



TRANSGENDERS AND THEIR RIGHT TO MARRIAGE

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ABSTRACT:

Transgenders, from the very beginning have suffered and fought for their rights. With the landmark NALSA judgement, hope was given to transgenders. Recognition of their gender and as well as according them with all human as well as constitutional rights was a long-awaited decision. Further, with the partial slashing of section 377 of the IPC by the Supreme Court of India led to further happiness and hope for a better tomorrow. However, a lot of loopholes and gaps remain in the legislations which hinder the enforcement of the rights of Transgenders. The Transgender (Right to Protection) Bill of 2016, 2018 and 2019 only scratch the surface of what needs to be done and do not get to the nitty gritty. Through this research paper, an attempt has been made to highlight the gaps and provide suggestions to overcome those gaps with reference to the right to marriage of transgenders. The Right to Marriage is a human right but there is no law or legislation which would help transgenders enforce this right. Through this paper, an attempt has been made to first of all understand the term transgender and discuss and compare the laws relating to marriage or the lack of such laws for transgenders and how this can be changed.

Background:

Even though the Transgenders have the same amount of rights as the other people do in the eyes of law, in practice this does not hold true. In India, the Supreme Court in its 2014 judgement in the case of NALSA held that

transgenders have the right to identify their gender as it is while not conforming to the binary gender categories. It also held that they have all the rights that other individuals do and that these rights should be safeguarded. The Transgender (Protection of Rights) Bill, 2016 which was introduced in the Lok Sabha in 2016 and then amended and reintroduced in 2018 talks about protection of rights of the transgenders. But nowhere in the two bills is there any mention of the rights that the transgenders are entitled to such as the right to inheritance and the right to marriage. The right to marry is a right that they are entitled to because they can marry out of their own free will and choice. If they are not allowed to practice their own free will and choice, then how can one say that they have the equal status to those of the binary gender categories. Isn't it like saying that you have rights but you cannot practice or exercise your rights to the fullest because there are no provisions under the law which allow you to do so?

Need:

The need for this is so that all contradictions can be rid and there be more clarity and so that the Transgenders can exercise their right of choice freely without having the restriction of law as a hinderance. The Law is supposed to be facilitating in nature for the rights of minorities as well and should not restrict their rights. Gender is by nature and one does not have much choice in that matter but Marriage is by choice and everybody no matter who, should have the right to exercise their choice.

Research questions:

In this research paper, I would like to answer the following questions.



- Who are Transgenders? How does science, society, history and law define Transgenders?
- What are the provisions for the transgenders under various legal systems for marriage?
- How India could possibly amend its personal laws to allow the marriage of a transgender and the need for such amendments?

Research Objectives:

The research objectives are as follows:

- To understand and probably define the term 'Transgender' with the help of science, history and society.
- To analyse the provisions which exist around the globe for marriage of transgenders.
- To analyse whether India can amend its personal laws and how India can do so.

Outcome:

It seems that even though the rights of transgenders is a widely debated topic, there are no amazing actions taken in this regard. Their rights are spoken of even in the Bill, but to some extent all that has been spoken of is only on the surface and the Bill does not dig deep into what can be considered rights for them. Through this research paper, I hope to clarify certain concepts and the need for the laws where there are no laws or where the laws are inadequate.

Methodology:

The research methodology used for this research is doctrinal as well as deductive method. The inadequacy of the law is going to be examined with the help of how the judiciary and the legislature are trying to bring about change but do not realise that

there is a certain depth to the issue which needs to be examined as well as answered.

