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# The Third Gender Beyond Pride, a Gender Dysphoria

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ZENE QAMAR<sup>1</sup> AND REDA TAYYYABA<sup>2</sup>

## ABSTRACT

*Starting from the very beginning of our existence, we have observed that sexual orientation of every living being is characterized in only two terms, them being, Femininity and Masculinity. Anything outside these two terms and dichotomous orientation was out rightly excluded, rejected or considered abnormal. And from time immemorial the people from Third Gender/Transgenders have been the sole representatives of the term “exclusion/excluded” from the society, owing to their different unique sexual identity. The fact that they exist in every cultural background, in spite of being a stigma and unnatural, is astonishing. To describe the Third Gender we can say that, these are the group of people that do not fall under the Gender Binary Category.*

*In India, these people are considered to be “mistakes of nature” that require special therapies or attention to make them natural, to fit into the definition of the basic society. In a BBC News India Report of 2012, it was estimated that around 2.5 million LGBT People are found in India. The society in general or the people who believe likewise unanimously gives the heterosexuals the power to construct or mould the sexuality of other sexes, and it is because of this superiority and individual subjectivity that the Third Gender lacks the structural support possessed by the other sexes of the society. This societal exclusion should be considered heinous.*

*This article would highlight the Social Construction of the Third Gender, and the various problems they face in order to survive in society. How they are constantly in a battle against the whole Cultural system, who constantly through different means try to subjugate their identity, be it by passing meaningless Bills claiming them to boost the concerned section of people, rather it has worsened their situation in reality.c*

## I. INTRODUCTION

The word Transgender was discovered by a German Sexologist named Magnus Harshfield in 1971. The origin of this word has to do with the

position of the law at that particular time. It's a well-known fact that this particular gender has dealt with the utmost difficulties and challenges in their lives from time immemorial, right from

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<sup>1</sup> Author is a Student at Faculty of Law, Jamia Millia Islamia, India.

<sup>2</sup> Author is a Student at Faculty of Law, Jamia Millia Islamia, India.

their birth, their sexual orientation, beliefs, and uniqueness is in contrast to the norms of the society. Their life has been a constant struggle merely on the basis of how they are ‘naturally’ born.

We live in an era where there is a constant cry about the principle of Equality and Human Rights, yet we often find ourselves fighting over gender issues that comprise only men and women, the third gender has always been overlooked or would rather say, ignored.

If we speak about the scenario in India, we know that the hijra community is settled in India at quite a scale. They live scattered in the north and west sides of the country, however, due to their identity they are often forced to move from one place to another. They mostly come to bigger cities such as Delhi in order to find a suitable place where their identity isn't a threat or a place where they can hide from their family for the same reason.

When we talk about the right to equality or any other getting infringed or even ask for basic necessities such as food, shelter & clothing, we tend to forget that there is a certain section of the society that, on the basis of their gender does not even have right to live with dignity and on top of that they live with the constant fear.

## **II. NATIONAL LEGAL SERVICE**

### **AUTHORITY V. UNION OF INDIA - A WIN**

India follows a constitution with elephant size,

which has a federal system with unitary features, balance between the sovereignty of the parliament and the independence of Judiciary, and the independent and Integrated judicial system is the cherry on the top that makes our constitution the best of all, yet we find ourself debating on the issues like gender roles and discrimination. Part-III i.e., Fundamental Rights of the constitution, that guarantees the fundamental rights and the Role of Judiciary that further tends to widen its scope and protect the fundamental rights in every manner possible. The injustice and inequalities that have circled the third gender of our society is not a news, there have been landmark judgements such as *NALSA v. Union of India*<sup>3</sup> from 2014 where the third gender especially the Hijras, Eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc seeked legal declaration for their identity<sup>4</sup>, with cognisance of Article 14, 15, 16 & 21 of the Indian Constitution. It was the first case to legally recognise non-binary gender identities and uphold the fundamental rights of transgender persons in India. The judgement also directed Central and State governments to take proactive action in securing transgender persons' rights.<sup>5</sup>

The core issues that were reflected in the case were:

(a) Whether a person who is born as a male with predominantly female orientation (or vice-versa), has a right to get himself to be recognized as a female as per his choice more so, when such

<sup>3</sup> AIR 2014 SC 1863.

