
HOW DOES THE CURRENT LIMITED SCOPE OF TRANS RIGHTS AFFECT THEIR HUMAN DIGNITY

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ABSTRACT

My aim in this research paper will be to analyse the absence of the right to marry for the transgender community and the Transgender Persons (Protection of Rights) Bill as well as the recent Surrogacy Bill that has both denied some basic rights to Transgenders. I would try to prove through various judgments and my own arguments as to why these provisions violate the dignity of the Trans community.

“A gender-equal society would be one where the word ‘gender’ does not exist: where everyone can be themselves”- Gloria Steinem

Transgender people have had a terrible journey in their lives for many decades. Most transgender persons are forced to live on the periphery of society due to the stigma linked to sexual orientation and gender identity that deviate from the accepted heterosexual, non-transgender norm. According to Arthur Schopenhauer, dignity is the opinion of others about our worth. This quote rings true even today as the dignity of transgender people is highly dependent on the opinion society has of them.

The supreme court’s judgment in the case of **National Legal Services Authority v. Union of India & Ors.**¹ Was a turning point for the Trans community. The main issue framed in this case was whether the non-recognition of diverse gender identities violates Articles 14 and 21 of the Constitution of India. In this 115-page landmark judgment, the Supreme Court traced the history of the Transgender Community in the context of India. The court observed that it was the onset of British Rule that marked the onset of discrimination against Transgenders. Further, the court exhaustively relied on various judicial pronouncements and legislations in the international arena to highlight the fact that the recognition of “sex, identity, gender” of persons, and “guarantee to equality and non-discrimination” on the ground of gender identity or expression is increasing and gaining acceptance in international law and, therefore, be applied in India as well. An interesting point to examine here is that the court said the word sex would also include gender. Now sex and gender mean two different things. Sex is what is assigned at birth and determined through a person’s genitals and chromosome makeup. Gender on the other hand is what a person chooses to identify themselves as. The court also granted the transgender community equal constitutional standing for the first time in Indian law and acknowledged their fundamental rights under Part III of the constitution, which include, among other things, the right to gender equality and the value of self-dignity.²

Now the question arises: does the trans community have the same rights as the cisgender citizens in India?

While examining the Hindu Marriage Act of 1955, the Madras High Court passed a judgment in 2019 in relation to section 5 of this statute. It was the case of **Arun Kumar and others vs**

¹ AIR 2014 SC 1863

² Salma Jennath, A Case Note on National Legal Services Authority v. Union of India, <https://blog.ipleaders.in/national-legal-services-authority-v-uoi/>

the inspector general of registration and others³. In this case, the registrar refused to register the petitioners' marriage since it was between a man and a trans woman. The main issue framed was whether the term "bride," as used under Section 5 of the Hindu Marriage Act (HMA), solely referred to women or also encompassed transgender people. The court in this case held that Personal identity, gender expression, and presentation are all based on one's gender identification. As a result, as a transgender person is neither male nor female, they fall under the definition of "person" in Article 14 of the constitution and are thus entitled to the same legal protection under the law in all areas of governmental activity as any other Indian citizen. Articles 14, 19, and 21 of the Indian Constitution prohibit discrimination based on sexual orientation or gender identity. Additionally, it was decided that article 21 of the Indian Constitution's basic right to dignity includes the legal acknowledgment of gender identification. The Court also ruled that the term "bride" used in the HMA cannot have a fixed meaning and must be construed in light of the current legal system. Despite the fact that it did not address same-sex marriage in its decision, the court supported the legitimacy of marriages between non-traditional genders (i.e., those that were not to biological women. The court then referenced **Shafin Jahan vs. Asokan K.M. and Ors**⁴, where the right to marry a partner of one's choice was upheld as a fundamental element of Article 21 of the Constitution, which includes the right to marriage as a human right.⁵

Article 14 of the Indian Constitution which ensures equality before the law, states that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India and discrimination on grounds of religion, race, caste, sex or place of birth is prohibited". The very fact that the trans community is not given the right to choose whom they marry or even marry at all shows how the absence of any provision not only violates their dignity but also is a violation of article 14 of the Indian Constitution.

However, to date, there is no particular act that governs the marriage rights of trans. The judgment passed in the case of **Arun Kumar and others vs the inspector general of registration and others** was indeed liberal but since it was a judgment passed by a high court, it will not be a binding precedent throughout India and will only have a persuasive value. Not only that, this particular case discusses the rights of a trans woman and there is yet to be any

³ W. P. (MD) No. 4125 of 2019

⁴ (2018) 16 SCC 368

⁵ Swapnil Ahir, Arunkumar and Sreeja vs. Inspector General of Registration and Ors, <https://lawtimesjournal.in/arunkumar-and-sreeja-vs-inspector-general-of-registration-and-ors>.

conversation regarding trans men. Therefore, the rights of the trans community with regard to marriage are still quite undetermined. Even the **2019 Transgender Persons (Protection of Rights) Bill** which was introduced as a safeguard for the trans community and to pave the path for a more forward-thinking legal system has no provisions relating to the marriage of transgender people. The union government has made its stance clear that marriages should be limited to intersex couples since it is the “most natural way”, implying that marriages should result in the procreation of children. This thought itself reinforces the idea of family as a patriarchal, heterosexual, and casteist institution and fails to account for other models of "chosen families "and intimacies that co-exist in India.

