

A Gendered Indian Society: Recognition of the Third Gender

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Rig-Veda, one of the most popular and oldest existing sacred books has a verse - “VikrutiEvamPrakriti” – what seems unnatural is natural which broadly means that any act is natural. Mahabharata, a major Hindu epic has a part where Lord Shiva is described as a half white half yellowish, neither man nor woman looking form, also popularly known as the Ardhnarishvar. The Bible says God had made man and left him to tend to the Garden of Eden but then He realized that the man would need a helper so He put the man to sleep and took out his rib and from it a woman was formed. The Quran also discusses a separate gender that is neither masculine nor feminine. Similar examples can be seen in other religion’s texts, scriptures or books. Since we are the world’s largest secular country we will start our introduction to the third gender by taking help of not only science but also religions and cultures - things that India is made of.

The term “third gender” or as Indians say “hijras” is a highly misinterpreted word. Firstly, we must know the difference between sex and gender. Sex is biological attribute of an individual or in scientific terms the number of x and y chromosomes that the individual is made up of. But gender is either masculine or feminine and we relate the sex male to masculinity and female to femininity. So it can be said that even though we refer to a person as either masculine or feminine, that individual may have a completely different set of chromosomes than the designated men and women. Therefore the term third gender is not just the people who either appear both masculine and feminine by their actions but people with a disrupted chromosomal order. We, Indians, like to think of the third gender as only hijras, eunuchs, chhakkas, transgenders etc. but the term has a much broader meaning attached to it. Third gender or third sex is the categorization of an individual as neither man nor woman. This separation may be done by the society or by the individual himself based on his feelings and wishes. The people belonging to this category may represent an intermediate state between man and woman, a state of being both, the state of being neither, the ability to cross or swap genders, or another category altogether independent of man and woman. Evolutionary biologist Joan Roughgarden argues that, in addition to male and female sexes, more than two genders exist in hundreds of animal species. There are various anthropological evidences of

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there being more to gender than a male or female and several comments have been made on the topic of third gender.

There has also been the acceptance of a new English language honorific “Mx.” that does not indicate gender and is the only option for non-binary people as well as those who do not wish to disclose their gender. The proposal of this title is dated back to the 1970s. This indicates that the concept of third gender is nothing new but an attribute of mankind that got lost on its way to present. This loss of information is what makes life of the third gender in India a curse. There are an overwhelming amount of examples of third genders in the past. Vedic period is the period between 1500 – 500 BCE during which the religious texts, scriptures, Puranas were composed. Ardhanarisvara which represents the synthesis of masculine and feminine energies of the universe as a symbol of Lord Shiva’s all pervasive nature. Aravan is a patron God of well-known transgender community. He is the son of Arjun and Naga Princess Ulupi. After the Kurukshetra war, he desired being married for a single day before his death, to satisfy his boon Krishna took the form of Mohini. This gave rise to a festival called Koovagam in which all third gender people get married for a day. Even some deities were born like Ayyappa (from the union of Shiva and Mohini) and Kartikeye (fire God ‘Agni’ swallows the seed of Shiva). The Hindu Epic Mahabharata describes Hero Arjun who is cursed to live a year of his life as a transgender. Shikhandi is born as female but grew up as a male and even married a female. Kama sutra also gives a glimpse on third genders. After considering all the factors in mind, it divides the genders into three categories namely; male, female and the “TritiyaPrakriti” (third nature) and this category has been further divided into several other categories which are generally referred to as lesbians and gay males and these people are of five types: children, elderly, the impotent, the celibate, and the third sex. In the Padma Purana, widows drink potion, make love to each other (one behaving as a man and other as a woman) and conceive a child.

During Mughal period, eunuchs play an important role in court administration as royal guards and consultants. They were considered to be the trusted servants and also were employed as trusted security in women’s palaces. Example, Rukaiya begum’s (Akbar’s wife) trusted servant was also a eunuch. Ila, the prince who was a princess for a major part of his life, even bore children as a female.

