

The Social Recognition of Third Gender Community in India: Legality for Adoption and Marriage

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Abstract

The constitution embodies a commitment to shaping our destiny, with its preamble dedicated to safeguarding fundamental rights. This dedication is aimed at ensuring justice across all societal aspects and protecting essential duties. However, despite these noble intentions, the realization of such promises, especially in the context of India's independence, has been challenging. The aspirations for dignity, integrity, equality, and dynamic policy-making have often not been reflected in practical implementation at the grassroots level.

Among various rights and obligations, the recognition of transgender individuals has been notably absent. Despite national and international protections, the transgender community continues to face neglect and segregation worldwide. This oversight reflects a broader issue with the protection of minority rights and the need for effective remedies and initiatives for their welfare.

This research seeks to acknowledge the rights afforded to transgender individuals and to identify the various terminologies used, highlighting legal provisions that have gone unnoticed by different government levels. It aims to address the self-identified reasons behind certain abnormalities, the challenges in applying equal treatment and protection under the law, and the enforcement of relevant legislation. By promoting fair and impartial treatment for all, we can enhance the legal system, foster secularism through legislative measures, and eliminate barriers to preventing rights violations.

Addressing the significant challenges faced by the transgender population requires establishing and following a unique approach that recognizes and respects their rights and contributions to society.

Keywords – Fundamental Rights, Equality, Recognition, Remedies, and Secularism.

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Introduction

There are just two genders acknowledged by society, and those are male and female. Genitalia serve as the basis for this gender differentiation. However, there are those who believe that their internal gender does not correspond with the sex they were given at birth.³ These individuals are often referred to as transgender. A person's internal experiences of gender might vary from their biological sex, and this range of experiences is included by the term "transgender."⁴ There is a difference between gender and sex. People should have the autonomy to decide for themselves how they identify biologically, since sex is determined by a person's genitalia and gender is a product of one's thoughts and actions. There is a polarizing discussion over the legitimacy and reinterpretation of religious principles around gender and social identities in today's society. However, many civilizations have long acknowledged individuals outside of biological binary.⁵ Gender fluidity has been a topic of heated intellectual dispute for ages, while the ancients described persons who did not fit neatly into either the male or female categories. Persons have also been transgender for generations. It was about 200 BC when the Manu smriti, or Laws of Manu, which are the foundation of Hindu law, stated: "A male child is produced by a greater quantity of male seed, a female child by the prevalence of the female; if both are equal, a third-sex child or boy-and-girl twins are produced." There is a wide range of sexual orientations among transgender persons, as well as among the many ways in which transgender people show their gender via their clothing and behavior. There is a wide range of expression among transgender persons. Dressing, acting, and presenting oneself in a certain way might help some individuals live more authentically with their preferred gender identity. In order to conform to their gender identification, some persons use hormones and/or undergo surgical procedures. All around the globe, people have given them various names. "Hijra" is the name they go by in India.

Psychologists and medical professionals use the phrase "gender dysphoria" to describe the feelings of shame, dissatisfaction, and anxiety that transgender persons may experience due to the discord between their biological gender and their self-identified gender.⁶ In order to get medical therapy for gender change, a person may be officially diagnosed with gender dysphoria. The field of psychology refers to this as gender identity disorder.

Contrast sexual orientation with transgender or third-gender people. No, a transgender person does not identify as bisexual, gay, or lesbian. A person's sexual orientation describes their romantic interests, while transgender is a subjective experience that differs from their given biological sex. The film "Passing" depicts a transgender person's encounter with society accepting them as the gender they identify with.⁷ People surrounding a transwoman who uses the ladies' restroom may mistakenly assume that she is a woman. For some transgender people, passing is really essential. Because it both identifies one's gender and provides protection from abuse and harassment, passing may be quite meaningful.

