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LEGAL FRAMEWORK FOR PROTECTING THIRD GENDER RIGHTS IN INDIA: ISSUES AND CHALLENGES

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ABSTRACT

There have been incidents of both verbal abuse as well as physical violence against third gender people. The third gender kids are harassed by their classmates at the school, and they are not treated equally like other students. They also encounter problems within the healthcare sector of the nation, since doctors refuse to provide medical treatment to them due to their gender identity. The goal of the paper is to catalogue and examine the different obstacles and difficulties that transgender people in India encounter, such as violence, exclusion from mainstream society, prejudice, and social stigma. The author has analysed the merits, demerits, and shortcomings of Transgender Persons (Protection of Rights) Act, 2019. A principal aim of the research is to conduct a critical analysis of legal cases and ensuring that the legislative and policy measures which are intended to safeguard the rights of transgender persons in India are followed in letter and spirit. The Transgender Persons Act, 2019 does not adequately address several related rights, such as marriage and adoption rights. The Act imposes a maximum prison sentence of two years together with a fine, which seems inadequate for prevention of serious crimes like violence and sexual abuse of third gender people in our country. There is a need of providing free education up to the twelfth grade for transgender kids. Strict legal measures must be taken in the case when derogatory remarks or dishonourable statements are made against third gender people. Doctors and other medical professionals have a responsibility to cater to the special requirements of transgender individuals. There is a requirement of creating public awareness about the difficulties faced by the third gender people.

Keywords: Third Gender, Transgender, Equality, Fundamental Rights, Gender Identity.

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INTRODUCTION

Transgender persons are individuals whose identities deviate from the conventional gender norms that exclusively classify individuals as either male or female.² They have experienced stigma, societal oppression, and physical and sexual abuse as a result of refusal by society to acknowledge their gender identities.³ The Indian legal system has undergone a substantial socio-legal transformation with the recognition of the rights of the third gender. People who identify as third gender have long struggled with stigmatization from the society and legal invisibility as a result of being historically marginalized and misunderstood. Recently implemented social and legislative reforms have the goal of removing these barriers and paving the way for a society that is more equal and welcoming to people of all backgrounds.

POSITION AND PLACE OF THIRD GENDER IN INDIAN SOCIETY: HISTORICAL PERSPECTIVE

The concept of the 'third gender' is intimately woven into the fabric of Indian Civilisation, which includes its cultural beliefs, religious practices, and social structure.⁴ A unique position has been held by the hijras or the third gender over the course of history.⁵ This position has varied between respect and marginalisation. The Mahabharata, one of India's great narratives, features figure such as 'Shikhandi' who was a woman that has transformed into a man. It also mentions the character of 'Brihannala' who was Arjuna's eunuch manifestation. These stories show that society accepts the third gender during ancient time by treating them as normal human beings and by assigning them significant responsibilities. The character of 'Shikhandi' who was a warrior of significant importance in the Kurukshetra battle in the Mahabharata, is sometimes regarded as a figure belonging to a third gender. Shikhandi, a character that exemplifies the flexibility of gender roles, was born as a 'female' but subsequently took on the personality of a 'male' in order to accomplish a certain purpose. Medieval temples, such as those in Khajuraho, have engravings of hijras, suggesting their integral role in society. Throughout the Middle Ages, the 'third gender' occupied a multifaceted position inside the royal courts, particularly during the Mughal period.⁶ Frequently, hijras were assigned the roles of trust and power as counsellors, and harem guards.⁷ The advent of British colonisation in India resulted in a significant

² Saumya Agarwal, "What are the Rights of Transgender in India" *iPleaders*, October 23, 2015, *available at*: <<https://blog.ipleaders.in/legal-rights-of-transgender-india/>> (last visited on August 29, 2024).

³ *Ibid*

⁴ Dipika Jain and Kimberly M. Rhoten, "Epistemic Injustice and Judicial Discourse on Transgender Rights in India: Uncovering Temporal Pluralism" 26 *Journal of Human Values* 30-49 (2020).

