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## **THIRD GENDER: STRUGGLE OF TRANSGENDER PEOPLE FOR LEGAL RECOGNITION IN INDIA**

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### **ABSTRACT**

Man is called social animal; we cannot survive alone hence we need someone who support us, whom we can rely upon. In every stage of life, we need someone who support us encourage us. Here family plays an important role in the life of an individual. But people from third gender often abandoned by their own families. They don't have adequate means of livelihood, be it basic necessity for human survival such as food, cloth shelter and basic health care facilities. They were always neglected and never accepted by the society which led them to live their life in poverty and isolation.

Poverty and illiteracy leave no other option to them but to indulged in dirty and hateful jobs such as begging, prostitution and much more. It is only after the mid 1990's and in the beginning of 20th century when people of transgender community coming together and started movement in different parts of the world for their rights. Also in our country where we treat everyone equal the condition of transgender was pathetic. It is the Hon'ble Supreme Court of India who act as savior came to rescue and provide some relief to the people of Transgender Community in the year 2014. This case gives them a ray of hope for brighter future. After the NALSA case many states high court protected transgender rights. Legislature also enacted many laws and policies for the welfare and development of the transgender community in India.

Key Words:- Trans., Third Gender, Transgender, Hijra, Legal Recognition.

## INTRODUCCION

*“Commit yourself to the noble struggle for equal rights. You will make a greater person of yourself, a greater nation of your country, and a finer world to live in”.*

- *Martin Luthar King Jr.*

Man is called social animal; we cannot survive alone hence we need someone who support us, whom we can rely upon. In every stage of life, we need someone who support us encourage us. Here family plays an important role in the life of an individual. But people from third gender often abandoned by their own families. They don't have adequate means of livelihood, be it basic necessity for human survival such as food, cloth shelter and basic health care facilities. They were always neglected and never accepted by the society which led them to live their life in poverty and isolation.

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## MEANING OF TRANSGENDER

The term transgender is used to denote those category of people who don't belong to a particular gender (neither male nor female). The shorter form of transgender is trans. Transgender people who take medical help or do sex reassign surgery and change their gender are called as transsexual. In other words, we can say that transgender is a person who belongs to the third gender.

A person who does not identify with the traditional gender of men or women, but identifies with another gender.. Third Gender or Transgender recognized by different name in different countries in the world. For example, Native American called them two-spirit people<sup>1</sup>, in India

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<sup>1</sup> <https://www.theguardian.com/music/2010/oct/11/two-spirit-people-north-america> (Visited on May 21, 2021)

they commonly known by the name of Hijra or Kinner<sup>2</sup>, in Thailand they are called Kathoey<sup>3</sup>, and in Brazil Travesti<sup>4</sup> is the popular term used for transgender.

## **HISTORICAL BACKGROUND**

History of human being is more than 3.5-billion-year-old. The presence of third gender can be traced back to 4000 BC. today we live a 21<sup>st</sup> century where people generally called themselves more civilized and modern than ever before. But still the condition of transgender or third gender category people didn't change, they still face abuse, harassment, and got beaten up by the general public and torched by the government officials. They are not someone who came in 19<sup>th</sup> or 20<sup>th</sup> century in the earth but their history is as old as human civilization. Our ancient religious text books such as Rig Veda, Ramayana Mahabharata contain many stories that tells us the existence of the third gender in the Ancient era. Even during the medieval history when Mughal ruled India at the time also there are many books and inscription that tells about the third gender.

## **TRANSGEDNER DURING MUGHAL RULE IN INDIA**

During the Mughal Empire (1526-1857) people from Transgender community had a much better condition during the Mughal rue in India. Some of them were in prestigious position on royal darbar such as guardians of harem, political advisor, officers, administrators, royal servants and etc. Account of foreign traveler Francisco Pelsaert in his work mention about the condition of the transgender. He wrote that transgender community enjoys similar rights as the other people of the kingdom have. Some of them were in powerful position also as they were considered the most trustworthy and loyal.

During the Mughal Empire, a number of the preexisting Delhi Sultanate laws were mandating a common set of punishments for zina (unlawful intercourse) which included adultery, rape, prostitution, homosexuality, sodomy, bestiality and fornication.

## **POSITION OF TRANSGENDERS DURING COLONIAL PERIOD**

During the British regime in India, transgender community faces many difficulties and their

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[https://en.m.wikipedia.org/wiki/Hijra\\_\(South\\_Asia\)#:~:text=In%20the%20Indian%20subcontinent%2C%Hijra,excel%20at%20song%20and%20dance.](https://en.m.wikipedia.org/wiki/Hijra_(South_Asia)#:~:text=In%20the%20Indian%20subcontinent%2C%Hijra,excel%20at%20song%20and%20dance.)

