

**THIRD GENDER PERSONS SOCIAL AND EDUCATIONAL EQUALITY LEGAL RIGHTS
IN INDIA****Dr. Ravi Kumar¹, Mr. Atul Yadav², Ms. Chanchal Khatri³**¹Assistant Professor Department of Law, J S University Shikohabad, Firozabad,
adravityagi@gmail.com²Associate Professor Department of Law, J S University Shikohabad, Firozabad,
atuladvocate@gmail.com³Assistant Professor Department of Law, J S University Shikohabad, Firozabad,
chanchalkhatri700@gmail.com**Abstract-**

Transgender people are people of any age, religion, faith, gender, appearance, personal characteristics, or behaviour that deviate from the norm about how men and women 'should' be. Transgender people have existed in all cultures, races, countries and classes since time immemorial. The word "transgender" appeared in the same language in the mid-1990s from the indigenous community of people with different genders. In today's practice, transgender has become a "common and umbrella term" used to describe a broad spectrum of identities and experiences, including but not limited to heterosexual, male and female heterosexuals.

The present paper is an attempt to know the historical account of transgender people. How they are continuously discriminated against and how they behave to protect their rights in different processes. Are there prominent threats to their lives? How powerful has Indian law been in changing the perception of different sections of society? The various rights granted to this community are rarely enforced and the welfare measures remain on paper. Although the Constitution of India makes strong promises prohibiting discrimination of all kinds, there is ambiguity about the concept of gender and the implications that prohibition can have on the rights of third genders. With the Supreme Court taking immediate action on the NALSA decision, significant attention has been drawn to the rights of transgender people, which will be explored in the next paper. Highlighting the historical growth of transgender people and analyzing their position in places around the world, this research paper aims to shed light on the dark world of suffering and discrimination that this community has been subjected to in India.

Keywords:

Legal Rights, Third Gender, Equality, Freedom, Bill of Right.

Research Methodology-

Present the course based on the research teaching method. A comprehensive review of existing books, journals, articles, reports, magazines, newspaper articles is highly relied upon to get a clear updated picture of the current situation of transgender people in India in the rule of Constitutional law and its conflict with statutory laws the fast pace of modern law development. The case laws of the various Courts are referred.

Introduction-

While discussing third genders and their rights in India one must first decide between the extreme marginalization or the underplayed distinction between the notions of “sex and gender”. The word "gender" refers to what is recognized by society and, which may or may not correspond to the sex assigned at birth. Sex refers to what you are born with. Both of these are close to human nature and are aspects of choice, dignity and freedom.

Third genders are gender types, where people are of any age or gender whose appearance, personal characteristics, or behavior' do not match the structure about how men and women 'should' be. The term "third gender" is often used to describe those who transgress society's gender norms. National Legal Services Authority V Union of Indiaⁱ is a landmark judgment of the Supreme Court of India, which declared that transgender people are a 'third gender'. Transgender is often used as an umbrella term for the third gender to denote people who do not conform to the binary structure, and who express or present the violation and/or blurring of traditionally prevalent gender roles. Transgender people may live full-time or part-time in the 'opposite' gender role to their natural sex. In current usage, the term ``transgender" has become an umbrella term used to describe a wide range of identities and experiences, including but not limited to pre-transgender people, providers and those who are non-participants (mostly aligned with them). the opposite sex in their natural sex) 'misogyny' male and female (sometimes referred to as "transvestites", "drag-queens", or "kings" depending on what gender they choose, what they think they look like or what their characteristics are. A person who has changed gender from male to female is called a "transgender woman" and a person from female to male is called a "transgender man". The terms "transgender" or "transgender people", used in this summary, while more inclusive than transgender women, are used to refer to Trans-Women when the focus is on the abbreviation. Sometimes, for short, the abbreviation "TG" is used to describe transgender women. Transgender people have existed in every culture, race, and class since the history of human life has been recorded. That includes people who don't identify as transgender, but others who do and as such are subject to the same social oppression and physical violence as those who identify with any of these categoriesⁱⁱ.