The very idea that a family is supposed to be procreative and heterosexual is a violation of the dignity of the trans community. They are being denied the basic right to choose their partners, marry or have a family. The Indian judiciary too has from time to time established that article 21 includes the constitutional right to marriage. Why should this right be limited only to heterosexual people? In the case of **Shakti Vahini vs the Union of India**⁶, the supreme court held that when two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognized under Articles 19 and 21 of the Constitution. Such a right has the sanction of the constitutional law and once that is recognized and needs to be protected. Since the court does not mention the gender of the adults, this can be considered a precedent for making a case for the recognition of the right to marry of a trans person. According to Article 141 of the Constitution, all courts located in Indian territory must follow the law that the Supreme Court has pronounced. Therefore, this judgment can be considered binding in all courts throughout India.⁷

Less than a month later, the exact same bench restated this right in **Shafin Jahan v. Asokan K.M. and others**, citing Article 16 of the Universal Declaration of Human Rights and the Puttaswamy case, in the clearest possible terms. The majority held that Article 21 of the Constitution affirms the freedom to marry the person of one's choosing. The right to life is protected by the Constitution. This right cannot be restricted unless it is done so by legislation that is both substantively and procedurally just and fair. The freedom of every person to make judgments on issues essential to the pursuit of happiness is vital to the liberty that the

⁶ (2018) 7 SCC 192

⁷Dormaan J Dalal, The fundamental right to marry in India and its application to same-sex marriage, <https://www.barandbench.com/columns/the-fundamental-right-to-marry-in-india-and-its-application-to-same-sex-marriages>

Constitution provides as a basic right. The court held that everyone should have the freedom to choose their own partners. This judgment too does not specify that the right to marry is limited to heterosexual couples. Thus, an argument in favor of marriages between the LGBTQIA+ community.

In the historic judgment of **Navjet Singh Johar and others v. Union of India**⁸ which decriminalized Section 377 of the Indian Penal Code, 1860, a colonial-era provision that had criminalized homosexual relations, the majority opinion of Dipak Misra CJ and AM Khanwilkar J and the concurring opinion of Dr. DY Chandrachud J did rely on the Shafin Jahan and Shakti Vahini cases and recognized sexual autonomy of an individual. One noteworthy point was made by DY Chandrachud, when he clearly said that LGBT people "are entitled, like all other citizens, to the entire spectrum of fundamental rights, including the liberties protected by the Constitution," as well as to equal citizenship and "equal protection of the law."⁹

Thus, when it is said that LGBTQIA+ members should have access to every constitutional right, this no doubt includes to right to marry whomever they choose. The rights of the trans community to marry can be included in all the Marriage Acts, and whomsoever identifies as a female should be considered to be a bride and whomsoever identifies as a male should be considered to be a groom and in case they prefer to be recognized as neither, there should be a special provision that dictates the marriage for those who identify as nonbinary. Denying marriage rights to the trans community just because they do not fit into the expected social standards and norms is a gross violation of their dignity. However, the likelihood of Indian courts accepting same-sex marriage on par with heterosexual weddings is favorable with small steps already being taken. One can only hope that the Indian State would someday adopt the same practical approach as the courts in the struggle for equality and dignity.

Coming to a country that had similar constitutional provisions as ours, is United Kingdom. The right of transsexual individuals to private life and the right to be married and create a family were both breached by UK legislation, the European Court of Human Rights concluded in 2002. The UK government should support transgender persons by issuing new birth certificates that accurately represent their gender identity and allow them to marry someone of the opposite gender, according to judges' rulings. Here, the absence of rights for the trans community was

⁸ AIR 2018 SC 4321

⁹ Hasi Jain, Case for recognition of same-sex marriage under Special Marriage Act, <https://theleaflet.in/case-for-recognition-of-same-sex-marriage-under-special-marriage-act/>

explicitly brought to account by the government. The state then introduced the Gender Recognition Act of 2004 which made it legal for transgender people to marry in the gender they were assigned at birth. The supreme court of the United Nations also held that changes in one's gender will not affect one's marriage or the rights associated with it. There is no provision that talks about the rights of nonbinary people as of yet. The condition of the dignity of transgenders in the UK is still better than the situation in India since they have actual legal provisions that talk about their right to marry.

One country that has the most liberal outlook on trans rights in New Zealand. Trans people have the same rights as the general population and marriage for them has been legal ever since 19 August 2013, after the passing of legislation allowing the same.

