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## Right of the third gender: The incessant struggle

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**Abstract**--In today's era and age, the identity of the individual is described by society's opinion and accordingly that plays a very important role in today's world, but few individuals don't bother about society's opinions and live their life according to their own choices, those individuals are called others. We may think that third-gender people are getting equal rights by our Constitution but in the end, we all know that they are not treated equally by our society. Many problems have been solved and many are to be solved, Different courts have given judgements concerning protecting the rights and dignity of the third Gender persons, but there are some loopholes in the society i.e., they are not able to avail themselves of their rights even after they have been granted. The case played an important role in the context of preserving or attaining the rights of the third gender persons. The Fundamental Rights portion of the Constitution guarantees protection to all persons, with some rights reserved for citizens exclusively. The COI does not create any more distinctions between the rights holders after this classification. Justice — communal and governmental equality of position – is mandated in the Preamble of the Indian Constitution.

**Keywords**--Fundamental Rights, Third Gender, Constitution, Other, Hijra, India, Equality, Human Rights.

## Introduction

Nature made a mistake, which I have corrected

By Christine Jorgensen

Transgender is a phrase that describes a range of persons whose identity, expression, behaviour, or a general sense of self does not correspond to the sex to which they were born. It's generally argued that sex is a physical issue, whereas gender is a mental one. Gender talks to an individual integral perception of existence, woman, or non-binary. People frequently use binary terms to define gender, such as masculine or feminine, much as they do when referring to sex. Gender, on the other hand, is more complicated and involves more than simply two options. Gender is influenced by culture, class, and ethnicity since what is acceptable in one community or group may not be acceptable in another.

Trans sex people have a distinct personal identity than the gender they were intended to be hereditary with. The term "trans" is frequently used as a transcription for third-gender people. Medicinal practitioners frequently state that we are masculine or feminine at birth and hold up our corporal aspect (Dixit P. K., 2019). The popular people who have been born as males age into men, while the general public who were born as females mature into women. However, some people's identities are innately aware of who they are and are distinct from what was anticipated of them when they were birthed. The majority of those individuals identify as transgender. Some transgender lives as women today yet have life assumed to exist as men while they were born, while transgender men live as men today but were to be female when they were born. Some transgender, describe themselves as male nor female, nor as a combination of both. Non-binary and genderqueer are two phrases used by people who are neither male nor female to describe their own identity.

India has roughly a million transgender people, according to estimates. Hijra is a term used in India to refer to transgenders, transsexuals, crossdressers, eunuchs, and transvestites. They live on the outskirts of society, often in poverty, and are shunned because of their gender identity. The majority of people make a living by singing and dancing, as well as begging and prostitution. Hijras are nor men neither female, as well as they, profess to exist in an organisational "Third Gender" because they arise unable to reproduce as either men or women.

## History of the third gender in India

The other gender is a sex in which people are classified as neither men nor women, either by themselves or by society. According to texts, the third gender was well-known in premodern India and encompassed both male and female-bodied individuals as well as intersex individuals. From ancient times Indian kings have been praising them and letting them work in their palaces and their army. In Mahabharata and Ramayana, shikhandi was used to kill bhishmpitamah for the win of the Pandavas is that Dharam, another episode in Mahabharata when Arjun has to play the role of brihandala for a year as he has been cursed. (<https://triumphias.com>, 2022) As lord Ram addressed their men and women to go back to the Ayodhya and so hijras were left in this and they

went to visit lord ram to give blessings. As in the Mughal Empire third gender was used for the security of 'Harams' is where the begums of Muslim kings stayed and they were also given a recognised place in Royal courts. But in the rule of the Britishers, the importance that was given to the third gender was not in continuance and they lack their status and opportunities in society.

