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# Transgender Rights related to child Adoption, Constitutional Equality, Regulatory Exclusion, and Imperative Reforms

## Article History:

### Name of Author:

Saumya Pandey<sup>1</sup>, Dr. Neetu<sup>2</sup>

### Affiliation:

<sup>1</sup>Phd scholar (G D Goenka University, Gurgaon

<sup>2</sup>Assistant professor (G D Goenka University, Gurgaon.

### Corresponding Author:

Saumya Pandey

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**Abstract:** Transgender self-identification and equality under Articles 14, 15, and 21 are recognized by Indian constitutional doctrine, especially National Legal Services Authority v. Union of India ("NALSA"), (2014) 5 SCC 438. However, because of Central Adoption Resource Authority (CARA) guidelines under the Juvenile Justice (Care and Protection of Children) Act, 2015 ("JJ Act"), which prioritize "traditional" marital stability without taking gender-diverse parents into account, transgender people are still essentially barred from adopting children. Ongoing rejections are highlighted by recent Madras High Court hearings (B. Shama, 2025; Priyanka Yashini, 2025), where the court is requesting an explanation from the Center for not amending the Transgender Persons (Protection of Rights) Act, 2019. In addition to analyzing interactions with the Hindu Adoption and Maintenance Act, 1956 ("HAMA") and drawing comparative lessons from the US, UK, and Canada, this article critically examines statutory gaps, judicial hesitation, social stigma, and child welfare misconceptions.

**Keywords:** Article 14, JJ Act sec 57, NALSA, transgender adoption, CARA Regulations 2022, and Transgender child adoption.

## INTRODUCTION

The approximate number of transgender individuals in the Indian population is only 0.4% (4.88 lakh out of 1.4 billion according to the 2011 Census). However, the lack of proper social support leads to barriers that prevent them from becoming parents, which is a violation of their dignity under Article 21 of the Constitution of India. In 2014, NALSA sec 59 held that gender identity is a core aspect of sex; therefore, gender identity should not be a basis for discrimination by self-identification as male or female based on individual preference/receipt of a new certificate after undergoing gender reassignment surgery (also referred to as SRS). Subsequently, the Transgender Persons (Protection

of Rights) Act, 2019 came into effect and established policy and procedure for issuing these certificates, however, there continues to exist barriers to adoption such as the failure to include transgender on the Central Adoption Resource Authority's (CARA) online application website and the investigation into the stability of the individual taking each child's above-mentioned transitional experiences or lack thereof prior to any child being adopted.

The question of whether transgender people can have adoption rights has been discussed. Transgender people deal with a lot of issues on a daily basis. Approximately five lakh transgender people are struggling for their rights in India. Every day, they encounter discrimination at work, home, and other

places. Like other persons, transgender people are regular people with the same rights accorded to other genders. Everyone in India's diverse community, which includes people of various racial and ethnic backgrounds, should have the same rights and not be subjected to prejudice. Additionally, the government works to ensure the welfare of transgender people by providing welfare benefits, housing programs, pension plans, free government operations, and many other things that ensure transgender people don't experience any social challenges and may live a better life.

### **Evolution of Transgender Rights in India**

Acknowledging transgender people as a third gender is a human rights issue rather than a societal or medical one. It stated that given rights to those who identify as neither male nor female, they were granted the freedom to select their gender, whereas previously they were not even acknowledged as a gender. Although the Indian Constitution grants them several rights, one of those rights of adoption is still up for debate as to whether or not a transgender person can adopt a child. On 15th March, 2014, the Supreme Court of India decision held that transgenders have a legally recognised identity as a third gender, by virtue of their being enumerated in the Census as a distinct category. Transgender is defined as a collective term for all people who have a gender identity, gender expression or behaviour that is different from their biological sex. There are many different types of identities which fall under this umbrella term trans. One of the petitioners, whose story was told before the Supreme Court, was also able to tell her story at the same time.

### **Definition of Transgenders**

According to Section 2(k) "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 a person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, gender queer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.

According to Stryker "transgender" is a word that "encompasses the whole spectrum" of gender diversity, that lumps together rather than splits apart the many subgroups within a large, heterogeneous set of communities.

### **THE HISTORIC MOVE TO RECOGNISE TRANSGENDER**

The transgender community has suffered greatly at the hands of us Indians. Their name is frequently used in derogatory contexts. In India, they were denied their fundamental rights. They have consistently faced discrimination, contempt, and suppression.