⁵ *Ibid*

⁶ M. Michelraj, "Historical Evolution of Transgender Community in India" 4 *Asian Review of Social Sciences* 18 (2015).

⁷ *Ibid*

transformation in the perception and treatment of the third gender.⁸ In comparison to the rigid Victorian moral norms enforced by the British, Indian rituals exhibit greater inclusivity and flexibility.⁹ The third gender faced institutional marginalisation throughout this period.

RIGHTS OF THIRD GENDER IN INDIA: ISSUES AND CHALLENGES

The discrimination against third gender in educational institutions is prevalent in our country. The third gender kids are harassed by their classmates at the school, and they are not treated equally like other students.¹⁰ They also encounter problems within the healthcare sector of the nation, since doctors refuse to provide medical treatment to them due to their gender identity.¹¹ There have been incidents of both verbal abuse as well as physical violence against them. Instances of suicide are frequently observed within the transgender population. They are frequently subjected to a great deal of inequality by the society which leads them to resort to suicide to escape the situation. It has been observed that third gender people are compelled to engage in prostitution.

Another significant problem faced by third gender people is poverty.¹² This problem arose due to the lack of educational training among these individuals, as they faced restrictions in accessing and registering for primary educational institutions. Their employment prospects are quite limited as they were not integrated into the society by the people. Due to their extreme poverty, they faced significant challenges in procuring food for two times in a day. They were compelled to either pursue prostitution or resort to begging or dancing at small events in order to sustain themselves and generate income for themselves.¹³

Third gender people are being denied entry into public places and religious places which is clearly inhumane but it is still carried out by the society.¹⁴ They are subjected to verbal insults, unwarranted beatings, and exclusion from the society.¹⁵ The act of referring a third gender person as a 'non-human' and subjecting him to physical violence for the same purpose is inherently inhumane.¹⁶ There is a large amount of discrimination directed towards transgender individuals in public venues like restaurants, movie theatres, and shopping

⁸ Bandana Meher and Arun Kumar Acharya, "De-Identifying the Distressed in the Transgender Community Related to Their Identity Formation and Discrimination in India" 6 *Genealogy* 92 (2022).

⁹ Dr. Neena S. Sawant, "Transgender Status in India" 1 *Annals of Indian Psychiatry* 59 (2017).

¹⁰ Rashi Sharma, "Transgender and Rights of Transgender" *iPleaders*, June 27, 2020, available at: <https://blog.ipleaders.in/transgender-rights-transgender/> (last visited on August 29, 2024).

¹¹ Sireesha Jaddidi and Gunjan Sharma, "Position of Transgender in Contemporary India: An Analytical Study" 4 *International Journal of Law Management and Humanities* 2754 – 2768 (2021).

¹² Dipayan Chowdhury and Atmaja Tripathy, "Recognizing the Right of the Third Gender to Marriage and Inheritance under Hindu Personal Law in India" 3 *BRICS Law Journal* 43-60 (2016).

¹³ Dipali A. Purohit, "Third Gender & Marriage" 6 *International Journal of Creative Research Thoughts* 302 (2018).

¹⁴ G.K. Venugopal, "A Sociological Study of Third Gender Community in India: Special reference to Mysore District of Karnataka" 10 *Journal of Research in Humanities and Social Science* 38-41 (2022).

¹⁵ Dr. Dilip Pandey, "Protection of Rights of the Third Gender Persons in India" 10 *International Journal of Scientific and Research Publications* 133-138 (2020).

¹⁶ Akanksha Mishra, "Third Gender Rights: The Battle for Equality" 5 *Christ University Law Journal* 9-21 (2016).

mall.¹⁷ They frequently confront a significant challenge in terms of access to public restrooms or toilets. There are no separate restrooms or toilets that are specifically designated for transgender people, so they are forced to use the restrooms or toilets that are reserved for men. This puts them at the risk of being sexually assaulted or harassed.