### **Third Gender: Aeon in the 21<sup>st</sup> century**

In India, if we talk about the third gender, there is a mainstream society concerning the third gender is Hijras. They were treated normally in the eye of society in that they have accepted their existence in society and some people treat them as consecrated. After being accepted by society, no legislation recognises them as a different gender. Concerning this hijra community protested to a large extent, in 2005 they got recognition as the third gender and the passport form got updated with the option of the third gender i.e., Male, Female and eunuch (Hijra). In November 2009, The Government of India tried to reconcile the 'Transgender' and 'eunuchs' under the same umbrella as 'Other'. In 2014 the Honourable court of India in NLSA vs. UOI notices that the other gender is unique from the other two defined genders and they were considered as the other gender. and from now on every application form has three genders i.e. Male, Female and third gender to restore the dignity of the individual. (<https://translaw.clpr.org.in>, 2022). These steps were taken by the government of India to integrate the other gender into society but these steps have not given the up to mark results because society accepted the transgender. People do not admit them as the third gender and treat transgender as male and female and adding them to others is not an appropriate decision.

Changing times have also seen various other evolution, nowadays transgenders are fighting for elections and even winning them, even at the municipal levels, transgender was elected. This shows that we are going on the right track to gathering society. (Dixit, 2022). Facebook has expanded the gender options on user profiles. There are about fifty new choices, inclusive of "cisgender" and "neutrois" (someone who completely discard a gender binary), and simply "other.". In 2015, World Health Organisation has provided a recommendation that is going to be used in the whole nation. Following this guideline, no medical or otherwise prejudice is to be done against trans sex.

### **Third gender marriage**

Marriage is regarded as one of the most significant components of a person's character, both financially as well as legally. The institution of marriage, which is a lawfully defined connection between two people, has significant societal importance because it confers significant rights and obligations, particularly in the areas of property, succession, inheritance, as well as associated integrity. Marriage is now a national and international idea as well as an accepted community-based privilege for all residents of the sector. It is for this reason that the imposition of the wedding as a civil right is crucial to the executive authority, particularly in terms of all the laws and policies that are drawn from it, as well as in terms of regulating the institution of marriage. In this essay, we will discuss

transgender marriage rights as well as privileges granted to transgenders. (<http://delevensschool.org>, n.d.)

As a consequence of shifting public beliefs and views on a variety of subjects, together with gender and sexual orientation, marriage legislations rapidly alter across the country. As governments try to keep up with the pace of development, new legal judgements and regulations may outdate ones, posing a variety of legal issues. *Obergefell v. Hodges* was a landmark Supreme Court decision that legalised identical-gender weddings in the US. Before this landmark ruling, third-gender couples frequently came across slow legitimate obstacles in their wedding. Premarital sex, for example, increases the likelihood of same-sex marriage. When they engage or live in same-sex marriages, however, they may confront additional hurdles. This can affect a variety of sectors, including employment, living, hospital visits, and indemnification plans.

Third-gender people usually have a different gender identity than the gender recorded on their childbirth certificates. Third-gender individuals might choose to utilise hormone therapy or undergo surgery to conceal their actual recognition. Some intermediate intermediaries alter their legal identity as well as in some areas, their sex on certificates of birth and driver's licences as part of their transformation process.

### **Legislative Approach**

Justice, social, economic, and political equality – is enshrined in the Preamble of the Constitution. The state never refuses anyone's impartiality before the regulation or uniform preservation under the principle, which is the first and most fundamental right to those who merit it under Article 14. (<https://www.learnhowtobecome.org>, n.d.) Prejudice related to religion, citizen, sex, or location of birthplace is prohibited under Article 15.

According to article 21, all the people living in the nation have the right to seclusion and individual nobility.

Bondage as beggars and other appearances of obligatory employment is prohibited under Article 23, and any breach of these laws is a criminal offence. The Constitution of India promises everyone the right to impartiality and says no prejudice related to sex, sectarianism, religion, or belief. All people are pledged ministerial integrity and other perks under the Constitution. Third parties (transmitters) are nevertheless subjected to discrimination. The Constitution of India also talks about equality in all areas, but the question that arises at this stage is whether it is followed or not. According to the constitution of India, the major protection provided by the Fundamental Rights are equally accessible to everyone, with some rights reticent for citizens alone. The Constitution does not discriminate between rights holders without this provision.

