



GENDER JUSTICE: LEGAL STATUS OF NON-BINARY IN INDIAN SOCIETY

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ABSTRACT

The term third gender describes about individuals who identify as exclusively masculine or feminine termed as Non-binary. Non-binary means that we can't identify them as totally masculine or feminine, rather somewhere in between or totally different. Non-binary community in India is an important part of society. Even law cannot deny their existence and constitution also guarantees the third gender have their basic right like Right to dignity, Personal liberty, Educational freedom of expression etc. These individuals are generally denied by their family and society too. The study also covers that the third gender is excluded from the society and what the law and order is doing to convert that social exclusion into social inclusion. People of non-binary category face severe discrimination and harassment in all respect of contemporary India. They are subjected to unfair treatments like verbal abuse, physical and sexual violence, false arrests, denial of share in their ancestral property, services and admissions to educational institutions and victimization in family, institution, workplace etc. The golden threads that run through the equality scheme of the Indian Constitution (Art 14, 15, 16, 19 and 21) is enjoyment of life by all citizens and equal opportunity to grow as human being in irrespective of their race, caste, religion, community, social status and gender. Recently, in the wake of 'Nalsa judgment', the Indian parliament enacted The Transgender Persons (Protection of Rights) Act, 2019.

Key words: NON-Binary, Sexual-violence, Social exclusion, Social inclusion, Harassment.

“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 said phrase, in its basic sense, conveys that what really matters is the essential qualities of the substance and the fundamental characteristics of an entity but not the name by which it or a person is called.”

INTRODUCTION

The transgender community in India includes Hijras, Eunuchs, Aravanis, Jogappas, Shiv Shaktis and others who have been a part of Indian society for centuries. Vedic and Puranic literature mention 'Tritiyaprakriti,' meaning the Third gender and Napunsak meaning someone with non procreative abilities.

Non binary entities have historical presence in Indian society, but moral policing, and societal norms have rejected their recognition and acceptance. National surveys in most countries, including India follow a binary gender framework, resulting in the no visibility of non-binary genders in the collected data. This lack of visibility and recognition of gender- diverse population leads to disparities in different areas such as healthcare, education, employment, housing and social security. It is a need of an hour to extend gender categories to include non –binary options in national surveys of India to rise visibility, address marginalization, and facilitate a better understanding of the perspectives and requirements of gender incongruent individuals.¹

The LGBTQ group which stands for 'Lesbian, Gay, Bisexual, Transgender and Queer community' while lesbians and gay individuals have gained acceptance in various part of the world but transgender individuals still face significant challenges and lack of comprehensive rights.

Research on the third gender enriches broader discussions on gender diversity, inclusivity, and social justice by questioning entrenched gender norms. It investigates intersections between gender and other social dimensions like sexuality, race, class, and religion, offering a thorough examination of the lived experiences of individuals identifying as third gender. Ultimately, embracing and understanding the concept of the third gender promotes societal progress, enhancing awareness, empathy, and acceptance for people of diverse gender identities, and advancing toward a more fair and inclusive society.

In cultures that have not undergone hetero normativity, they are usually seen as acceptable sexual partners for the masculine males as long as later always maintain the "active" role. The very sight of eunuchs speaks volumes about them .Dressed in ill- fitting, loud clothes and face caked with cheap make-up, they roam about in public places try to extract money from any person who seems susceptible to part with it, generally as a way to get away from them. These members are not ordinary beggars, they are eunuchs castrated males who are typically know to dress like women, heavy voice and are identified by their prototypes clap.

¹ Majumdar, R. C., Raychaudhari, H. C., & Datta, Kalikinkar. (1950). *An Advanced History of India*. New York: Macmillan & Co.

OBJECTIVE OF THE STUDY

The objective of the research paper is to analyze measures taken by the state as well as central government to make laws and policies for the protection of rights and needs of gender identities of non-binary and also to make their presence in education and employment system in India.

RESEARCH METHODOLOGY

The study employs a historical methodology centered on textual analysis.

Primary sources such as the Kamasutra, Manusmṛti, Nārada Smṛti, and the Arthaśāstra are examined, alongside secondary sources comprising books, articles, and reports.

The study is designed as exploratory in nature.

HISTORY OF TRANSGENDER IN INDIA

The India mythology is the proof that in permissive time the transgender are the once venerated and appreciated to great extent, there are many example of deities which are venerated in permissive and today also for example Ardhanarishvara, formed by integrations of Lord Shiva and Pārbati.² The transgender group includes shivshakits, jogappas, eunuchs, kothis , Aravanis.

These are also described as pumspraktistri-prakrti (female-nature) and tritiya-prakrti (third-nature) in the Kama Sutra (4th century AD) and other places.