However, things changed when transgender people were acknowledged as a third gender in India. This took place in the Union of India vs. NALSA. The term "transgender" refers to all of these individuals whose gender identity, gender expression, or behavior does not correspond with their biological sex. It covers a variety of identities under these criteria. A petitioner who appeared before the Supreme Court related her experience there. The applicant, born as a male, shared her experiences of feeling different from other boys and facing sexual harassment, molestation, and abuse due to her femininity. She felt rejected by society and feared she wouldn't fit in. Despite her courage, she started dressing as a woman in her late teens and living with the hijra community in Mumbai. These stories are common across India. The Supreme Court's recognition of the third gender changed history, but it was a small step towards improving the lives of transgender individuals. The court in the NALSA vs UOI case established guidelines for the treatment of Hijras, Eunuchs, and others as "Third Gender" to protect their rights under Part III of the Constitution and laws. They granted the right to self-identify and requested legal recognition of their gender identity. The court also directed the government to treat transgenders as socially and educationally backward citizens, provide proper medical care, create separate toilets, and improve living conditions.

In the case NAVTEJ SINGH JOHAR vs. UNION OF INDIA, another major ruling came from the court indicating the decriminalization of Section 377 of the Indian Penal Code which made it a criminal offence to engage in homosexual acts. Following this ruling, a new section of society now legally has recognition and has fought long enough for it to occur. This was the LGBTQ+ community of India. While giving the judgment, Justice Mishra said that the "LGBT community possess rights like others. Majoritarian views and popular morality cannot dictate constitutional rights." Justice Mishra went on to say that, "Shakespeare through one of his characters in a play says —What's in a name? That which we call a rose by any other name would smell as sweet". The phrase indicates that what is important is the true essence of a substance or the inherent nature of an entity, as opposed to how it or a person is known or called.

### **Constitutional and Legal Dimension Of Transgenders Rights-**

#### **The Foundations of the Constitution and Public Policy**

The criterion for classification under Article 14 (Equal Protection) is that it must pass the 'rational basis test.' State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75. There is discrimination against marriage stability-proxy and marriage equality for

the single transient history of equally able parent(s) Maneka Gandhi, (1978) case.

**Article 15(1)** prohibits all forms of discrimination; sex-based discrimination is specifically prohibited, and in NALSA, the gender identity of trans is included, sec 75.

**Article 21** guarantees dignity and autonomy of the family. Puttaswamy v. Union of India, (2017); privacy includes the right to make intimate decisions regarding parenthood. Navtej at sec 126 parallels the legal rights of families with same-sex couples, and NALSA at sec 74 states that the State has a positive obligation to implement policies for the welfare and education of families with a transgender member.

**The constitution of India 1950 provides** "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of Indian". Here, "any person" refers to any human without distinction on the basis of caste, creed, religion, sex, or any other characteristic. In India, a transgender person is considered "any person" and is accorded the same status as people of all other genders. The transgender population cannot be divided based on any arbitrary class or subjected to discrimination since they differ and no law in the country applies to them. Legal recognition of transgender persons as members of the "third" or "other" gender exists in India.

They are on the same footing as any individual, male or female. They also enjoy the same rights as everyone else, including the freedom to exercise their fundamental rights as guaranteed by the Indian Constitution. In 2014 the Supreme Court of India formally recognised "transgender" as the "third gender" in the country with the historic NALSA v. Union of India & Ors ruling.

**Freedom of speech and expression (Article 19) :** This right grants every citizen the freedom of speech and expression. This includes the freedom to express your gender identity publicly.

**The Preamble to the JJ Act** states that "the best interest of the child is of primary importance" (Art. 3, UNCRC). Para 56 provides "Complete Parentage" and Para 57(1) has no gender exclusions. Sections 7-11 of HAMA place certain limitations on how a parent may be identified, i.e., by sex (e.g., no same-sex adoptions possible). The JJ Act takes a secular approach.

**The Transgender Act** has the following synergies: sec 2(k) "transgender definition"; sec 4 allows self-identification; sec 15 prohibits discrimination when providing services. Conversely, CARA, a body of the Ministry of Women and Child Development, is

disregarding this and may be acting ultra vires (beyond its authority), as per the Madras High Court's ruling from 2025.

By enabling individualized assessments based on fitness, equality of treatment should be achieved regardless of the identity concept applied.

