

# **THIRD GENDER RIGHTS TODAY : LOVE FINDS A WAY!**



**Wednesday Wisdom**

**03-05-2023**



## 1. INTRODUCTION[1]

"Transgender rights are not special rights; they are human rights. We don't want to be pitied; we don't want to be discriminated against. We want to be treated with dignity, with respect and with love"-Laxmi Narayan Tripathi, an Indian Transgender rights activist[2] .

The concept of transgender individuals, generally referred to as in very derogatory manner as "Hijra" in India, is an umbrella term used to describe people who identify as neither male nor female but as a third gender. Hijras have been a visible and accepted part of Indian society, performing traditional roles as healers, blessers and dancers.

In this Article we have attempted to understand the existence of transgender and their rights related to marriage and the right to have family.

To understand the concept of transgender we need to understand the concept of "gender" and "gender identity".

'Gender' refers to the behavior and characteristics that society expects out of a person based on their assigned, biological sex. However, 'gender identity' is how that person psychologically perceives his/her gender. It is the way a person desires to express his/her gender through clothes, emotions, appearance, or behavior[3] . Thus, a person whose gender identity aligns with his/her assigned sex is called cis-gender. While a person whose gender identity is in conflict with his/her assigned sex is called a transgender.

## 2. TRANSGENDER REFERENCES IN RAMAYANA AND MAHABHARATA

In India, transgender individuals have been historically recognized and have been a part of country's cultural and religious traditions for centuries. Indian literature offers glimpses of reality at times and a brief look at the reflections of the past, stipulate that the transgender persons who are often denigrated today were once recognized and appreciated to a great extent. The starting point of the concept of third gender can be traced from the Hindu Mythology which has many examples of deities changing gender, manifesting as an Avatar of opposite sex etc. Gods were often considered to be represented as both male and female at different points and in various incarnations.

[1] The article reflects the general work of the authors and the views expressed are personal. No reader should act on any statement contained herein without seeking detailed professional advice.

[2] <https://ur.life/article/seven-powerful-quotes-by-transgender-rights-activist-laxmi-narayan-tripathi-you-should-read>

[3] <https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity>.

For example, Ardhanarishvara, formed by integrating Lord Shiva and his consort, Parvati, is widely worshipped. Mahabharata and Ramayana were the treasure boxes for references to transgender people. Shikhandi from Mahabharata is probably the most known transgender figure found in the Hindu mythology. Aravan or Iravan, son of Arjuna is another crucial transgender character who is believed to have laid down the lineage from which the transgender persons are born.

Another episode in the Mahabharata which witnesses the presence of third genders revolves around the time when Arjuna was sent to exile. There, he assumed the identity of Brihannala, a eunuch teaching dance to princess Uttara who performed rituals during occasions of weddings and childbirths.

Ramayana is another source of inspiration for the emergence of transgender people. Rama, while leaving for the forest for fourteen years, asked his followers, addressing them as “men and women”, to return to the city. Among them, the hijras did not feel bound by the order and decided to stay with him. Impressed with the devotion, Rama conferred powers on them to give blessings on auspicious occasions[4].

Despite the cultural acceptance, transgender individuals in India have faced significant discrimination, violence and lack of legal recognition. However, in recent years, the Indian government has taken steps to recognize and protect the rights of transgender.

## 2. Understanding Identities of Third Gender such as Kinner, Hijra, Aravani and Jogta

**Kinner:** The hijra community in India prefer to call them Kinner referring to the mythological beings that excel at song and dance[5].

**Hijras:** They are the largest and most organized community among the third gender. It is composed of biological males who over the course of time reject their masculine identity in favor of a more feminine one. They identify themselves as “neither male nor female.”[6]

Hijras are known by different nomenclature in different parts of the country. They are referred to as “**Aravanis**” and “**Thirunagis**” in Tamil Nadu[7].

**Jogta:** They are a unique community of transgenders based on a long-standing superstition. As per the superstition, male to female transgender is believed to be possessed by the Goddess Yellamma or Renuka. Thus, they are estranged from their family and are supposed to serve Goddess Renuka throughout their life.