One of the myriad challenges faced by the transgender individuals is homelessness due to the lack of housing options available to them.¹⁸ They are compelled to live on urban streets due to their eviction from their residences for being transgender. They also leave their homes as a means of escaping from an abusive environment. Homeless same-sex couples do not have access to family lodging across the country because no one wants to even let out their house to the homosexuals.

CONSTITUTIONAL AND LEGISLATIVE SAFEGUARDS TO THIRD GENDER IN INDIA

The Indian Constitution establishes a robust framework for safeguarding the fundamental rights of the third gender, including non-discrimination and equality.¹⁹ The Constitution protects right of third gender people to live a dignified life by outlawing discrimination based on their gender and sexual orientation.²⁰ The third gender community has historically experienced systemic discrimination and exclusion, despite these constitutional guarantees.²¹

A major piece of legislation that addressed the rights and welfare of transgender people is the Transgender Persons (Protection of Rights) Act, 2019. The Act guarantees equality in the workplace and in education, acknowledges transgender identity, and forbids discrimination.²² The Act provides a definition of ‘transgender people’ and outlaws discrimination against them in the workplace, in the healthcare system, and in other contexts.²³ Additionally, it offers welfare benefits like social security, healthcare, and educational opportunities. According to the Act, the Central Government is required to establish a National Council for Transgender Persons (NCT) in order to provide guidance, monitor and analyse the policies that pertain to transgender individuals.²⁴ Another function of the Council is to address the grievances of transgender individuals.²⁵ The Statute now includes offences such as coercing transgender people into labour, denying

¹⁷Abhinav Kumar, “Non-Recognition of Third Gender: A Failure of Indian Legislation” 4 *International Journal of Law Management and Humanities* 121-131 (2021)

¹⁸ Madhubrata Mohanty, “Recognition of a Third Gender-A Way Forward” 3 *Global Journal for Research Analysis* 154-156 (2014).

¹⁹ The Constitution of India, art. 14.

²⁰ Akash Kori, “Laws for third gender in India - Section 377 and the debate” *iPleaders*, August 8, 2018, available at: <https://blog.ipleaders.in/laws-relating-to-third-gender/> (last visited on August 29, 2024).

²¹ Nidhi Verma, “Legal Status of Third Gender in Our Society” 9 *International Journal of Current Advanced Research* 21466-21468 (2020).

²² The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019).

²³ Ishikaa Seth, “Transgender Persons (Protection of Rights) Act, 2019 and its impact on the third gender” *iPleaders*, December 19, 2021, available at: <https://blog.ipleaders.in/transgender-persons-protection-rights-act-2019-impact-third-gender/> (last visited on August 29, 2024).

²⁴ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s.16.

²⁵ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s.17.

access to public facilities, engaging in mental, physical, and sexual abuse, and other connected offences.²⁶ The Act prescribes punishment for these offences to create deterrence among the wrong-doers.²⁷

The Transgender Persons Act is ineffective as it does not adequately address several related rights, such as marriage and adoption rights. This is a missed chance to enhance its comprehensiveness. The Act imposes a maximum prison sentence of two years together with a fine, which seems inadequate for prevention of serious crimes like violence and sexual abuse of third gender people in our country. Committing a similar offence against a cisgender individual may result in a sentence of life imprisonment or, in certain cases, even capital punishment. The implementation of less severe penalties perpetuates the existing disparities among the transgender population and makes their situation even worse. The Act has only resulted in the formation of a National Council. On the other hand, state councils should also be established. The transgender persons are dispersed over the entire nation. So, it is not possible for them to approach a body in Delhi every time in order to voice their complaints.