The surrogacy (Regulation) Bill of 2019 is yet another bill that forcefully puts forward the idea of a heterosexual and patriarchal family. The requirement for applying for surrogacy is a heterosexual couple [Section 2 (g) read with Section 4 (iii) (c)], who are married for at least five years and have no child of their own [Section 4 (iii) (c)] and have been medically certified to be an infertile couple [Section 2 (r) read with Section 4 (ii) (a)] are eligible to commission surrogacy. More importantly, the surrogate mother needs to be a close relative of the couple, is married with children of her own, and does not donate her own gamete for the purposes of surrogacy [Section 4 (iii) (b)]. This bill further criminalizes surrogacy in the case of single men, women as well as same-sex couples, and transgenders. This bill denies the trans community the basic right to have children and form families which is violative of the right to reproductive autonomy as an aspect of the right to privacy guaranteed under the Indian constitution.¹⁰

The right to parenthood has been recognized in international law through various covenants and declarations such as the **Universal Declaration of Human Rights, 1948** which established that the right to "found a family" is a right that is applied to all persons and should not suffer from any kind of discrimination. This once again is contrary to the provisions in India where not only are Hijra communities not recognized as families but neither do they have the right to adopt or apply for surrogacy.¹¹

¹⁰ ARIJEET GHOSH and DIKSHA SANYAL, How Can Families be Imagined Beyond Kinship and Marriage? , economic and political weekly.

¹¹ Juscorps, adoption rights of transgender persons in india,

The legal doctrine that every individual has the right to bear children is a fundamental human right. In **B.K. Parthasarathi v. Govt. of A.P**¹², the Hon'ble Supreme court agreed with the ruling of the US Supreme Court in **Skinner v. State of Oklahoma**¹³, which characterized the right to reproduce as one of the fundamental civil rights of man, and upheld "the right of reproductive autonomy" of an individual as a component of his "right to privacy." This right has been recognized by the Hon'ble Supreme Court as a constitutionally protected right, being a feature of Article 21 of the Constitution in the cases **Gobind v. State of M.P**¹⁴. and **Kharak Singh v. State of U.P.** The term "the right to reproductive autonomy," which is implied to be a component of the right to privacy protected by Article 21 of the Constitution, refers to an individual's choice to have a child through surrogacy. This means that each citizen has a right to make personal decisions free from the unwarranted intrusion of the government and this includes the decision to have children through surrogacy. Therefore, transgender people too being citizens of India are protected by these judgments made and constitutionally have to right to have children and form their own families. Another case was **Sweety [Eunuch] vs General Public 2016**¹⁵ where the Himachal Pradesh High court recognized the guru-chela relationship as a "custom" and held that a guru would thus be entitled to the deceased chela's property. This judgment proves that the judiciary has slowly begun to recognize the diversity of relationships, intimacies, and families many of which may not necessarily be heterosexual, marital, or biological.¹⁶

Transgender people are fighting every day for their right to form families. In India, the **Hindu Adoption and Maintenance Act of 1956** governs the adoption process. The Act says that a man or woman or a heterosexual couple can adopt and the term transgender is not even included. Once again this is a violation of Article 14 of the Indian Constitution which guarantees equality to each citizen and despite that, such an important Act excluded transgenders from their provisions. This too denies their basic right to have a family which is violative of their dignity.

To conclude I would like to say that if the state recognizes the right to marry as well as bodily autonomy and privacy, then these rights should be applied neutrally to all everyone irrespective

¹² 2000 (1) ALD 199 <https://www.juscorpus.com/adoption-rights-of-transgender-persons-in-india/>

¹³ 316 U.S. 535

¹⁴ 1975 AIR 1378

¹⁵ AIR2016HP148

¹⁶ Aparajita Amar and Arjun Aggarwal, The emerging laws relating Surrogacy: A procreational right for Single Parent, Transgenders and Foreigners, <https://www.sconline.com/blog/post/2018/04/10/the-emerging-laws-relating-surrogacy-a-procreational-right-for-single-parent-transgenders-and-foreigners/>

of their gender and there should be recognition for all forms of intimate and domestic relationships. When lawmakers are creating laws that control intimacy and dependency, they should utilize a vision of the family that is comprehensive and diverse and is based on recognizing the functional features of families rather than their form, that is, what families do rather than how they seem (Mirabelli 2018). Recognizing that families are diverse, complex, and dynamic means providing individuals with the freedom to not only choose their life partners but also the freedom to create the kind of family that they want.

We are living in a nation that has for a very long time denied a large portion of its people basic human rights. People feel that with the repulsion of Section 377, the LGTBQIA+ is at par with the rest of the citizens. But my essay proves that even though the government and the judiciary have slowly begun to acknowledge the rights of transgender people, there is still a long way to go before they are treated on par with the rest of the citizens.