

## THE LEGAL PATHWAY FOR TRANSGENDER MARRIAGE AND ADOPTION RIGHTS IN INDIA: A CONSTITUTIONAL AND COMPARATIVE ANALYSIS

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### ABSTRACT

The landmark judgment of the Supreme Court of India in *National Legal Services Authority v Union of India* (2014) constituted a paradigmatic shift in transgender rights jurisprudence by formally recognising gender identity as a fundamental right. Yet the transformative promise of NALSA remains conspicuously unfulfilled in the domains most central to personal life—marriage and adoption. This article undertakes a critical legal analysis of the pathways—existing, potential, and desirable—for the recognition of transgender marriage and adoption rights in India. It argues that the existing legal framework, interpreted through a constitutionally harmonious and rights-based lens, does permit such recognition, and that legislative reform is both necessary and constitutionally mandated. Drawing on the constitutional framework (Articles 14, 15, 19, and 21), personal law statutes, the Transgender Persons (Protection of Rights) Act 2019, the Juvenile Justice Act 2015, and comparative frameworks from South Africa, Argentina, the United Kingdom, Nepal, and Germany, the article identifies specific structural barriers and proposes a comprehensive agenda of legislative, administrative, and judicial reforms. The doctrine of ‘constitutionally harmonious interpretation’ is advanced as a judicial tool for protecting transgender family rights pending legislative action.

**Keywords:** *Transgender rights, marriage law, adoption rights, NALSA, constitutionally harmonious interpretation, Transgender Persons Act 2019, Juvenile Justice Act 2015, comparative family law, gender identity, India*

### I. INTRODUCTION

The legal recognition of transgender persons as full and equal citizens is one of the most urgent civil rights imperatives of the contemporary era. In India, the journey of transgender persons towards legal visibility has been long, painful, and incremental. The landmark judgment of the Supreme Court of India in *National Legal Services Authority v Union of India*<sup>1</sup> (hereinafter ‘NALSA’) in 2014 constituted a paradigmatic shift by formally recognising gender identity as a fundamental right, directing the State to treat

transgender persons as a ‘third gender,’ and mandating affirmative measures for their inclusion. Yet, the transformative promise of NALSA remains conspicuously unfulfilled in the domains most central to personal life—marriage and adoption.

Transgender persons in India continue to be denied the legal rights to marry their partners of choice and to adopt children, not through any explicit statutory prohibition alone, but through the combined operation of ambiguous legislative silence, gender-binary

statutory frameworks, and the absence of a coherent jurisprudential pathway. The Transgender Persons (Protection of Rights) Act, 2019 (hereinafter 'TPA 2019'), while ostensibly enacted to further the NALSA mandate, has been widely criticised for its silence on civil rights including marriage and adoption.<sup>2</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter 'JJ Act'), which governs adoption in India, does not expressly address the eligibility of transgender persons as adoptive parents, leaving the matter to administrative discretion that is frequently exercised in a discriminatory manner.

The Supreme Court's decision in *Supriyo @ Supriya Chakraborty v Union of India*<sup>3</sup> in 2023, declining to recognise same-sex marriage, has further complicated the legal landscape. However, the Court's majority reasoning, predicated on the definition of marriage as between 'man' and 'woman,' does not directly preclude heteronormative transgender marriages. The question of whether a transgender woman is a 'woman' for the purposes of marriage law—squarely addressed by the Madras High Court in *Arunkumar v Inspector General of Registration*—remains the central jurisprudential challenge.

This article undertakes a critical legal analysis of the pathways for the recognition of transgender marriage and adoption rights in India. It argues that the existing legal framework, when properly interpreted through a constitutionally harmonious and rights-based lens, does permit the recognition of transgender marriage and adoption, and that legislative reform is both necessary and constitutionally mandated to eliminate existing ambiguities and discriminatory outcomes.

## II. THE CONSTITUTIONAL FRAMEWORK FOR TRANSGENDER RIGHTS

### A. The Right to Equality and Non-Discrimination (Articles 14 and 15)

Article 14 of the Constitution guarantees to all persons equality before law and equal

protection of laws. The Supreme Court has consistently interpreted Article 14 to embody substantive equality—the requirement that law does not produce unequal outcomes for similarly situated persons. In *NALSA*, a Constitution Bench unequivocally held that the term 'sex' in Articles 15 and 16 is not limited to biological sex but includes gender identity.<sup>4</sup> This holding has momentous implications for marriage law. The Hindu Marriage Act 1955, the Special Marriage Act 1954, and other statutes employ binary gender categories—'husband' and 'wife,' 'male' and 'female'—that structurally exclude transgender persons. If the application of these statutes results in the denial of marriage rights to transgender persons on the basis of their gender identity, such application constitutes discrimination 'on the ground of sex' prohibited by Article 15.