Professional identical documents, on the other hand, provide a public identity. Gender identity is one of the most essential as well as indisputable classifications in which the Indian state defines humankind. The Indian government requires a gender-based identity card as part of public ownership. India's stance of only admitting cross-sexual and denying to acknowledge Kinnars as women or as a

third party (if hijra asks for it) denies them many of the rights that Indian citizens enjoy. The right to select the leader of one's own choice (vote), the right to possess estates, the right to do weddings according to the choice, the right to profess proprietorship of a passport, a driver's licence, and the right to attain knowledge, work, and well-being care is among these rights. The hijras are thus cut off from Indian society.

The equality program's concept is based on the awareness and acceptance of the "Right to Choose" and "Determination." The right to self-determination and dignity is inextricably linked to the determination of a person's gender. The Indian laws are substantially double-barreled and recognise two recognised genders. The honourable supreme court of India has provided this as of 15 April 2014 :

“ NALSA's judgment affirmed that the third gender has been granted the fundamental right to uniform to the male and female gender and gave them the right to self-identify as the third gender and some reservation were also going to be made for the upliftment of these people as there are not treated equally”.

The other gender Individual Act 2019 provides safeguard on these conditions:

#### 1. Prohibition of discrimination against transgender individuals

prejudice involves the rebuttal or cessation of approach to or pleasure of or unjust therapy in academic institutions; utilization; medical care services; any products, living quarters, or facility intended for public use; freedom of movement; the right to acquire, inhabit, buy, hire, or otherwise empty the property; the chance to run for or hold governmental workplace; and any formulation in custody a third gender individual is (Bali, 2022).

#### 2. Recognition of identity

Third-gender people's identities are recognised, and they have the equitable ability to acquire a guarantee of oneness from the appropriate state authorities as proof of that recognition.

#### 3. Welfare measures

Conceptualisation as well as ratification of welfare measures, strategy, and programmes for literacy, community-based security, healthcare, and effective participation in society by appropriate state governments, as well as facilitation of access to these programmes and security measures.

#### 4. Rehabilitation and right of residence

saviour as well as recovery measures, together with the integrity to live, are provided by the relevant state governments. (Dixit P. ., 2022)

#### 5. Obligation and Establishment

Anyone who has been confirmed by or in the process of a central or state act, or anyone possesses, managed, or assisted by the ministerial, or any firm or body of the individual, organisation, collective, other communal, belief, or institution, is referred to as an "establishment”.

Establishments are required by Chapter V to make sure following the Act and that gives opportunity as written by the Act for that time. In affairs about service, along with but does not restrict to appointment, advancement, and other similar matters, the formulation should not discriminate against 3<sup>rd</sup> gender and should dispense a sufficient grievance redressal mechanism to compact with a problem associated to Act infringement and in the workspace.

#### 6. National Council for Transgender Persons

The initiative of the global committee for other gender people. The global committee tend to carry out the work given to it by the enactment, which

includes, but is not restricted to, publicizing related collaborators on the conclusion of strategy, schemes, legislation, and well-being considered, observing and assessing the collusion of blueprints and programmes outlined to ensure the involvement of Transgenders, and ensuring the amend of Transgender individuals' grievances, among with other things.

#### 7. Offences and Penalties

The enactment establishes punishments for crimes opposed third gender people.

Anybody who:

forces or tempt a trans person towards compulsory or thralldom(except for mandatory ministerial duties for a communal motive); denies the other gender individual the integrity communal lane or use of public places; forcibly take away a 3<sup>rd</sup> gender individual from a house, village, or another place of living; execute or tends to execute to commit an act intending bodily, erotic, barracking, mentally, or financial loss and/or hurt to a 3<sup>rd</sup> gender; must be penalised.

