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Editor In chief – Assistant Professor Mr. Janmejay Singh

Publisher & Founder – Vaibhav Sangam Mishra

Frequency – Quarterly (4 Issue Per year)

ISSN: 2583-6323 (Online)

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Embracing Diversity beyond the binary of Sexes: Third Gender

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Received 22 November 2024; Accepted 24 November 2024; Published 01 December 2024

There are 4.88 lakh kinner in India according to the census of 2011. The term third gender refers to those who do not fit under the conventional categorization of men and women. The term third gender not only includes trans genders it is an umbrella term which includes **LGBTQIA+** where L stands for Lesbian, G for Gay, B for Bisexual, T for Transgender, Q for Queer, I for Intersex, and A for Asexual. A lesbian is a woman who experiences physical, emotional, or romantic attraction to other women. Bisexuality, on the other hand, refers to individuals who feel physical, emotional, or romantic attraction toward people of more than one gender, sex, or gender identity.[1] "Transgender" refers to a person whose gender identity or expression does not align with the sex they were assigned at birth.[2] The word "queer" is often used as an adjective by individuals whose sexual orientation does not align exclusively with being heterosexual or straight.[3] The term “intersex” is used to describe a person who is born with differences in their sex traits or reproductive anatomy that don’t fit typical definitions of female or male. The term “asexual” is used to describe a person who lacks sexual attraction or desire for other people. The "+" symbol represents additional gender identities and orientations that fall outside the LGBTQIA spectrum. However, the concept of the third gender is not new it has been in existence since the existence of society. The transgender community is made up of various groups, such as Hijras, eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis, and many more.[4] The traces of eunuchs can be found in the world in about 9th century BC. The word ‘eunuchs’ is the Greek which basically means "Keeper of the bed", these categories of the men were mainly hired by the kings or the royal households of Hindu, Jainism and Buddhism in order to protect the quarters of the women.

[1] Guides Library, https://guides.library.yale.edu/c.php?g=543814 (last visited Nov. 19, 2024).
[2] Alina Bradford, Timothy Willamson, wat does transgender mean?, Live Science (Nov. 19, 2024, 8:30 P.M.), https://www.livescience.com/54949-transgender-definition.html.
[3] Kevin le, What Does LGBTQIA+ Stand For?, goodRx (Nov. 19, 2024, 8:30 P.M.), https://www.goodrx.com/health-topic/lgbtq/meaning-of-lgbtqia.
[4] Venkata raja Malla, LIVING CONDITIONS AND QUALITY OF LIFE OF TRANSGENDER IN KURNOOL, ANDHRA PRADESH, book (Nov. 19, 2024, 8:35 P.M.), https://kile.kerala.gov.in/wp-content/uploads/2024/10/The-Changing-Fcae-KILE-IInd-proof.pdf.

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These three categories of the gender have also been recognized in the Vedic culture. In the epic Ramayana, When Lord Rama was living in the forest upon being banished for 14 years from the kingdom, as he turns around to his followers, and asks He called upon all the "men and women" to return to the city. However, among his followers, it was only the hijras who felt a strong commitment to his words and decided to stay with him. Recognizing their loyalty, Rama endowed them with the ability to bestow blessings during special occasions such as births, weddings, and inaugural events. This tradition is believed to have given rise to the custom of 'badhai,' where hijras sing, dance, and confer blessings. The Vedas (1500 BC - 500 BC) categorize individuals into three distinct types based on their natural tendencies or prakrti. These categories, also mentioned in the Kama Sutra (circa 4th century AD), are pumsprakrti (male nature), stri-prakrti (female nature), and tritiya-prakrti (third nature). Ancient Indian historical records reveal the presence of third-gender individuals, encompassing male-bodied, female-bodied, and intersex people, who were often recognized from a young age[5]. Ancient Hindu texts on law, medicine, linguistics, and astrology also acknowledge the existence of a third gender. The Manu Smriti (200 BC - 200 AD), a cornerstone of Hindu law, discusses the biological origins of the three sexes. According to this text, a male child results from a predominance of male seed, a female child from female seed, and a third-sex child or twins from an equal mix of both. Failure to conceive occurs if either seed is deficient in quantity. Patanjali's work on Sanskrit grammar, the Mahabhaya (200 BC), asserts that Sanskrit's three grammatical genders correspond to these three natural genders.

Hijras were also known in the Islamic world as they served in royal courts and took part in administration because were considered clever, trustworthy, and fiercely loyal. But after the colonial rule in the 18th century situation of third gender people drastically changed they were negatively treated and their condition became miserable they were denied all civil and political rights and were categorised in separate castes and tribes.