<sup>4</sup> Latest Laws (10 Apr 2021 02:54:23) <https://www.latestlaws.com/case-analysis/supreme-court-case-analysis-nalsa-v-union-of-india-and-ors->

[transgenders-rights-case-by-lavina-bhargava/](https://www.latestlaws.com/case-analysis/supreme-court-case-analysis-nalsa-v-union-of-india-and-ors-)

<sup>5</sup> South Asian trans law Database (10 Apr 2021 01:42:41 GMT) <https://translaw.clpr.org.in/case-law/nalsa-third-gender-identity/>

a person after having undergone operational procedure, changes his/her sex as well? <sup>6</sup>

(b) Whether transgender (TG), who are neither males nor females, have a right to be identified and categorized as a “third gender”? <sup>7</sup>

The issue was raised on the validity of application of Article 14 as the equality before law was challenged of the transgender community, it was contended that State is under legal obligation to ensure that equal protection has been provided to all the citizens of the country, since it states ‘person’ and not just male or female, and Hijra community falls under the same ambit of person within the Article 14. It was also contended through this Article that the sexual orientation of a person cannot be a ground of choosing the criteria of equality.

Further it was contended that Article 15 & 16 are also in violation as the two Articles prohibit Gender based discrimination and attempts to ensure equality irrespective of the Gender of the person. Lastly, an essential Article 21 that ensures personal liberty of an individual and a right to live with dignity has been gravely violated. The fundamental rights are the core principles enshrined in our constitution to make sure that the principles of equality have been enumerated and applied in the manner prescribed in the constitution of India.

Supreme Court also took examples of some international cases such as *Corbett v. Corbett*<sup>8</sup> judges expressed a strange views that any operative intervention should be ignored and the biological sexual constitution of an individual is fixed at birth, at the latest, and cannot be changed either by the natural development of organs of the opposite sex or by medical or surgical means.<sup>9</sup> However countries like New Zealand and Australia did not favour the view. Other judgments such as *Attorney-General v. Otahuhu Family Court*<sup>10</sup> & *Christine Goodwin v. United Kingdom*<sup>11</sup> were also discussed in the NALSA judgement.

### III. TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT <sup>12</sup>

As discussed above about the landmark Supreme Court judgement by Justice K.S Radhakrishnan and Justice A.K Sikri on April 15, 2014, and how it was widely celebrated throughout the country for the spirit of its, which provided the trans people to self identify their gender as male, female, or third gender irrespective of going through any gender change surgery or hormonal therapy. Although the struggle in our country for this identification went through a lot of phases and compromises, this Right to Self Identify Gender without Medical intervention or certification of any kind is not unique and has international precedent in New York, Columbia,

<sup>6</sup> Latest laws (10 Apr 2021 04:13:25 GMT) <https://www.latestlaws.com/case-analysis/supreme-court-case-analysis-nalsa-v-union-of-india-and-ors-transgenders-rights-case-by-lavina-bhargava/>

<sup>7</sup> *ibid.*

<sup>8</sup> *Corbett v. Corbett* 113 Cal.App. 595 (Cal. Ct. App. 1931).

<sup>9</sup> *id.*

<sup>10</sup> *Attorney-General v. Otahuhu Family Court* [1995] 1 NZLR 603, (1994) 12 FRNZ 643 (HC).

<sup>11</sup> *Christine Goodwin v. United Kingdom* App. No. 28957/95, 35 Eur. H.R. Rep. 18 (2002).

<sup>12</sup> Transgender Persons (Protection of Rights) Bill, 2018 (Bill No. 210-C of 2016).

Argentina, Ireland, Malta, Denmark, Ecuador and Italy.

The judgement above mentioned was supposed to be implemented in the coming six months after the passing of it, but unfortunately the implementation never actually happened as it was supposed to happen because the judgement somehow got itself stuck in the middle of a ping pong game between ministries and departments of the Government.

Tracing back to 2014, Tiruchi Siva, a Dravida Munnetra Kazhagam, Rajya Sabha MP formally introduced The Rights of Transgender Persons Bill, 2014, the bill was passed unanimously in Rajya Sabha but somehow in the process it got disappeared in Lok Sabha. Again in the coming year, i.e. in December of 2015, the Ministry of Social Justice and Empowerment brought forward a draft of The Right of Transgender Persons Bill, 2015, and this time the general public were given a chance of sending in comments and suggestions for making the Bill better, by January 2016.

Empowered by this opportunity the Trans community felt its need to send in recommendations for the betterment of their status, but sadly none of the recommendations and comments received were taken into consideration for adding or improving the draft by the Ministry. Further the Ministry went on and drafted an even more drastic version of Bill, called The Transgender Persons (Protection of Rights) Bill, 2016. Following this the Bill was introduced in Lok Sabha on 2nd August, 2016.

This agitated the whole Trans community and many other people too and many protests were seen, people demanded the Bill to be revoked and made better for benefiting the people for whom it is supposed to be in every manner. Recommendations were sent from various Legal Advocacy and Trans led groups.