<sup>3</sup> <https://en.m.wikipedia.org/wiki/Kathoey> (Visited on May 21, 2021)

<sup>4</sup> Don Kulick, "The Gender of Brazilian Transgendered Prostitutes", 99 JSTOR 574-582 (1997)

condition became worst day by day. They were no more among the people in power who hold higher position in the Royal Darbar during Mughal Saltanate rule in India. They were forced to do all the dirty works. Transgender during British rule in India became baggers and forced to live their life under the fear of British black laws which was specifically enacted to suppressed transgender community.

Britishers criminalization homosexual activity in India. Section 377 of Indian Penal 1860 Code which was remain in force for more than 75 years after Section 377 of the Indian Penal Code, 1860 states that anyone who voluntary do carnal intercourse with any man, animal or women against the order of nature shall be liable to fine and imprisonment either for ten years or foe life time.

Criminal Tribes Act,1871 is one of the example of it<sup>5</sup>. As per to this Act, all members of the hijra community were considered born criminal. It gives immense power to the British officials after this Act transgender could be arrested without any warrant. They were suspected of theft, public nuisance, kidnapping, committing offences under Section 377 of the IPC and abetting the commission of any of the said offences. After India got independence from Britishers this Act was also repealed.

## **MISCONCEPTION ABOUT TRANSGENDERS IN INDIA**

These are the following few myths regarding transgender community in India.

- 1) Transgender people are always confused regarding their gender
- 2) transgender people are mentally instable .
- 3) Misconception regarding sexual orientation that all trans people are either gay or lesbian.
- 4) All transgender people are engaged in prostitution.
- 5) Trans people have special power to curse or bless someone.

## **PROBLEM FACED BY TRANSGENDER**

### **1) Poverty and Unemployment**

Lack of opportunities and poverty makes third gender people most vulnerable section of the society. As per 2011 census data population of trans in India consist of more than 4,90,000<sup>6</sup> and according to the survey done by the National Human Right Commission 92% of trans people

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<sup>5</sup> Soutik Biswas, "How Britain tried to 'erase' India's third gender" BBC News, 31<sup>st</sup> May,2019.

<sup>6</sup> <https://www.fcaids.org/wp-content/uploads/2020/12/HIV-Philanthropy-for-Transgender-Communities-Dec-2020-FINAL.pdf> (Visited on May 18,2020)

are unable to participate in any type economic occupation. If somehow they get job then within few weeks they resign from their post due to the harassment in the office and inappropriate behavior of colleagues and boss towards them. Lack of work opportunity/ unemployment force them to all the dirty and hateful jobs such as begging, prostitution and etc.

## **2) Lack of Basic Health Care Facilities**

Transgender people faces humiliation and discrimination even in the hospitals and health care center which are called second home of god. Health diseases like HIV, Mouth cancer, psychological disorder are few very common diseases in transgender people. According to a report published by World Health Organization there are more than 49% chances that trans people get infected with disease like HIV, Cancers as compared to the general public.

Problems Faces by transgender in health care centers: -

1. Lack of knowledge regarding their rights.
2. Don't have enough money to pay the hospital bill.
3. Don't have knowledge regarding their health issues.
4. Registering and give treatment to them in opposite gender wards.

## **3) Problem of Illiteracy**

Education plays an important role in the development of human personality and also strengthening the of respect for human rights and fundamental freedom. According to 2011 census, there are around 4.9 lakhs transgender people live in the country. Census data also reveals that only 46% of transgender population are literate. Even after getting reservation as Economic weaker section of the society in educational institution more than 50% of transgender population never went to schools<sup>7</sup>. Exclusion from family/society, poverty, social stigma and discrimination, insensitive attitude of teachers/staff, violence and sexual abuse are few main causes of illiteracy due to which people from third gender avoids to take admission in any educational institutions.

## **4) Problem Of Homelessness**

Get abandoned by their own families and poverty are two main cause of homelessness among transgender community in India. As per Census data of 2011 more than 17 lakhs people faces

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<sup>7</sup> Dr Rajkumar (November; 2016); Education of Transgenders in India: Status and Challenges; International Journal of Research in Economic and Social Sciences; Vol. 6 Issue 11. pp.15-24

problem of homelessness in India<sup>8</sup>. In majority of the cases when parents hear that their child belong to the third gender category. They ended their relationship with children. After deserted by their own family third gender children/ individual have no place to live. No one came to help for these children as they are abandoned by their own family. This pandemic (COVID 19) which was started last year and still didn't end affect the life of transgender community in India. They were already facing the problem of homelessness and the policy of govt. to state at home put more pressure on them as they don't have any place whom they can called as home. In most of the cases footpath and roads are shelter for them.

