

THIRD GENDER RIGHTS: EMERGING TRENDS & ISSUES

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The terms third gender and third sex describe individuals who are broadly categorised as neither man nor women as well as the social category present in those societies who recognize three or more genders. Transgender, in our society, encompass all races, ethnicity, religious and social classes, yet, they've never enjoyed a respectable life, because of "what they are" and "how they are". My paper primarily focuses on the violation of rights of transgender where they are disowned by their families in their childhood, ridiculed and abused by everyone, an analysis is drawn by tracing back the abominable state of the transgender from their inception and the violation that they face from the colonial era which serves as a reminder of how helpless and neglected this section of society is. Lack of transparency of police administration in dealing with the hijras and failure to furnish information relating to procedure and penalties used in detaining them. Inability to address these failures leads to the authorities resorting to third degree treatment of harassment which leads to the violation of their right to life which is inherent as much as the right of expression of sexuality which forms the facet of right to life.

Therefore even after the wake of the judgement recognizing the rights of transgenders directing the state and the central government to recognise the rights of the hijras, widespread abuses which includes the false cases fostered upon them leads to the violation of their personal rights. It must be noted that third gender rights is not adequately provided for, though their existence is evident in our country. Thus, there should be a special legal protection against this form of discrimination inflicted by both state and civil society which is akin to the offence of practising untouchability.

Introduction

The rule of law is supreme and everyone is equal in the eyes of law in India. Yet, the transgender community is in a constant battle as they have to fight oppression, abuse and discrimination from every part of the society, whether it's their own family and friends or society at large. The life of transgender people is a daily battle as there is no acceptance anywhere and they are ostracized from the society and also ridiculed. Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.

Transgenders are neither treated as male or female, nor given the status of a third gender, they are being deprived of many of the rights and privileges which other persons enjoy as citizens of this country. TGs are deprived of social and cultural participation and hence restricted access to education, health care and public places which deprives them of the Constitutional guarantee of equality before law and equal protection of laws. Even after the pronouncements of judgement with respect of the recognition of transgenders' rights, they are still continued to be abused and face custodial torture and unlawful detention. Further, it was also pointed out that the community also faces discrimination to contest election, right to vote, employment, to get licences etc. and, in effect, treated as an outcast and untouchable.

In 2014, the Supreme Court ruled that transgender people be recognized as a third gender and enjoy all fundamental rights. The Supreme Court stated: "Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender."

Rights Granted Under Indian Law to Transgenders- Constitutional Safeguards

The right of equality before law and equal protection of law is guaranteed under Article 14 and 21 of the Constitution. **The right to choose one's gender identity** is an essential part to lead a life with dignity which again falls under the ambit of Article 21. Determining the right to personal freedom and self determination, the Court observed that "the gender to which a person belongs is to be determined by the person concerned." The Court has given the people of India the right to gender identity. However, the Supreme Court of India in its pioneering judgment by the division bench of Justices K.S. Radhakrishnan and A.K. Sikri in **National Legal Services Authority v. Union of India & Ors.**² recognized the third gender along with the male and female. By recognizing diverse gender identities, the Court has busted the dual gender structure of 'man' and 'woman' which is recognized by the society. The Court recognized the right to as to how a person choose to behave in private, personhood and the free thought process of the human being, which are necessary for the fullest development of the personality of the individual. The Court further noted that a person will not realize his dignity if he is forced to mature in a gender to which he does not belong to or he cannot relate to which will again hinder in his development. The Court also protects one's gender expression invoked by Article 19 (1) (a) and held that "no restriction can be placed on one's personal appearance or choice of dressing subject to the restrictions contained in Article 19(2) of the Constitution". "Recognition of Transgenders as a third gender is not a social or medical issue but a human rights issue," Justice K.S. Radhakrishnan told the Supreme Court while handing down the ruling:

¹ National legal service authority v. Union of India Writ Petition (civil) no.400 of 2012

² Writ Petition (Civil) No.400 Of 2012

The Supreme Court has given certain directions for the protection of the rights of the transgender persons by including of a third category in documents like the election card, passport, driving license and ration card, and for admission in educational institutions, hospitals, amongst others.

Human rights are basic rights and freedoms which are guaranteed to a human by virtue of him being a human which can neither be created nor can be abrogated by any government. It includes the right to life, liberty, equality, dignity and freedom of thought and expression.