In *Navej Singh Johar v Union of India*,<sup>5</sup> the Supreme Court held that sexual orientation and gender identity are 'natural and inherent' characteristics, and that discrimination on these grounds violates Article 15. Justice D Y Chandrachud specifically noted that the constitutional guarantee of non-discrimination extends to 'each of the multiple layers of identity' that a person possesses, including gender identity.

### B. The Right to Dignity and Life (Article 21)

Article 21 guarantees the right to life and personal liberty, expansively interpreted to encompass the right to live with dignity. Marriage is not merely a legal status; it is a social institution through which persons organise their most intimate relationships. The Supreme Court recognised in *Shafin Jahan v Asokan KM* that the right to choose one's life partner is a fundamental aspect of personal liberty under Article 21.<sup>6</sup> Denying transgender persons the legal capacity to marry denies them a fundamental means of expressing and protecting their intimate relationships—a denial that strikes at the core of human dignity.

In *Justice K S Puttaswamy (Retd) v Union of India*,<sup>7</sup> a nine-judge bench unanimously

recognised privacy as a fundamental right under Article 21. Justice Chandrachud articulated three dimensions of privacy: personal autonomy, informational privacy, and dignity. All three are engaged by the issues of transgender marriage and adoption. The right to choose a life partner and to constitute a family falls squarely within personal autonomy; the non-recognition of transgender persons' gender identity in family law constitutes a violation of dignity.

### C. The NALSA Judgment and Gender Identity as a Fundamental Right

NALSA constitutes the constitutional cornerstone of transgender rights jurisprudence in India. The Court held that each person's gender identity is an integral part of their personality and is 'one of the most basic aspects of self-determination, dignity and freedom.'<sup>8</sup> The State must legally recognise a person's self-identified gender. The Court drew on the Yogyakarta Principles to hold that transgender persons are entitled to 'all human rights, including civil and political rights.'<sup>9</sup> Marriage and adoption are among the most fundamental civil rights, and the Court's language clearly encompasses them within the rights to which transgender persons are entitled.

### D. The Supriyo Decision and Its Implications

In *Supriyo @ Supriya Chakraborty v Union of India*, the Supreme Court declined to recognise same-sex marriage, holding that the right to marry is not a fundamental right and leaving the matter to Parliament. Crucially, however, the question of transgender persons in heteronormative marriages—between a transgender woman and a cisgender man, or between a transgender man and a cisgender woman—was not squarely before the Court. The majority's reasoning does not directly preclude such marriages. The Madras High Court's decision in *Arunkumar v Inspector General of Registration*<sup>10</sup> is directly on point: if the State recognises a person's gender identity for all

purposes under the TPA 2019, it cannot deny that recognition in the context of marriage law.

## III. THE PERSONAL LAW FRAMEWORK AND TRANSGENDER MARRIAGE

### A. The Hindu Marriage Act, 1955

The Hindu Marriage Act, 1955 (HMA) does not explicitly define 'male' or 'female.' Section 5 refers to 'a marriage solemnised between any two Hindus'—textually significant, as it does not require the parties to be of different biological sexes; it requires only that they be Hindus. This textual reading opens the possibility that the HMA does not prohibit marriage between a transgender woman and a cisgender man, provided both are Hindus and satisfy the other conditions.<sup>11</sup>

The Madras High Court's decision in *Arunkumar* is the most significant judicial pronouncement on transgender marriage under Hindu law. The Court held that a marriage between a cisgender man and a transgender woman solemnised under Hindu rites was valid and required to be registered. The Court reasoned that the term 'bride' must be interpreted in light of NALSA and constitutional guarantees of gender identity, and that a transgender woman who identifies as female is a 'bride' within the meaning of the Act.<sup>12</sup> However, the *Arunkumar* judgment has not been followed uniformly across India, underscoring the urgent need for legislative clarification.

### B. The Special Marriage Act, 1954

The Special Marriage Act, 1954 (SMA) uses the term 'any two persons' in its conceptual framework but employs binary gender language in procedural provisions—Section 5 requires the 'male party' to be at least 21 and the 'female party' at least 18. In the context of a transgender man legally recognised as male under the TPA 2019, the *Supriyo* majority's reasoning is less compelling: the question is not of reading new words into the statute but of applying existing provisions to legally recognised gender identity. The SMA's

secular character makes it particularly important for transgender persons whose religious community's personal law does not accommodate transgender identity, and reform of its binary procedural provisions is a legislative priority.<sup>13</sup>

### C. The TPA 2019 and Marriage

The Transgender Persons (Protection of Rights) Act, 2019 explicitly prohibits discrimination in education, employment, healthcare, and public services—but not in marriage or adoption.<sup>14</sup> This omission is a fundamental failure of legislative vision. However, Section 6 provides for the right of self-identification of gender. A transgender person who has obtained a certificate of identity under Section 6 is legally recognised in their self-identified gender. The State cannot recognise a person as female for identity documentation and then deny them the right to enter a marriage as a female party—such inconsistency violates the principle of non-arbitrariness under Article 14.