[4] <https://countercurrents.org/gen-narrain141003.htm>

[5] [https://en.wikipedia.org/wiki/Hijra\\_\(South\\_Asia\)#:-:text=Also%20known%20as%20aravani%2C%20aruvani,transgender%20in%20the%20Urdu%20language.](https://en.wikipedia.org/wiki/Hijra_(South_Asia)#:-:text=Also%20known%20as%20aravani%2C%20aruvani,transgender%20in%20the%20Urdu%20language.)

[6] National Legal Services Authority vs. Union of India 1 (2014) 5 SCC 438

[7] ibid



#### 4. Recognition of Third Gender and LGBTQ[8] rights:

In 2014, the Supreme Court of India recognized transgender individuals as a third gender in the landmark judgment of **National Legal Services Authority vs. Union of India**[9] (NALSA Judgment). The court recognized transgender individuals as third gender and finally busted the bubble of binary gender structure of “man” and “woman” and granted equal rights and protection to transgender persons under Article 14[10], 15[11] and 16[12] of Constitution of India. The Court interpreted that the term “person” under Article 14 of the Indian Constitution, which deals with Equality before law that the term “person” does not restrict itself to the dual concept of man and woman but also includes Hijras/transgender persons who are neither male nor female and they are entitled to legal protection of laws in all spheres of State activity.

Furthermore, the Court broaden the scope of “sex” under Articles to include “psychological sex” or “gender identity” and hence held that no one could be discriminated on the grounds of sexual orientation. The Court also made an effort to protect one’s gender expression which is majorly reflected through dresses, actions, behaviors, and similar forms. The Supreme Court stressed on the importance of right to dignity by recognizing one’s gender identity within the ambit of Article 21 of the Indian Constitution.

The Court in the NALSA judgment divided the transgender community into two categories.

First, those who psychologically identify themselves as belonging to a gender on the opposite end of the spectrum vis-à-vis their assigned sex and prefer to get their sex reassigned.

[8]Lesbian, Gay, Bisexual, Transgender and Queer

[9]1 (2014) 5 SCC 438

[10]The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

[11]Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

[12]Equality of opportunity in matters of public employment.

And second, those who are perceived publicly as “third genders” and are recognized distinctly as a separate class/category in the subcontinent viz. Hijras, Aravanis, Jogtas, Kothis and Shiv-Shaktis.

The Court granted the legal status of “third gender/other” only to the latter category. Justice Sikri in his concurring opinion in this case (Para 81), dwelling upon the rights of transgenders, laid down that gender identification is an essential component which is required for enjoying civil rights by the community. It is only with this recognition that many rights attached to the sexual recognition as third gender would be available to the said community more meaningfully viz. the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver’s license, the right to education, employment, health and so on.

In 2018 the Supreme Court of India in the landmark case of **Navtej Singh Johar v. Union of India**[13] decriminalized consensual sexual activities between same sex individuals in India under Section 377 of Indian Penal Code (IPC). The Court decision was based on the principle that consensual sexual activity between adults in private is a matter of personal liberty and autonomy and that the state has no business interfering in such matters. The Court also found that Section 377 violated the fundamental rights of LGBTQ to equality, non-discrimination, and dignity under the Constitution of India.

In 2019 the Madras High Court in the landmark case of **Arunkumar v. Inspector General of Registration**[14] affirmed the right to marry under Article 21[15] of the constitution for transgender persons and interpreted that ‘bride’ under the Hindu Marriage Act would cover transgender persons who identify as women. The Court affirmed the second petitioner’s self-identification as a woman and recognized her right to self-identify her gender and be included, along with other intersexes/transgender persons who identify as women, within the definition of “bride”. It noted the violation of her fundamental rights by the State authorities that refused to register her marriage. Madras High Court held that:

**“A marriage solemnized between a male and a transwoman, both professing Hindu religion, is a valid marriage in terms of Section 5 of the Hindu Marriage Act, 1955 and the Registrar of Marriages is bound to register the same. By holding so, this Court is not breaking any new ground. It is merely stating the obvious. Sometimes to see the obvious, one needs not only physical vision in the eye but also love in the heart”**

[13] AIR 2018 SC 4321

[14] WP(MD) No. 4125 of 2019

[15] Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law



In 2019, the **Transgender Persons (Protection of Rights) Act, 2019 (the "Act")** was passed, which recognizes transgender individuals as a third gender.