3. Jake Scobey Thal, Craig and Karl, 'ANTHROPOLOGY OF AN IDEA: THIRD GENDER' (2014) July/August Foreign Policy.

4. Aslam M, 'The Position of India's Transgender - Third Gender' (Legalserviceindia.com) <<http://www.legalserviceindia.com/legal/article-1837-the-position-of-india-s-transgender-third-gender.html>> accessed 2 September 2020

5. Halder A, 'Education Inequality and Global Justice for The Third Gender. Hijras In India' <<https://www.grin.com/document/295334>> accessed 2 September 2020

6. Ibid, note 2

7. Supra, note 1

Problems Faced By Third-Gender in India

People who identify as third gender or who are transgender have several challenges within Indian culture. Their pervasiveness in Indian society is inescapable, yet the truth about them remains a mystery. They have always been an important part of Indian culture. Regardless, it is alarming that their standing has been lowered to the point of being uninformed, laughed at, and impoverished. Healthcare for conditions such as HIV/AIDS, depression, hormone pill misuse, alcoholism, penectomy, and marital and adoption issues is unavailable to them. Transgender people are unable to use public restrooms or other public areas. This exemplifies the prejudice that transgender people encounter while trying to use some of society's most fundamental services. All three settings—schools, hospitals, and prisons—present comparable challenges. When a boy in India begins to act in ways that are stereotypically associated with girls or that go against the grain of traditional gender roles, his family will likely reject him outright. Because of this, some family members may resort to physical violence, threats, or scolding to prevent their son or sister from acting or dressed like a girl or woman. When their son deviates too far from the socially anticipated gender roles, some parents may even forcibly remove him from the family. When they can't rely on their families, transgender persons seek refuge in the Hijra community. Due to a dearth of educational and occupational options, they make a living performing traditional songs and dances during special occasions like weddings and births. One source of transphobia is the uncertainty around transgender people's sex identities, which leads to a peculiar form of fear in people's minds.

Doing what they are doing for their earring they are sometimes charged under Section 268⁸IPC or under Section 294⁹. They are often exploited by the police and extracted money from. The complaints are also registered under Section 269¹⁰ and 270¹¹ of the Act, or under the Bombay Police Act, 1951. Sections 7 and 8 of the Immoral Traffic (Prevention) Act of 1956 penalize hijras soliciting having sex in public places, in addition to Section 377, which does not apply to them. Many sexual attacks against transgender people go unrecognized and unpunished because of the lack of a strong policy against the crime. It is peculiar that the Hijras continue to live in the shadow of denial of every basic right to fairness and education at a time when the whole world is engrossed with LGBT rights and legislation. Because of their peculiar looks, they have recently been the subject of research and analysis. The fact that they are human beings with inherent worth and dignity has been completely disregarded. They have no chance because of the people's bad attitudes and the fact that they're not part of society.

⁸. A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage.

⁹. Whoever, to the annoyance of others:

a) does any obscene act in any public place, or

b) sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

¹⁰ Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

¹¹. Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Marriage Rights of Third Gender in India

Marriage is believed to be one of the most essential constituents of a person's identity, both in a socio-economic and in a politico-legal sense.¹² Marriage, as a legally recognized bond between two individuals, is a very important social institution because it establishes a foundation for many rights and responsibilities, including those pertaining to property, succession, inheritance, and similar matters..¹³

Today, marriage is not only a recognized civil right¹⁴ that belongs to each and every member or citizen of the state, but also a concept that has both national and international acceptance.¹⁵ In light of this, it follows that the state must ensure the freedom to marry as a fundamental human right, and this is especially true with respect to the many laws and regulations that stem from the institution of marriage and govern its interpersonal aspects..¹⁶

The freedom to choose one's own life partner via marriage is a newly-established basic human right in India. This right cannot be violated by the state since it is basic. Under addition to the right to exist physically, citizens of India are guaranteed a high-quality living under Article 21 of the country's constitution.¹⁷ As a necessary condition for human survival, Article 21 has acknowledged the intrinsic dignity of every individual. Marriage is essential to an individual's dignity and purpose in life, as stated in this article's right to marry.