The entire ancient Hindu texts and scriptures are filled with examples of third genders and their importance as well as acceptance in the society. No one in the ancient times deemed them as cursed or outcasts, in fact they were and still are thought to be the “gifted” ones. After Lord Rama was ordered into exile, it was the third gender that followed him and was

thus provided with a gift of blessings. This superstition is still followed in India and we call on Hijras to weddings or baby showers to bless the couple or new born baby. But this is the extent to which we accept them into the society. Apart from imparting blessings we forget about the larger fraction of the Indian society that comprises of the third gender. According to the 2011 census of India, there were 2.5 billion gay people and 5 million Hijras. These are people who admitted to being gay or hijras but there are also many who don't come out of the closet. There are many transgenders, cross-dressers, lesbians and others with a difficulty in explaining themselves as either male or female. There are many people who are not even aware of what they feel or what they can be because there is illiteracy among the entire society regarding the third gender. There are no laws that would support them or help them grow outside of their homes. Neither the Hindu Marriage Act, 1955 nor the Special Marriage Act, 1954 mentions third gender. Degree of Prohibited relationship refers to any relationship between a man and woman that is mentioned in Part I and Part II of the First Schedule of the Act. The focus is on the male and the female sexes. The 'third sex' has conveniently been ignored. The few who do choose their path are mocked and separated from the society and left to live in the fringes of the Indian society. Their sanctioned place in Indian culture saw its downfall during the British colonial period. A well-known news anchor, Rose, from Chennai was born a male named Ramesh but chose to identify herself as a woman and is proud of it and has even made a stand in the society but still she is seen as a transgender and mocked when out on the streets.

There are many children who are unaware of what they go through and the ones who do try to show any sign of being something or someone else are ignored, or worst trapped in their own skin. They are forbidden from talking about it or told to act "normal" or a certain way that would suit the sex they were born in. Mostly it's the boys who are taught to act manly, not cry, not wear certain "girly" colours or to act the way a male should and the failure to adhere to these so called rules results in them being traumatized and teased throughout their lives. Eg. Sangita was 10 years old when she realised that she wanted to be a girl, but never told anyone. As a young man, she got her degree and a job teaching natural science at a school in her village.

All this hate and disrespect drives them into depression, anxiety, make them introverts or simply take their own lives. It's the lack of knowledge and awareness to deal with the third gender that has driven the Indian society to become this mess that refuses to accept one of their own. They can easily study about transgenders in epics and look at sodomy or gay

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intercourse in the form of carvings on temple walls but they shy away from looking into something that happens right now, right under their noses.

The third gender is deprived of the basic human rights they deserve. They are outcasts since they are born. They are supposed to either castrate themselves (in case of men acting effeminate) and live a disapproving life or go through the sex change surgery to ensure they are either one or the other. The society refuses to see the grey between the black and white. We get angry at small and petty issues like standing in lines for too long or when not given loans or when there's a rush in the public bathrooms or even if someone stares too long at us. These so called gays, lesbians, non-binary, and transgenders suffer this and much more when it comes to basic day to day necessities. They do not have a separate washroom in public places, they are stared at and made fun of, they are not given any preference of choosing a ward when in hospitals, they are not even allowed to something as common as marriage or having a child to take care of and call their own.

We think we are oppressed if our bosses or teachers give even one extra work and this entire faction has to work, worse beg to make a living. They are degraded in such forms daily, hourly by not only their families but also us, the society. We get angry when we don't get a job, spare time at home without earning something but jobs are denied to eunuchs due to their gender and they are ridiculed in the society. Time Magazine once interviewed a eunuch who complained that the application form for the job has only two sexes mentioned and makes it blatant how unwanted they are. Even if they apply, they are not allowed to enter the offices. The articles also said that the eunuchs were deprived of the liberty of opening bank accounts and possess passports. In 2005, the central government introduced an E category in Passport application forms where E stood for 'eunuch' which was later revoked on the protests from trans community. Even they face harassment but it is overlooked through any media coverages. We still get angry at the Britishers for trapping us in our own country, enslaving us in our own country yet we do the same to our own people. The condition of the common is bad but of the third gender is worse.

This abominable stage can be traced back from colonial era, when section 377 of Indian Penal Code, 1860 has come into existence to keep a check and to penalise the person who were found guilty for 'Unnatural Offence' includes all penile-non-vaginal sexual acts between persons, including anal sex and oral sex, at a time when transgender persons were also typically associated with the prescribed sexual practices.

After this a legislation was enacted to have a check on third gender known as Criminal Tribes Act, 1871 which considers the community of Hijras persons as innately 'criminal' and

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'consider it as non-bailable offence' The Act provided for the registration, surveillance and control of certain criminal tribes and eunuchs and had eunuchs, who were registered, and appeared to be dressed or ornamented like a woman, in a public street or place. Such persons also could be arrested without warrant and sentenced to imprisonment up to two years or fine or both. This act got repealed in 1949 after India attained independence.