### **Third Gender in different Countries:**

#### **Nepal**

The Supreme Court of Nepal has ordered that the government add a transgender categorized ("other") to citizenship documents. Asia's first openly gay (Sunil Pant) United-level minister, and the originator of the Blue Diamond Society, A non-governmental organisation that works closely with trans sex workers, filed the anti-discrimination case regardless of the governing, other-gender individuals continue to report announced intimidation. Only five people had officially registered as "other" as of 2014, according to activists. (<https://phdessay.com>, n.d.)

#### **Pakistan**

The Supreme Court of Pakistan instructs the formulation of global cards that will allow hijras to identify as a gender.

#### **Australia**

The government of Australia has announced that a 3<sup>rd</sup>gender visa will be available. The new authorities, however, have restrictions: candidates who wish to choose "X" as their category must submit an application from a doctor confirming that they are androgyne or do not identify with the gender must be allowed since they were born. (in the same way, people who want to switch their identities—must provide a communication promising that they are proceeding through gender transition therapy.)

#### **Germany**

Germany has announced that parents will be able to lodge new ones on birth certificates as indeterminate. The law-making was enacted to reduce the coercion to perform urgent surgery on babies born with enigmatic physical characteristics. The German Ethics Council conducted an investigation that revealed issues caused by compulsory operations. "I will remain the patchwork created by doctors, bruised and scarred," one mature says of surgery carried out shortly after his birth, according to the BBC.

### Judicial approach

- (a) In the case of *Suresh Kumar Koushal vs. Naz Foundation* (Civil Appeal no. 10972 of 2013), Although Section 377 is dedicated to particular sexual behaviours, it has designated certain identities, including the Hijra, according to the ruling. Section 377 has also been utilised to harass and physically harm hijra and transgender persons, according to the report. The judgement just states that this is an abuse of the Section in contrast to what it mandates, rejecting to register a significant basic rights scrutiny to it. Now we get a conflicting result.
- It refutes Koushal's infamous minuscule minority' argument, arguing that transgender people, albeit small in number, are nonetheless masses who deserve to exercise their natural rights. The Court of law concluded that discrimination based on sexual inclination and identity breaches Article 14 and that transgender people are particularly vulnerable to persecution, brutality, and sex offence in public places, acceptance areas, and jails, as well as by the police officer. If we combine this with their determination that Section 377 is used to harass and physically assault transgender people, we might conclude that Section 377 fails the constitutional equality test. (<https://en.wikipedia.org>, n.d.)
- (b) In the case of the *National Legal Services Authority vs. Union of India* (AIR 2014 SC 1863), Gender and sex are not the same things. The biological determinant of human sex is decided at birth. The sex industry, on the other hand, is a different story. That is the reason why, after thoroughly debating global human rights in this regarded as, The SC of India ruled that Article 14 of the Constitution promises that the state will never repudiate the impartiality of "any person" before the law or equal protection of the laws within its specified territory, including converts. Transgender non-male/female people are considered 'persons,' and hence have the same legal rights as any other citizens of the country. prejudice based on sexual identity, then, is a violation of the law's equality and equal protection clauses. He noted that gender identity is part of a person's independence and encompasses his integrity to secular and regality, citing the ensured postulate in the NALSA judgement. In a statement to Srija, he added, "It is not up to the State authorities to examine the second applicant's choice here." (<https://translaw.clpr.org.in>, n.d.)
- (c) In the case of *Arun Kumar and Other vs. The Inspector General of Registration & Others* (W.P. NO. 4125 of 2019 MP High Court), The Hindu sacred wedding of Arun Kumar and Sreeja (a transwoman), which had been rejected registration by the Register of Marriages in Tuticorin, was affirmed by the Supreme Court. The refusal is based on Section 5 of the HMA, 1955, which states that a woman does not qualified to be a "bride." Far away from the reality of the lawsuit, the court considered the matter of the question of alternative, self-independent, as well as the privilege of expressing, eventually upholding transgender people's rights. The court initially stated that under Section 5 of the HMA, a marriage between a Hindu man and a Hindu woman is legitimate. The court went on to say that the establishment of sexual individuality shall breach equality before the law and violate Article 14 of COI. The sexual inclination is an intrinsic aspect of self-determination, according to the NALSA case, and is protected by civil rights provided under Article 21. The