The text of Mahabharata and Ramayana are treasure box for the references of the transgender people. Manu Smriti also explains three categories of sex: A male child is produced by greater amount of male seed, a female child is produced by greater amount of female seed, if amount of both male and female seed is equal then the third sex child is produced. From Mahabharata "Shrikhandi" is probably the most powerful trans. figure found in the Hindu Mythology, another example in Ramayana when Lord Rama exile the kingdom and he was for the 14 years. His followers followed him to the forest but he request to all the "men and women" to return back to the Ayodhya.

The transgender people are hijras stayed back with Lord Rama. The very first reference of transgender is the "Mohini" (Female avatar of Vishnu). The literal meaning to Mohini is "enchantress". Mahabharata provide the traces of Mohini when the devas and asuras had churned asuras had churned the ocean with the assistance of Vishnu in the form of Kurma (tortoise) avatar to acquire Amrit. Another traces of Mohini has been found in Vishnu Purana. Ling Purana provide the ascribed to the merging of Shiva and Mohini

² Marwick, A. (1970). *Nature of History: Knowledge, Evidence and Nature* (p. 39). Germany: Red Global Press.

(Vishnu). This story is also similar to the creation of the Ayyappa (who is also known as Hariharaputra- son of Shiva and Vishnu).³

During the Mughal Empire (1526-1887), hijras were known for positions held in Royal Courts as Political advisors, administrators, generals as well as guardians of the harems. They even occupied high positions in the Islamic religious institutions and were also able to influence state decisions. Later, these benefits were removed through legislation in the British period.

NON BINARY IN PRESENT TIMES

The onset of modernity and Western influence has been linked to the imposition of gender binaries in Indian society. This shift has marginalized cultural identities of third genders such as Hijra, Aravani, Jogappa, Shiva-shakti, Kinnar, and Sakhi-Bekhi, forcing them into obscurity or the fringes of society. Many families reject gender-nonconforming behavior in their children, and until recently, legal frameworks predominantly adhered to binary classifications, neglecting acknowledgment of third genders or those with identities opposite to their assigned sex at birth. Transgender individuals living with their families often face attempts at "therapeutic" interventions.⁴

Discrimination against transgender individuals persists even after death, as they often encounter refusals from burial grounds or crematoriums to grant access or facilities. Culturally, there remains a belief that transgender individuals must be cremated at night, with people avoiding the deceased's body due to superstitions about auspiciousness.⁵

Beyond socio-economic challenges, transgender and gender non-conforming individuals, such as hijras, also encounter difficulties in exercising their citizenship rights. Despite successes in contested elections at the local, state, and national levels, where hijras have become mayors and MLAs, they continue to face significant barriers in achieving adequate representation in the political sphere.

The issue of transgender rights took considerable time to gain prominence, and only recently has their exclusion been widely acknowledged. The Supreme Court ruling in 2014 opened new avenues for inclusion of transgender individuals in India. However, criticisms suggest that the ruling remains insufficient in addressing the structural inequalities and injustices faced by transgender people in their daily lives.

³ Sharma, P. (2012). Historical background and legal status of third gender in Indian society. *International Journal of Research in Economics & Social Sciences (IJRESS)*, 2(12).

⁴ Moran, L., & Sharpe, A. (2004). Violence, identity and policing: The case of violence against transgender people. *Criminal Justice*, 4(4), 395-417.

⁵ Wilhelm, A. D. (2013). *Tritiya Prakriti: People of The Third Sex* (p. 56). Philadelphia: Xlibris Corporation.

LEGAL STATUS OF NON BINARY

Disowned by their families in their childhood and ridiculed and abused by everyone as "hijra" or non-binary, non-binary earn their livelihood by dancing at the beat of drums and often resort to obscene postures but their pain and agony is not generally noticed and this demand is just a reminder of how helpless and neglected this section of society is. Thousands of welfare schemes have been launched by the government but these are only for men and women and non-binary do not figure anywhere and this demand only showed mirror to society. The Constitution gives rights on the basis of citizenship and on the grounds of gender but the gross discrimination on the part of our legislature is evident. The Constitution, while it contains certain prohibited grounds of discrimination such as race, caste, creed, sex etc., does not specifically include sexual orientation. A reading of Section 13 of General Clauses Act, 1897 which talks about gender and number makes the discrimination more apparent. It says "wards importing masculine gender shall be taken to include females". This in itself shows that the law makers did not take cognizance of non-binary.

