

# LEGALFOXES LAW TIMES

## MARRIAGE AND ADOPTION: THE BATTLE FOR THE TRANSGENDER COMMUNITY IS STILL NOT OVER.

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### ABSTRACT

The moral norms and decisions of society commonly form an individual's identity. Individuals who tend to contradict these with their attitudes, sexual orientations, and tendencies, on the other hand, are frequently shunned, abandoned, and labeled as the "other." Notwithstanding the Constitution of India lofty promises to ban all forms of discrimination, there is controversy about the definition of gender and the implications of such a restriction on transgender rights. The Apex Court of India made a strong move in the NALSA judgment and the partial slashing of section 377 of the Indian Penal Code, there has been increased focus on Transgender rights, which will be discussed in the paper later. The transgender persons (Protection of Rights Bill), 2019 defined the term transgender and granted various social and legal rights to the transgender community but this bill is silent on marriage and adoption rights of the transgender person. While some encouraging changes that have enhanced visibility and acceptance of their suffering, major issues such as transgender marriage rights and adoption continue to haunt this segment of society. While the freedom to marry is a human right, there is no statute or regulation that will assist transgender people in exercising this right in India. This research paper aims to first define the word transgender, then address and analyze the laws governing marriage and adoption, as well as the failure of such laws for transgender, and the legislators of India require making the amendments in its personal laws to allow lawful marriage and adoption for the transgender community.

**Keywords: transgender, marriage, adoption, fundamental rights, NALSA judgment.**

### RESEARCH METHODOLOGY

The method used in this research paper is a doctrinal method. The present study demanded an analytical research. The data collected for paper is secondary data from various sources including books, websites, articles, references and journals.

## RESEARCH QUESTIONS

1. Whether the term 'bride' under the Hindu Marriage Act, 1955 includes a marriage between a man and a transgender?
2. Whether a transgender person can lawfully adopt a child under the Hindu Adoption and Maintenance Act, 1956 and CARA?

## INTRODUCTION

Transgender people are those whose personal identity is different from the gender he or she was supposed to be born with. "Trans" is often used as shorthand of transgender.<sup>1</sup> They are people whose identities vary from gender stereotypes, which only recognize male and female genders. They have faced bigotry, social injustice, and physical abuse as a result of Indian society's refusal to recognize their sexual orientation. There are often called as Hijras, jogappas, Sakhi, Aradhis, and other which are derogatory.<sup>2</sup> Although Constitution of India guarantees justice and equality to every citizen but Transgender community is still deprived from their rights.

Marriage is regarded as among the most significant aspects of a person's identity, both financially and legally, but transgender person is still deprived from his right to marry. Since the time same - sex relationship was decriminalized by the Supreme Court and held that LGBT+ Indians will be given equal constitutional rights while scrolling down Section 377 of the IPC implying potential civil rights extension.<sup>3</sup> Transgender persons believed that they will now find their place in personal law as well giving them liberty to marry and start their family but nothing so that sort happened till date.

The Constitution of India guarantees all the right to equality and prohibits discrimination on the basis of sexual orientation, sectarianism, faith, or belief. All people are also guaranteed voting rights and other privileges under the Constitution but even after this transgender are subjected to discrimination. The Constitution guarantees equality in all areas, but the question is whether it is followed. According to the constitution, much of the protection provided by the Fundamental Rights Chapter is applicable to all citizens, with some exceptions.

The Transgender Person (Protection of Rights) Act 2019, defined the term transgender as a person whose gender does not reflect with the gender assigned them at time of birth and includes trans-man or trans-woman(whether or not such individual has endured Sex Reassignment Surgery or hormone therapy or laser therapy or any other therapy), person with intersex

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<sup>1</sup>SERENA NANDA, NEITHER MAN NOR WOMAN: THE HIJRAS OF INDIA 22 (2nd ed., Belmont, CA: Wardsworth Publishing Co., 1999).

<sup>2</sup>GAYATRI REDDY, WITH RESPECT TO SEX: NEGOTIATING HIJRA IDENTITY IN SOUTH INDIA 89 (Chicago: University of Chicago Press, 2005).