ROLE OF JUDICIARY TOWARDS PROTECTION OF RIGHTS OF THIRD GENDER

In “*National Legal Service Authority v. Union of India (NALSA)*,”²⁸ the third gender was officially recognised by the law. The Hon'ble Supreme Court held that the third gender category have the same fundamental rights which are available to men and women. An equal treatment should be extended to them in a manner consistent with the treatment afforded to males and females. The Court upheld the fundamental rights guaranteed by the Constitution to transgender people and acknowledged their right of self-determination of their gender identity. The Court ordered that the third gender category must be provided on all official government documents, including PAN cards, ration cards, passports, and other such documents. The Court observed that the transgender community have been subjected to injustice for generations. They have the full right to receive the benefits of all projects and programmes that have been created by the government for the public. The Supreme Court observed that the recognition of transgenders as a ‘third gender’ will safeguard their basic human rights.

As a result of the *NALSA* case, the idea that the third gender is a separate category gained importance. It is imperative to acknowledge that the transgender community has experienced prolonged periods of suffering, humiliation, and anguish. They remained silent and faced hardship, but ultimately, as a result of this verdict, the state of the transgender community has improved. This ruling has a significant influence not just within the borders of India but also on a global scale. A significant violation of human rights occurs when members of the transgender community are prevented from participating in the society. India adheres to a democratic system that encompasses all individuals, regardless of their physical or mental state. If we adhere to the

²⁶ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s.18.

²⁷ *Ibid*

²⁸ (2014) 5 SCC 438.

requirements of the Rule of Law, then it is imperative that all individuals must receive equal treatment and legal protection of their fundamental rights.

In “*Ganga Kumari v. State of Rajasthan*,²⁹” the petitioner Ganga Kumari, a transgender, was initially chosen for the vacant position of female constable. But the selectors rejected her based on the medical test rendering her ineligible for the job. In the Court, she contended that her rejection was a result of gender-based discrimination, which is both legally and morally wrong. It is important to note that the phrase ‘person’ has been used in both Article 14 and Article 21. It is clear that this gender-neutral expression pertain to human beings. In light of this, the term ‘person’ includes transgender people within their ambit and are not restricted to either the male or female gender. The ruling established that ‘gender identity’ is a fundamental aspect of sexuality, and individuals including those who identify as third gender, cannot be subjected to any kind of discrimination based on their ‘gender identity’. The Court further determined that Ganga Kumari possesses the right to establish a ‘Self- Identity’ in relation to her gender and should be re-employed again for the position. The Hon’ble Supreme Court in “*Navtej Singh Johar v. Union of India*,³⁰” ordered for decriminalisation of Section 377 of IPC to some extent. The Court held that the private sexual practices of the homosexual couple, when conducted consensually, do not result in harm to any third party or pose any societal risks. The determination of whether a provision of an Act infringes upon fundamental rights should be guided by ‘constitutional morality’ rather than ‘societal morality.’ The Court also observed that the arbitrary nature of this clause is evident in its failure to differentiate between consensual and non-consensual sexual actions. Justice Deepak Mishra relied on ‘transformative constitutionalism’ and held that Constitution must guide the transformation of society from an archaic to pragmatic society where fundamental rights of every human being is fiercely guarded. As a consequence of this decision, homosexuals are now able to live in an environment that is more respectful of their own dignity and are able to openly express themselves. The judgement is in consonance with the notion of progressive society.

In the case of “*Jasmine Kaur Chhabra v. Union of India*,³¹” a public interest litigation (PIL) was submitted with the intention of drawing attention to the fact that the transgender community do not have access to adequate public bathrooms or toilets. Transgender people possess the right to have different toilets from men and women since they are now seen as a third gender. In this particular case, the Delhi High Court issued an order to the government directing them to construct such toilets within the allotted time.

In “*Supriyo @ Supriya Chakraborty v. Union of India*,³²” it was held that the Judiciary does not have the authority to legalise same-sex marriages as they are unable to interfere in the functioning of the Legislature. The Judiciary is prohibited from legalising or interpreting language in a manner that deviates from its intended purpose. Its role is limited to interpreting the law, not creating it. The Court ordered the Central Government

²⁹ Writ Petition (Civil) No. 14006 of 2016 decided on November 13,2017.

³⁰ AIR 2018 SC 4321.