General Discrimination-

Gender-based discrimination and harassment is a violation of human rights. In common parlance, women are the subject of gender-based violence. However, research shows that the transgender community ranks higher than women. Quoting Ban Ki Moonⁱⁱⁱ the Secretary-General of the United Nations, “We see a pattern of violence and discrimination directed at people simply because they are gay, lesbian, bisexual or transgender. There is widespread discrimination in workplaces, schools and hospitals as well as horrific attacks including sexual harassment. This statement highlights the widespread abuse and gross human rights violations of sexual minorities including transgender people at the global level. When it comes to India, a country with deep cultural and religious beliefs and bad social practices directed against unnatural sex, their presence is very sad. It is a surprising fact that transgender in India are not considered as human beings. They are stigmatized, marginalized and isolated from all spheres of social life. There is no proper legal attention to recognize their existence as people and promote them to the mainstream media. Transgender plight is universal. Even in countries where there is a strong framework of laws to respect their grievances they are not adequately addressed. In a large country like India, where religion and morality play an important

role in shaping the criminal law, their situation is very problematic.

Indian Scenario-

When we talk about transgender in relation to India, we see a unique position that they did not have any identity. Here is a society that has not fully accepted the third gender or transgender people in society. Some people here have thought that transgender is normal and it has risen to a level where others people consider themselves holy. The Indian situation becomes unique when compared to the rest of the world where even the society partially accepted the third gender, but there was no law that recognized them unlike many other cultures. Therefore they are treated like men, so they face many difficulties in writing, employment etc. In addition, in November, 2009, with the aim of ensuring greater recognition of third genders, India agreed to list eunuchs and transsexuals as "other" than men and women, on ballot papers and voter ID cards. These measures are some of the ways in which the Government of India has tried to integrate the Third Gender in Indian Society but this has not been a complete success as there is still a part of the society that fails to understand the third person who changes gender which leads to discrimination. But in 2016 after Naz Foundation case^{iv} transgender was recognized as third gender in India. Now there are three genders in India male, female and third gender. But the status of these people has not changed, but we hope that in the future they will be treated as normal people like any other person in society. Some steps were taken by the Government of Indian States so that they can promote themselves and now days in the Government documents the option is given to these people and it was named as 'other sex'. Gradually they found their identity in India^v.

Historical Accounts-

There has been historical evidence of the recognition of "third genders" or people who do not confirm male or female gender near the earliest texts of ancient India. The concept of "Tritiyaprakriti" or "Napuunsaka" has been an integral part of Hindu mythology, legend, epics and early Vedic and Puranic texts. The word "Napunsaka" was used to describe the lack of reproductive ability, which was introduced by showing differences in the male and female castes. Therefore, some of the early writings dealt extensively with gender issues and the concept of a third gender was an established thought there. In fact, Jain scriptures even refer to the concept of "psychological sex", which emphasizes a person's mental makeup that differs from their gender characteristics. King Rama, in the famous Ramayana, was walking in the forest when he was exiled from the kingdom for 14 years, turning to his followers and asking all the 'men and women' to return to the city. Among the followers, one hijra felt bound by this method and decided to stay with him. Impressed by their loyalty, Rama authorized them to grant blessings to people on auspicious occasions such as the birth of a child and marriage, as well as at initiation ceremonies that were supposed to set the stage for the badhai ritual where the hijras sang, danced and sang. give blessings. Aravan, the son of Arjuna and Nagakanya in the Mahabharata, offered sacrifice to Goddess Kali to ensure the victory of the Pandavas in the battle of Kurukshetra, the only condition he did was to spend the last night of his life in marriage. Since no woman was willing to marry a man who was going to be killed, Krishna assumed the form of a beautiful woman named Mohini and married her. The Hijras of Tamil Nadu considered Aravan Transgender people who had been a part of Indian society for centuries.