candidate's decision to identify as a woman is within the limits of their sovereignty. On the other hand, this decision is a significant lawfully and social move ahead for 3<sup>rd</sup> gender, it is vital to recall that it only extends the ability to get married to those who identify as sexually active but are not homosexual. This judgement does not permit same-sex marriage, and under Article 21 of the COI, LGBTQIA people, as well as people as gay, lesbian or bisexual, have yet to be granted the basic right to tie the knot. (<https://translaw.clpr.org.in>, n.d.)

- (d) In the case of *P. Ramesh Kumar vs. Secretary, K. Annapuram Grama* (AIR 1998 Ker 95 II 1997 DMC 399), The court determined that his motion had been denied by a judge of the Supreme Court of Madras. The SC (Madras) underlined the significant degree of business suffered by 3<sup>rd</sup> gender in their household and local society in the case of Prithika, Yashini, court. As a result, the selection board was asked to create several performance benchmarks. The court ruled that the case of Prithika Yashini was not relevant to the current issue because it dealt with the protection of transgender people. It further noted that a written application cannot be used to argue whether the court should be more sympathetic to gender women than transgender women. (<https://indiankanoon.org>, 2022)
- (e) In the case of *Kantaro Kondagari @Kajol Vs State of Orissa and Others W.P.(C), NO. 4779 of 2022*, Subject The right of transgender people to choose their self-identified gender was supported in this case, and the Centre and state governments were ordered to recognise their gender identity as male, female, or third gender. Important stipulations Rule 56(1), 56(5)(d) of the Odisha Civil Services (Pension) Rules, 1992, Rule 5 of the Transgender Persons (Protection of Rights) Rules, 2020, and Section 6 of the Transgender Persons (Protection of Rights) Act, 2019

The petitioner's father, Balaji Kondagari, worked as an executive engineer for the Rural Development Department's RW Division in Rayagada. After the late Balaji Kondagari's death, his wife, Smt. Benjamin Kondagari was sanctioned and received the family pension. Due to old age-related health issues, Smt. Binjama Kondagari died on July 11, 2020. Following that, the current petitioner requested a family pension from the Executive Engineer RW Division, Rayagada, according to Rule 56 of the Odisha Civil Services (Pension) Rules, 1992. The current petitioner and her sister are unmarried, widowed, or divorced daughters, and thus qualify for a family pension.

Is a transgender daughter eligible for a family pension?

Even though Rule 56 of the Orissa Civil Services (Pension) Rules, 1992 permits the payment of a family pension to an unmarried daughter, the petitioner's lawyer, Mr Omkar Devdas, alleged that the authorities dismissed the petitioner's request for a family pension. It was also argued that the authorities had treated the petitioner unfairly because she was a transsexual woman and had failed to provide her with the family pension she was entitled to when her parents died. The petitioner's lawyer further claimed that the petitioner was a transsexual woman, as proven by a certificate issued by the District Magistrate on December 2, 2021.



The State's counsel, on the other hand, said that the case appeared to be unprocessed and that it was awaiting consideration at the Accountant General (A&E), Odisha, Bhubaneswar. He also claimed that the petitioner's case had already been recommended by the competent authority, namely the Ex. Engineer, R W division.

