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“Dharma is to protect the Needy”

Article on

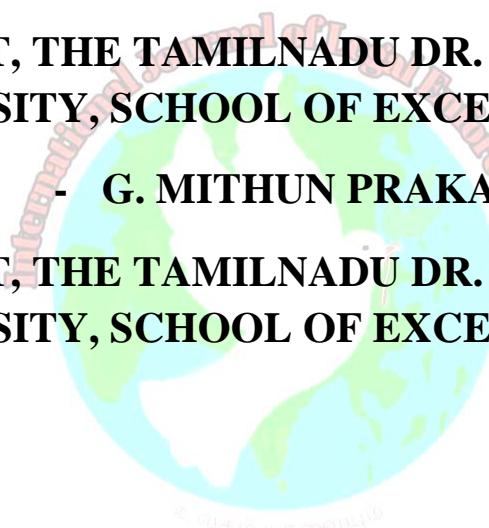
LIFE AS THIRD GENDER

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ABSTRACT

“Transgender people have served, are serving, and will continue to serve”

- Allyson Robinson

The motive of the authors at choosing this topic out of so many other topics is indeed, we preferred to learn an area that is not much commonly addressed nor focused on a community in India, who are one amongst us but are distinguished against their biological change. This paper aims at studying the transgender and address the recognition of the transgender as third gender, by tracing back to the history as how they were been treated in ancient India, how the perspective upon them was later changed when the British arrived in India and discussing their hasty conditions during the medieval period and the modern period. The Authors quoted the Constitutional rights available to the transgender along with famous NALSA judgment, Bills and proposes the key recommendations for an equal treatment of transgender as the third gender for their wellbeing and protection. In this paper the Real-life incidents are addressed for the better understanding on bitter truth and struggles they have undergone at different times and looking toward their difficulties that nothing was easy to them when compared to other genders, because of the discrimination in many areas. It is believed that yet the society is not transformed well to accept them at all areas and realize that they do have feelings and emotions like other human beings.

KEYWORDS:

1. DISTINGUISHED
2. REBUFFED
3. NALSA
4. STRUGGLE
5. EMOTIONS

INTRODUCTION:

In modern days the use of term “third gender or transgender” is denoted as quite unwonted in our social life, because they are treated as unequal and not a part of the society, although they are considered as third gender under legislations. The thought factor in people’s mind has to be reformed and has consider them as they are also citizens and part of this country and not to infringe or discriminate them upon any unlawful grounds. In the eye of common man, the transgender are considered as those who identified themselves as transgender or transsexual, are ones born with male or female anatomies and transformed themselves on a biological change. For example, a person who identified themselves as transgender or transsexual may have typical female anatomy but they feel like a male and they desire to change into a male by taking hormones or undergoing surgeries, why I am giving this as an example is because “transgender may not always be a man who wants to transform into women it might be vice versa also and they are called as transgender”, but this case is the rarest of rare, unlike other scenarios. In medical terms, it is referred to as “gender dysphoria” which means difficulty in identifying the biological sex in an individual. When we look at the cause for this change in a man or a woman it is said that because of chromosome abnormalities which lead the ‘gender dysphoria’ or the defect in child-rearing and human bonding rear may be the contributing factor to gender identity disorders.¹

1. TRANSGENDERS IN INDIA:

According to the 2011 census, the total population of transgender in India was around 4.99 lakhs. The highest proportion of the third gender population at 28% was identified in the U.P. followed by 9% in A.P., 8% each in Maharashtra and Bihar, and over 6% in both M.P. and West Bengal.

In 2014, the Hon’ble Supreme Court of India had formally recognized the existence of a ‘third gender’, and there was no particular definition for the third gender persons but they were considered as person who is neither a man nor a woman and referred to as Hijra or transgender

¹ <https://www.news-medical.net/health/Causes-of-Gender-Dysphoria.aspx> (Visited on July 13,2020).

(defined under the act, 2019). At general the Hijra or Transgender faces humiliation, harassment and persecution for what they are.

Earlier the Hijras were targeted by law enforcement and government officials under section 377 of the Indian penal code, 1980. This section was introduced by the British to criminalize any sexual acts and justify discrimination and ill-treatment towards the LGBT community since their arrival.