Hijras were considered intelligent, reliable and honest and had free access to all areas and classes of

people, thus playing an important role in the politics of empire building during the Mughal period. One such example is the Nizams of Hyderabad who hired and respected the hijras. Nizam Mahboob Ali Pasha the sixth employed hijras as relatives and advisors, household managers and menial domestic workers. Even the State of Hyderabad had an Inspector of hijras in the Police Department to look after their welfare and ensure that they were not harassed. The Hijras had claims on the public revenue through grants of money and land and in some places they had a legal and collective right to begin in India. However many laws were introduced against the hijras which led to their unfavorable situation. According to the Andhra Pradesh (Telangana Area) Eunuchs Act 1329, which is a State Law, the term eunuch was used for those who admitted to being impotent or who appeared to be impotent after medical examination. Although the term eunuch was used to refer to hijras, impotence was required to qualify as a eunuch. According to this Act the Government had to maintain a register to keep the records of hijras and their residence details. Restrictions have also been placed on hijras performing badhai or any other type of street entertainment activity carried out in secret. There were also restrictions on liberating oneself and liberating oneself from others. Therefore, the Law closely monitored the lives of hijras, their traditional work, and their customs^{vi}.

Situation during the British rule-

The status of hijras began to deteriorate when the British colonial rulers came with their gendered/gendered bodies and heterosexual ideologies. The body of the hijras was problematic because of its ambiguity and its difference from the reproductive/homosexual body. Gradually, various anti-hijras laws were established because the hijra community was deprived of its rights given by the Kings and Mughals. Hijras were classified under a list of criminal categories / tribes during the colonial rule. The Criminal Tribes Act (Act 27) of 1871 provided for the 'registration, supervision and control of certain tribes and eunuchs'. This Act was applicable in all states of India. This was the Law that was written in the bodies of these so-called criminal cases. Therefore the bodies and performance of hijras were regulated. The lands that were given to the hijras during the Mughal and Imperial rule were also taken back by the colonial rulers. Like criminal Tribes Act. Section 377 of the Indian Penal Code (IPC) was also introduced during the colonial period from 1860. This section prohibited same-sex relationships and is often referred to as the "Anti-Sodom Law"^{vii}.

Situation in India after freedom-

After Independence, the Prime Minister in 1952 repealed the Criminal Nations Act 1871 calling it a 'blot on the law book of free India'. However, in the same year the Government of India passed the Common Criminals Act, which retained most of the provisions of the CTA except on the basis that the entire society is not born criminal. Now the focus is on making the nation a crime, but the focus was on making one person a crime. The Immoral Traffic Prevention Act of 1956 which was amended in 1996 is now a gender neutral law. The scope of the Act now applies to both male and female sex workers and those whose gender is undetermined. With this amendment, both male and hijra sex workers become agents of crime as this gives the police a legal basis to arrest and intimidate transgender sex workers. The transgender community lives a life of discrimination-socially, culturally, economically and politically. The Government of India's Census process which is the most authentic source of information on demographics, literacy and housing among other data points did

not include transgender people in the first 64 years after Independence in its coverage. In 2009 consensual sex acts between adults in private were struck down by the Delhi High Court. When the public was given the opportunity to self-identify as transgender in a census for the first time in 2011, half a million people (out of 1.2 billion) self-identified as transgender. The top three states with the highest level of gender identity in India are Uttar Pradesh, Bihar and Maharashtra. Only 46% of transgender people are literate compared to a 74% literacy rate among the general population. Those who continue to be part of the education system often report abuse, exploitation, physical and sexual abuse at the hands of older students, classmates and peers. In a landmark judgment in April 2014^{viii}, the Supreme Court of India noted that "transgender communities, known as "Hijras", are a segment of the Indian population that is treated by society as unnatural and often as objects of ridicule and because of superstition. In its decision the Supreme Court ruled that In addition, everyone should have the right to decide how they talk about their gender and who they are, including transsexuals, transsexuals, hijras and they should have the right to express their gender freely and be treated as a third person. Therefore, today transgender people in India are considered Third Gender.