### **Judicial Interventions and Challenges**

Two recent cases exemplify the continuing challenges in this area of law. The Madras High court in K Prithika Yashini v Union of India (2025) rejected a request for judicial relief from a transgender Sub-Inspector against the rejection of her application at the Central Adoption Resource Authority (CARA). The court held that Section 5 of the Adoption Regulations contains language which describes persons as only "male/female," and that the court would not provide a remedy without a change to those regulations. The court directed the petitioner to apply to the Ministry of Women and Child Development for a change to the regulations, and ordered the ministry to respond within 12 weeks.

Similarly, in a 2025 application by B Shama to challenge both the HAMA and CARA guidelines that have not been updated in light of transgender inclusion under the 2019 legislation, the court requested that the union respond. As of February 2026, the government's continued failure to address these issues demonstrates the courts frustration with the continuing inaction by the executive in updating these existing guidelines.

### **Marriage right before Supriyo case**

The Supreme Court found in Supriyo v. India (2023) that creating a gender-neutral understanding of the Special Marriage Act for same-sex unions is an act of legislation, not interpretation. However, it also recognised LGBTQIA+ individuals and couples as having rights to partner choice, cohabitations, closeness, and dignity in non-discriminatory ways. One of the Court's recommendations was the establishment of a committee, chaired by the Cabinet Secretary, to investigate the extension of several business benefits (e.g., pensions and health coverage) for queer couples through an executive-style process. Constitutional litigation is now shifting from challenging the right to marry to challenging the right to equal access to all the incident benefits of family life. The lack of bundle benefits (hospital visitation/decision making; ration/beneficiary status; nomination defaults; tenancy; immigration sponsorship) may also be challenged as arbitrary or discriminatory; especially when those benefits are unrelated to procreation. The risk is that there will be a fragmented system of piecemeal administrative recognition without the certainty of portability provided by a civil union/marriage statutory framework.

## **LGBTQ+ People and Transgenders' Adoption Rights**

After reading the two rulings mentioned above, one could believe that India is among the nations that will grant adoption rights to the LGBTQ+ community and transgender people. However, this is untrue. Adoption rights are not available to transgender individuals or members of the LGBTQ+ community. There are two methods, as mentioned above, for any Indian who wants to adopt a child. An individual who identifies as Hindu may adopt through the Hindu Adoption and Maintenance Act or through the CARA. According to the Hindu Adoption and Maintenance Act, only men and women are eligible for adoption rights and are subject to the norms that govern them. They provide rules about the appropriate times for male and female adoptions. In a similar vein, the CARA adoption form offers three choices: single man, single female, and couple. The transgender community cannot use any of the legal adoption procedures. Similarly, the present method did not allow homosexual couples. The Indian constitution guarantees the right to equality for every citizen, with Article 14 stating that the government must not deny any person equality before the law and equal protection of laws within India's territory. This principle prohibits discrimination and encourages special treatment for different persons in different situations. The supreme court has developed a basic structure theory, which highlights the constitutional characteristics that cannot be removed. Article 15 prohibits discrimination based on religion, race, caste, sex, or place of birth, allowing reasonable classification to elevate the status of certain classes. The classification of transgender individuals as third-gender is not reasonable and discriminatory, depriving them of basic happiness and family.

Any law violating these fundamental rights is invalid in India, making not giving adoption rights to transgender individuals ultra vires. The community suffers socially and economically due to the discrimination and lack of opportunities for upliftment. The NLSA vs Union Of India case and Supreme Court guidelines state that recognizing transgender individuals as third-gender is meant to enforce the rights given under Part III of the Indian Constitution for them. However, denying adoption rights would be against societal norms and would be in violation of articles 14 and 15.

Homosexual couples in India deal with a comparable issue. In India, it is illegal for them to adopt a child. Despite the fact that a homosexual person can adopt a child on their own. This can be accomplished by completing the adoption paperwork as a single man or single woman. The Indian judiciary has not yet acknowledged same-sex marriage. They do not now

have the authority to do so formally or legally as a couple. This is the reason a homosexual couple cannot use their adoption procedure. Despite the fact that our Supreme Court decriminalized section 377 of the Indian Penal Code, meaning that it was no longer a crime to be. As a result of the recent debate around Supriyo, "regulatory equality" has become an overarching theme of adoption reform, as people have begun to call for changes to CARA criteria, separation of parenting ability from being married to a hetero couple, and establishing child welfare assessments based on evidence-based standards. The Supreme Court ruled that homosexuality can no longer be considered a crime; this ruling was made when the British law criminalizing love and being in love was overthrown. However, the Supreme Court did not address the issue of marriage, surrogacy or adoption for the LGBT community, creating a serious injustice against all members of the LGBT community.