1.1 TRACING BACK TO THE HISTORY -

The Hijras were recognized and were holding administrative roles and positions in the Mughal era, and they were believed to have the ability to bless and people wanted to take blessings from them during religious ceremonies.

During Ancient India, the Hijras were considered to be one of the loyal persons and they were all entrusted with governmental posts. So, it was lastly when they were well treated. In Modern India, the question arises that "**why they aren't well treated now and what is the reason behind their ill-treatment**". To find that answer to, we need to look back into laws enforced by the British that the government sought to recognize the western ideas and beliefs on Indians.

1.2 OUTCOME OF SECTION 377 -

The British had achieved their goal by framing such a law, considering them as unclean and dirt for this reason they inserted Section 377 in Indian Penal Code, 1860 which is illegal and against the order of nature. Then the posts and roles given to the Hijras were ceased by the government officials and considered them as social outcasts.

This expulsion in later days became the reason for their socioeconomic and medical difficulties faced by them. They were rebuffed from educational opportunities, jobs, and discriminated against every area in their lives. Due to this widespread, the discrimination against many Hijras forced them to beg for money, food and most of them earned their livelihood through begging, dancing, and prostitution. They were not considered as a part of this society and discriminated against every fundamental right.

Most of the schools and college forms did not have any other option than male or female. So they were denied from pursuing the education they faced difficulties in case of a medical emergency and were not treated with any basic medical care, there have been instances of medical malpractice against Hijra people.

The Civilian Welfare Foundation is an NGO that had conducted studies on the medical problems faced by the transgender community. The study found that majority of the doctors are not educated on gender identity issues and transphobic stigma ingrained amongst medical professionals who are responsible for lack of proper medical care to Hijras².

Section 377 under the Indian Penal Code, 1860 was prior to the enactment of the Criminal Tribes Act that criminalized all penile non-vaginal sexual acts related to men and women, which include oral and sexual intercourse, at a time while transgender humans had also been usually associated with a prescribed sexual walkthrough. Reference to this context can be taken from the judgment pronounced /decided by the Hon'ble Allahabad High Court in **Queen Empress vs. Khairati** ³ where transgender, was arrested for being a 'habitual sodomite on suspicion later acquitted on appeal. National Prison Service Authority was constituted under the Legal Services Authority Act, 1997, to offer free legal offerings to the weaker and other marginalized sections of the society, to advocate their reason.

2. THE CONSTITUTIONAL RIGHTS OF LGBT COMMUNITY:

As per the recommendations of the **C.S. Dwarkanath Backward Classes Commission of 2010** Transgender was included in the category of Backward Class to enjoy government benefits.⁴

India is a country with a well-established framework of Fundamental Rights embedded in the constitution. The Constitution provides a fundamental right to equality and tolerates no

² <https://sites.uab.edu/humanrights/2018/10/29/indias-relationship-with-the-third-gender/> (Visited on July 13, 2020).

³ (1884) ILR 6 ALL 204

⁴ <https://thewire.in/lgbtqia/karnataka-trans-policy-may-be-a-step-in-the-right-direction-but-needs-work> (Visited on July 13, 2020).

discrimination on the grounds of caste, religion, sex. The constitution additionally guarantees political rights and other benefits to its every citizen.

The constitution of India affirms equality in all spheres of life, but the questions are how far it is been implemented. The Identification of the idea of sex within males and females is a vital aspect of civil identity as required throughout our country. The transgender deprived of their numerous rights that the normal Indian citizen takes as right and was constantly aggrieved against the right to vote, right to own property, right to marriage, right to education, right to employment, right to claim an identity via the passport, ration card, a driver license, right to fitness and health care so on. Such deprivation excluded Hijras from the Indian Civil Society.

The Transgender are being neglected from common citizenship rights like the other two genders, they are entitled to the following important provisions of constitution under-

- **Article 14** Equality before law 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.
- **Article 15** which prohibits discrimination on grounds of religion, race, caste, sex or place of birth that
- **Article 21** guarantees the protection of life and personal liberty.
- **Article 23** prohibits trafficking in human beings as beggar and other comparable kinds of pressurized hard work and any contravention of those provisions will be an offense according to the law.