<sup>3</sup>Navtej Singh Johar & Ors. v. Union of India, Writ Petition (Criminal) No. 76 of 2016.

variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.<sup>4</sup>, and also prohibited discrimination against transgender people in matters of jobs, education, and health care, and development and welfare have been implemented to protect their rights.<sup>5</sup> However, even after years of passage of this law, transgender people continue to struggle for their rights, including the right to marriage and adoption.

## BACKGROUND

### 1. Criminal Tribes Act, 1871

**Transgender people have a long history in the country, but the situation changed under colonial rule. To control the actions of the transgender community in India, the Government enacted the Criminal Tribes Act, 1871. The hijras were labeled as an explicitly criminal tribe in the Act. It referred to transgender people as 'eunuchs,' and divided them into two categories: respectable eunuchs and dubious eunuchs.<sup>6</sup> The Act also stated that any eunuch found engaging in typical hijra cultural practices such as public dancing or dressing in women's clothing would be arrested or fined. The Act also required the transgender community to be registered and monitored. This Act was harsh, rigid and was violating the rights of the transgender community as no one is criminal by birth because of these reasons it was repealed after India got Independence.**

### 2. National Legal Services Authority v. Union of India and others

This came out to be a landmark decision in the case of India's 4 million transgendered persons (Census 2011). A two-judge bench, consisting of Justice K.S.P. Radhakrishnan and Justice A.K. Sikri, handed down this decision. The Indian Constitution was interpreted by the Supreme Court in context of international human rights treaties and standards. Article 14 states that "The State shall not refuse to 'any individual' equality under the law or equal protection of the laws within the country<sup>7</sup>,". Hence held that transgender persons who are neither male nor female will also come under the term 'person' and, therefore, entitled to full protection of laws in all fields of State activity, including jobs, healthcare, schooling, as well as equal civil and citizenship rights, as exercised by every citizen of India.<sup>8</sup> It also stated that the prohibitions on discrimination against any resident, including on the basis of sex, in Articles 15 and 16 extend uniformly to transsexual people. The use of the term "sex" in the articles, according to the Court, is not restricted to biological sex of male or female, but also includes people who would consider oneself neither male nor female.<sup>9</sup>

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<sup>4</sup>The Transgender Person (Protection of Rights) Act, 2019, § 2, cl.k, Acts of Parliament, 2019(India).

<sup>5</sup>*Id.* at § 3.

<sup>6</sup>Arafat Safdar, Criminalizing the natives: A study of The Criminal Tribes Act, 1871, UBC Library 45, 56 (2020).

<sup>7</sup>INDIA CONST. art. 14.

<sup>8</sup>National Legal Services Authority v. Union of India and others, (2014) 5 SCC 438.

<sup>9</sup>*Id.* at. para54.

Finally, the Court concerned Article 21 of the Constitution, which states that “no individual shall be deprived of his life or personal liberty except in accordance with legal procedure.”<sup>10</sup> It was interpreted as meaning that this clause covers "all areas of life that go to making a person's life significant," along with a person's right to self-determination of gender.

The Supreme Court also ordered that the governments should grant them the status of socially backward classes and provide them with necessary accommodations in educational institutions and jobs. Recognizing the social challenges confronting the transgender community, the court ordered the federal and state governments to resolve issues such as social stigma, gender dysphoria, social coercion, shame, and others, as well as to raise public consciousness about transgenders.

### 3. The transgender persons (Protection of Rights Bill), 2019

The government of India introduced its own Bill in the Lok Sabha in 2016, which was forwarded to a Standing Committee. The Committee made several recommendations, including identifying the term "persons with intersex differences," giving reservations to socially and educationally disadvantaged groups, and acknowledging civil rights such as marriage, partnership, divorce, and adoption. The Bill, nevertheless, officially ended with the dissolution of the 16th Lok Sabha (2014-19).