In December, 2002 NAZ foundation filed a Public Interest Litigation in Delhi High court to challenge the constitutional validity of section 377 of Indian Penal Code, 1860 and get it repealed. The challenge is founded on the plea that it infringes the fundamental right of consenting parties in private under Equality before Law², Prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth³, Right to Freedom⁴ and Right to Life⁵ of Indian Constitution.

In 2004 High Court dismissed the plea. Further, on 03, February, 2006 Supreme Court in Civil appeal set aside the said order and observed that the matter does require the consideration and is not of nature which could have been dismissed on the aforesaid ground.⁶In May 2008, the case came up for hearing in the Delhi High Court, but the Government was undecided on its position, with The Ministry of Home Affairs maintaining a contradictory position to that of The Ministry of Health on the issue of enforcement of Section 377 with respect to homosexuality. On 7, November, 2008, the seven-year-old petition finished hearings. The Indian Health Ministry supported this petition, while the Home Ministry opposed such a move. On 12, June 2009, India's new law minister Veerappa Moily agreed that Section 377 might be out-dated. Eventually, in a historic judgement delivered in the case *NAZ Foundation v. NCT*,⁷ Delhi on 2 Jul 2009, Delhi High Court overturned the 150-year-old section, legalising consensual homosexual activities between adults.

The two judge bench (Justice Ajit Prakash Shah and Justice S Muralidhar) went on to hold that: "If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is

²INDIA CONST. art. 14.

³INDIA CONST. art. 15.

⁴INDIA CONST. art.19.

⁵INDIA CONST. art.21.

⁶*NAZ Foundation v. NCT of Delhi*, (2009)160 Delhi Law Times 277 (India).

⁷*Ibid.*

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manifest in recognising a role in society for everyone. Those perceived by the majority as “deviants” or 'different' are not on that score excluded or ostracised. Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination. This was the 'spirit behind the Resolution' of which Nehru spoke so passionately. In our view, Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.”

As a result, in 2009 India’s Election Commission took a first step by allowing transgenders to choose their gender as “other” on ballot forms. Indian Census has never recognized third gender i.e. Transgender while collecting census data for years. But in 2011, data of Transgenders were collected with details related to their employment, Literacy and Caste. In India, total population of transgender is around 4.88 Lakh as per 2011 census. Still, after this all they are being excluded from social, cultural and political life and decision making processes and their issues had never been assigned to any official authority of central government to look into this matter and they became a neglected part of the society again. For safeguarding the interest of Hijras or third gender, National Legal Service Authority filed a petition in August, 2012 for seeking a legal identity for them (Aadhar and a few other documents have this provisions), and that TG community should be given all the fundamental rights available to other male and female citizens of India.

After this, for looking deep into the case a committee known as "Expert Committees on issues relating to Transgender" has been constituted.

The Supreme Court also said that both centre as well as state government will devise social welfare schemes for third gender and run a public campaign to raise social stigma. Now they are getting opportunity to be a part of events Eg. Sonu Nigam (a playback singer) launched India’s first transgender band called, ‘6 Pack Band’. RBI and Indian Railways also asked all banks and IRCTC respectively to add third gender column in their forms and also stated that state should provide them the medical facilities Eg. For identification of TG- Psychological test and not the biological test will be used and no one can be forced to undergo sex-change surgery to fit in the male or female gender, sanitation facilities. Government shall provide formal identity to third gender- in passports, licenses and ration cards. In 2008 the state of Tamil Nadu recognised the "Third Gender", with its civil supplies department giving in the ration card a provision for a new sex column as 'T', distinct from the usual 'M' and 'F' for males and females respectively. This was the first time that authorities anywhere in India

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have officially recognised the third gender. The SC also added that if a person surgically changes his/her sex, then he or she is entitled to her changed sex and cannot be discriminated. The apex court expressed concern over transgenders being harassed and discriminated in the society and passed a slew of directions for their social welfare.