Criminal Tribes Act, 1871

Criminal Tribes Act, 1911

Criminal Tribes Act, 1924

Several provisions within the Criminal Tribes Act were inherently unjust and

[5] Subhajit Debnath, The Third Gender: It's a Start, lawoctops (Nov. 19, 2024, 8:40 P.M.), https://www.lawctopus.com/academike/third-gender-start/.

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disproportionately targeted the transgender community. Such as: According to the Criminal Tribes Act, of 1871, the police were required to register the names and residences of all 'eunuchs' reasonably suspected of sodomy, kidnapping, castration, or of committing offenses under Section 377 of the Indian Penal Code, 1860.

For example, in **Queen Empress v. Khairati (1884),** in this case it was mentioned that under the provision of the section 377 a transgender was detained and prosecuted. Here was a belief that the individual had become a "habitual sodomite." However, in this instance, an appeal led to an acquittal.[6] Such acts were punishable by up to two years of imprisonment, a fine, or both. This pre-partition history continues to shape the challenging and vulnerable conditions faced by the Hijra community in the modern era. Furthermore, **Section 27 of the Criminal Tribes Act** permitted the arrest of transgender individuals without a warrant and their imprisonment if found with a boy below the age of 16. This leads to re-instilling the stereotype of hijras to be perverse, deviant, and criminal.

Section 3 of the Criminal Tribes Act authorized the local government to designate any class of people who were addicted to the systematic commission of non-bailable offenses as criminal tribes. Every registered Criminal Tribes Act member was supposed to report himself either once a week or when the District Magistrate deems it necessary to do so, to the police or the village authority in whose neighborhood the registered member happens to be at that moment.

As a final result these people have suffered and a lot as their freedom and privacy was drastically restricted.

There were so many problems that were faced by the third gender which are as follows:-

They did not have any source of income to survive and fulfill their basic needs. Their condition was miserable they could not have a dignified life. They performed in public dressed as women for their daily expenses or they could only beg or sell themselves as a slave. They were suspected for any crime which has been done in their locality. Punishment was harsh in those days for them in comparison to normal citizens.

According to a report from 1874, several transgender people complained that they were starving and no one was allowed to have any dignified work to feed themselves. They were exploited mentally, physically, and sexually their life was full of traumas. Even they were

[6] Akash Kori, laws relating to the third gender and Homosexuality, ipleader (Nov. 19, 2024, 8:45 P.M.), https://blog.ipleaders.in/laws-third-gender-india/.

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rejected by their own family.

However, in post-independence criminal tribes act was repealed in 1952 but it took a lot of time to change the attitude of society towards them. Even today after so many reforms they are not in the mainstream society. In the Indian constitution, protection is available to all kinds of persons whether it is male, female, or third gender. The preamble of the Indian Constitution emphasizes the principles of justice—social, economic, and political—and ensures equality in status and opportunities for all citizens.[7] **Article14, 15, and 16** of the **Indian constitution** deal with equality as well as equity. These articles provide fundamental right to equality to everyone without discrimination. But even today they are suffering they have to choose between who they are and what they want to be their fight is in only against society but also against themselves where they have to accept themselves as who they are.

Even today in 2024 they have to go door to door to bestow blessings and earn bread and butter. It has been seen that their family is their first enemy and they are forced to leave home. They are bullied, harassed, and treated like a toy. They struggle a lot to get any job and even if they get the job they are not treated appropriately and at a workplace they do not have basic facilities like separate washrooms for them.

During COVID most people lost their job but no one discussed how they were going to feed themselves and they were not educated enough to find any alternative easily to survive.

In 2014 **Supreme Court** directed to treat the third gender under SEBC and to provide horizontal reservation to them but it could not be enforced. In 2019 an act was legislated but no one discussed job reservations. **Sangama petition** was filed in the High Court of Calcutta and Court provides 1% horizontal reservation across all public jobs. This petition was advocated by BT Venkatesh.

Further the honorable **Supreme Court** of India in **National Legal Service Authority vs. Union of India 2014** in its landmark judgment legally recognized third gender. The judgment was issued by a two-judge bench, supported by insights from the "Expert Committee on Issues Relating to Transgender" established under the Ministry of Social Justice and Empowerment. Further, it directed state governments to develop mechanisms to realize the rights of "third gender" The Court upheld the right of all persons to self-identify their gender. The ruling affirmed that hijras and eunuchs have the legal right to identify as the "third gender." It emphasized that gender identity is not tied to biological traits but is

[7] ClearIas, https://www.clearias.com/preamble-of-indian-constitution/ (last visited Nov. 19, 2024).

