

Third Gender & Marriage

Dr. Dipali A. Purohit
Assistant Professor
Anand Law College
Sardar Patel University
Anand, India

Abstract

It is right of every human being to choose their status male or female. It is the responsible of government to give them equal status and equal rights to transgender people. Third genders are economically and socially backward and their rights are also frequently violated, so they will be granted reservations in admission to education and employment. Third sex citizen's existence & marriage were also recognized in "kamsutra"¹. The right to marry being crucial for retaining individual dignity and enjoying a meaningful human existence, Indian courts have therefore interpreted marriage to be an essential right under Article 21 of the Constitution.²

Index Terms: Marriage, Third Gender, KamSutra, Equal Rights

Introduction

The Supreme Court landmark decision National Legal Services Authority Vs. Union of India³ held that transgender people to be a third gender and also declared that the fundamental rights granted under the Indian Constitution equally applicable to the transgender. It is major step towards gender equality in India. Third genders are economically and socially backward and their rights are also frequently violated, so they will be granted reservations in admission to education and employment.

The Third gender is free to choose their identity of male or female. But here big questions arise that are they have right to marry?

We are living in the democratic country. In India different types of religion peoples are living and for marriage, divorce, maintenance, succession, adoption and guardian we have different personal laws. Here question raise is that if third gender wants to marry or adopt the child whom legal provisions attract?

According to the Indian Constitution, the right to life and personal liberty under Article 21 of the constitution does not merely provide for a physical existence, rather it implies the existence of human life which is qualitative and meaningful.⁴ The right to marry being crucial for retaining individual dignity and enjoying a meaningful human existence, Indian courts have therefore interpreted marriage to be an essential right under Article 21 of the Constitution.⁵ According to Article 16 of Universal Declaration of Human Rights right to marry and to found family is human right. Covenant on Civil and Political Rights consists of 53 Articles and in Part III deals with the Substantive rights of the individuals and the obligations of the States Parties not to violate human rights. In this Covenant, Article 17 provides that individual has right to privacy, family, home or correspondence and Article 23 provides right to marry and found family.

Research Methodology

This research work is purely doctrinal. For this researcher has refereed different articles, news papers, books, journals etc.

¹ Marvin Mahan Ellison & Judith Plaskow, *Heterosexism in Contemporary World Religion: Problem and Prospect* 219 (Cleveland: Pilgrim, 2007).

² Mr. X vs. Hospital Z, AIR 1999 SC 495.

³ AIR 2014 SC 1863, at 14

⁴ Olga Tellis and Ors. Vs. Bombay Municipal Corporation and Ors. (1985) 3 SCC 545.

⁵ Mr. X vs. Hospital Z, AIR 1999 SC 495.

Objects

The main object of this research work is to evaluate position of third gender in marriage and adoption.

Hindu Personal Laws in Marriage

Among Hindus marriage is a necessary *samskar*; every Hindu must marry. The man is incomplete without his wife, and it is a wife who completes him. The Brahmanas proclaimed, “The wife is verily the half of the husband”.⁶ According to Hindu Vedic Scriptures, Marriage has eight different forms; *brahma*, *asura*, *daiva*, *arsha*, *prajapatya*, *paisaca*, *rakshasa* and *gandharva*.⁷ Gandharva marriage is most commonly and accepted marriage and this type of marriage is also supported by third gender if accompanied by mutual love and affection and only qualifications are accompanied by the performance of relevant ceremonies and customs.⁸ In a earlier vedic society, third gender people are bestowed with all the liberties and basic rights including that of marriage which were guaranteed to any other individual⁹. Third sex citizen’s existence & marriage were also recognized in “*kamsutra*”¹⁰.

We have not any specific definition of marriage. According to the different authors we have different definitions and explanations of marriage.

Edward Westermarck in his “History of Human Marriage” defines marriage as “the more or less durable connection between male and female lasting beyond the mere act of propagation till after the birth of offspring.”¹¹

Malinowski says that marriage is a “contract for the production and maintenance of children.”¹²

According to *Robert H. Lowie*, “Marriage is a relatively permanent bond between permissible mates.”¹³

Section 5 of the Hindu Marriage Act provided conditions for a valid marriage. In this clause (iii) the bridegroom has completed the age of twenty one years and the bride, the age of eighteen years at the time of the marriage.

Here one big question arise that what is the actual position of third gender marriage. Whether third gender is bride or bridegroom. According to the Supreme Court judgment National Legal Service Authority¹⁴ recognized third sex people as a separate class apart from the straightjacket classification of gender as male and female, along with recognizing their civil right to vote, to receive education and to contest elections as well as to marry, to receive inheritance and to adopt children. Thus, gender recognition is the first step towards acknowledging the need and creating an enforcement mechanism for the array of human rights that every citizen including third-sex people are entitled to. Multiple problems faced by the third gender community with respect to marriage and other rights necessitate a variety of solutions and actions which need to be reflected in policies and the laws, and in the attitude of the government and the general public. It is a one of the welcome step that most of them find it difficult to change their sex in the records after a surgery and claiming rights as particular gender. But this judgment is some contrary. Through this judgment third gender is not solve their problems.