## IV. ADOPTION RIGHTS FOR TRANSGENDER PERSONS

### A. The JJ Act Framework and its Silences

The Juvenile Justice (Care and Protection of Children) Act, 2015 and the Central Adoption Resource Authority (CARA) Adoption Regulations 2022 do not mention transgender persons explicitly. This silence has meant that CARA and adoption agencies apply eligibility criteria with reference to binary gender categories, creating barriers for transgender persons. A transgender man may be treated as female by CARA, limiting his adoption eligibility to criteria applicable to single women; a transgender woman may find her application processed with reference to biological sex rather than self-identified gender.<sup>15</sup>

The single adoption provision in CARA Regulations—that a single male is not eligible to adopt a girl child—creates a direct problem for transgender men legally recognised as male. The resolution proposed in this article is that

CARA must apply the gender category that corresponds to the person's legally recognised gender identity under the TPA 2019. Legal consistency demands it: transgender persons should be neither unfairly advantaged nor unfairly disadvantaged relative to cisgender persons.

### B. The Best Interests of the Child Principle

Any analysis of adoption law must centrally engage with the best interests of the child, which is the paramount consideration under the JJ Act and Article 3 of the UN Convention on the Rights of the Child. The best interests principle must be applied in a non-discriminatory manner. In *Githa Hariharan v Reserve Bank of India*,<sup>16</sup> the Court emphasised that the best interests principle cannot be a vehicle for gender discrimination. Research from the United States, the United Kingdom, and other jurisdictions where transgender persons have been permitted to adopt consistently shows that children raised by transgender parents fare as well as children raised by cisgender parents on measures of psychological adjustment, social development, and academic performance.<sup>17</sup>

## V. COMPARATIVE ANALYSIS: INTERNATIONAL FRAMEWORKS

### A. South Africa

South Africa's Alteration of Sex Description and Sex Status Act (Act 49 of 2003) permits persons to alter the sex description on their birth certificate following gender reassignment or where their 'psychological gender' differs from their biological sex. Once altered, a person is treated as a person of the new sex for all legal purposes, including marriage.<sup>18</sup> South Africa demonstrates that recognition of transgender gender identity for legal purposes flows naturally into recognition of marriage rights, and that constitutional non-discrimination provisions are a sufficient basis for extending marriage rights to excluded groups.

## B. Argentina

Argentina's Gender Identity Law (Law No 26,743) of 2012 grants all persons the right to recognition of their gender identity and to obtain identity documents reflecting their self-perceived gender, without requiring surgery, psychiatric diagnosis, or any medical intervention.<sup>19</sup> Argentina's Civil and Commercial Code uses gender-neutral language, referring to 'spouses' rather than 'husband and wife,' ensuring that transgender persons can fully participate in marriage and family life without legal barriers. The Argentine model demonstrates the value of gender-neutral statutory drafting as the most elegant and comprehensive solution to binary gender language in statutes.

## C. United Kingdom and Nepal

The United Kingdom's Gender Recognition Act 2004 provides that a person who holds a Gender Recognition Certificate is treated in their acquired gender for all legal purposes, including marriage and adoption.<sup>20</sup> Nepal's Supreme Court, in *Sunil Babu Pant v Government of Nepal*, recognised the rights of sexual minorities and directed the government to repeal discriminatory laws.<sup>21</sup> Nepal has recognised a 'third gender' category in official documents, and its incremental reform pathway—judicial direction combined with constitutional recognition of gender diversity—illustrates a viable approach for the Indian context.

## D. Lessons for India

The comparative analysis reveals several consistent themes: jurisdictions that have successfully recognised transgender family rights have done so by linking gender recognition to a comprehensive framework of legal rights; the most effective recognition frameworks are accessible and based on self-identification; gender-neutral statutory drafting in family law is the most elegant solution; and the best interests of the child principle, properly

applied, does not justify exclusion of transgender persons from adoption.

## VI. CRITICAL ANALYSIS AND REFORM PROPOSALS

### A. The Constitutional Mandate for Reform

The constitutional mandate for the recognition of transgender marriage and adoption rights flows from the convergence of four constitutional principles. First, if gender identity is a fundamental right (NALSA), then the denial of rights that flow from that identity—including the right to marry in one's recognised gender—is a denial of a fundamental right. Second, the right to live with dignity (Puttaswamy) encompasses the right to constitute intimate relationships and family life. Third, discrimination on the basis of gender identity constitutes discrimination 'on the ground of sex' prohibited by Article 15 (NALSA and Navtej). Fourth, courts must protect the rights of minorities against majoritarian prejudice (the principle of constitutional morality in Navtej).

