, 2019, Transgender Persons (Protection of Rights) Rules, 2020, that necessitates a trans person to go through the medical procedure for gender identification of either male or female is making an adverse impact on transgender rights, which is also unconstitutional and violation of human rights. Making a positive change in this regard could be a big leap in the protection and recognition of transgender rights.

It is imperative for India to enact legislative reforms to solve the existing issues and promote equality, inclusivity and dignity. Such reforms must recognise the marriage and adoption by transgender individuals. Further, the Indian Government must also devise a comprehensive legal framework that delineates the rights and responsibilities of transgender individuals within the institution of marriage.

Adoption laws must also include transgender individuals as eligible adoptive parents. Such laws must recognise that these individuals too are capable of providing a safe home and environment for their children. They cannot be discriminated against solely because of their gender orientation.

Even if transgender people can lawfully get married and adopt children, they frequently deal with societal and cultural obstacles on a daily basis. Feelings of loneliness and marginalization may result from families and societies rejecting their marriages or their parental responsibilities. This lack of social acceptance feeds the cycle of prejudice and ignorance and can have detrimental effects on transgender people's mental and emotional health.

In order to improve the marriage and adoption rights of transgender individuals, education, awareness and advocacy are essential. Promoting awareness and acceptance of transgender rights through education can break down societal prejudices and educate citizens about the importance of inclusivity and equality. It is crucial to initiate dialogue among policymakers, legal experts, and the transgender community to shape effective legislation that recognizes their rights.

CONCLUSION

Marriage and adoption rights of transgender persons are fundamental rights that are unfortunately not yet foolproof. The current legislation and legal provisions available do not provide enough safeguards to offer adequate protection and prevent discrimination and inequality. It is imperative for the Government of India to acknowledge the rights of transgender people to marry and adopt. This will be the right step in the direction towards inclusivity and equality, therefore upholding the principles of social justice enshrined in the Constitution.