Violation of Human Rights

The transgender communities are deprived of social and cultural participation and hence they have restricted access to education, health care and public places which further deprives them of the Constitutional guarantee of equality before law and equal protection of laws. It has also been noticed that the community also faces discrimination as they are not given the right to contest election, right to vote (Article 326), employment, to get licenses, etc. and in effect, they are treated as outcast and untouchable.

Discrimination on the basis of class, gender, and sexuality not only limits the choice of profession and the possibility of economic advancement but also impedes access to education and information about lifestyle choices of sexuality minorities. The classification of state and societal violence against hijra and kothi sex workers can be done under the following heads:³ **Harassment by the police in public places b) Harassment at home c) Police entrapment d) Abuse/harassment in police stations e) Rape in jails**

- a) **Harassment by the police in public places:** Due to the extreme intolerance they face in their families, hijras and kothis often adopt public spaces like parks or certain streets, as social spaces where they meet sexual partners, lovers and even clients. Since they can't afford the protection and privacy afforded by independent accommodation, they are driven to making furtive sexual contacts and having sex in parks and public toilets. This makes them vulnerable to violence, inflicted largely by the police.
- b) **Harassment at Home:** Although public spaces do indeed expose hijras and kothis to extreme violence, the private space by itself cannot guarantee safety either. For most hijras and kothis a long struggle is involved in leaving the confines of their family and setting up a house of their own, albeit with meagre resources. This home is a private space, which should guarantee them, like everyone, a sense of personal security. Unfortunately, hijras and kothis are subject to constant surveillance by the police, which often leads to their intrusions into the private spaces of the home as a continuation of the harassment that the hijras face on the street.
- c) **Abuse/harassment in police stations:** Police stations have always functioned as custodial institutions in which there is tremendous scope for both harassment and abuse. The powers of the police, which are enormous due to laws like Section 377, are

³ <http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.pdf>

minimally checked in public spaces, but function unbridled in a closed environment such as the police station. The various legal norms which govern the behaviour of the police are completely disregarded in the police stations with the police violating all canons of civilized behaviour.

- d) **Rape in jails:** Jails are custodial institutions where feminine behaviour by men is always at a greater risk of mistreatment by both authorities and inmates. Jails are closed institutions with a strict segregation based on sex. This ensures that male wards in general are highly masculine spaces with no heterosexual contact. The cult of masculinity promoted by the jail environment necessarily entails a targeting of those considered not 'masculine' enough. As a consequence, kothis and hijras admitted to jails become the sites for the enactment of the most brutal forms of sexual violence, as the following testimony reveals.

Reasons behind incitement of violence

The reason why the sexuality of hijras incites such gratuitous violence could be two-fold. First, since sexuality is often the most intimate part of a person, sexual abuse and violence can be seen as the most systematic tool of dehumanizing an individual⁴.

Second, the sexual nature of the violation can be understood as an apt punishment for a transgressive sexuality. Since this non-conformative and highly visible sexuality of hijras is so deeply threatening to the conventional social order, a punishment centering on a targeting of sexuality is deemed most effective.

Children and Adolescents

While most transgender individuals behave in ways that do not conform to expected gender roles during childhood, not all gender-nonconforming children grow into a transgender identity. However, gender-nonconforming children are subjected to harassment and violence at home and schools⁵, regardless of whether they consider themselves transgender as adults. Hence the author uses the term 'transgender and gender non-conforming' while referring to children.

Addressing stigma, discrimination and violence against transgender adults

In addition to the recommendations previously made for transgender children, their families, educational institutions, and healthcare systems, the following measures are suggested to address stigma, discrimination and violence against transgender adults.

⁴ <http://socialjustice.nic.in/pdf/chapter7.pdf>

⁵ Roberts, AL, M Rosario, HL Corliss, KC Koenen and SB Austin. 2012. Childhood Gender Nonconformity: A Risk Indicator for Childhood Abuse and Posttraumatic Stress in Youth. Pediatrics. <http://pediatrics.aappublications.org/content/early/2012/02/15/peds.2011-1804>

Workplace: In consultation with community groups and human resource professionals experienced in the area of Diversity and Inclusion, workplaces in public and private sector need to sensitize employers and employees on issues of transgender persons. Antidiscrimination policies must be instituted and meaningfully applied to the processes of hiring, retention, promotion, and employee benefits. Workplace sexual harassment policies should be made transgender-inclusive.