Article 21 of the Indian constitution guarantees the right to marry, which implies that every citizen should be able to pick their spouse and tie the knot, however the third-gender community in India is currently denied this privilege.

Traditional Hindu ceremonies surround the institution of marriage, which is regarded as a sacrament according to Hindu law. The union of a man and a woman is revered as a precious and holy institution. According to Hindu scriptures, there are eight distinct kinds of marriage, the holiest of which is the *gandharva* marriage. This union is a result of the two people's mutual desire and agreement. The Hindu Marriage Act of 1955 specifies the necessary conditions for a third-gender marriage, and this paragraph affirms those conditions. *Aptapadi* and *kanyadaan* are two common customs that the status acknowledges.

There is evidence of and encouragement for third-gender marriage in ancient Hindu literature. During the early Vedic era, people of the third gender were free to marry and live happily ever after.¹⁸ Princess Shikhandi is a character in the *Mahabharata* who became a man after marrying the lady she loved.

¹² Dipayan Chowdhury & Atmaja Tripathy, Recognizing the Right of the Third Gender to Marriage and Inheritance under Hindu Personal Law in India, 3(3) BRICS Law Journal 43–60 (2016).

¹³ Indra Sarma v. V.K.V. Sarma, 2013 (14) SCALE 448 (“Marriage as an institution has great legal significance and various obligations and duties flow out of marital relationship, as per law, in the matter of inheritance of property, successionship, etc.”); see also *Perez v. Lippold*, 198 P.2d 17, 20.1 (1948); *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁴ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

¹⁵ International Covenant on Civil and Political Rights, December 19, 1966, 999 U.N.T.S. 171 (1976), Art. 23; Universal Declaration of Human Rights, December 10, 1948, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), Art. 16; International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 993 UNTS 3 / [1976] ATS 5 / 6 ILM 360 (1967), Art. 10; European Convention on Human Rights, November 4, 1950, 213 U.N.T.S. 221, Art. 12.

¹⁶ *Ibid*, note 10

¹⁷ *Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors.*, (1985) 3 SCC 545.

¹⁸ Amara Das Wilhelm, *Tritiya-Prakriti: People of the Third Sex: Understanding Homosexuality, Transgender Identity, and Intersex Conditions Through Hinduism* (Philadelphia: Xlibris Corporation, 2004).

To formalize Hinduism's traditional marital practices, the Hindu marital Act of 1955 was passed. The Hindu Marriage Act of 1955 specifies the necessary conditions for a marriage to take place. A "man" and a "woman" are required to be present at the marriage ceremony according to Section 2 (1)(a). The terms "man" and "woman" are vague and up for debate since the Act does not define them. The literal rule of interpretation is one of many approaches of interpreting the law, however it becomes inadequate in situations when there is ambiguity or where the same term might have more than one meaning.

According to the law, there are two distinct categories of people with equal rights: men and women. Men may lawfully marry women, and women can lawfully marry men. There is no clear legal standard that may permit the implementation of this apparently linear segmentation and the subsequent assignment of rights..¹⁹ Though right to marry is now under Article 21, but if a whole group of people are not allowed to marry just because they do not fit under any definition of Man or Woman, then it is sheer discrimination, and violation under Article 14²⁰ Indian Constitution.

Recently, in a judgement Madras High Court granted the transgender people their right to marry and choose their partners. In the case of Arunkumar and Another. v The Inspector General of Registration and Ors.²¹ upheld the marriage between Arun Kumar and Seerja, a transwoman. The Court said that marriage between a Hindu male and Hindu transwoman would be valid under section 5²² of Hindu Marriage Act, 1955. The Court relied on the decisions of the Supreme Court in NALSA v. Union of India²³, Justice K. Puttaswamy v Union of India²⁴ and Navtej Singh Johar v Union of India²⁵ to reiterate that transgender persons have the right to self-identify their gender. It held that sex and gender are distinct, where a person's sex is biologically determined at the time of birth, which is not the case with gender.