As per Section 2(k) of the Act :

**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-cultural identities as kinner, hijra, aravani and jogta.**

The Act further prohibits discrimination against them in education, employment and healthcare. Section 18 of the Act makes physical, mental, sexual, verbal emotional and economical abuse of a transgender a punishable offence with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine.

Despite the legal recognition to third gender and the provisions for discrimination and offences punishable under the Act in the rule book, there has not been much difference in the outlook and behavior of people towards the transgender.

#### **5. Third Gender's right to marry:**

The right of transgender persons to marry was specifically recognized in NALSA judgment. In practice, despite the recognition of one's gender identity, transgender persons are unable to exercise their full full legal rights for many reasons. The Act did not include any provisions related to marriage of transgenders.

The Supreme Court of India in **Shafin Jahan v. Asokan K. M & Others**[16] held that the right to marry a person of choice is integral to Article 21 of the Constitution of India.

Further in **Shakti Vahini v. Union of India**[17] the Supreme Court held that assertion of choice is an inseparable facet of liberty and dignity.

[16] (2018) 16 SCC 368

[17](2018) 7 SCC 192

Even after recognition of third gender and their constitutional rights, there is no provisions under any personal law which recognizes third gender's right to marry and register the marriage. The registration of marriage is important to give legality and to provide recognition and acceptance of transgender couples in society. As argued by the petitioners in the current pending petition before the Supreme Court, marriage is bouquet of rights and from which various other rights will fall into place like right to adopt a child, right in spouse property, right to health insurance as couple and so on and so forth.

### Analyzing the position of transgenders with respect to laws relating to marriage under Hindu Marriage Act 1955 and Special Marriages Act, 1954

- Hindu Marriage Act, 1955 (Hindu Marriage Act)

The Hindu Marriage Act applies to any person of Hindu religion in India which also includes Buddhist, Jaina or Sikh by religion. Section 5 of the Hindu Marriage Act deals with the conditions for a valid Hindu marriage.

As per this section, two Hindus, one of whom can be identified as bride and other the bridegroom, can solemnize a marriage, unless it is barred by subsection (iii), (iv), and (v) of the section[18].

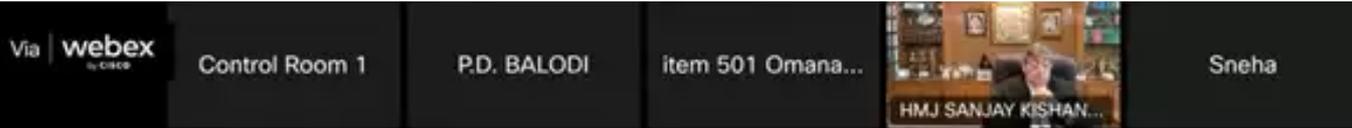
The terms "bride" and "bridegroom" are gendered terms. It necessarily translates to "woman" and "man" on their wedding day. Thus, it provides no recognition to marriages for the third gender.

However, as per the Act[19] a person after undergoing a sex reassignment surgery can get their gender marker changed in all of the official documents as per section 7 of the Act and can officially be recognized as male or female. Such people undergoing surgery to change their gender are known as transsexual. Therefore, transsexuals who have got their sex reassigned in all of their official documents and can legally identify themselves to be female or male, i.e., bride or bridegroom, can get their marriage legally recognized. Such a marriage is also not a subject matter of challenge by a third person, since a petition for nullity of marriage or for divorce can be brought only by the parties to the marriage.



[18]Section 5 in The Hindu Marriage Act, 1955 (indiankanoon.org)

[19]Transgender Persons (Protection of Rights) Act, 2019



### Special Marriage Act 1954 (Special Marriage Act)

The Special Marriage Act, provide a special form of marriage for the people of India and all Indian nationals in foreign countries, in certain cases, for the registration of such and certain other marriages and for divorce, irrespective of the religion or faith followed by either party. The marriages solemnized under the Special Marriage Act are not governed by personal laws. The main objective of the Act is to address inter-religious marriages and to establish marriage as a secular institution lacking all religious formalities which required registration alone.

Section 4 of the Special Marriage Act prescribes that any male above 21 years of age and any female above 18 years of age may solemnize marriage, unless it is prohibited by sub-section (d)[20] . Section 4 requires a “male” and a “female” and that neither party shall be unfit for marriage and procreation amongst other conditions to register a marriage.