In the case of NALSA vs. Union of India, the petitioner cites the Supreme Court of India's ruling. All human beings are born free and equal in dignity and rights, according to Article 1 of the Universal Declaration of Human Rights, which was established in 1948. According to Article 3 of the Universal Declaration of Human Rights, everyone has the right to life, liberty, and personal security.

Article 14 of the Indian Constitution states that the state cannot deny equality before the law or equal protection under the law to "any individual" living within India's borders. The Court has ordered the Principal Accountant General to deliver a family pension to an unmarried transgender offspring of a deceased State government employee within six months, supporting transgender community members' legal rights following the Supreme Court's ruling in NALSA (supra). According to the Court, the petitioner has the right to choose her gender and has claimed a family pension under Section 56(1) of the Odisha Civil Services (Pension) Rules, 1992, as a transgender person. The Supreme Court has also recognised and legalised this right. Because of this, The current writ petition filed by the petitioner is deserving of being granted. (<https://www.barandbench.com/news/>, 2022)

### **Conclusion**

Transgender people of different sexual orientations face intolerance, discrimination, and exclusion in society, as evidenced by the observations made above. Isolation can be caused by a variety of factors, ranging from personal reasons to the most common social misunderstanding.

While the judiciary has taken an important step toward removing the stigma associated with the third gender, it is now our turn to recognise the true implications of this judgement and prioritise its implementation. When we throw money at hijras to drive them away, we are not only insulting these people, but we are also relegating the most basic principle of humanity; even curs are better treated when they are treated with humanity's love. Such actions will only cause the transgender community to toil and struggle in the same quagmire of humiliation that they have faced for generations. While the judiciary has taken an important step toward removing the stigma associated with the third gender, it is now our turn to recognise the true implications of this judgement and prioritise its implementation. When we throw money at hijras to drive them away, we are not only insulting these people, but we are also relegating the most basic principle of humanity; even curs are better treated when they are treated with humanity's love. Such actions will only cause the transgender community to toil and struggle in the same quagmire of humiliation that they have faced for generations.

### **Recommendations**

1. The transgender community has its dance, folk music, and art culture. It

offers the community immense strength and a sense of belonging. These ethnic and creative manifestations are indivisible components of the community and should be blended with livelihood activities to increase community participation. Efforts should be made to act as a link to employment possibilities with suitable funding support<sup>23</sup>.

2. Any pension programme should include the transgender community so that they can get any benefits.
3. Police officers are being educated on the issues and problems that the transgender community faces. Dishonourable remarks and molestation, if any, should be addressed by the law.
4. Making the general public aware of their difficulties. A public awareness campaign is required. Local governments, policymakers, schools, and families require greater instruction on how to embrace gender-variant children, how to treat persons of diverse sexualities and gender identities equally, and how to administer legislation and programmes in a "friendly" rather than hostile manner.
5. Human rights of 3<sup>rd</sup> gender concerns ought to be raised in the mass media and other communal forums to raise awareness and empower 3<sup>rd</sup>gender persons to exercise their integrity. The social stigmatising coverage should be reduced.
6. Parents need to be aware of and informed about gender-nonconforming and transgender children to support them, despite their discomfort and firmly held normative ideas. Parents and siblings should be aware of the possibility of their children being bullied or subjected to other forms of violence outside the house – in the extended family, in schools, or on the playground – and provide appropriate support. They must also consider how a gender-nonconforming or transgender child's stress levels rise as he or she enters puberty and suffers dysphoria when secondary sexual traits conflict with his or her sense of gendered self.
7. Workplaces in the public and private sectors must educate employers and employees on transgender issues in consultation with community groups and human resource specialists with experience in the field of Diversity and Inclusion. Antidiscrimination rules must be established and implemented in the hiring, retention, promotion, and employee benefits processes. Transgender-inclusive workplace sexual harassment rules should be implemented.
8. Transgender inclusion is required in strategy as well as organizational betterment that allows access to communal guard structure focused on the poverty-stricken and other unprotected category.

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