The court said discrimination on the basis of sexual orientation or gender would negate the Article 14²⁶ of the Indian Constitution. The court on the issue of marriage denied on the grounds that transwoman do not qualify to be "bride" under section 5²⁷ of Hindu Marriage Act, 1955, said that meaning of a word in statute is not "static" and should be interpreted according to the laws and social structure prevalent in present time.

Section 5 of the Hindu Marriage Act, 1955 states that a marriage between a male and a

¹⁹. Theodore Bennett, *Cuts and Criminality: Body Alteration in Legal Discourse* 167 (Burlington, VT: Ashgate Publishing, 2015).

²⁰. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

²¹. W.P. (MD) NO. 4125 OF 2019 AND W.M.P. (MD) NO. 3220 OF 2019

²². Conditions for a Hindu marriage. – A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely: –

- (i) neither party has a spouse living at the time of the marriage;
- (ii) at the time of the marriage, neither party –
 - (a). is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
 - (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
 - (c) has been subject to recurrent attacks of insanity;
- (iii) the bridegroom has completed the age of 21 [twenty-one years] and the bride, the age of 18 [eighteen years] at the time of the marriage;
- (iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;
- (v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

²³. AIR 2014 SC 1863

²⁴. Writ Petition (Civil) No 494 of 2012

²⁵. WRIT PETITION (CRIMINAL) NO. 76 OF 2016

²⁶. Supra note 18

²⁷. Ibid, note 22

transwoman who both profess Hindu faith is a lawful marriage. The Registrar of Marriages is obligated to record this marriage. There is no new ground being broken by this Court in its decision. Declaring the obvious is all it is. Love in the heart is sometimes necessary in addition to bodily eyesight in order to see the obvious. The High Court of Madras.

For transgender and third-gender individuals in India, this case represents a watershed moment in their struggle for equality. After a lengthy fight, they finally won the freedom to marry anyone they wanted. To our knowledge, this is the one instance in which this has been decided. It is still up to the personal laws of India and the Supreme Court to recognize transgender marriage as legitimate and lawful. Society still has to recognize the reality that the freedom to marry is a basic right, even if the Supreme Court has made a ruling declaring as much.

Educational Rights of the Third Gender in India

One of the fundamental principles of the equality lies in the acknowledgment and affirmation of the 'right of decision and self-assurance'. Assurance of the sex to which an individual has a place and relates is natural for their privilege of self-assurance and their poise. Acknowledging that Indian laws are substantially binary in nature, recognizing only male and female genders, the Honorable Supreme Court of India in its order in the case of the 'Nalsa Judgement'²⁸, declared transgender individuals distinct from binary genders, as the 'Third Gender' under the Indian constitution and for the purposes of laws enacted by the parliament and state. Transgender persons are deprived of social and cultural participation and hence they have restricted access to education, health care and public places which further deprives them of the Constitutional guarantee of equality before law and equal protection of laws. It has also been noticed that the community also faces discrimination as they are not given the right to contest election, right to vote (Article 326), employment, to get licenses, etc. and in effect, they are treated as outcast and untouchable.

The Indian way of life has long promoted the concept of "Vasudev Kutum bhakam," the belief that all individuals are members of the same family. However, embracing those within our own community seems to be a bit of a challenge. They are also unable to participate in political or decision-making processes, in addition to social and cultural aspects of daily life. It is challenging for transgender people to exercise their fundamental civil rights. Because they are transgender and have experienced bullying and harassment at school, many transgender students have chosen to leave the institution.

Every kid has the choice to live their life to the fullest, just like any other person. As transgender youth live on the outside of mainstream society, they are one of many marginalized groups in our country that face discrimination, poverty, disability, and other forms of discrimination. Like all understudied, they play an important role in the nation's development cycle. No one could dare to leave the shadows behind in the current climate of global progress. Though they may be an acceptable human asset for the public advancement, transgender children were never seen as a main part of our society throughout the frontier time.