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based on an individual's deeply felt sense of their own gender. The judgment also stated that no individual identifying as a third gender should be subjected to medical or biological tests that infringe upon their privacy. The Court expanded the interpretation of dignity under **Article 21** of the Indian Constitution to include the freedom of self-expression, enabling individuals to live with dignity[8]. Gender identity was acknowledged as a vital component of the fundamental right to dignity protected under Article 21.

Furthermore, it was observed that the right to equality (Article 14 of the Constitution) and the freedom of expression (Article 19(1)(a)) are both framed in terms that include all individuals, regardless of gender. This means that these rights also apply to transgender persons. The judgment highlighted the severe discrimination faced by transgender individuals across various aspects of society, emphasizing that such treatment violates their right to equality. It also expanded the scope of freedom of expression to include the right to convey one's gender identity through clothing, language, actions, and behavior.[9] Articles 15 and 16 of the Constitution, which prohibit discrimination based on "sex," were interpreted by the Court to encompass not only biological traits—such as chromosomes, genitalia, and physical characteristics—but also the concept of gender as defined by an individual's self-identity.

Thus, the Court held that discrimination on the grounds of "sex" included discrimination on the basis of gender identity.

The Court affirmed that transgender individuals are entitled to fundamental rights under Articles 14, 15, 16, 19(1)(a), and 21 of the Constitution. It also recognized the importance of international human rights treaties and the Yogyakarta Principles in upholding the rights and dignity of transgender persons.[10]

Further Directions:

The Court emphasized the need for public awareness initiatives to combat the stigma faced by the transgender community. The Court instructed both the Central and State

[8] South Asian translaw database, https://translaw.clpr.org.in/case-law/nalsa-third-gender-identity/ (last visited Nov. 19, 2024).
[9] Roopashree Sharma, Explained: What Is Gender Identity and Gender Reassignment?, Jagaran Josh (Nov. 19, 2024, 8:42 P.M.), https://www.jagranjosh.com/general-knowledge/explainer-what-is-gender-identity-and-gender-reassignment-1720688543-1.
[10] Aayushi Tiwari, 20 Landmark cases on Human Right, legal bites (Nov. 19, 2024, 8:45 P.M.), https://www.legalbites.in/20-landmark-cases-on-human-rights/.

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Governments to implement measures aimed at improving the welfare of the transgender community, including:

- Establishing provisions for legal recognition of "third gender" in all documents
- Recognizing third-gender persons as a "socially and educationally backward class of citizens", entitled to reservations in educational institutions and public employment.
- Taking steps to frame social welfare schemes for the community.
- The Court provided a series of directives to both the Central and State Governments, which included setting up dedicated HIV Zero-Surveillance Centers, ensuring access to separate public restrooms, and providing specialized medical care for transgender individuals in hospitals.[11]

In its landmark judgment, the court referenced several rulings from international courts in countries such as New Zealand, Australia, Malaysia, Pakistan, and England. As a result of the **NALSA judgment TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019** came into force under this act central government provided certain rights to trans genders which are as follows:-

- Prohibition against Discrimination
- Right of residence
- Right to Employment
- Right to education
- Right to health
- A national council for transgender persons has been established
- This act also recognizes certain acts as offenses against third persons.
- This act also imposes penalties against wrongdoers.

The world has also recognized third gender rights through norms and conventions and states are free to adopt these norms and conventions in their municipal law in order to protect the rights of these community people. Some examples are as follows where the world has given

[11] Anindita Deb, section 377 IPC, ipleaders (Nov. 19, 2024, 8:50 P.M.), https://blog.ipleaders.in/section-377-ipc/.

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space to third gender identity-

- The **Yogyakarta Principles of 2007 & 2017** are revolutionary as the first international comprehensive enumeration of LGBTQI+-specific universal human rights standards.
- In Nepal, transgender individuals can only register under the “Others” category, irrespective of their gender identity.
- Article 26 of the International Covenant on Civil and Political Rights (ICCPR) prohibits discrimination and guarantees equal legal protection for all, including[12] safeguarding the rights of marginalized groups for transgender individuals within the scope of the term "sex."[13]
- Article 9 of the ICCPR asserts that the right to liberty applies to “everyone,” encompassing all LGBTQ individuals.
- **Article 12 of the ICESCR** has been interpreted to recognize the right to health of transgender persons as a vulnerable group that requires positive State protections.