The transgender persons (Protection of Rights Bill), 2019 establish a definition for a transgender person as we have earlier discussed and also intersex variations is described as an individual who at the time of birth differs from his or her primary sexual characteristics, external genitalia, chromosomes, or hormones from the normative standard of male or female body. The bill forbids discrimination against them in aspects such as health, housing, and healthcare. It instructs both the central and provincial governments to implement welfare programs in these regions. Although this bill gave transgender a statutory meaning but had major drawbacks such as after evidence of sex reassignment surgery is obtained, the Act allows an individual to receive a certificate from a District Magistrate to alter the proof of gender in records.<sup>11</sup> The Act makes begging illegal, but it makes no provisions for work or education and lastly the Act makes no mention of intersex, gender-queer, or transgender people.

## LAW RELATED TO TRANSGENDER MARRIAGE IN INDIA

Transgender people must overcome many obstacles in order to get married in India. If they are transmen or transwomen, they must obtain ‘cismale’ and ‘cisfemale’ identity cards in order to marry.<sup>12</sup> LGBT community gain autonomy and immunity from state intervention when their

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<sup>10</sup>*Id.* at. para58.

<sup>11</sup> *Supra* note 4, § 6. cl. 1.

<sup>12</sup>PREETI SHARMA, HISTORICAL BACKGROUND AND LEGAL STATUS OF THIRD GENDER IN INDIAN SOCIETY, 2(12) IJRESS 64 (2012).

freedom to choose their spouses is recognized as an inalienable right.<sup>13</sup> Despite that they can live together if they want to, but their relationship would not be legal.

Personal laws in India are vast and varied. There are personal laws specific to and religion, as well as personal laws that are universal if anyone wishes to use them. Hindus, for instance, have a marriage law called the Hindu Marriage Act, whereas Muslims follow Sharia law. The Parsis, Jews, and Christians all have their own collection of marriage rules.<sup>14</sup>

The Hindu Marriage Act was enacted to protect the marriage rights of Hindu brides and grooms who are bound by the sacred institution of marriage in every ceremony. The section 5 of Hindu Marriage Act, lays out the requirements for a legal marriage, which does not mentions anything about the transgender person.<sup>15</sup>

### **Whether the term ‘bride’ under the Hindu Marriage Act, 1955 includes a marriage between a man and a transgender?**

The Madras High Court confirmed the right to marry for transgender people in the landmark case of Arunkumar and Others v. The Inspector General of Registration and Ors.<sup>16</sup>, the court ruled that under Section 5 of the Hindu Marriage Act, 1955, an individual who is born intersex but addresses as a woman will be regarded as a "bride."

The High Court relied on the decisions of the Supreme Court in NALSA v. UOI<sup>17</sup>, Justice K. Puttaswamy v. UOI<sup>18</sup> and Navtej Singh Johar v. UOI to affirm that transgender people have the right to self-identify their genders. It was decided that sex and gender are two separate concepts, with sex being biologically defined at birth and gender not. The Court went on to explain that discrimination based on sexual orientation or gender identity may impair equality before the law and would breach Article 14 of the Constitution, citing transgender people's right to self-identify their gender. It quoted NALSA as saying that gender self-determination is an essential aspect of personal independence and self, and that it comes under Article 21's protection of personal liberty. As a result, the Petitioner's decision to convey her gender identity as a woman will come under her personal sovereignty, which the State has no right to challenge.

The Supreme Court stated that Article 25 of the Constitution of India recognizes the right to practice Hindu religion.<sup>19</sup> The right of transgender people to marry has been affirmed by the Supreme Court. As a result, they cannot be shut out of the Hindu Marriage Act's review process, and the petitioner fundamental right under Article 25 has been violated.

<sup>13</sup>Justice (Retd) K S Puttaswamy v. Union of India, AIR 2017 SC 4161.

<sup>14</sup> Dipayan Chowdhury & Atmaja Tripathy, Recognizing the Right of the Third Gender to Marriage and Inheritance under Hindu Personal Law in India, BRICS Law Journal 43, 53–60 (2016).