⁶ Manusmiriti IX, 64-68.

⁷ R ajbali Pandey, *Hindu Samakaras: Socio-Religious Study of the Hindu Sacraments* (2nd ed., Delhi: Motilal Banarasidass Publishers, 1969).

⁸ See, e.g., *Bhaurao Shankar Lokhande & Anr v. State of Maharashtra & Anr.*, AIR 1965 SC 1564 (“The two ceremonies essential to the validity of a Hindu marriage, i.e. invocation before the sacred fire and *sapatapadi*, are also a requisite part of a ‘Gandharva’ marriage, unless it is shown that some modification of these ceremonies has been introduced by custom in any particular community or caste.”).

⁹ A mara Das Wilhelm, *Tritiya-Prakriti: People of the Third Sex: Understanding Homosexuality, Transgender Identity, and Intersex Conditions Through Hinduism* (Philadelphia: Xlibris Corporation, 2004).

¹⁰ M arvin Mahan Ellison & Judith Plaskow, *Heterosexism in Contemporary World Religion: Problem and Prospect* 219 (Cleveland: Pilgrim, 2007).

¹¹ C.N. Shankar Rao, *Sociology, Principles of Sociology with an Introduction to Social Thought* p.327 (6h ed. 2007).

¹² *Ibid* p. 327

¹³ *Ibid* p. 327

¹⁴ National Legal Services Authority Vs. Union of India & Ors. AIR 2014 SC 1863

For marriage purpose we have no any specific laws of third gender. The General Clauses Act, 1897 states that unless there is anything in the subject or context, words importing the masculine gender shall be taken to include females.

According to the Indian Penal Code, Section 377 a same-sex relationship is an "unnatural offence" and punishable by a 10-year jail term.

Sexual intercourse is one of the parts of marriage and the Supreme Court has given judgment in the favour of third gender but our other legislations are not support of this judgment. For proper implementation of direction of Supreme Court is require that to make necessary amendments in other relevant legislations.

Even in the Marriage Registration Act we have not any special category of third gender. Even though the country has no law about same sex or transgender marriage on the books – Nepal registered its first ever transgender marriage. Nepal has only 30 million population even though this historical decisions taken by them and we are just talking about equal rights and their problems.

Conclusions

Equality is one of the main liberal aspirations and a fundamental assumption of a democratic society. It is included in all human rights documents in one form or another, and these provisions attempt to give it a legal meaning. However, equality as a concept is neither definite nor clear and its contents can be debated. Despite the historical importance of transgender individuals and direction of Supreme Court in India, these people were denied basic rights, the ability to vote, medical care, education, fair employment opportunities, and were often forced into poverty in their own country. They were ostracized by their communities for self-determining their gender.

Suggestion

For equal rights of transgender just we talk is not enough. It's time to remove all hurdles. According to the National Legal Service Authority we recognize as separate legal entity and also given freedom to them for choose their gender. But just one direction we have not succeeded. It also requires amending laws. It is require amending personal laws, adoption, inheritance laws, Indian Penal Code, Constitutions, and The Marriage Registration Act. The Special Marriage Act, Guardians Act etc.

References

1. Family Law, Dr. Paras Diwan, Allahabad Law Agency
2. The Hindu Marriage Act, 1955 (25 of 1955) Bare Act, Universal Publishing, 2017
3. The Constitution of India, Dr. J.N. Pandey,
4. AIR 2014 SC 1863, at 14
5. Olga Tellis and Ors. Vs. Bombay Municipal Corporation and Ors. (1985) 3 SCC 545.
6. Mr. X vs. Hospital Z, AIR 1999 SC 495.
7. Manusmriti IX, 64-68.
8. R ajbali Pandey, Hindu Samakaras: Socio-Religious Study of the Hindu Sacraments (2nd ed., Delhi: Motilal Banarasidass Publishers, 1969).
9. See, e.g., Bhaurao Shankar Lokhande & Anr v. State of Maharashtra & Anr., AIR 1965 SC 1564 ("The two ceremonies essential to the validity of a Hindu marriage, i.e. invocation before the sacred fire and sapatapadi, are also a requisite part of a 'Gandharva' marriage, unless it is shown that some modification of these ceremonies has been introduced by custom in any particular community or caste.").
10. A mara Das Wilhelm, *Tritiya-Prakriti: People of the Third Sex: Understanding Homosexuality, Transgender Identity, and Intersex Conditions Through Hinduism* (Philadelphia: Xlibris Corporation, 2004).
11. Marvin Mahan Ellison & Judith Plaskow, *Heterosexism in Contemporary World Religion: Problem and Prospect* 219 (Cleveland: Pilgrim, 2007).
12. C.N. Shankar Rao, *Sociology, Principles of Sociology with an Introduction to Social Thought* p.327 (6h ed. 2007).