### **5) Harassment And Violence**

People from transgender community faces ill treatment from birth to the death by the society. They were discriminated on the bases of gender as they do not belong to any particular gender. They were treated like untouchable of modern world. Wherever they go they suffer the violence, abuse and get harassed by the people be it schools, colleges, workplace, hospital and health care centre, and even in public places.

Not only general public harass them but people in power and authority specifically police including railway police, traffic police also do the same. They arrested them on false charges under section 268<sup>9</sup>, 268<sup>10</sup>, 270<sup>11</sup> and 294<sup>12</sup> of Indian Penal Code, 1860 and demanded money or pressurize them to do illegal activities. Sometimes they even asked them to indulge with in sexual act. Those who refuse to police officer demands they suffered a lot sometime even with a loss of their life. In *Jayalakshmi v. State of Tamilnadu*<sup>13</sup> a transgender was arrested on the charge of theft. He immolates himself after being sexually assaulted by the police within the four wall of police station.

### **6) Marginalization and Social Exclusion:**

Untouchability is prohibited in India and Article 14 of the Indian Constitution states that untouchability practiced in any form shall be an offence and punishment shall be awarded to

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<sup>8</sup> <https://www.census2011.co.in/houseless.php>

<sup>9</sup> Section 268 of I.P.C., 1860 – Public Nuisance

<sup>10</sup> Section 269 of I.P.C., 1860 - Negligent act likely to spread infection of disease dangerous to life

<sup>11</sup> Section 270 of I.P.C., 1860 - Malignant act likely to spread infection of disease dangerous to life.

<sup>12</sup> Section 294 of I.P.C., 1860 - Obscene acts and songs at public place.

<sup>13</sup> (2007) 4 MLJ 849

the committer in accordance with law. People from third gender community in India are treated like modern day untouchables. The members of society have a negative attitude towards the transgender community which lead to low self-esteem and low self confidence among the people of third gender community. Therefore, they prefer to remain in isolated from the society and makes their shelter far away from the crowded areas mostly in in remote areas or in boundaries of cities.

### **7) Psychological Problems**

People from transgender community faces stigmatization, violence, social rejection, discrimination and harassment in their whole life. It impacts on their mental health and cause leading level of psychological distress, self-harm and increase in no. of suicide cases among people who belong to third gender. It led them to live their life in isolation.

Situation of transgender people is more difficult in rural areas where everyone including one's community, one's family and one's friends are aware that one is transgender. Transgender people who live in rural areas are more likely to leave the place of their birth/youth than the general population. These emotions affect the mental health of a transgender.

### **8) Difficulty in Document Identification**

People of transgender community find it difficult to get their name in important documents. As majority of documents only consisted two genders in it that is male and female. People from third gender community do not able to get themselves to registered with many schemes and programs and always remain untouched from those policies of the government because while filing the form they don't know which gender they belong to. In the year 1994 transgender people had won the right to vote but it is in 2013 when the Election Commission of India introduced other gender in vote identity card<sup>14</sup>.

After more than 58 years of Independence finally in the year of 2005 Indian passport included other gender symbolized as E (eunuch) . After 2014 ruling of apex court, in March 2015 Passport application form had the option of choosing transgender in the gender category. Prior to Income Tax (Fourth Amendment ) rules,2018 people from transgender community cannot enroll themselves for Permanent Account Number or PAN Card in India<sup>15</sup>.

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<sup>14</sup> [Http://thewire.in/gender/third-gender-railway-forms-passport-voter-id](http://thewire.in/gender/third-gender-railway-forms-passport-voter-id) (Visited on May 22, 2021)

<sup>15</sup> [Http://www.hindustantimes.com/india-news/transgenders-to-be-recognised-as-independent-gender-category-in-pan-form/story-7YMffDaGloDsCuge9cgdrM.html](http://www.hindustantimes.com/india-news/transgenders-to-be-recognised-as-independent-gender-category-in-pan-form/story-7YMffDaGloDsCuge9cgdrM.html) (Visited on May 22, 2021)

## **NALSA CASE: A HOPE FOR TRANS PEOPLE**

National Legal Service Authority v. Union of India<sup>16</sup>

### **FACTS OF THE CASE**

- NALSA (National Legal Service Authority) has been constituted under the Legal Service Act, 1987. Its main objective is to provide free legal aid to the marginalized and weaker sections of the Indian society. NALSA in the year 2014 filed a writ petition in the apex court of India on the behalf of hijra community.
- The core concern is to recognize the rights of third gender people living in India who faces discrimination and are subject to harassment and violence.
- These two PIL seeking the legal recognition of transgender as third gender and protection of their rights mention under article 14 and 21 of Indian Constitution.