<sup>15</sup>Hindu Marriage Act, 1955, § 5, Acts of Parliament, 1955.

<sup>16</sup>WP(MD) No. 4125 of 2019

<sup>17</sup>Supra note. 8.

<sup>18</sup>Supra note. 13.

<sup>19</sup>INDIA CONST. art.25.

Next, the High Court addressed the issue of marriage. It held that the term 'bride' in Section 5 of the HMA cannot have a 'static' or 'immutable' meaning and that statutes must be interpreted in light of the legal system as it exists today.<sup>20</sup> The Court relied on Article 16 of the Universal Declaration of Human Rights on the right to marry and on the Supreme Court's decision in *Shafin Jahan v. Asokan K.M. and Ors.*<sup>21</sup>, where the right to marry a person of one's choice was held to be integral to Article 21 of the Constitution.

Justice G R Swaminathan decided that a transsexual was indeed a "bride" and that the word applied to in the Act would not necessarily refer only to a woman in his decision, ordering that the marriage between a man and a transwoman be registered under the Act.

"In provisions of Section 5 of the HMA, 1955, a marriage solemnized between a male and a transwoman, both proclaiming Hindu religion, is a legal marriage, and the Registrar of Marriages is obliged to register it.<sup>22</sup> This Court is not creating any new ground by doing so. It's nothing more than pointing out the obvious. Often, not only physical sight in the eye, but also compassion in the heart, is needed to see the obvious." The Act, which specifies the requirements for a Hindu marriage, corresponds to "the band" as "bridegroom" and "bride," with no description of gender. Therefore, Section 5 of the HMA, 1955 defines a transwoman as a "bride."

This is the initial judgment in India to recognize transgender people's right to marry under Article 21 of the constitution, and to maintain that the term "bride" under the Hindu Marriage Act includes transgender people who identify as women. The appellant self-identification as a woman was upheld by the Court, which recognized her right to self-identify her gender and be used in the category of "bride" alongside other intersex/transgender people who identify as women. It cited the state's refusal to register her marriage as a breach of her civil rights.

While this decision is a significant move forward for transgender people both legally and socially, it is worth noting that it only protects the right to marry for those who self-identify as male or female and are still considered to be in heterosexual relationships.<sup>23</sup> The judgment does not legalize same-sex marriage in any way, and LGBTQIA+ people in same-sex relationships still do not have a constitutional right to get married under Article 21 of the Indian Constitution.<sup>24</sup>

## TRANSGENDER RIGHTS OF ADOPTION

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<sup>20</sup>Maitrayee Mukhopadhyay, *Legally Dispossessed: Gender Identity and the Process of Law*, *Stree Calcutta* 23, 67 (1998).

<sup>21</sup>AIR 2018 SC 1933.

<sup>22</sup> *Reema Aggarwal v. Anupam and Ors.* (2004) 3 SCC 199.

<sup>23</sup> Powell T. & Stein E., *Legal and ethical concerns about sexual orientation change efforts*, *Hastings Cent.*, Repp.44 (suppl 4):S32-S39 (2014).

<sup>24</sup>Kyle Knight, *India's Transgender Rights Law Isn't Worth Celebrating*, THE HUMAN RIGHT WATCH, (Dec.5, 2019, 1:30 PM), <https://www.hrw.org/news/2019/12/05/indias-transgender-rights-law-isnt-worth-celebrating>.

### Adoption in India

Adoption has been a tradition in India since the beginning of time. While the act of adoption has remained the same, the aim with which it is rolled out has changed. It typically ranged from a deep inclination for a child as an object of affection, a caretaker in later life, and an heir after death, to a humanitarian purpose of caring for and raising an abandoned or destitute child.

However, since adoption falls under the purview of personal law in India, there has been no opportunity to create a uniform law that applies to all of the diverse cultures that make up this melting pot.<sup>25</sup> As a result, this rule is regulated by various religious personal rules.