4. PROPOSED LEGISLATION:

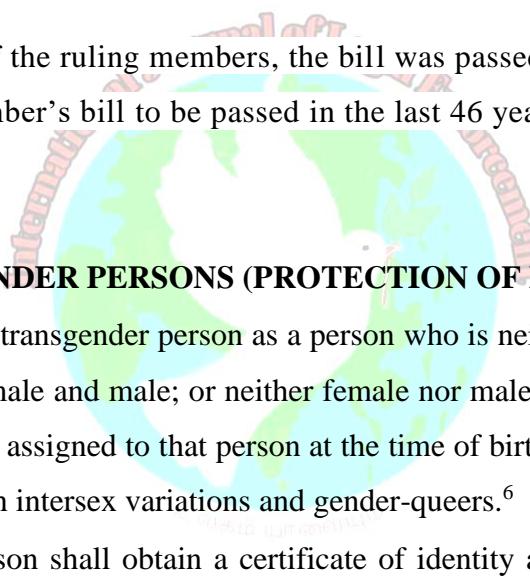
4.1 THE RIGHT OF TRANSGENDER PERSON BILL, 2014 -

- This was a private member's bill introduced by the MP from Tamil Nadu, Tiruchi Siva in Rajya Sabha on 12th December 2014⁵ which was subsequently passed on 24th April 2015 unanimously, with cross-party support after a gap of 47 years. On 24th April of every year, it is celebrated as Transgender day following the passage of the Bill in the Rajya Sabha.
- The bill proposed the formulation and implementation of a comprehensive national policy to ensure the development and welfare of the transgender.

⁵ Bill No. XLIX of 2014

- The bill seeks to determine the employment Exchange, National and State Commission for transgender persons, and establishment of Special Transgender Rights Court for their protection of rights.
- The bill stressed that no child will be separated from his or her parents on the grounds of being transgender unless a competent court directs to do so.
- The bill guaranteed there shall be 2% reservation for the transgender in the educational institutes and in government jobs.
- The bill also proposes to impose a penalty on those persons who make disparaging comments on transgender, which includes imprisonment up to at least one year and with fine.

Despite the opposition of the ruling members, the bill was passed in the Upper House, and it was the first private member's bill to be passed in the last 46 years. The bill failed to pass in the lower house.



4.2 THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2016 -

- The Bill defined a transgender person as a person who is neither wholly female nor male; or a combination of a female and male; or neither female nor male; whose sense of gender does not match with the gender assigned to that person at the time of birth and includes trans-men and trans-women, persons with intersex variations and gender-queers.⁶
- A transgender person shall obtain a certificate of identity as a proof for the purpose of recognition of identity as a transgender person and to invoke rights under the Bill.
- Such a certificate shall be granted by the District Magistrate on the recommendation of a Screening Committee. The committee shall be comprised of a medical officer, a psychologist or psychiatrist, a district welfare officer, a government official, and a transgender person.
- The Bill prohibits discrimination against a transgender person in areas such as education, employment, and healthcare. It directs the central and state governments to provide welfare schemes in these areas.

⁶ Bill No. 210 of 2016

- Offences such as compelling a transgender person to beg, denial of access to a public place, physical and sexual abuse, etc. would lead up to 2 years of imprisonment with a fine.

5. **THE NALSA JUDGEMENT:**

Acknowledging that the Indian laws are binary in nature and that accepts either male or female genders, the Honorable Supreme Court of India in its order in the case of **National Legal Service Authority Vs. Union Of India⁷ (NALSA judgment)** declared that transgender individuals distinct from binary genders, as the ‘Third Gender’ under the Indian Constitution and for the purposes of laws enacted by the parliament and state legislatures. After the NALSA judgment, the Indian Parliament recently enacted the Transgender Persons (Protection of Rights) Act, 2019.

The Court recognized that the third gender persons were entitled to the fundamental rights under the Constitution and under International law. Further, directed the state governments to develop mechanisms to realize the rights of “third gender” or “transgender persons” and defined the third gender.