### **NALSA CASE JUDGEMENT**

The judgement was delivered by a two-judge bench comprising of Justice A.K. Sikri and Justice K.S. Radhakrishnan on April 15, 2014. The Hon'ble Court made a distinction between Psychological sex and biological sex. The apex court recognize transgender as third gender. it further held that, people from transgender community will be considered as Other Backward Classes (OBC) and entitled for reservation in educational institutions and employments.

#### **•Supreme Court on Article 14**

By virtue of Indian constitution they are equally entitled to legal protection, civil & citizenship right. Non-recognition of identity of trans person denies them equal protection of the law. The Court therefore held that article 14 outlaw's discrimination on the basis of sexual orientation or gender identity.

The term person used in the Article 14 of the constitution is not restricted to the male and female but it has a wider meaning. People from third gender community also include in it.

#### **•Supreme Court On Transgender right Against discrimination**

Discrimination on the grounds of sex includes discrimination on the ground of gender identity. "Sex" is not limited to biological sex, but rather gender identity, and is intended to include

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<sup>16</sup> AIR 2014 SC 1863

people who consider themselves to be neither male nor female.

Transgender people are also entitled to enjoy economic, social, cultural and political rights which are available to the people of other gender. any kind of discrimination which is strictly prohibited by the constitution of India is violation of their fundamental rights guaranteed and protected by the Constitution of India.

•Supreme court on ARTICLE 19 of India Constitution

The Hon'ble apex court of India in NALSA v. Union of India held that freedom of expression includes one's right to expression of self-identified gender, which could include expression through dress, action, words, behavior or in any other form. Therefore, no restriction should be placed on a person's choice of dressing or appearance.

•Supreme Court on Article 21 of Indian Constitution

Article 21 of the Indian Constitution states about protection of life and personal liberty. It states that, no individual shall be deprived from his right to life & personal liberty except according to the procedure established by law. This protection of life and personal liberty under Article 21 of Indian Constitution includes all those aspects which make a person's life meaningful. It not only protects the dignity of an individual but also safeguard his privacy and give a right to live a life on personal autonomy. Recognition of gender identity is a part of the right to dignity.

The Hon'ble supreme court of India also directed both central and state government to take appropriate measures for the welfare and protection of the rights of transgender community including:

1. Legal recognition of transgender as third gender in all documents.
2. To recognize them as educationally and socially backward class of society and give them reservation in educational institution and occupation opportunity.
3. Frame social welfare schemes, policies and programs for their development.

## CONCLUSION

*“Family is the most important aspect when it comes to looking at the mental health of young people who are trans and gender diverse and non- binary”.*

- ‘Dr. Michelle Telfer’

Get abandoned by their own families and poverty are two main cause of homelessness among transgender community in India. As per Census data of 2011 more than 17 lakhs people faces problem of homelessness in India<sup>17</sup>. People from third gender faces problems and difficulties throughout their life from birth to death. Be it a minor child, adolescent or major people from third gender neglected by the society at each stage of life. A child is considered an asset of nation. For his proper growth and development he require proper care , love, affection and nourishment<sup>18</sup>. But in majority of the cases when parents hear that their child belong to the third gender category. They ended their relationship with children. In this so called modern day materialistic world name, status and honour became so important that, even pure and unconditional love of parents towards their child can't stop them from abandoning their children. After deserted by their own family third gender children/ individual have no place to live. No one came to help for these children as they are abounded by their own family.

After waited more than 70 years of independence from Britishers in the year 2019 people of transgender community finally get a legislation for protection of their rights in India. They waited five years after the NALSA case. But their wait for the legislation was not gave full satisfaction to them as many provisions of the said Act were ambiguous.

Problem of housing snowballed into both physical and mental health of people who belonged to the transgender community. The legislation passed by the Indian Parliament in 2019 (Transgender Person (protection of Rights) Act, 2019 do not talk about housing. This pandemic (COVID 19) which was started last year and still didn't end affect the life of transgender community in India. They were already facing the problem of homelessness and the policy of govt. to state at home put more pressure on them as they don't have any place whom they can called as home. in most of the cases footpath and roads are shelter for them.

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<sup>17</sup> <https://www.census2011.co.in/houseless.php>

<sup>18</sup> Sheela Barse v. Union of India 1986 SC