Third gender has been given opportunity in the public appointments also Eg. Prithika Yashni who was categorised as male though was a female filled an application form for the post of sub-inspector of police. The Madras high court has directed Tamil Nadu Uniformed Services Recruitment Board (TNUSRB) to appoint a transgender as sub-inspector of police saying she is entitled to get the job. The first bench, comprising Chief Justice Sanjay Kishan Kaul and Justice Pushpa Sathyanarayana, also directed TNUSRB to include transgenders as a “third category” by the time next recruitment process is carried out. K Prithika Yashini’s application for the post was initially rejected, following which she moved to the high court. The court said: "She is entitled to be recruited to the post of sub-inspector and for declaration of her result with the hope that she will carry out the duties with dedication... to advance the cause of other transgenders. on 4 January, 2015 an independent candidate Madhu Bai Kinnar was elected as the mayor of Raigarh, Chhattisgarh becoming India’s first openly transgender mayor. Yashini cited a Supreme Court judgement wherein it ordered the state and central governments to take steps to treat transgenders as socially and educationally backward citizens and extend them all kinds of reservation in the admissions to educational institutions and public appointments. The HC had ordered authorities to permit her to participate in the viva voce subject to certain conditions. Governments were to operate separate HIV Serosurveillance Centres for treating sexually transmitted diseases among third gender people and make provisions to take better care of them in public hospitals. In fact, one of the most significant breakthroughs of the NALSA ruling was the right of ‘self-identification’, with verifications allowed only through psychological assessment and not physical tests. The apex court also safeguarded their rights under part III of Indian Constitution like 'right to decide their self-identified gender' and the laws made by the Parliament and the State Legislature. Public awareness campaigns were started to end social stigma, fear, shame, depression and suicidal tendencies among TG. There were steps taken to make TG feel they’re also part of social life. It was also asked to not treat them as untouchables. And all these should be implemented within six months. The directive principles of state policy⁸ also urges that the state needs to respect international laws and treaties and India has ratified both UN

⁸INDIA CONST. art. 51.

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declaration of human rights and International covenant on civil and political rights,1966, as both of these treaties provide equal treatment to all including TG community. 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 his honour and reputation and that everyone has the right to protection of law against such interference or attacks.

International Commission of Jurists and the International Service for Human Rights on behalf of a coalition of human rights organizations, took a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and sexual identity to bring greater clarity and coherence to State's human rights obligations. Significantly, in reaching its decision, the Court stated that the 'Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity' should be applied as an Indian law.⁹ A distinguished group of human rights experts has drafted, developed, discussed and reformed the principles in a meeting held at GadjahMada University in Yogyakarta, Indonesia from 6 to 9 November, 2006, which is unanimously adopted the Yogyakarta Principles on the application of International Human Rights Law in relation to: Right to the universal enjoyment of human rights, Right to equality and non-discrimination, Right to recognition before law, Right to life, Right to privacy,Right to treatment with humanity while detention Protection from medical abuses, Right to freedom of opinion and expression.After this all, the first ever official census of Transgender in the country in 2014 has taken place according to which, the third gender was 490000 out of which 55000 were children. Welcoming the Supreme Court decision, Lakshmi Narayan Tripathi, transgender rights activist said, "the progress of the country is dependent upon human rights of the people and we are very happy with the judgment as the Supreme Court has given us those rights."

The constitution accepts third gender in some way or form, science accepts third gender in some form, even our scriptures and Gods accept it so why can't we as the general human

⁹National Legal Service Authority V. Union of India, (2014) 5 SCC 438 (India).

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population accept it. Change is difficult. It must have been difficult when the third gender was suddenly boycotted by all and it sure will be difficult to accept them into society again but it is worth a try. There is at least one person in every house who struggles with identity and recognition due to difficulty in being categorised as a particular gender, so we are not unaware of the forms in which self-identity gives a boost to the person. If we accept it we will be giving them their birth right. They too are the children of God and produced by His will so who are we to judge them or keep them away from society.

As the Preamble of our constitution states that “we the people of India having resolved ourselves into a sovereign, socialist, secular, democratic republic also resolve to secure to all its citizens justice economic, social and political, liberty of thought, expression, belief, faith and worship, equality of status and opportunity, to promote fraternity assuring the dignity of the individual and unity and integrity of the nation.” But when it comes to enforcing the term “citizens” the society narrows down as detriment of the third gender. In fact, we fail to recognise them as a human being. As a human being, what we are doing to them? We shun them, alienate them, and become violent which compels them to form a group for their security rather than all this we should think of them as same species as we are.

They too should be given a right to be what they are and blossom into what they can. They must be considered as equals rather than something that is beneath us. We must help them rise not by paving their path but by holding their hands and lifting them up. They are human beings not some vile creature but a beautiful creation just like me, you or any next person. We revere their blessings but why not allow them to live as we do. When God can consider them equal and good enough to be born then who are we to discriminate and to draw a line on their way of living or rather surviving because that’s what they are left with, the need to survive, the need to sustain.