This Act ensures the following:

- **Prohibition of Discrimination against Transgender individuals**
- **Recognition of identity**
- **Welfare measures**
- **Rehabilitation and right of residence**
- **Obligations on establishments**
- **National Council for Transgender Persons**

This Act also ensures punishments for the following offences and persons who:

- Deploy transgender individual into forced or bonded labour (excluding compulsory government service for public purposes);
- Denies a transgender person to use his right to public passage or use of public places;

⁷ AIR 2014 SC 1863

- Forcefully removing transgender out of a residence, village, or other places of residence;
- Commits an act which tends to be or intends to be an act of physical, sexual, verbal, emotional or economic harm and/or abuse against a transgender person shall be punished with imprisonment of **SIX** months which may extend up to **TWO** years, with a fine.

6. THE KEY ISSUES AND ANALYSIS OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2019:

- The Hon'ble Supreme Court of India held that the right to self -identification of gender is part of the right to dignity and autonomy under Article 21 of the Constitution. However, objective criteria may be required to determine one's gender to be eligible for entitlements.
- The Transgender Persons (Protection of Rights) Bill was passed in the Upper House of Indian Parliament and assented by the President of India on 5th December 2019⁸. The Bill states that a person who is recognized as transgender would have the right to self-perceived gender identity. Neither, it provided the enforcement of such a right.
- Transgender people consider that certain provisions of the act are being violated and unconstitutional such as the formation of district level, five-member screening committees to certify the gender of a transgender person which runs against the Supreme Court's view in National Legal Service Authority Vs. Union Of India⁹ which granted the right to self-recognition of gender to a transgender individual.
- The definition of "transgender person" in the Bill is at conflict with the definitions that are recognized by international bodies and experts in India. The terms such as trans-men, trans-women, gender queers, and persons with intersex variations are not defined in the bill.
- There are several other areas, they require clarity on the criminal and personal laws which is in existence at present and those only recognize the genders of man and woman. Further, it is unclear how those laws would apply to transgender persons who are neither identified with the other two genders. Hence, these laws require amendments.

⁸ Bill No. 169 of 2019

⁹ AIR 2014 SC 1863

7. SITUATION OF TRANSGENDERS IN INDEPENDENT INDIA:

7.1 PRE-RECOGNITION OF TRANSGENDER AS THE THIRD GENDER -

The hijra community was cluttered at all parts of India, but the majority of them were found in the Western and North parts due to the larger availability of livelihood sources, where few live-in southern India.

Traditionally hijra's engaged in the profession of dancing, begging, and sex work. Performed at rituals like childbirth and marriages because people believe that they have the power to bless or curse on the account of a fact on the religious and cultural background.

The United Nations Development Programme (UNDP) is a United Nations global development network¹⁰ who advocates and helps to achieve in the eradication of poverty and the reduction of inequalities and exclusion had recorded and framed the legal issues and injustice faced by the transgender community in India such as legal recognition of their gender identity, immigration status, inheritance, employment discrimination, wills and trusts, and access to public and private health benefits due to their nature of work.

The UNDP addresses that the change of name and gender on the credentials was an issue that the sex assigned at birth on their birth certificate and other schools/ college documents do not match with the gender identity had denied transgender admission in colleges for higher education

In 2008 UNDP reported that hijras found difficulty in getting legal recognition as a woman or a transgender woman transgender and were prosecuted under Section 268 IPC for causing a public nuisance and under Section 294 for Obscene Acts and songs. They were booked and penalized under Section 269 and 270 the IPC, 1860 for likely to spread infection under the Bombay Police Act, 1951.

In 2010 UNDP mentioned that transgender in India is migrated to the metropolis join the hijra community at large against their family support, a search for identity and security. Reported that the skilled transgender is denied employment opportunities because of transgender status

¹⁰ <https://www.unjobnet.org/jobs/detail/6295289> (Visited on July 13, 2020).

and the kinnars were booked under the various activities on account of the public nuisance under sections 268 and 290 IPC along with Sections 7 and 8 of the Immoral Traffic (Prevention) Act of 1956. Not just socio-economic problems, hijras faced problems in exercising their citizenship rights.