Law and Law Enforcement: Cases of violations of human rights of Transgender persons have been highlighted in the media and brought to the notice of Courts, although no separate data is maintained by the National Crime Record Bureau (NCRB). The incidents of atrocities and harassment by police occur mainly due to lack of proper knowledge of applicable legislations and sensitization in police. There is a need for training and sensitization of police on transgender issues on the lines of training and sensitization done for treatment of issues related to Women, Children and other vulnerable sections of society. The legal and law-enforcement systems need to be sensitized on issues of transgender people and be empowered to take actions such as:

- (i) Criminal and disciplinary action against delinquent police official in cases of violations of human rights of transgender persons.
- (ii) Taking action against parents who neglect or abuse their gender-nonconforming or transgender children and against doctors who practice electro-shock or other kinds of unethical “conversion” therapy.
- (iii) Making free legal aid available to transgender individuals seeking redress against discrimination and violence.
- (iv) Bureau of Police Research & Training (BPR&D) may undertake a study on crime against transgender persons, including alleged excesses by Police, with a view to investigate their causes and suggest preventive measures.
- (v) National Crime Records Bureau may, from now on, collect and compile statistics of crime against transgender persons, as also about cases registered against them as accused.
- (vi) Sexual assault, sexual harassment and domestic violence laws must be made transgender-inclusive. Presently, Section 375 of IPC, as amended doesn't cover the transgender persons as victims of sexual assault (only cis women can be the victims of sexual assault). Alongside Section 375, another section should be included to cover the cases of sexual assault on transgender persons.

Many cases of human rights violations by police have been reported from time to time across the country. There is no systematic research done on the subject of transgender persons and violence, often the only reports are those few that reach the media.

A case in recent memory was that of Pandian/Pandiammal, a transgender person who was repeatedly and brutally sexually abused by the police in Chennai, leading her to immolate

herself in front of the police station. In a 2007 ruling⁶, Chief Justice AP Shah and Justice P Jyothimani ordered the Government of Tamil Nadu to provide compensation to the next of kin. Our societal discomfort with transgenderism has rendered transgender victims of sexual assault, and domestic violence without necessary services. Rape Crisis Intervention Centers and domestic violence shelters are unprepared to address the issues of transgender people. Medical personnel, criminal justice and the legal systems often re-traumatize victims. The complexity of issues facing the transgender person who is sexually assaulted can only be addressed by broad changes in the delivery system and extensive education regarding the needs of this community.

India: The case in Kolkata where two transgenders were allegedly beaten up near Hazra on Navami night. The duo also alleged cops were reluctant to lodge a complaint. Police, though, denied the claims and top south division officers said they would probe to find out if there was any lacuna on the police's part. **Facts:** The transgenders had boarded the Metro from Shyambazar and got down at Jatin Das Park station to reach Maddox Square. The duo alleged that a few men, who had allegedly passed objectionable remarks at them on the Metro, beat them up near Hazra.⁷

The transgender community faces stigma and discrimination and therefore has fewer opportunities as compared to others. They are hardly educated as they are nor accepted by the society and therefore do not receive proper schooling. Even if they are enrolled in an educational institute, they face harassment and are bullied every day and are asked to leave the school or they drop out on their own. It is because of this that they take up begging and sex work. Seldom does a skilled individual from this community get into formal employment due to the policy of hiring only from either the male or female gender. Even if they do, they are ridiculed and ostracized and hence forced to leave their jobs.⁸

They are forced into sex work which puts them at the highest risk of contracting HIV as they agree to unprotected sexual intercourse because they fear rejection or they want to affirm their gender through sex. They are viewed as 'vectors' of HIV in the society. Other sexually transmitted infections such as rectal gonorrhoea, syphilis, rectal Chlamydia, etc., add to the risk of HIV.

Non-recognition of Identity:

Hijras/transgender persons have been facing extreme discrimination in all spheres of the society. Non-recognition of the identity of Hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police. Sexual assault,

⁶ Shah, AP and P. Jyothmani. 2007. Jayalakshmi vs. Government of Tamil Nadu. Common judgement, Madras High Court. Online at <http://indiankanoon.org/doc/1373799/>

⁷ <http://timesofindia.indiatimes.com/city/kolkata/Transgenders-beaten-up/articleshow/49522082.cms>

⁸ <http://blog.iplayers.in/legal-rights-law-transgenders-in-india/>

including molestation, rape, forced anal and oral sex, gang rape and stripping is being committed with impunity and there are reliable statistics and materials to support such activities.