Legal Discrimination against the sexual minorities takes many forms, the most notorious being section 377 of the Indian penal code (IPC). It reads:⁶ "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment for life or with description for a term of which may extend to 10 years and also be liable to fine." There is no mention of non-binary in this section, even as non-binary are known to engage in prostitution. Neither the Hindu Marriage Act nor the Special Marriage Act mentions non-binary. Degree of prohibited relationship refers to any relationship between a man and woman that is mentioned in part I and part II of the first schedule of the Act. The focus is on the male and the females sexes. The 'non-binary' has conveniently been ignored. A BBC correspondent covering a non-binary festival in Bangalore, 2003 quoted a non-binary complain that due to their social unacceptability.

The main cause for discrimination is the mindset of the society at large. Owing to the fact that these people are different in matters of their sexual preference and are strong enough to show it, the society sees it as a violation of a norm and thus subjects them to isolation. Family and popular play a predominant role in perpetuating the present dilemma law needs to step in to ensure that a relatively small but deeply aggrieved humiliate section of the civil society is given its rights guaranteed by the Constitution of the land.

CONSTITUTIONAL PROTECTION

The National Legal Services Authority (NALSA) asserted that "the social liberties of an individual must be protected irrespective of their gender identity, self-expression, and decision to undergo surgical (sex-reassignment) intervention." NALSA sought the recognition of 'Transgender' as a third gender, arguing that Articles 14, 15, and 21 of the Indian Constitution encompass the rights of transgender persons, including

⁶ Gaur, K. D. (2020). *Text book on Indian Penal Code* (7th ed.)

'Hijras'. They successfully argued that transgender individuals, like males and females, should have the freedom to express their gender identity openly.

In a landmark judgment in 2014, the Indian Supreme Court acknowledged the legal and constitutional rights of transgender persons. This ruling enabled transgender Indians to designate their gender status as male or female according to their preference, or alternatively to choose a 'third gender' category if they did not fit neatly into either.⁷

To grow as human being in irrespective of their race, caste, religion, community, social status and gender, Our Constitution is a tryst with destiny, preamble with lucent solemnity in the words 'Justice – social, economic and political'. Our Constitution is a tryst with destiny, preamble with lucent solemnity in the words 'Justice – social, economic and political'. When our country got independence we decided to promise every Indian a life which was filled with dignity, offered equality to all, and promised development in all aspects of life. A happy family is a part of what one can call living life with dignity. It was through a dream for a lot of people. These were the people belonging to the LGBTQ. Especially people belonging to the transgender family. One of the most distinctive features of our constitution is that it says no to any form of discrimination. This helps in establishing a system which gives an equal opportunity to every citizen to grow, to reach the highest point of their potential. Our constitution in its article says 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."⁸ The golden threads that run through the equality scheme of the Indian Const. (Article-14, 15, 16,19 & 21) is enjoyment of life by all citizens and equal opportunity Recently, in the wake of 'NALSA Judgment' the Indian parliament enacted the Transgender persons (Protection of Rights) Act, 2019.

The passing of the Transgender Persons (Protection of Rights) Act in 2019 marks a significant development. Against the backdrop of contemporary legislative changes and global shifts, the topic has gained renewed relevance.

Many contemporary third gender and transgender groups in India argue that traditional Indian society recognized and accepted a diversity of transgender identities prior to colonial influence. They contend that Hinduism, in particular, maintained a relatively inclusive stance toward gender variance and homosexuality. It is suggested that classical Hindu texts, notably the Kāmasūtra, did not view ambiguity of sexual identity or orientation with apprehension, nor did they attempt to rectify it.⁹

⁷ "National Legal Services Authority versus Union of India and others". *Supreme Court Cases*, 5, 438. (2014).

⁸Mahajan, N. (2020). Rights of adoption of transgender. *International Journal of Law Management & Humanities*, 3(3). Retrieved June 26, 2024, from <https://www.ijlmh.com/wp-content/uploads/Rights-of-Adoption-of-Transgenders.pdf>

⁹ *Transgender Persons (Protection of Rights) Bill, 2019*. Retrieved June 28, 2024, from <https://www.prsindia.org/billtrack/transgender-persons-protection-rights-bill-2019>

Supreme Court of India in National legal service authority v. Union of India¹⁰

- The third gender people will be considered as OBCs. They will be given educational and employment reservation as OBCs.
- The Supreme Court also said States and the Centre will provide social welfare schemes for non binary community and run a public awareness campaign to erase the negative public images.
- The Supreme Court also said that the states must provide special public toilets and provide assistance for special medical issues.

In Navtej Singh Johar v Union of India,¹¹

The Supreme Court of India held that, Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. The Constitution-makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders. Both gender and biological attributes constitute distinct components of sex. The biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of sex under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression sex used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider they to be neither male nor female.