### B. The Doctrine of Constitutionally Harmonious Interpretation

This article proposes the doctrine of 'constitutionally harmonious interpretation' as the judicial tool for giving effect to transgender marriage and adoption rights pending legislative reform. Where a statute is capable of two interpretations, one consistent with constitutional rights and one not, courts must adopt the constitutionally consistent interpretation. Applied to transgender marriage, where the term 'bride' or 'female party' is capable of being interpreted as referring only to biological females or as referring to all persons legally recognised as female, courts must adopt the latter interpretation as consistent with the constitutional guarantee of gender identity recognition and non-discrimination. This is the ordinary exercise of judicial power to interpret statutes in conformity with the Constitution.

### C. Proposed Legislative Reforms

#### (i) Hindu Marriage Act, 1955

Section 5 should be amended to provide that 'a marriage may be solemnised between any two Hindus, irrespective of their gender identity as legally recognised under applicable law.' The definition section should be amended to provide that references to 'husband' and 'wife' shall include any spouse irrespective of gender identity, and that a person's gender shall be determined by reference to their legally recognised gender identity.

#### (ii) Special Marriage Act, 1954

Section 4 should be amended to provide that 'a marriage may be solemnised under this Act between any two persons, irrespective of their gender identity.' The age requirement provisions should be amended to refer to the 'elder party' and 'younger party' rather than 'male party' and 'female party.' Forms should be amended to use 'Party A' and 'Party B' or gender-neutral options.

#### (iii) Transgender Persons (Protection of Rights) Act, 2019

Section 3 should be amended to include the right to marry a person of choice and to have the marriage registered without discrimination, and the right to adopt without discrimination. A new Section 3A should be inserted providing that for all purposes of personal law including marriage, divorce, adoption, succession, and guardianship, the gender of a person shall be determined by reference to their legally recognised gender identity. The District Screening Committee mechanism in Section 6 should be replaced with a self-declaration process consistent with the Yogyakarta Principles+10.

#### (iv) Juvenile Justice Act, 2015 and CARA Regulations

A new Section 57A should be inserted in the JJ Act providing that no prospective adoptive parent shall be rejected solely on the ground of their transgender or gender-diverse

identity, and that assessment shall be based on the welfare of the child and standard criteria applicable to all prospective adoptive parents. CARA Regulations should be amended to explicitly include transgender persons, applying gender-based criteria by reference to legally recognised gender identity, and prohibiting adoption agencies from rejecting applications on the ground of gender identity.

#### D. Judicial Directions Pending Legislative Reform

Pending enactment of the legislative reforms above, courts should: issue mandamus directing marriage registrars to register marriages involving transgender persons with legally recognised gender identity; issue mandamus directing CARA and adoption agencies to process applications from transgender prospective adoptive parents on the same terms as cisgender applicants; and issue declarations that gender-binary provisions of marriage and adoption statutes are to be interpreted inclusively so as to include transgender persons in their legally recognised gender.

### VII. FINDINGS AND CONCLUSION

#### A. Summary of Findings

This article has established the following findings. First, the Constitution of India, as interpreted in NALSA, Navtej, and Puttaswamy, provides a compelling normative basis for the recognition of transgender marriage and adoption rights as core incidents of the fundamental rights to dignity, equality, privacy, and personal liberty. Second, existing personal law statutes, interpreted through the doctrine of constitutionally harmonious interpretation, can recognise heteronormative transgender marriages and permit adoption by transgender persons, as demonstrated by the Arunkumar precedent. Third, the TPA 2019 represents a significant but incomplete legislative response, with its silence on marriage and adoption constituting a fundamental deficiency. Fourth, the comparative analysis confirms that

recognition of transgender family rights is both legally feasible and increasingly the global norm. Fifth, the legislative and administrative reforms proposed in this article provide a comprehensive and practicable framework for the full inclusion of transgender persons in the institutions of marriage and adoption.

## B. Conclusion

The legal pathway for transgender marriage and adoption rights in India exists—it runs through the Constitution, through the NALSA mandate, through the principle of constitutionally harmonious interpretation, and through the legislative reforms this article has proposed. The question is not whether the path exists but whether the State has the will to clear it. The constitutional promise of NALSA remains, after more than a decade, a promise deferred. Transgender persons in India have waited too long for that promise to be redeemed in the domains most central to their lives—the freedom to love, to marry, and to parent. The reforms proposed in this article, grounded in constitutional principle, comparative analysis, and international human rights standards, provide both the normative justification and the practical framework for that redemption. The time for legislative and judicial action is now.

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