Throwing in some light on Transgender Persons (Protection of Rights) Bill, 2016, the Bill without much debate and questioning was passed in the Rajya Sabha, subsequently the Cabinet also approved the said Bill in August, 2018 and finally the Bill was passed on December, 2018. Also in September, 2018 the landmark judgement of Navtej Singh Johar<sup>13</sup> was given by the honourable Supreme Court which decriminalized Homosexuality, which was widely celebrated throughout the country.

While discussing about the Transgender Persons (Protection of Rights) Bill, 2016, the Bill describes the basic definition of Transgender, and what a Transgender person is, measures and provisions for their safety etc, also includes Penalty for anybody who in any way offends a Transgender person.

The bill somehow never reached the level of expectation which everybody, and majorly the Trans community people, were looking for. It got shredded into mockery and no beneficiary came out of it, which could have helped boost the community and their genuine welfare. The Standing Committee on Social Justice and Empowerment in the The 43rd report on the Transgender Persons (Protection of Rights) Bill,

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<sup>13</sup> *Navtej Singh Johar & Ors. v. Union of India* (2018)

10 SCC 1.

2016<sup>14</sup>, kept on referring Trans/Intersex people “Eunuchs”, which is derogatory in many ways, as one can understand by the actual meaning of a Eunuch. The same community has also pointed out that the term “Hijra”, denigrates people of the community and shouldn’t be used for them. Ironic!

From the definition of the word “Transgender” to the process of issuing Gender identification certificate, the Bill did not explained anything to its finest nature, and does not satisfy the meaning either. To provide an example the Ministry struck down a portion of the definition, which is, “those whose sense of gender does not match with the gender assigned to that person at the time of birth and include trans-men and trans-women, persons with intersex variations and gender-queers stating the reason that, “any person could claim that their gender doesn’t match” with the gender that they were born into. Well, seeing the state of laws and safeguards for Transgender/Intersex people, I don’t see why anyone would want to misuse this term and become one for the sake of it. That is the thing, the Ministry and the Government does not take the reality of it seriously enough.

#### **IV. RIGHTS AND LEGAL STATUS OF TRANSGENDER PEOPLE**

The Preamble of Indian Constitution provides and mandates Justice, Liberty, Equality and Fraternity to people of India. With this our Constitution also provides every citizen of the Country the Fundamental Right to Equality (Article 14), Prohibits Discrimination on the basis of Sex, Caste, Creed or Religion (Article 15),

Right to Privacy and personal Dignity (Article 21) and Prohibition of trafficking in human beings as beggars and other similar forms of forced labour (Article 23).

The Election Commission had registered a total of 28,341 Transgenders as voters in the General Election, in the year 2014. In India till now, only 6% of the total Transgender Population has Voter ID Cards. So with all these, it's still a long battle to attain a state of being able to exercise every citizenship rights with full dignity, for the people belonging to the Trans community.

#### **Understanding Equality and Human Rights for the Third gender**

We exist in a society that has been intolerant towards the Transgender/Hijra Community for so long, that every minor leap for the normalcy of their existence, feels like a very big deal. The intolerance is so deep rooted that, the transgender people often see themselves as some kind of curse for the sins of their past life. They strive so hard to adjust themselves in the society, for which they also perform crazy rituals, in hope to get their one wish fulfilled from the Gods, that is, to be born as man or woman in their next life.

Human rights are something very essential and fundamental basics for every living being residing in any society irrespective of nationality, place of residence, sex, religion, colour, language or any other aspect. Every human being is entitled to have these Human Rights without discrimination, and having to struggle much. We have to understand that these Human Rights are not merely rights but are Duties too, and both

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<sup>14</sup> *id.*

rights and duties go hand in hand in the long run. To get to enjoy these fundamental rights, we have to perform the duties that come with it, in order to sustain peacefully in the society.<sup>15</sup>

Looking upon our Preamble, which says, "We the People of India, In our Constituent Assembly, do hereby adopt, enact, and give to ourselves this constitution."<sup>16</sup> Here the words "We the People of India" represents every single person who is a citizen of India, it does not specify anything more or less than that, the main essence of those words is that it covers everybody irrespective of any status people may claim to have. The constitution of India in Article 15(1) and 15(2) clearly reads that it prevents the state from making any discriminatory law on the ground of gender alone. The constitution always shows the spirit of equality and discriminates any sort of bias based on gender or other.