[20] <https://indiankanoon.org/doc/594580/>

Therefore, there is no scope for registration of a marriage for “third gender” under the Special Marriage Act.

However, as condition prescribed under Special Marriage Act are very similar to Hindu Marriage Act, a transsexual person’s marriage with someone from the opposite gender can be registered under this Act.

Supriyo @ Supriya Chakraborty & Anr. v. Union of India is[21] an ongoing case before Supreme Court filed by various members of LGBTQ++ to recognize their rights to marry under personal laws as well as Special Marriage Act. The five-judge constitution bench of Supreme Court of India are presently hearing the matter on maintainability of the petition and have restricted the arguments to Special Marriage Act. The hearing of the matter began on 18th April 2023. The petitioners’ advocates have concluded their arguments and presently the Court is hearing the the Central Governments arguments. The live streaming of the arguments can be accessed through Supreme Court website link <https://main.sci.gov.in/>.

The Petitioners have challenged both Hindu Marriage Act and Special Marriage Act as discriminatory on the basis of sexual identity and sexual orientation under Article 14 and 15 (1) of the Constitution.

The Central government has objected strongly to the petition and has submitted that the marriage of LGBTQ is a legislative matter, and the Court should leave the matter for legislation. The petitioners are seeking declaration to the extent that the word "male" and "female" in section 4 to be read as 'spouse' and to make them gender neutral. We will have to wait for the Supreme Court decision on this matter and hope that the Supreme Court will recognize the pain and struggle and violation of Transgender's fundamental right by not recognizing the right to marry.

## 7. Conclusion:

In 2015 the U.S Supreme court in its landmark case Obergefell v. Hodges held that the Due Process Clause of the Fourteenth Amendment guarantees the right to marry as one of the fundamental liberties it protects, and that analysis applies to same-sex couples in the same manner as it does to opposite-sex couples.[22]

Family is a core of our being as our family gives us not only love and care but also psychological and economical support. The right to marry gives rise to a family and therefore it also has to be recognized as right to Life under Article 21 of the Constitution.

Transgender individuals who are not accepted by their family live their life in isolation and loneliness. Most Transgenders have left their family and home and have started living their life with Transgender communities. They have fought a long social and legal battle to even get recognized as a third gender, which has now given them a legal identification.

The discrimination still exists and is evident from the fact that they are struggling to register their legal relationship in the form of marriage and to live their life with dignity with their partner. Transpersons already have families - they're in relationships, adopting children but these families are not being legally recognized and accepted by society. Once state accepts the transgender right to marry then slowly and gradually the society will also accept them and maybe we will see a different form of marriage which will not be only for procreation but to form a family based on love and care.

So far 34 countries in Europe and America have legally recognized LGBTQ marriage. Of these 34 nations, 23 legalized LGBTQ couples to marry through legislation, while ten through Court decisions. Both South Africa and Taiwan enacted the legislation following Courts mandates.[23] A favorable decision from Supreme Court of India will make India the 35th country to legalize LGBTQ marriage and will set off a momentous change in society.

---

[22] <https://www.britannica.com/event/Obergefell-v-Hodges>

[23] <https://www.hindustantimes.com/world-news/supreme-court-same-sex-marriage-hearing-list-of-countries-where-same-sex-marriage-is-legal-101681798846639.html>

For any feedback or response on this article, the author can be reached on [Suhas.Joshi@ynzgroup.co.in](mailto:Suhas.Joshi@ynzgroup.co.in) or [pranav.mane@ynzgroup.co.in](mailto:pranav.mane@ynzgroup.co.in) and [priya.shahdeo@ynzgroup.co.in](mailto:priya.shahdeo@ynzgroup.co.in)



**Priya Shahdeo**

**is an associate at YNZ Legal. By qualification she is Bachelor of Arts and Bachelor of Law from Bharti Vidyapith University.**

**Suhas Joshi**

**is experienced in Litigation. By qualification he is Bachelor of Commerce and Bachelor of Law from Mumbai University.**



**Pranav Mane**

**is an associate at YNZ Legal. By qualification he is Bachelor of commerce and Bachelor of Law from Mumbai University.**