³¹ Writ Petition (Civil) No. 2997/2021 decided on May 13,2024.

³² Supriyo @ Supriya Chakraborty v. Union of India, Writ Petition (Civil) No. 1011 of 2022 decided on October 17,2023.

to establish a committee with the purpose of addressing the marriage related issues raised by same-sex couples. Furthermore, the Court affirmed that couples who identify themselves as LGBT, are not eligible to adopt children.

The ruling in *Supriyo @ Supriya Chakraborty* case which was decided in 2023 is a backward step towards realization of human rights of transgender people in our country. The idea of ‘constitutional morality’ means that no person can be discriminated on the basis of sexual orientation. It is different from ‘public morality’ which imposes the notion of majority of the people in the society about the morality of a particular action. It can be argued that ‘constitutional morality’ is clearly ignored by the Supreme Court in this case. The primary objection raised in the Court against legalising of the same-sex marriages was the potential instability in the society. It was also argued that India is not adequately prepared for such legislation and that it will contradict the cultural values prevalent in the society. This is clearly the act of imposition of ‘public morality’ on the LGBTQ community. An action cannot be prohibited on the ground that it is considered as ‘immoral’ by the majority of the people. Earlier the practice of Sati was prevalent in our country and was considered as right by the majority of the people. But law was used as a weapon to prohibit this inhumane practice and bring social transformation. In a similar way, there is a need of introducing entirely novel and gender-neutral legislations pertaining to same-sex marriages in India. The fundamental right to choose one's spouse is vested in every adult which is ignored in this ruling.

CONCLUSION AND SUGGESTIONS

India has made great strides in formally respecting and safeguarding the rights of the third gender, but more has to be done to enable society to embrace these rights. The real change depends on the prevailing attitudes of society and the proactive implementation of these legislative safeguards. It is very important to recognise third gender identities if we want to make a society that is more equal and fairer for everyone. In order to challenge conventional ideas of gender and work towards establishing environment where everyone can live authentically and without facing discrimination, we must first acknowledge the diversity of gender experiences and identities. The implementation of education and awareness-raising initiatives is crucial for removing misconceptions and promoting tolerance and acceptance of various gender identities. Educational institutions, workplaces, and healthcare institutions have a significant obligation to provide inclusive environments that enable individuals to freely express their gender identity without apprehension of violence or prejudice.

- There is a need of providing free education up to the twelfth grade for transgender kids.
- Promote mutual respect among students and implement stringent measures to combat harassment of third gender people.
- Inform the police about the harassment and discrimination faced by the transgender community. This will help in resolving the problems encountered by these people. Strict legal measures must be taken in the case when derogatory remarks or dishonourable statements are made against third gender people.

- It is important that matters pertaining to human rights of third gender people be brought to the attention of the public through the media and other public platforms in order to increase public awareness and improve the knowledge of third gender individuals to exercise these rights. We must put an end to the stigmatisation of third gender people.
- Doctors and other medical professionals have a responsibility to cater to the special requirements of transgender individuals.
- There is a requirement of creating public awareness about the difficulties faced by the third gender people. There is a need for more education among the members of the society on the acceptance of children with gender differences. The equitable treatment of the third gender individuals is necessary for the effective implementation of laws, policies, and programmes. The creation of ‘friendly’ environment for the all-round development of third gender people will help them to live a dignified life.
- It is necessary to determine whether the rules and policies formulated by the legislature and executive are properly implemented or not.
- The provision of free legal aid to third gender people is recommended to enhance the quality of their social lives.
- The education sector, including schools and colleges, should actively help third gender kids to ensure that they receive equal treatment and value in the society.
- There should be more laws that deal with the health care problems faced by third gender people.
- Lack of knowledge about the issues faced by the transgender people around the world is a big problem that needs to be redressed by giving more information to the public about their human rights.
- Establish Commissions or Specialised entity tasked with supervising the implementation of legislation concerning third gender rights and providing practical remedies in case of legislative violations.