Adoption is not permitted in India, according to the personal laws of Muslims, Christians, Parsis, and Jews.<sup>26</sup> As a result, they often choose guardianship of a child under the Guardians and Wards Act of 1890. Hindus, Jains, Sikhs, and Buddhists in India are permitted to officially adopt a child. The Hindu Adoption and Maintenance Act of 1956, which was passed in India as result of the Hindu Code Bills, govern the adoption. It resulted in a few amendments that liberalized the adoption process.

### Law related to Transgender right to Adopt in India

A child can only be adopted by a male, female, or couple in India.<sup>27</sup> The third gender, which has been granted status and is recognized by the courts as a member of our society, is still denied this right. Other than male and female, there is no third option on the online adoption form. Aside from the significant financial cost of such legal adoptions, the restrictions prohibit sexual minorities from adopting children lawfully.

The transgender persons (Protection of Rights Bill), 2019 contain several flaws and fails to address critical transgender community needs, the first being the provision of adoption rights to the transgender community. Despite the fact that transgender rights have progressed over time, transgender and members of the LGBT group still do not have access to adoption. As previously mentioned, there are two options available to any Indian who wishes to adopt a child.<sup>28</sup> A Hindu has the choice of adopting through the Hindu Adoption and Maintenance Act, 1956 or via the Central Adoption Resource Authority (CARA).

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<sup>25</sup>VINITA BHARGAVA, ADOPTION IN INDIA: POLICIES AND EXPERIENCES, 104 (1<sup>st</sup>ed. Sage Publications, 2005).

<sup>26</sup>Seema Chowdhry, Adoption: Two shades of grey, THE LIVE MINT, (May 15, 2021, 11:55 PM), <https://www.livemint.com/Leisure/pZ1rSusqj8ub50NdgJTQmO/Adoption-Two-shades-of-grey.html>.

<sup>27</sup>Hansa Apparao, International Adoption of Children: The Indian Scene, 20, Journal of Behavioral Development 03, 03-18 (1997).

<sup>28</sup>Bhooloram (Bhola) and Ors. v. Ramlal and Ors., AIR 1989 MP 198.

## Whether a transgender person can lawfully adopt a child under the Hindu Adoption and Maintenance Act, 1956 and CARA?

### 1. Hindu Adoption and Maintenance Act, 1956

The Act was passed as part of a modernization and codification of Hindu law. By eliminating some (but not all) gender-based discriminatory clauses, the Act represents the ideals of equity and social justice to some degree but is silent when it refers to adoption by same-sex parents.

Section 7 of HAMA, 1956 states any male Hindu being of sound mind and is not a minor has the capacity to adopt a son or a daughter: provided, however, that if he has a living wife, he shall not adopt without her permission unless the wife has fully and permanently renounced the world or has ceased to be a Hindu, or has been found unsound by a court of competent jurisdiction.<sup>29</sup>

Whereas section 8 of HAMA, 1956 states that any female who is of:

- i. of sound mind,
- ii. not a minor, and
- iii. not married, or if married, whose marriage has been dissolved, or whose husband is dead, or who has absolutely and permanently renounced the earth, or who has ceased to be a Hindu, or who has been found of unsound mind by a competent court.<sup>30</sup>

This Act sets directions when a male can adopt a child or when a female can adopt a child, depriving transgender community to adopt.

### 2. Central Adoption Resource Authority (CARA)

CARA states eight principles for the eligibility criteria for adoptive parents of a child.<sup>31</sup> It specifies that a parent must be physically, psychologically, and emotionally stable, as well as financially capable and not suffering from a life-threatening illness. Also, the age gap between the infant and either parent must not be less than twenty-five years. None of the criteria mentioned in CARA's eight principle mention LGBTQ parents. There is really nothing wrong with the community expecting to live a regular life like anyone else in their nation.

Adoption Regulations, 2017, reported on the official website for the CARA allowed the couples who have been married for at least two years, and also single women, to adopt a child of either gender ( male or female) while a single man can only adopt a male child.<sup>32</sup> Couples in live-in

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<sup>29</sup> Hindu Adoption and Maintenance Act, 1956, § 7, Acts of Parliament, 1956.

<sup>30</sup>*Id.* at. § 6.