The hijras who were criminalized and solicited for having sex in public places were not charged under Section 377 of Indian Penal code, 1860. Further, no stringent action was taken against rape on transgender and many of these sexual assaults went unreported and unaccounted.

In the year 2011 NACO (National Aids Control Organization) reported that 57 percent of transgender people have faced violence from police¹¹, anti-social elements, and others. There were incidents of gang rape and domestic violence, harsh force against the aravani sex workers for unprotected sex went unreported. About 41.2 percent of transgender were discarded by their family members due to their gender status and 75.2 percent as a result they were forced to leave their home, on account of this 48.8 percent was a school dropout between classes of 6th to 12th standard and 18.4 percent were illiterate.

7.2 POST RECOGNITION OF TRANSGENDER AS THE THIRD GENDER -

In the year 2014, The Hon'ble Supreme Court delivered a judgment¹² recognizing transgender people as a third gender and held that they are entitled to enjoy the rights which have been already enshrined in the constitution for every individual in a landmark ruling.

The Judgment made the following changes as follows.

By making Central government create government jobs, education, facilities, issue documents such as ration card¹³, voter identity cards, passports¹⁴, and bank forms by providing

¹¹ (2007) 4 MLJ 849

¹² AIR 2014 SC 1863

¹³ <https://www.livelaw.in/food-security-for-transgenders-other-gender-in-application-form-for-ration-card-allows-transgenders-to-avail-status-of-head-of-household-allahabad-high-court> (Visited on July 13, 2020).

¹⁴ <https://thewire.in/gender/third-gender-railway-forms-passport-voter-id> (Visited on July 13, 2020).

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“TG” (Third Gender), “other”, or “T” (transgender) as sex identifiers with a separate category¹⁵ and reservations available to them in line with other minorities.

Sadhana Mishra of Odisha State has got her passport where her sex is identified as “T” in the sex column. Even the IRCTC (the Indian railway catering and tourism corporation) has now included transgender or third gender in ticket reservations and cancellation forms.

Transgender named **Shreegauri Sawant** was appointed as one of the Goodwill Ambassadors of the Election Commission of India in Maharashtra¹⁶.

At State Level, the Government of Tamil Nadu has implemented the most progressive and developmental policies for the Transgender in India.

India’s first Transgender Police Officer **Prithika Yashini**¹⁷ was appointed in the state of Tamil Nadu to ensure employment to the third gender and also due to the constant efforts of Transgender community leaders and activists, The Tamil Nadu Transgender Welfare Board was formed in May 2008 to protect the ends and rights of Transgender including housing, employment education, income generation activities and soul security measures.

Every year the Tamil Nadu State Government allocates a sum of 10 million rupees for the board’s programs and activities.

State Government of Tamil Nadu enumerate the transgender population in all the districts and the department of education passed an order that government and its aided colleges will admit transgender and share 30% of the seats reserved for women. The State government has also taken several measures for the welfare of transgender by issuing ration cards, providing free surgeries in government hospitals, etc.¹⁸

Joyita Mondal is India’s first transgender judge who was appointed as Lok Adalat judge in north Bengal continued to fight for her justice and respect who was once homeless and

¹⁵ <https://www.firstpost.com/india/include-transgender-as-separate-category-in-job-application-forms-centre-directs-ministries-and-departments-8282561.html> (Visited on July 13, 2020).

¹⁶ <https://www.thehindubusinessline.com/news/national/ec-appoints-first-transgender-goodwill-ambassador/article26655200.ece> (Visited on July 13, 2020).

¹⁷ <https://www.indiatoday.in/india/story/prithika-yashini-india-first-transgender-police-officer-tamil-nadu-969389-2017-04-04> (Visited on July 13, 2020).

¹⁸ United Nations Development Programme, Report: The Case of Tamil Nadu Transgender Welfare Board: Insights for developing practical models of social protection programmes for transgender people in India (UNDP, 2012).

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begging in streets because of the discrimination faced by her. She stated that after working at transgender rights organizations she was inspired to complete a law degree and turned strong and capable to fight for anyone against their social discrimination. In many places, transgender is transforming as eminent advocates¹⁹.