Literature Review:

- Transgender Persons (Protection of Rights) Bill, 2016 and 2018: This bill was introduced in the Lok Sabha in the year 2016. A primary reading of the bill shows that though it was for the protection of the rights of transgenders, the bill did not even define transgenders in a proper scientific manner. The amended bill of 2018 does have certain changes like the definition has been made more comprehensive as well as scientific in nature. It still lacks in the protecting of rights area as there is no mention of inheritance or marriage rights. The 2018 bill should have considered marriage rights after the partial striking down of section 377 of the IPC through the Navtej Singh Johar v Union of India judgement.
- Sexuality and Gender Identity under the Constitution of India¹: This article talks about how the Indian judiciary has had inconsistencies in its decisions in famous judgements. This article criticizes the way India sees sexuality and gender identity as two completely separate subjects or topics while in reality they are interrelated and interconnected.
- Advancing Transgender Family Rights through Science: A Proposal for an Alternative Framework²: This article touches upon the subject or topic of family and how transgenders should also be able to make use of scientific progress just the way other can. The article suggests pursuing family rights from a different venue: a relational approach

¹ Bret Boyce, Sexuality and Gender Identity under the Constitution of India, 18 J. Gender Race & Just. 1 (2015)

² Maya Sabatello, Advancing Transgender Family Rights through Science: A Proposal for an Alternative Framework, 33 Hum. Rts. Q. 43 (2011)



to the universal right to enjoy scientific progress and its application under Article 15 of the International Covenant on Economic, Social, and Cultural Rights.

- **Shifting Subjects of State Legibility: Gender Minorities and the Law in India³:** This article takes us through the history of the rights of transgenders. It talks about how the term eunuch evolved and how the NALSA judgement tried to broaden the horizon and inadvertently just ended up restricting the rights of transgenders which they actually in spirit wanted to broaden.
- **Hijras: The 21st Century Untouchables⁴:** This article talks about the Indian transgender community and how they are denied most of the basic human rights. This article is an analytical framework and deals with and provides for a recommended course of action for India as it continues to face dilemmas.
- **Transgender Science: How Might It Shape the Way We Think About Transgender Rights?⁵:** This article or paper presents some insight on the existing knowledge that is available on transpeople or transgenders and how understanding the term 'transgender' may help us understand the rights they have and shape the way we think.
- **Legal Recognition of Same-sex Relationships in India⁶:** This article analyses the different ways in which same-sex relationships could be recognised in India and concludes that the best way would be by amending or reading down the provisions of

the Special Marriage Act so as to give rights and not unfairly discriminate against the members of the LGBT community.

- **Disgust or Equality? Sexual Orientation and Indian Law⁷:** This lecture mentions and takes us through how same-sex laws evolved or changed with time and how they may have regressed with times especially in India and how the thought process of Indians was affected by the colonial rule and the British. It also talks about the disgust principle and how there are times the law is based on what the majority may like and something may be illegal on the basis of the majority disliking it.

India's Hijras: The Case for Transgender Rights⁸: This article talks about the Hijras or the Indian Transgender Community and the perceived rights that they have. They have been given rights but there is no way in which they can get them implemented or there is still a lot of inadequacy in the legal provisions.

In conclusion, going through all the literature available on the topic of Transgenders and their marriage rights, I believe that there is inadequacy of legal provisions as well proper understanding of the term 'Transgender' itself. There is a need for better understanding the concept of Transgenders and their rights and also for providing proper legal recognition to such rights. Gender is by nature and one does not have much choice in that matter but Marriage is by choice and

³ Dipika Jain, *Shifting Subjects of State Legibility: Gender Minorities and the Law in India*, 32 *Berkeley J. Gender L. & Just.* 39 (2017)

⁴ Sapna Khatri, *Hijras: The 21st Century Untouchables*, 16 *Wash. U. Global Stud. L. Rev.* 387 (2017)

⁵ Sam Winter, *Transgender Science: How Might It Shape the Way We Think about Transgender Rights*, 41 *Hong Kong L.J.* 139 (2011)

⁶ Nayantara Ravichandran, *Legal Recognition of Same-Sex Relationships in India*, 5 *J. Indian L. & Soc'y* 95 (2014)

⁷ Martha C. Nussbaum, *Disgust or Equality: Sexual Orientation and Indian Law*, 6 *J. Indian L. & Soc'y* 1 (2014)

⁸ Amisha R. Patel, *India's Hijras: The Case for Transgender Rights*, 42 *Geo. Wash. Int'l L. Rev.* 835 (2010)



everybody no matter who, should have the right to exercise their choice.