<sup>31</sup>Central Adoption Resource Authority, Eligibility criteria for prospective Adoptive Parents, [http://cara.nic.in/Parents/Guideline\\_RI.html](http://cara.nic.in/Parents/Guideline_RI.html), (last visited May 15, 2021).

<sup>32</sup>IAS Abiyan, Adoption Regulation 2017 framed by CARA, IAS ABHIYAN (Jan. 16, 2017, 11:59 PM), <https://www.iasabhiyan.com/adoption-regulations-2017-framed-central-adoption-resource-authority-cara/>.



partnerships, same-sex couples, and transgender people aren't mentioned at all, almost as if they don't exist.

Transgender persons are struggling to find a place in mainstream society and to understand what is morally correct and what is morally reprehensible. Although though they are now lawfully permitted to live together and remain as a couple, they are still unable to adopt a child and experience the joy that all other parents do.

## SUGGSTIONS

Since current legislation cannot be enforced in the case of LGBT marriages and adoption, new laws will have to be drafted, modified, or inserted to accept transgender marriages. There are following approaches to make marriage and adoption laws more accepting of transgender community.

- The best solution to give them right to legally adopt a child is to allow marriage. Transgender marriages can be allowed after reinterpreting, altering or amending the current laws or by creating the wording of the act gender-neutral.
- The second way is by amending section 4 of the Special Marriage Act which provided essentials for solemnization of a valid special marriage. Section 4 (c) states "The male has reached the age of twenty-one, while the female has reached the age of eighteen."<sup>33</sup> If section 4 (c) is amended to read, "The persons who have reached twenty-one years of marriage," transgender people will be able to marry under this Act.
- The third viewpoint proposes that the legislature should also grant same-sex marriages a different status, such as a civil partnership, in which they would not have any of the rights of marriage but would still be able to share insurance and file joint tax returns. i.e., it can be defined as a partnership dependent on emotional and financial interdependence.

## CONCLUSION

While the landmark 2018 court ruling and the 2014 NALSA judgment were major steps forward in the development of Transgender rights movements in India, it is argued that there is still a long way to go. However, LGBT people in India are not treated equally violating their fundamental rights and do not have the same rights as heterosexual people.<sup>34</sup> Furthermore, they continue to face abuse and prejudice in all aspects of life.

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<sup>33</sup> Special Marriage Act, 1954, § 4, cl. c, Acts of Parliament, 1954.

<sup>34</sup> NANDA, supra note 01, at 98.

Today it is critical that the government shed its conservative nature and take meaningful measures to end the stigma, bigotry, and violence that LGBTQIA+ people face.<sup>35</sup> It is past time for the government to enact new legislation or amend existing ones about marriage and adoption for these people, with a particular emphasis on transgender people.

One partner of an opposite sex couple who later married converted to the same sex as the other partner. It is a process of reincarnation or sexual alteration on the person's birth certificate, based on what state law imposes on a person's sexuality for marital considerations. Immediate marriages are a legal issue that needs to be addressed and recognized right away. Since marriage is a fundamental right and an essential institution, a framework should be established to specifically identify "sexual" significance for the purposes of transgender marriage. Some states may recognize a man and a woman who died as men and married women, while others may recognize the same person as a woman and then marry an empty woman.

Adoption should be open to everyone who can provide a child with a healthy, stable, and caring family. It is unjust to deprive a child, as well as their parents or community, of a happy life simply because the sentiments of some conservative religious groups are hurt. The transgender community's illegal adoption has aided and rescued girls in India. They also rescued girls from being sold in several nations. It's past time for us to reward their efforts by allowing them to adopt children. This would have happier families for the children, as well as the transgender community with the opportunity to have a child that they would not otherwise be able to provide.

Hopefully, the existing condition of transgender persons in India will improve and parliamentary notice on these subjects will be taken and acknowledged.

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<sup>35</sup> 2 SHARI THURER, THE END OF GENDER: A PSYCHOLOGICAL AUTOPSY, 132 (Routledge, 2006)