## **Role of Non Governmental Organizations**

The human rights movement highlights humanity's ongoing struggle for a better world. Non-governmental organizations (NGOs) play a crucial role in advancing human rights, with their legitimacy based on the Protection of Human Rights Act 1993. NGOs have historically contributed to cultural promotion, education, health, literacy, and social welfare. Their performance has been acknowledged by organizations like the United Nations, which relies on their information and data. NGOs have played a significant role in various organizations, including the Anti-slavery Society, International Committee of Red Cross, Council of Europe, Organization of American States, and Amnesty International. They also played a crucial role in drafting provisions of the International Bill of Human Rights and its corresponding Protocols. NGOs have become increasingly active in standard-setting work, and their role in addressing human rights issues, such as LGBTQIA+ rights, is essential. They should translate local experiences of abuse and discrimination to the international level. NGOs have made significant strides in addressing the LGBTQIA+ community, fighting litigation and bringing marginality and ostracism within the realm of judicial discourse. Their efforts laid the groundwork for a transgender-specific law in India. At the international level, around 17 NGOs are working for LGBTQIA+ advocacy and welfare.

## **Rights of LGBTQ+ and Transgenders people Globally**

The rights of the LGBTQ+ community have seen significant progress, with many countries now recognizing transgenders and other individuals. Argentina passed the Gender Identity Bill in 2012, giving transgenders the right to marry and adopt. Less developed nations such as Mexico are providing

marriage and adoption rights to their citizens. Same-sex marriage has been recognised in England and Wales as well. President Barack Obama has openly supported the LGBTQ community. Same-Sex Marriage is now legal due to the Supreme Court's ruling that it was unconstitutional. Trinidad and Tobago and Jamaica have expressed their wishes to repeal laws banning homosexuality. Europe remains one of the safest continents for homosexual rights. The European Court of Human Rights is crucial in ensuring legal inconsistencies in countries adopting another country's laws, such as same-sex marriages in the UK. The European Convention on Human Rights prohibits Member States from discriminating based on sexual orientation in adoption proceedings, protecting the right to respect family, life, marriage, and protection from discrimination based on sexual orientation. The E.B. v France (2008) case has significantly impacted parental rights for the LGBTQ community in Europe. It used the principle of 'best interest of the child' to prohibit domestic authorities from making distinctions based on sexual orientation in adoption proceedings. This decision aligns with the Convention for the Protection of Human Rights and Fundamental Freedoms, which promotes a broader concept of family and prohibits discrimination, strengthening support for same-sex families.

#### **The United State Of America-**

The idea of individual liberty as guaranteed by the constitution has always been upheld by the United States of America. However, the American Constitution denies numerous rights to same-sex spouses. The discrimination that same-sex couples endured as a result of societal rejection and inaction on the part of the government was actively abolished by the judiciary. In the 2014 case of DeBoer v. Snyder, the US Court of Appeals for the Sixth Circuit ruled that the Michigan State Law that prohibited same-sex marriages and joint adoptions was unconstitutional. The U.S. Supreme Court ruled in the well-known Obergefell v. Hodges (2015) decision that discrimination against gays is against the spirit of the Constitution.

#### **South Africa-**

South Africa, a former British colony, and Indian law are similar in a few ways. South Africa is among the few common law nations that has acknowledged the rights of same-sex couples in spite of societal prejudices. In the Ministers of Home Affairs v. Fourie (2005) case, the South African Constitutional Court approved same-sex marriages by rejecting the stereotypes that were common at the time. The government implemented the Civil Union Act, 2006, which legalised same-sex marriage in the nation, in response to criticism from the Court on the dehumanising conditions of living for members of the LGBTQ community. The Du Toit and Another v

Minister of Welfare and Population Development case (2002) ruled that the Child Care Act, 1983, discriminated against the best interest of the child and South African society's values, requiring amendment to ensure parity between married and unmarried couples, thereby promoting equality.