Chapter 1: Understanding the term “Transgender”.

Who are Transgenders? How does science, society, history and law define Transgenders?

To understand who transgenders are, we first need to understand the difference between a few key concepts which are many a times used interchangeably. Sex and gender are two different things and need to be understood first to get a clear understanding about transgenders. A widely used definition quoted from a pamphlet published by the American Psychological Association is: “Sex is assigned at birth, refers to one’s biological status either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy. Gender refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women. These influence the ways that people act, interact, and feel about themselves. While aspects of biological sex are similar across different cultures, aspects of gender may differ.”⁹ This definition points to the obvious fact that there are social norms for men and women, norms that vary across different cultures and that are not simply determined by biology. But it goes further in holding that gender is wholly “socially constructed” – that is detached from

biological sex.¹⁰ Anthropologist Gayle Rubin writing in 1975 states “Gender is a socially imposed division of the sexes. It is a product of the social relations of sexuality.”¹¹ She means to say that if it were not for the social impositions of roles, males and females would still exist but not ‘men and women’. Furthermore, Rubin argues, if traditional gender roles are socially constructed, then they can also be deconstructed, and we can eliminate “obligatory sexualities and sex roles” and create “an androgynous and genderless (though not sexless) society, in which one’s sexual anatomy is irrelevant to who one is, what one does, and with whom one makes love.”¹² The Oxford English dictionary defines the term Transgender as denoting or relating to a person whose sense of personal identity and gender does not correspond with their birth sex. Being Transgender does not limit gender identity to the two categories of male and female, as many who identify as transgender do not feel exclusively masculine or feminine. Now, legally, in India, according to the Transgender Persons (Protection of Rights) Bill that was passed in 2018, transgenders are defined under section 2(k). Section 2(k) states the following: ““transgender person” means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-

⁹American Psychological Association, "Answers to Your Questions About Transgender People, Gender Identity and Gender Expression" (pamphlet), <http://www.apa.org/topics/lgbt/transgender.pdf>

¹⁰ The New Atlantis, No. 50, Special Report: Sexuality and Gender (Fall 2016), pp. 10-143

¹¹Gayle Rubin, "The Traffic in Women: Notes on the 'Political Economy' of Sex," in *Toward an Anthropology of Women*, ed. Rayna R. Reiter (New York and London: Monthly Review Press, 1975), 17

¹² Ibid, 204



cultural identities as kinner, hijra, aravani and jogta.”¹³

From reading and analysing the article Exclusion as Language and the Language of Exclusion: Tracing Regimes of Gender through Linguistic Representations of the "Eunuch" written by Shane Gannon, I have come to the understanding that in India, historically, there were various gender identities which existed and were accepted. Each type had a very specific name but during translation of our ancient and historical texts to English, the intricacies were lost and a universal term “eunuch” was given and used. This term did not come close to explaining all the different gender identities one of which was transgenderism. Historically, transgenders were also defined as people who were abnormal and had certain mental issues. So, society, to a great extent still may believe in this even if they wish to change this thought, because it has been drilled into the subconscious of the societal morals or definitions through history that what is not understood by most is abnormal.

So, to understand the complexities and intricacies of the term transgender, we need to understand a host of different concepts and have a proper understanding of these to come to the real meaning of transgenderism. So, to my little understanding, Transgender means anyone whose gender identity, expression or behaviour differs from the sexual identity they were assigned at birth which may be so naturally or by choice.

Chapter 2: Legislations across the World for Transgenders regarding Marriage

What are the provisions for the transgenders under various legal systems for marriage?