Courts for Disputes-

The validity of Section 377 of the Indian Penal Code was challenged in Naz Foundation Vs Government of National Capital Territory of Delhi, as it criminalizes consensual sex between two adults in private. A challenge against the Section was instituted on the ground that it violates Articles 14, 15, 19 and 21 of the Constitution of India. They said that their activities were abhorred by the State's actions of discriminating against sexual minorities. The basis of their argument was that sexual minorities have an interest in not being disclosed because they will be harassed and treated inhumanely which will ultimately hamper the applicant's efforts to prevent the aforementioned diseases. The petitioner also submitted that the scope and content of Section 377 should be limited only to punishing non-consensual, non-genital penetration of children. It was also noted that by introducing the Sexual Offences Act, 1967, England condemned homosexual acts to ensure equality and the precious human rights of sexual minorities. It is worth noting at this point that there were two conflicting affidavits filed by two different wings of the Union of India. The first affidavit is on behalf of the Ministry of Home Affairs, Government of India which opposed the maintenance of the impugned provision. But a reasonable suggestion came from the Ministry of Health and Family Welfare that the presence of the criticized Section has hindered efforts to prevent HIV/AIDS. The Ministry of Home Affairs established its argument on the grounds that the retention of Section 377 of the Indian Penal Code is very important because it not only punishes homosexual acts, but also serves as a safeguard against child sexual abuse and recommends the exploitation of rape laws.

Arguments

the Department of Home Affairs was not disturbed as the very purpose of maintaining the criminal justice system is to punish those who break the law. The Union of India argued that Indian society is intolerant of homosexuality. But in fact we have learned to tolerate the actions of the underdog over the centuries. An expression of such tolerance can be found in religious texts, Hindu mythology and ancient stone carvings etc. It should be noted that transgender people were given a respectable position in Indian society before the arrival of the British. Section 377 of the Indian Penal Code was actually the result of British efforts to impose their biblical values on their colonies. It is worth

mentioning here that they have been trying to control the activities of transgender people by passing some laws. In this case, the Court recognized that there is a growing body of legislation regarding the rights of transgender people that can be found in human rights treaties sponsored by the United Nations. The Court identified and divided this legal doctrine of human rights under three heads, namely: "non-discrimination, protection of private rights; and to ensure the special protection of human rights for all, regardless of who they are." Accepting the arguments of the plaintiffs in this case, the Court said that "so far as it punishes consensual sexual acts of adults in private, it violates Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern promiscuous sex involving minors..."

However, in *Suresh Kumar Koushal & Ors Vs Naz Foundation & Ors*, the decision of *Naz Foundation Vs the Government of National Capital Territory of Delhi* has been heavily scrutinized in law. The appellant in this case established his argument on the ground that the Hon'ble Supreme Court committed a serious error as the Writ Petition did not contain the relevant facts to determine the constitutionality of the statutory provision. It was also submitted that Section 377 of the Indian Penal Code was used to prosecute homosexuals as a category and not to discriminate against transgender people. The basis of their argument was that Section 377 of the Indian Penal Code is a gender-neutral provision that is widely used to punish homosexual acts regardless of gender. Another argument raised by the plaintiff is that physical sexual acts between two homosexuals increase the risk of HIV/AIDS and it is even more dangerous when the female homosexual partner does not know about his partner's conditions. One of the major arguments raised by the plaintiffs is that there is no relevant evidence to show that the existence of Section 377 of the Indian Penal Code is hampering efforts to prevent HIV/AIDS. The Court observed in this case that, while striking down a clause as unconstitutional, the courts should be guided by considering the constitutionality of the impugned provision. The Court also observed that the removal of Section 377 of the Indian Penal Code was recommended by the Law Commission of India in its 172nd report, which was not considered by the Parliament of India and shows that the legislature is undoubtedly representative. People thought it was wrong to remove the supply. Therefore unless and until a clear violation of the Constitution is proven, the Court is not authorized to strike down the law.

Recognizing that the possibility of harassment is not enough to strike down the legal provision, the Court allowed the complaint undermining the rays of hope in the life of the transgender community. In *National Legal Services Authority vs. Union of India and Ors*^{ix}, the petitioner was the National Legal Services Authority, constituted under the Legal Services Authority Act, 1987 to provide legal services to the weaker and disadvantaged sections of the society; approached Hon. The Supreme Court has a common cause for the transgender community. The petitioner said that every member of the transgender community has the legal right to determine who they are and who they are. It was also submitted that not recognizing a transgender as a third gender would violate Article 14, 16 and 21 of the Constitution of India. The Court was reluctant to address the constitutionality of Section 377 of the Indian Penal Code in this case as decided by the Division Bench of the Hon'ble Supreme Court in *Suresh Koushal's* case and the rights of transgender persons is a different matter altogether.