Further, non-recognition of identity of Hijras /transgender persons results in them facing extreme discrimination in all spheres of society, especially in the field of employment, education, healthcare etc. Hijras/transgender persons face huge discrimination in access to public spaces like restaurants, cinemas, shops, malls etc. Further, access to public toilets is also a serious problem they face quite often. Since, there are no separate toilet facilities for Hijras/transgender persons, they have to use male toilets where they are prone to sexual assault and harassment. Discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India.

Justice Kennedy in **Lawrence v. Texas**⁹ delivered the opinion of the Court: “Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.” *In this respect, the Supreme Court should contemplate not only moral values and cultural integrity of the country before deciding the matter on merits but also the liberty and freedom of each individual in the country. There is need to keep state away from the personal life of the people. Right of privacy also needs to be broadening its scope and ambit in regard of the homosexual activity.*

United Nations and Other Human Rights Bodies – On Gender Identity and Violence Against Transgender

United Nations has been instrumental in advocating the protection and promotion of rights of sexual minorities, including transgender persons. **Article 6** of the Universal Declaration of Human Rights, 1948 and **Article 16** of the International Covenant on Civil and Political Rights, 1966 (ICCPR) recognize that

*“Every human being has the inherent right to live and this right shall be protected by law and that no one shall be arbitrarily denied of that right”.
Everyone shall have a right to recognition, everywhere as a person before the law.*

Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on

⁹ 539 U.S. 558 (2003)

his honour and reputation and that everyone has the right to protection of law against such interference or attacks.

Article 14, 19(1)(A) And Transgenders

Article 14 of the Constitution of India states 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”.

Equality includes the full and equal enjoyment of all rights and freedom. Right to equality has been declared as the basic feature of the Constitution and treatment of equals as unequals or unequals as equals will be violative of the basic structure of the Constitution.

Article 14 of the Constitution also ensures equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws and nobody is denied such protection. Article 14 does not restrict the word ‘person’ and its application only to male or female.

Article 19(1) of the Constitution guarantees certain fundamental rights, subject to the power of the State to impose restrictions from exercise of those rights. The rights conferred by Article 19 are not available to any person who is not a citizen of India. Article 19(1) guarantee those great basic rights which are recognized and guaranteed as the natural rights inherent in the status of the citizen of a free country.

Article 19(1) (a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one’s right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, action or behaviour or any other form. No restriction can be placed on one’s personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution. In this connection, it is pertinent to note the landmark judgement in the **Supreme Court of State of Illinois** on the rights of TG’s freedom of expression-

the notion that the State can regulate one’s personal appearance, unconfined by any constitutional structures whatsoever, is fundamentally inconsistent with “values of privacy, self-identity, autonomy and personal integrity that the Constitution was designed to protect.”¹⁰

Gender identity, therefore, lies at the core of one’s personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India. A transgender’s personality could be expressed by the transgender’s behavior and presentation. State cannot prohibit, restrict or interfere with a transgender’s expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. Therefore the values of privacy, self-identity, autonomy and

¹⁰ City of Chicago v. Wilson et al., 75 Ill.2d 525(1978)

personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognize those rights.¹¹

Legislative Measures

The world is slowly but painfully moving towards formal recognition of the existence of 3rd gender rights. On April 15,2014 landmark decision of **National legal service authority v. Union of India**, recognised the rights of the transgender in the eyes of law relying on Article 14 of the Indian Constitution dealing with right to equality uses the term person which does not restrict itself to binary term. Article 15 signifies that state shall not discriminate against any citizen on the ground of sex with regard to access to shops public restaurant, hotels & places of public entertainment. Article 16 states that there shall be equality of opportunities for all citizens in matters relating to employment of any office. Gender identity is at the core of one's personal identity. Therefore, it will have to be protected under Article 19. The SC also went on to that self- determination of gender is an integral part of personal autonomy & self- expression falling within Article 21 of the Indian Constitution.