Likewise, the Committee on the Anti-Torture Convention mandates specific measures to safeguard transgender individuals from torture as outlined in Article 2, and also demands efficient redressal mechanisms for transgender victims of torture as per Article 14 of the Convention.

- In 2017, the Office of the High Commissioner for Human Rights (OHCHR) confirmed that LGBTQI+ individuals are entitled to protections under both the UN Charter and the Universal Declaration of Human Rights, highlighting that no additional specific obligations are required. In the context of India, the Constitution coexisted with **Section 377 of the Indian Penal Code, 1860**, which stated, "Whoever voluntarily engages in carnal intercourse anyone engaging in carnal intercourse deemed unnatural with a man, woman, or animal shall face

[12] Manrettindaskrifstofa islands, https://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-right-to-equality-and-non-discrimination/the-principle-of-non-discrimination-as-a-vehicle-for-the-protection-of-economic-social-and-cultural-rights (last visited Nov. 19, 2024).

[13] International law observer, https://internationallawobserver.eu/wp-content/uploads/2023/03/Factsheet_ICCPR-Article_26_30January2023.pdf (last visited Nov. 19, 2024).

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punishment."[14] Now this section has been decriminalized, a movement to declare this section unconstitutional was started in 1991 and recently, an attempt was made by **Naz Foundation** to challenge the constitutionality of section 377 as it violates the right to privacy and personal liberty between two consulting adults and section 377 was decriminalized but this judgment was again challenged in the supreme court and this time in case of **Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors.** The honorable Supreme Court has reversed its judgment and said that only parliament has the power to decriminalize homosexuality.

- And the current situation is the court recognizes all fundamental and legal rights of third-gender people and legalizes consensual sex between adults as India has expressed support for the Yogyakarta Principles, which advocate against discrimination based on gender identity and sexual orientation.
- And now in India, the situation of the third gender has seen significant progress yet societal changes remain substantial. The Ministry of Social Justice and Empowerment has launched a national umbrella program named "SMILE" (Support for Marginalized Individuals for Livelihood and Enterprise) to uplift marginalized communities.[15] This initiative includes two sub-schemes: 'Comprehensive Rehabilitation for the Welfare of Transgender Persons' and 'Comprehensive Rehabilitation of Individuals Engaged in Begging.'**.** This comprehensive scheme would encompass various measures aimed at the welfare of transgender individuals and those engaged in begging, with a significant focus.
- Rehabilitation initiatives will encompass access to medical care, counseling services, education, skill development programs, and economic opportunities. These efforts will be carried out in collaboration with State Governments, Union Territories, local urban authorities, voluntary organizations, community-based groups (CBOs), and other relevant institutions.[16] And if we discuss societal change

[14] Lawctopus, https://www.lawctopus.com/academike/unnatural-offences-under-the-ipc/ (last visited Nov. 19, 2024).
[15] Vanshiks Singh, Empowering India: The Role and Impact of NGOs in the Nation's Development, medium (Nov. 19, 2024, 8:55 P.M.), https://medium.com/@vs160834/empowering-india-the-role-and-impact-of-ngos-in-the-nations-development-7fdc896f9a97.
[16] Drishtiias, https://www.drishtiias.com/daily-updates/daily-news-analysis/building-an-inclusive-society-through-smile (last visited Nov. 19, 2024).

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then now a day's acceptability towards homo marriages (man can marry to a man and women can marry to women) has been seen.

- There are people who are getting married to a person of the same sex with the consent of their families. A person who is not comfortable in his or her assigned gender can now change their gender by surgery and can lead a normal life science has made their life easy. In the old days if a person identified himself as transgender was forced to live a miserable life and forced to entertain people with their dance or some acts and they were also forced to indulge in illegal sexual activities now there are laws to help and the effect of these laws can be seen here are some examples- Manvi Madhu Kashyap has become first transgender sub-inspector of Bihar, Aishwarya Rutuparna Pradhan has become first IAS officer, Jyoti mondal has become first transgender judge in India and the list is not limited.
- The role of transgender Laxmi Narayan Tripathi was prominent she fought was her and for so many like her. Movies like **'Badhai Do', Subh Mangal Zyada Sadhana,** and **Super Delux** provided mainstream to third-gender people. However, the real challenge lies in transforming societal attitudes and ensuring legal protections. A new change has been seen in new criminal laws of 2024 where in the definition of victim third gender included. Apart from laws, there is a need to change the perspective of people through education and awareness so that the stigma that the third person carries with them can be eliminated, allowing them to lead a life of dignity.

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