²⁸. Supra, note 23

The lack of a safe space for transgender students to learn and grow in Indian schools, along with the pervasive stigma and bullying they face, makes it very difficult, if not impossible, for these students to attend classes. The management of the school need to be accountable for creating a conducive learning environment for the pupils. It is critical that those in charge of educational institutions raise awareness on this issue. Every child has the inherent right to optimal psychological, social, emotional, and moral development, as outlined in the universal declaration of human rights. From a humanistic perspective, it is imperative that transgender children receive the same quality education as any other child, and that all individuals involved in the educational process, regardless of rank or status, are made aware of the importance of transgender students' right to an inclusive learning environment. Transgender students' lives and cultures, their mental health, the need of teamwork in the classroom, and the dynamics between transgender and non-transgender students are just a few of the many topics that teachers should be educated on.

It is imperative that schools alter their curricula and pedagogical approaches so that transgender children are not marginalized. We need a shift of perspective in our culture, schools, and workplaces. The early years of a transgender kid are fraught with stigma; they need nothing less than to be reassured immediately. There has to be a shift in the literature to be more accepting of non-binary identities and gender expressions. The educators in these fields need training on how to recognize and respect students who identify as third gender.

In light of the 2014 Supreme Court judgment that acknowledged "third-gender," the Union HRD ministry requested the adjustments needed to admit children of non-binary genders to the educationally and socially disadvantaged student body. Article 21A, which guarantees universal basic education, especially for children from disadvantaged groups, was strengthened in 2009 as part of the Right to Education Act, which also placed an emphasis on the inclusion of transgender children in regular schools. Students who identify as transgender will be permitted to apply for the disadvantaged student program. Transgender people and children may find new hope in this, since they may finally be able to attend school with the same respect and dignity as their peers. Other Indian governments have also taken action; for example, the state of Odisha has established a program called SWEEKRUTI to advance transgender justice and equality. A group of transgender people in India established the first transgender school in 2017 to support transgender children. The Indian legal system's failure to acknowledge the existence of a third gender has led to pervasive economic and social discrimination in Indian society and the workplace, as well as a systematic rejection of equal protection under the law. Following the Nalsa Judgment, the Transgender Persons (Protection of Rights) Act, 2019 was passed by the Indian parliament. The denial or unjust treatment of transgender people in the employment, educational institutions, or healthcare services is illegal under this law.

A certificate of identification is presented to them as evidence of acknowledgment. The National Council of Transgender People was also established at same time. These are the consequences for transgender people who commit crimes.

Conclusion and Suggestion:

A person's humanity, regardless of their gender or sexual orientation, is inherent in every person's birth certification. Every person in our contemporary day has certain rights and responsibilities that are guaranteed by society. To maintain our society, these rights are fundamental. The right to live a decent life is fundamental to human dignity. Although other rights may have a social, political, or economic component, human rights are fundamental. Because they are human, transgender persons deserve equal rights. They deserve a dignified existence where they are free to pursue their interests, marry whoever they choose, and study anything they desire. When deciding on a profession and a life mate, one should not be afraid of bias.

While transgender people in India have made great strides, the country's laws and culture still have a ways to go. Despite the several outstanding cases, there is one where a transgender person was granted the opportunity to marry anyone they wanted. Every kid has the right to an education, but transgender children still endure huge amounts of prejudice that make it impossible for them to stay in school. Changing the educational system so that it embraces transgender students is necessary. Despite several legislation that aim to support transgender people, they are taken advantage of.

Our word "mainstreaming" originated from our efforts to make gender equality a central focus of development initiatives. To advance gender parity, gender mainstreaming is an approach that has been used. It involves bringing the perspectives of people of all genders and expressions to the development agenda, including women, men, and transgender people. In order for women, men, and transgender people to have a say in, and reap the benefits of, the development process, it may be necessary to alter our objectives, methods, and practices. Transforming unfair social and institutional systems into ones that are fair to both genders is, hence, the aim of mainstreaming gender equality.

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