#### **United Kingdom-**

The UK initially discriminated against same-sex couples by limiting adoption rights to married couples and single individuals. However, the Adoption and Children Act, 2002, allowed unmarried same-sex couples to adopt children. Regulations illegalizing discrimination based on sexual orientation led to the Equality Act, 2010, promoting individual liberty and protecting vulnerable minority interests.

Adoption rights should be provided to the LGBTQIA+. There are a number of reasons that equal adoption rights should be granted to all types of parents with the appropriate levels of due diligence. First, it creates loving home environments for children IF a proper evaluation is done by the authorities just as it is done with heterosexual couples. If the child is placed with a same-sex couple where they are going to be in a stable, healthy, loving home, it is better than staying in the orphanage. Plus, the implication that there need to be only male and female parental figures for the adopted child is unjustifiable. Again, it is about providing a safe and loving home for the adopted child, which a great number of same-sex couples are able to provide. In fact, one US based adoption agency reported that 21% of same-sex couples in the US have adopted them.

It is even noted that same sex couples are more likely to adopt in a transracially type unit than the opposite sex couples. Some studies show that same-sex couples are even better able to cope with children of diversity and children with special needs than heterosexual couples. LGBT people are more likely than heterosexuals to adopt children with serious physical, emotional and behavioural problems. Furthermore they are more likely to adopt children who are older rather than babies and various ethnicities instead of just their own ethnicity. Fortunately, children of LGBT parents have been studied as being more open to diversity. When children are raised in a LGBT parenting situation they have been shown to be more accepting and welcoming to peers (American Civil Liberties Union). The amount of adoptions has risen significantly since same-sex couples are adopting and if same-sex couple adoption rights were fully recognized, we could expect further rise. Secondly, to allow same-sex couples to have adoption rights would promote equality and India could meet the same international standards, the United Kingdom in 2002 gave same-

sex couples adoption rights with the Adoption and Children Act 2002. India should change such an antiquated worldview and change the legislation, in order to provide equal adoption rights for LGBTQIA+ individuals.

#### **Reform pathways:**

**1. Civil unions / registered partnerships** - This pathway proposes that a legislative framework can enable both the portability and certainty of benefits/immediate change to personal laws.

**2. Decoupling benefits from marital status** - This pathway proposes eligibility for benefit entitlements based on nominations/choices (rather than spousal status) to serve welfare/administrative purposes (i.e., insurance, pensions, hospital visitation) will increase the access to benefits by non-married couples, thereby de-linking benefits from marital status.

**3. Reform of adoption regulations** - This pathway proposes reliance on individualized capacity assessments and strong safeguards for child protection replacing marriage only requirements for placing children.

**4. Anti-discrimination scaffolding** - This pathway proposes the establishment of a comprehensive equality code (or sector-specific rules) that will help implement the Articles 14 and 15 principles across all service delivery, work, education, and health.

#### **Conclusion-**

Overall, we have seen individuals lose many of their basic human rights and equality from Society through the inequitable treatment of many people by Society and denial from both Court system and Government regarding their Human Rights. However, the recognition of someone's rights through the Court system and other forms of Government has led to some momentum and progression of change towards them. There are currently over 30 million children who have been abandoned or forgotten and are looking for families to go to in India, and the new proposed surrogacy laws will create more difficulty in adopting a child for queer persons. Although there are many individuals who are happy with the ruling against Section 377, there is still a significant amount of work that needs to be done to achieve equality amongst queer individuals. Transgender illegal adoption of unwanted females has also saved them from being sold into slavery and forced prostitution in multiple Countries across the State. Now is the time to support the transgender community by allowing them the right to adopt children so that we as a society can provide a nurturing home for the child as well as a loving home for the child to be loved and nurtured by the child.

People from the LGBTQ+ community are treated equally in India by society, irrespective of sexual orientation or gender. The decriminalization of voluntary same-sex sexual activity in the Supreme Court's judgement on the Navtej Singh Johar vs Union of India case meant that same-sex couples could enjoy the same equality of rights in these activities as heterosexual couples. However, the Juvenile Justice Act and Adoption Regulations — which were enacted in 2015 and 2017, respectively — have failed to keep pace with developments in society; as such, same-sex couples and single people cannot adopt children in India. This obligates same-sex couples to remain childless, which is a violation of their Constitutionally guaranteed equal protection under Articles 14, 15, and 19 (the right to free speech and expression). Legalizing marriage and parenting for same-sex couples would also create benefits for the children and partners of both types of victims.

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