Talking about Right to Education, for the Transgender, apparently in our country Transgenders/Hijras are not considered Minorities or should we say that they do not come in the minority bracket even, which simultaneously takes away a large chunk of privilege from their lives, as education is the way to getting prosperity and status in the society, and if the officials would snatch away such an important aspect from a community or a group of people, then that community or group of people are bound to be helpless and backwards. There's no awareness or policies formed by the state. A very clear depiction of this deprivation could be that, till date there's no column for Third Gender,

other than Male and Female, in the admission forms for college, there's simply no recognition for the Third gender, forget about encouragement for the same.

Coming on another major deprivation of Rights, i.e. Right to Employment. The Constitution of India in Article 16(2) clearly explains, "No Citizen can be discriminated against any employment or office under the state, on the grounds only of religion, race, caste, sex, descent, place of birth or residence or any of them", yet the major issue in concern is that, whenever a recruitment process is held or advertised, generally the slots for employees are labelled as Male or Female only, and there is no recognition for the third gender. It's even possible to take in consideration that the employers or recruiters might believe that Transgender people are not fit to be working at certain workplaces, owing to their unique personality and there is no awareness and policies for the concern lead to such issues. And It is expected that we need not go deeper into discussing what unemployment does to a person or community.

Rights in Ancestral Property is another very crucial right, of which the third gender is very conveniently deprived. We all know how a Transgender is socially boycotted from their own family, owing to different reasons, that their families put forth. How we always talk about getting that special emotional space from our family members, but if one's deprived of that because of their sexual identity only, we can only imagine what it would feel like. The Hindu

<sup>15</sup> Henry J. Steiner & Philip Alston, "International Human Rights in Context" (2ndEdn.2000) p.388.

<sup>16</sup> MP Jain, "Indian Constitutional Law" (5th Edn. 2008) p.11.

Succession (Amendment) Act, 2005<sup>17</sup>, Section 6 [1(a & b)], defines that “Daughter of the Coparcener shall by birth become Coparcener in her own Rights in the same manner as the son and have the same rights in the coparceners property as she would have had if she had been a son”. Here also what we observe are only the words “Daughter/Son” are considered as successors and it completely rules out the Transgenders or Hijras. This comes from a deep rooted stigma of having a Transgender in the family, and they are discarded on the same basis from their families, consecutively snatching them of their natural rights even.

## V. SEXUAL ASSAULT AGAINST TRANSGENDERS - A TRIVIAL OFFENCE?

The Section 375 of Indian Penal code<sup>18</sup> defines ‘Rape’ and in a general view, it’s an accepted notion that Rape can only be committed to men and women, irrespective of the fact that Transgenders can be subjected to the same treatment and it could be penetrative or non-penetrative, The same comes with the grave violation of Article 14<sup>19</sup> of the Indian Constitution.

The question for gender neutrality first came into question in the case of *Sudesh Jhaku v. KC Jhaku*<sup>20</sup>, by Delhi High Court where the Court opined that the protection of the law against sexual assault must be extended to men as well, and it was after the Criminal Amendment Act that the legislative Act was propounded. If we

look closer then there is a grave disparity in rendering the punishment, The punishment for rape if committed on a woman the punishment may extend up to imprisonment for a lifetime while an offence of a similar nature upon the body and dignity of a transwoman, is treated as a petty offence. As stated in the provision of the 2019 Act<sup>21</sup>, Section 18 that clearly that Whoever,—

(d) harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine

The disparity in the punishment is clearly visible and to an extent that it is highly discriminatory in nature, when it comes to women its often stated that the crime of rape tends to lower the dignity of the women, and the societal exclusion of the victim and the family happens. First of all, this notion of ‘dignity’ is vague as to the mentality of the society is concerned, this is a serious and stupid case of victim blaming and sick mentality, second of all, even if we go with this notion then why is Transgenders not treated in the same manner? So, this clearly shows that the dignity differs from person to person and that too shall be dependable on the societal notion of a country.

<sup>17</sup> The Hindu Succession (Amendment) Act, 2005, Section 6 [1(a & b)] (INDIA).

<sup>18</sup> The Indian Penal Code [Section 375].

<sup>19</sup> INDIAN CONSTITUTION art. 14.

<sup>20</sup> *Sudesh Jhaku v. KC Jhaku* 1998 CriLJ 2428, 62 (1996) DLT 563, 1996 (38) DRJ 22.

<sup>21</sup> Transgender Persons (Protection of Rights) Act, 2019 [2019 Act] [Section 18].

Why can't be rape treated as rape, no matter on who its is being committed.