Third Gender-Declaration from the Apex court¹²:

- Hijras, eunuchs, apart from binary gender, be treated as “Third gender” for the purpose of safeguarding their rights under Part III of the Constitution and the laws made by the Parliament and State legislature.
- Transgender persons right to decide their self-identified gender is also upheld and the Centre and State government are directed to grant recognition of their gender identity such as male,female or as third gender.
- To extend all kinds of reservation in cases of admission in educational institution and for public appointments.
- Central government should seriously address the problems faced by Hijras such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma.
- Central and State governments should take proper measures to provide medical care to the TG's in the hospitals and also provide separate public toilets and other facilities.
- Central and State governments should take steps for framing social welfare schemes for their betterment.
- To take steps to address the violations faced by the transgender community with respect of custodial torture and unlawful detention of the transgenders who are languishing in the prison cells.

¹¹ <http://www.pucl.org/Topics/Gender/2003/sexual-minorities.pdf>

¹² National Legal Service Authority V. Union of India Writ Petition (Civil) No.400 Of 2012

Police Reforms¹³

- The police administration should appoint a standing committee comprising Station House Officers and human rights and social activists to promptly investigate reports of gross abuses by the police against kothis and hijras in public areas and police stations, and the guilty policeman immediately punished.
- The police administration should adopt transparency in their dealings with hijras and kothis; make available all information relating to procedures and penalties used in detaining kothis and hijras in public places.
- Protection and safety should be ensured for hijras and kothis to prevent rape in police custody and in jail. Hijras should not be sent into male cells with other men in order to prevent harassment, abuse and rape.
- The police at all levels should undergo sensitization workshops by human rights groups/queer groups in order to break down their social prejudices and to train them to accord hijras and kothis the same courteous and humane treatment as they should towards the general public.

Right of Transgender Persons Bill, 2014:

The Bill was introduced in Rajya Sabha on 12th December, 2014 which is passed on 24th April, 2015 unanimously, with cross-party support. The rights guaranteed under the Bill are mostly substantive rights such as the right to equality and non-discrimination, life and personal liberty, free speech, to live in a community, integrity, along with protection from torture or cruelty and abuse, violence and exploitation. There is a separate clause for transgender children.

Education, employment and social security and health are also covered under the Bill. The chapter on education makes it mandatory for the Government to provide inclusive education for transgender students and provide adult education to them.

With the employment chapter, there are two separate clauses dealing with formulation of schemes for vocational training and self-employment of transgender persons by the Government. There's a separate clause for non-discrimination against transgender persons in any establishment – public or private. The Bill envisages setting up a number of authorities and forums – **National and State Commissions for Transgender Persons**. The Commissions work will be mostly in the nature of inquiry or recommendations in the inconsistencies in the application of the law or violations of right of transgender persons. The Commissions can issue summons to witnesses, receive evidence, etc. There is penalty by way of imprisonment for upto a year for hate speech against transgender people.¹⁴

¹³ <http://www.pucl.org/Topics/Gender/2004/transgender.htm>

¹⁴ Rights of transgenders in India - iPleaders <http://blog.ipleaders.in/legal-rights-law-transgenders-in-india/#ixzz3xvyVokI3>

Status of the Bill

To become law, it now must be passed by the lower house of parliament, where the ruling Bharatiya Janata Party (BJP) has a majority. The Minister for Social Justice and Empowerment, belonging to the BJP, has thus far said that the government supports the issue but wants to bring its own comprehensive bill in this regard. The Rights of Transgender Persons Bill, if passed, will allow for legal gender recognition, removing a fundamental barrier for transgender people toward realizing their basic human rights, including protection from violence and discrimination.

Conclusion

Sexual violence is a constant, pervasive theme in all these narratives. Along with subjection to physical violence such as beatings and threats of disfigurement with acid bulbs, the sexuality of the hijra also becomes a target of prurient curiosity, at the very least and brutal violence as its most extreme manifestation. As the narratives indicate, the police constantly degrade hijras by asking them sexual questions, feeling up their breasts, stripping them, and in some cases raping them. With or without the element of physical violence, such actions constitute a violation of the integrity and privacy of the very sexual being of the person. The police attitude seems to be that since kothis and hijras engage in sex work, they are not entitled to any rights of sexual citizenship. What became apparent in the course of study is that discrimination against hijras and kothis is embedded in both state and civil society. The violence that this community faces is not only due to the state but also has deep societal roots.

While India has made considerable progress on rights of transgender people in recent years, most remain socially marginalized and deprived of basic rights, including the right to vote, own property, marry, and claim a formal identity through a passport or other government identification. They are frequently publicly ridiculed and excluded from general society, enduring discrimination and humiliation from the police and medical authorities.