RoseVenkatesan a successful master's degree holder in biomedical engineering from the Louisiana Technical University in the United States who faced several problems and struggled with discrimination and stigmatization before building a career is now campaigning and empowering others against the discrimination at economic and gender injustice. He states that education alone can change the outlook of transgender people.

Radha from Tamil Nadu contested in Lok Sabha election 2019. **Shabnam Mausi**, who is a Transgender, was an ex-MLA won by a huge number of votes; she is also the first Transgender MLA in India.

Though there are favoring views and outcomes from the Hon'ble Supreme Court of India and various High Courts²⁰ there are still major key areas and issues are needed to be focused and redressed on transgender people against certain systematic denial of equal protection of law analogous to male or female at the locus of employment, education, healthcare services, identity, movement, stand for or hold public office²¹, rehabilitation and right of residence, registration of land accommodation and facility of public use, strict actions on offences and penalties.

8. **NEED FOR REFORMS:**

In this modern world, there is an urgent need to reform the third gender community of India. Reforms are required to ensure that the third gender of India is properly justified and is

¹⁹ https://www.indiatoday.in/india/story/meet-india-s-first-transgender-lawyer-sathyasri-sharmila-1274308-2018-07-01_ (Visited on July 13, 2020).

²⁰ 2018 (2) CTC 683

²¹ https://theprint.in/india/2-yrs-after-sacking-transgender-sailor-navy-goes-back-on-promise-to-give-her-fresh-chance/310235_ (Visited on July 13, 2020).

able to live their life peacefully. The following suggestions would like to suggest for their betterment such as for.

- A Long-term service and inclusive approach to the transgender must be framed and adopted by the Government and Society. Despite the fact that policies are been framed but poorly implemented.
- Judicial and law enforcement systems need to be empowered and sensitized on the issues against the Transgender community.
- Severe criminal and disciplinary action must be charged against the people, committing violence and abuse against the Transgender.
- Strict action and must be taken against parents who neglect, abuse, or leave their child because of their biological difference.
- Recruitment and provision of free legal aid must be ensured to reach the Transgender community at ground level.
- Prior to introducing a change in the system, the Schools and colleges need to play a supportive and encouraging role in providing education and value system to Transgender.
- Provision of social entitlement must be addressed.
- Establishment of helpline services for career planning and guidance, career opportunities, and online placement system must be empowered.
- Liberal credit policy and financial assistance must be ensured to start up their career as an entrepreneur or businessman.
- Separate policies relating to transgender health care must be framed and communicated to all private and public hospitals and clinics.
- Awareness programs must be organized at a huge parallel to outreach public and transgender communities.
- A comprehensive sex education program should be incorporated in the school curriculum and college syllabus to aware of students at ground level.

9. CONCLUSION:

In recent times, the Government of India had taken its stance by introducing several schemes and welfare policies for the transgender which shall be truly a welcome step forward by recording census, documentation, issuing of the citizenship ID Cards, passports, etc. along with social, economic, political transformations, housing, police reforms, legal aid and constitutional safeguards to prevent human rights violations against the transgender community and institutional mechanisms to address specific concerns of transgender people. Education is the most important right, so the government has to take necessary measure to make them study, where most at a stage they feel low because of their change in gender and won't prefer coming out and mingle with general public thinking that they would bully them or make fun of them, to overcome this a separate transgender school with hostel facilities, transgender teachers, transgender chefs, and transgender wardens shall be provided. By implementing this recommendation, they would have a peaceful environment to study without any harsh feelings since everyone are of the same kind. If transgender is educated, there won't be any need to strive for hunger nor beg nor indulge themselves in any other illegal activities, education saves them. Inclusion of the third gender in common schools and colleges make their lives much better. They should be given equal opportunity in terms of employment and the organizations should educate their workforce about inclusivity and acceptance of the third gender, separate washrooms to transgender. The change of opinion on transgender shall be transformed only when their rights are not denied and educated thus construct a fair and peaceful practice.

Recognition of transgender by the government is most welcomed but the same is yet to be accepted by the common people and consider them to be one among us. 'A Welcome by Society is Welcome by people.' Despite all these efforts by the government and organizations, the responsibility lies in our brains.

"Make the mind, make them common."

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