Over the years, slowly and steadily, a lot of countries have come up with legislation for the rights of Transgenders. These countries were also to some extent in a place where Transgenders were not recognised and were looked down upon. With the help of the international conventions as well as their judiciary, these countries have also managed to come up with laws for the Transgenders. Various countries are moving towards development of proper legislation that will enable gender recognition and also marriage. For marriage among transgenders to be recognised, the transgenders need to be recognised first. Various countries have done so with the help of legislation. The United Kingdom in its Gender Recognition Act of 2004 recognises and sets down a procedure for transgenders to have the choice to be recognised like that in the eyes of law. One of the most important legislative changes of recent times is the enactment of the Argentinian Gender Identity Law 2011, a comprehensive law that allows a person to change their gender identity in all documents including the national identity document.¹⁴ While this is amazing, there are certain problems faced in recognising their marriages. Countries which do have legislation on and have legalised same-sex marriage are quite few in number and they too face certain problems. For example, after Britain had passed their gender recognition act, they faced certain issues and they were not dealt well. Transgenders who were already in marriages and wanted to be recognised legally so, had to divorce their

¹³ The Transgender Persons (Protection of Rights) Bill, 2018

¹⁴ Siddharth Narrain, Gender Identity, Citizenship and State Recognition, 8 Socio-Legal Rev. 106 (2012)



partners or remain unrecognised by the government. In cases where both the partners wanted to continue with their marriage, while still wanting legal recognition of their gender, had to divorce their partners, get their gender recognised and then enter into civil unions or partnerships which if you go to see is not exactly equivalent to marriage. Netherlands became the first country to legalise same-sex marriage. Other countries like Canada, Spain Sweden, Iceland, Portugal all have legalised same-sex marriage. There are no specific laws for transgenders, but they do fall under the ambit of same-sex marriages as sex and gender are two different things as discussed earlier.

Chapter 3: The Indian Scenario How India could possibly amend its personal laws to allow the marriage of transgenders and the need for such amendments?

Personal laws in India are vast and varied. There are personal laws for each religion and then there are personal laws which are common if someone may wish to opt to use the universal laws. For example, Hindus have codified marriage law under the Hindu Marriage Act while the Muslims follow the Sharia law. The Parsis, Jews and Christians also have their set of laws regarding marriage. There is also something known as the Special Marriage Act of 1954 which lets two people get married if they are of different religions or castes or if they wish to follow this universal law. Now, there is a pressing need to make amendments in these acts so as to accommodate the rights of Transgender people.

For the first time, the “third gender” was recognised by the Indian Law, in National Legal Services Authority v Union of India¹⁵ which was decided in 2014. The Supreme Court held that India recognises a third gender category (beyond the male-female binary) entitled to equal rights under the Constitution of India. In Navtej Singh Johar v Union of India¹⁶, the Supreme Court partially struck down section 377 of the Indian Penal Code which made “carnal intercourse against the order of nature”. These two judgements along with the various international conventions that India is a signatory to, like Universal Declaration of Human Rights, the Yogyakarta Principles and the International Covenant on Civil and Political Rights, can facilitate change. With the help of these laws and directions, India can facilitate amendments to the already existing laws and bring about a massive change and relief for people of the LGBTQ community. These changes can be brought about by making quite simple amendments into Acts like the Special Marriage Act, 1954.

Amendments are needed because, currently there is a legal situation, where the Courts declare that Transgenders and other persons of the LGBTQ community have rights according to the constitution under Articles 14 (the Right to Equality), 19 1(a)(the Right to freedom of speech and expression) and 21 (the Right to Life) which is called the golden triangle as well as rights against discrimination under Articles 15 and 16. But, there are no statutory laws or the statutory laws that exist go against this philosophy. It has come to a stage where these people have rights, but no way to enforce or express those

¹⁵ National Legal Services Authority v Union of India, (2014) 5 SCC 438.

¹⁶ Navtej Singh Johar v Union of India, 2018 SCC Online SC 1350.



rights. The recent Transgender Persons (Protection of Rights) Bill, was a completely dissatisfactory or half-hearted work where when it was first introduced in 2016, transgenders were defined in a humiliating manner and their choice to be what they are was ignored in the definition. The 2016 Bill defined transgenders under section 2 clause (i) as follows:

“transgender person’ means a person who is

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- (A) Neither wholly female nor wholly male; or
- (B) A combination of female or male; or
- (C) Neither female nor male; and whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and gender-queers.”