Position-

After many Supreme Court decisions paving the way for transgender rights, the first attempt to enact

a similar law was made in December 2014 by Tiruchi Siva, Dravida Munnetra Kazhagam (DMK) Rajya Sabha MP. The Transgender Rights Bill, 2014 was introduced as a Private Member's Bill in the Rajya Sabha by Mr. Siva. It was passed unanimously in the Upper House but was not discussed in the Lok-Sabha.

In January 2018, the Supreme Court agreed to hear an application to revisit the 2013 Naz Foundation judgment. On September 6, 2018, the Court ruled unanimously in *Nevtej Singh Johar V Union of India* that Article 377 was unconstitutional as it criminalized consensual sexual behavior between adults of the same sex. The decision was issued by a bench of five judges including the former Chief Justice of India at the time, Dipak Mishra, Justices.

R. F. Nariman, D. Y. Chandrachud, A.M. Khanwilkar and Indu Malhotra. Article 377 was partially dismissed by the Constitutional Court and will no longer apply to same-sex acts between homosexuals, homosexuals and lesbians but will continue to apply to sleeping with animals and sexual acts without the consent of one of them.

After the above judicial development, the Lok Sabha introduced and passed a new version of the bill in December, 2018. Due to the lack of Transgender Persons (Protection of Rights) Bill 2018 which was preceded by the 2016 version, both protests were met. and criticism of Trans-groups, advocates and activists in India. The Minister of Social Justice and Empowerment, Thawar Chand Gehlot has now proposed an Act of the Parliament of India on 19 July 2019 the Transgender Persons (Protection of Rights) Bill 2019^x with the aim of providing protection to the rights of transgender persons, their welfare and other related matters. The Bill repealed several of the most criticized provisions of the 2018 Bill, such as criminalizing solicitation and the establishment of a Regional Screening Committee to review transgender certification applications. The 2019 bill was passed by the Lok Sabha on 05 August 2019 by a voice vote, amid uproar in the house over the withdrawal of the special status of Jammu and Kashmir on the same day.

In a recent judgment the Madras High Court observed that special reservation must be given to the people who recognise themselves as transgender in the admissions for Post Basic (Nursing) Course. The matter was between *Tamilselvi v. The Secretary to Government and others* and was presided over by Hon'ble Mr. Justice R. Suresh Kumar^{xi}.

Conclusion-

Court judgments are all about affirmative action in education, basic health care, and that transgender people are identified as beneficiaries of social programs. The blueprint for transgender rights legislation comes from the court's directives. Some of the recommendations that find a place in the final draft include the rescue, protection, and rehabilitation of transgender people. Educational institutions have been instructed to adopt a gender-neutral inclusive approach. The government has also implemented social programs specifically aimed at transgender people such as basic medical facilities including sex reassignment surgery. Vocational training programs are also on the way. However, the transgender community in India is still in a different position. Now, here is a society that is slowly accepting the transgender community. People of the society still think about gender change as normal in some times and in other places it has increased to the extent that some people find them scary and unattractive.

References-

ⁱ (2014) 5 SCC 438)

ⁱⁱ Wilson Sincy & Kabeer M Hashim, “Transgender Right Protection In India- An Analysis” Arts & Education”

ⁱⁱⁱ Excerpt from the speech of Baan Kii Moon, the then Secretary General of United Nations in the Human Rights Council Meeting on violence and discrimination based on sexual orientation or gender identity at the United Nations, Geneva on 12th March, 2012

^{iv} Naz Foundation Vs. Government of NCT of Delhi

^v PP Atheeqe Mohammed and Nishanthi Rajathurai, “Marginalization of Transgender Community: A Sociological Analysis

^{vi} Ibid

^{vii} Id.

^{viii} 2014 (5) SCC 438

^{ix} 2014 (5) SCC 438

^x Bill No 169 of 2019

^{xi} W.P. No.26506 of 2022