In so far as Article 19(1)(a) of the Constitution and transgender were concerned, the Court held:

Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19 (1)(a) of the Constitution of India. A transgender's personality could be expressed by the transgender's behavior and presentation. State cannot prohibit, restrict or interfere with a transgender expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognize those rights.

In a significant paragraph relating to the personal autonomy of an individual, this Court held: Article 21, as already indicated, guarantees the protection of personal autonomy of an individual. In *Anuj Garg v. Hotel Assn. of India*¹² this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express

¹⁰ "(2014) 5 SCC 538":

¹¹ "AIR 2018 SC 4321"

¹² (2008)3SCC1

themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.

CONTEMPORARY DEVELOPMENT

- The 11th version of the International Classification of Diseases, which eliminated Trans categories from the chapter on "Mental and Behavioral Disorders," was accepted by the World Health Assembly in May 2019. Therefore, it is no longer considered to be a condition or mental illness to identify as transgender.
- In terms of gender minorities' rights and legal recognition, India has likewise made great strides in recent years. The Transgender Persons (Protection of Rights) Act of 2019 and the Supreme Court of India's decision in the historic case of NALSA versus The Union of India, which recognized the existence of people who identify as gender nonconforming, are two examples of actions taken in the direction of greater inclusion and recognition.
- The Indian government has implemented numerous welfare policies and programs in the modern era, including documentation requirements, citizenship ID card issuance, passport issuance, social and economic development, and constitutional protections for transgender individuals.
- The 2011 Census marked the first national survey in India to recognize the gender nonconforming community, including the option for people to identify as "others" in the gender category. This provided those who don't identify as strictly male or female another option to express their gender.
- The Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA), significant project of 11th five year plan provided transgender with employment opportunities.
- Joyita Mondal is India's first transgender judge and stands as an epitome of hard work, dedication and perseverance. Her work ignites hope for transgender all around the world.
- Shabnam "Mausi" Bano ("Mausi" noun. Hindi - "Aunty") is the first transgender Indian to be elected to public office (MLA). She was an elected member of the Madhya Pradesh State Legislative Assembly from 1998 to 2003. (Hijras were granted voting rights in 1994 in India.)
- Kerala native Sruthy Sithara on Wednesday was crowned as Miss Trans Global 2021. According to a report in The New Indian Express, Sithara received the award on December 1 in her hometown, Vaikom in Kerala, during an online event. She became the first Indian to win this title
- Joshi won Miss World Diversity beauty pageant three times in a row. She is India's first transgender cover model. She is the world's first trans woman to win international beauty pageant with cisgender women. Naaz is India's first transgender show stopper
- Aishwarya Rutuparna Pradhan is India's first openly transgender civil servant, working in the Odisha Financial Services as a commercial tax officer. Pradhan successfully joined the OFS in 2010 as Ratikanta Pradhan.

- Narthaki Nataraj is a Bharatanatyam dancer. In 2019, she was awarded the Padma Shri, making her the first transgender woman to be awarded India's fourth-highest civilian award.
- Country's first university for transgender community will be opened in Uttar Pradesh's Kushinagar district to facilitate its members to study right from class one to PG and even do research and get PhD degree. The university, which will come up in Fazilnagar block of Kushinagar district, is being built by the Akhil Bhartiya Kinnar Siksha Seva Trust (All-India transgender education service trust).
- Including non-binary gender options in national surveys will help increase visibility and recognition for non-binary people and address the marginalization and discrimination that non-binary people often face. It will also lead to more accurate and comprehensive data collection on gender identity which will facilitate researchers and policy makers to understand the experiences and needs of non-binary people in a better way and meet their needs.

CONCLUSION AND SUGGESTION

It is distinctly clear from the above observation that transgender individuals with different sexual orientation face intolerance, discrimination and exclusion in the society. This isolation varies from private reasons to the most common social incomprehension.

While judiciary has taken a significant step to remove the stigma attached to the third gender, it is our turn to recognize the true implication of this judgment and prioritize its enforcement, while throwing money at hijras to spurn them away. We are not just insulting these individuals but are relegating the very basic principle of humanity; even curs are better treated by the love of humanity. Such actions will only lead the transgender community to toil and struggle in the some quagmire of inclignity that they have been facing for generations together.

Transgender persons experience ostracism in a variety of ways, despite having a rich and varied history that includes becoming Hindu mythological heroes and deities. It is only recently that they have been given the chance to integrate into society and the necessary social security. Integration of this marginalized community is much needed. The inclusion of non-binary gender options can also present challenges in implementation and arouse issues related to data analysis and privacy. This would require a shift in the way that gender is conceptualized and measured in Indian society, and would likely require consultation and collaboration with non-binary individuals and communities.