In the recent petition filed by advocate Reepak Kansal states that there is no provision in the Indian Penal Code which can protect transgender from sexual assault by a male or female or another transgender<sup>22</sup>. The petitioner seeks to challenge the constitutional validity of clauses (i), (ii) and (iv) and sub-section (1) of section 354A of IPC<sup>23</sup> the same is ultra vires of section 14, 15 & 21 of the Indian Constitution.<sup>24</sup>

The plea further added that, "Sexual assaults can be perpetrated by any individual; however, it is particularly startling when professionals who are in "helping" roles abuse their power and sexually assault individuals they are supposed to be serving. 15% of transgender individuals report being sexually assaulted while in police custody or jail. The main reason is that there is no security of transgender and they are put in jail with male convict and there are no separate jails or wards or security to transgender."<sup>25</sup>

The plea further urged the court to issue an appropriate order, for the respondents to pass the anti-discriminatory bill that shall penalise the discrimination and harassment against the Transgender community. It also sought a direction to the Centre to adopt and implement the Universal Declaration of Human Rights being signatory of it.<sup>26</sup>

<sup>22</sup> Hindustan Times (3 Apr 2021 11:44:36 GMT) <https://www.hindustantimes.com/india-news/sexual-offences-govt-reply-sought-on-equal-protection-for-transgender-persons/story-t1bRzrccRG08O0vk17FcNK.html>

<sup>23</sup> Indian Penal Code (IPC) S. 354A. Sexual harassment and punishment for sexual harassment.

The supreme court has taken into account the plea of the petitioner and there is a hope that a fair judgement shall be delivered by the court so that this discriminatory practice can end and Transgenders can enjoy the guaranteed right i.e., Right to live with dignity.

The root of this problem lies in a deeply ingrained notion of rape being of a gender-restricted crime which further arises due to toxic notions of masculinity, widespread ignorance, lack of understanding and acceptance and transphobia prevalent in the Indian society.<sup>27</sup>

## VI. SUGGESTIONS

Although we have ourselves made this particular section of human beings, a taboo, it is only us and everyone who is an inherent part of the society, who should come forward and make the difference for their betterment. It is time we understand their claim to be treated as normal human beings who have every ounce of feelings and dignity like every other living being.

Some of the major areas where immediate attention is required could be their Rights in property and every right to be a part of the family they were born into, to remain included. Their employment rights, to ensure their progress, as well as their education rights. And definitely not the least their inclusion in either or both the

<sup>24</sup> INDIA CONSTITUTION art. 14,15,21.

<sup>25</sup> Logical Indian (18 Oct 2020 15:06:30 GMT) <https://thellogicalindian.com/lgbtq/pilsc-transgender-24048?infinitescroll=1>

<sup>26</sup> *ibid*

<sup>27</sup> The leaflet (9 Oct 2020 08:26:49 GMT) <https://www.theleaflet.in/transgenders-and-rape-law-is-equal-protection-of-law-still-a-pipe-dream/>

Minority or The Physically Handicapped Category for their well being and social status.

#### Conclusion

Genuine equality means not treating everyone the same, but attending equally to everyone's different needs.<sup>28</sup> - Terry Eagleton

The Transgenders in our community are undoubtedly living a life that no one wishes for, no one dreams of. They are being subjected to every kind of abuse and torcher from time immemorial, with no fault of their own. The injustice that this community faces come in many colors and phases, be it poverty, Social Stigma or harassment, Violence, Lack of HealthCare Coverage or identification threat, this community has been bearing the inhuman torture by the society, However, they are upfront for their needs, yet face severe discrimination, and systemic inequality that is often justified by the society itself, A country like India where it has elephantite sized constitution, with the laws enumerated of all kinds that cover almost every sphere of one's life, apart from the constitution of India we have several other Statutes and Acts that further deal with the laws and rules in a specific area. Even after having them in abundance, there exists a huge disparity and discrimination among certain classes on account of gender.

It's the need of the hour that the Indian judiciary take the rights of the transgender people seriously. They have been denied their rights since a longest time now, their right to live with

'dignity' is being infringed on all the levels possible, be it educational opportunities or employment, and on top of that they are subjected to violence and inhuman behaviour, The sexual harassment against them is rising day to day and there is hardly any remedy available to them, it looks like we have deliberately sidelined this sector, forcing them to ask for money on roads and trains. It is essential for the country's growth that we treat all the genders equally, yet differently as per their needs and take caution steps especially for those who have been denied access to their rightful 'rights' for ages.

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<sup>28</sup> Quotes.pub (6 Apr 2021 03:51:59 GMT) <https://quotes.pub/q/genuine-equality-means-not->

[treating-everyone-the-same-but-at-288197](https://quotes.pub/q/genuine-equality-means-not-)