The bill was amended and then finally passed in 2018 where the definition was tweaked and changed. Still, many consider it to not be of a satisfactory nature because it does not mention choice anywhere. Also, the Bill passed in 2018 just touches the surface, it talks about how transgenders should not be discriminated by establishments or persons on nine grounds that have been enumerated in the Bill. These grounds consist of denial, discontinuation or unfair treatment in educational establishments, healthcare services, with regard to right to movement, in relation to employment or occupation, with regards to facilities available to general public, with regards to property rights, with regards to standing for or holding public office, and with regards to unfair treatment in Government or private establishments in whose care or custody a transgender person

is. This just scratches the surface and if you go to see, provides no real rights which have not been provided for through other statutes. There are remedies which already exist for these rights. The Bill doesn’t dig deep and look into matters where to a great extent no legal recourse or remedies are available, for example, rights to inheritance, rights to adoption or marriage. It wholly ignores these rights which exist where no legal recourse is available. Thus, amendments are needed to facilitate transgenders to enforce or practice rights which the Constitution and the Courts have given them. It’s like saying that you have rights but you can’t enforce them because there is no provision through which you can do it.

Amendments to the Special Marriage Act, 1954 can be made where it mentions the age after which a male or female can marry. Section 4 of this Act mentions the conditions for solemnisation of special marriages and states: “Notwithstanding anything contained in any other law for the time being in force relating to the solemnisation of marriages, a marriage between any two persons may be solemnised under this Act, if at the time of marriage, the following conditions are fulfilled, namely: -”

Clause (c) states: “the male has completed the age of twenty-one years and the female has completed the age of eighteen years.”

If section 4 (c) is amended and changed to: “the persons have completed twenty-one years of marriage”, then transgenders and persons of the LGBTQ community could marry through this Act. They would be able to give legal sanction to their right to marry because the section provides for the solemnisation between marriage of, and I emphasize, “ANY TWO PERSONS”.



An alternative to this would be to think about civil unions or civil partnerships, which is basically not marriage and thus, may be easier for people in India to accept. But this again goes against the principle of equality and it is to a great extent still discriminatory in nature and thus, goes against the basic principle of equality, and right to life of our Constitution.

CONCLUSION

In conclusion, as we can see, the laws in the country are of conflicting nature. The Transgenders have been given rights to be recognised officially as the Third Gender and the process for gender recognition is present. It has also been stated to them that they have the same fundamental rights as the other citizens of the country. Fundamental rights include the right to life and personal liberties which consists of a lot of rights which have been read into Article 21 of the Constitution by our Supreme Court. The reality is that the transgenders have been given rights but they do not have proper ways of enforcing the rights. This is because the various acts and statutes that we have in this case, regarding marriage laws are gender binary in nature and do not mention the third gender anywhere. Also, our courts have had a great problem in realising that gender identity and sexuality may be vastly different things but these concepts are connected and interlinked with each other. The recent Transgender Persons Rights Bill that was passed in 2018 proves that the gravity and depth of the situation is not seen and what the legislature has come up with is something that barely scratches the surface and only talks about things which can be enforced using Chapter III of our Constitution which deals with fundamental rights. This Bill did have an opportunity to

actually dig deep and give and provide for rights which cannot be enforced directly by the fundamental rights chapter. Our legislature is having a hard time in understanding the need for laws regarding marriage, inheritance and adoption. It is like I have mentioned earlier; the transgenders have the rights but they have no feasible way of enforcing them.

The Right to Marriage for transgenders, is something that the Indian judiciary and the legislature can begin with as this as it deals solely with their choice, and nobody else can have a say in it. This can be the beginning of changing the mindsets of people as well as the beginning of acceptance which can then lead to changes in other aspects of personal laws such as inheritance and adoption as well. As Indian citizens, they have the right to choose and this right to choose should be exercised and their choice to marry should also have proper legal recognition and what better way to do that but by providing for laws or amending the existing laws in such a manner as to accommodate transgenders as well.

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