**Third Gender in India**

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**ABSTRACT**

This research article contains details about third-gender in India and their situation. It firstly introduces third-gender and then tells about all the problems faced by them in the Indian society. It further streamlines the issues related to the marriage rights of third-gender people and their educational rights. It talks about how Hindu law and custom recognizes the third-gender marriage. Educational issues faced by themare focused and also the reasons for the same. Conclusion of this article is that though there are many problems with third gender in India and there are many policies enacted for their upliftment, yet there is a long way to go for Trans-gender rights in the Indian society. I also suggest how there can be improvement in education for third gender and how gender mainstreaming could help.

KEYWORDS: Marriage rights of third-gender, Educationalrights of third-gender, problems of third gender, gender mainstreaming, solution for the educational issues of the third-gender.

**INTRODUCTION**

Social norms recognize only two types of gender: male andfemale. This distinction between male and female is based on their genitalia. But some people feel that the sex they were assigned at birth does not match their gender identity, or the gender that they is inside[[1]](#footnote-2).These people are often called transgender. Transgender is a term that includes the many ways that people can feel about their gender identities and how it can be different from the sex they were assigned at birth[[2]](#footnote-3). Gender and sex are two different concepts. Sex is based on the genitals that a person is sborn with and gender is a mental and physiological construct, which people should be free to choose for themselves.

Presently in the society, gender and social identities has been an issue creating a bipolar debate of legality and redefinition of religious rules, butin fact, various cultures have long recognized members except biological binary[[3]](#footnote-4). The ancients wrote of people whowere neither men nor women; individuals have been swappinggenders for centuries; and intellectuals have fiercely debated theconnection between the body and the self. Around 200 BC, the Manusmriti (Laws of Manu), whichforms the basis of Hindu rules, said, "A male child is produced by a greater quantity of male seed, a female child by the prevalence of the female; if both are equal, a third-sex child or boy-and-girl twins are produced."

Transgender people are diverse in their gender identities (the way one feels on the inside), gender expressions (the way one dresses and acts), and sexual orientations (the specific gender thatone is attracted to). Transgender people express their gender identities in many different ways. Some people use their dress, behavior, and mannerisms to live as the gender that feels right for them. Some people take hormones and may have surgery to change their body so it matches their gender identity. There are different names assigned to them around the world. In India, they are commonly known as “Hijra”.

Gender dysphoria is a term that psychologists and doctors use to describe the distress, unhappiness, and anxiety that transgender people may feel about the mismatch between their bodies and their gender identity[[4]](#footnote-5). A person may be formally diagnosed with gender dysphoria in order to receive medical treatment to help them transition. Psychologists call this gender identity disorder.

Transgender or the third-gender is not to be confused to sexual orientation. A transgender person is not gay, lesbian or bisexual. Sexual orientation is the way to describe to whom a person is attracted to, whereas transgender means to have a different feeling of gender to the biological sex assigned. Passing portrays the experience of a transsexual individual being seen by others as the gender they want to be[[5]](#footnote-6). An example would be a transwoman utilizing the ladies’ washroom and being viewed as female by people around her. Passing is critical for some transgender individuals. Passing can be genuinely significant on the grounds that it asserts one’s gender and likewise give security from harassment and violence.

**PROBLEMS FACED BY THIRD-GENDER IN INDIA**

There are many problems faced by the third- gender or the transgender people in the Indian society. The truth is yet a mystery and their ubiquity in the Indian culture is unavoidable. They have consistently stayed a vital aspect of the Indian culture since old time. In any case, shockingly their status has been diminished to degraded poverty, absence of education, scorn and joke.They lack medical facilities: like HIV care and hygiene, depression, hormone pill abuse, tobacco and alcohol abuse, penectomy, and problems related to marriage and adoption.Transgenders have no access to bathrooms/toilets and public spaces. This is illustrative of discrimination faced by transgenders in availing some basic human facilities and amenities.

They face similar problems in prisons, hospitals and schools. Most families in India do not even accept their male child if he starts behaving in ways that are considered feminine or inappropriate to the expected gender role. Consequently, family members may threaten, scold or even assault their son/sibling from behaving or dressing-up like a girl or woman. Some parents may outright disown and evict their own child for crossing the prescribed gender norms of the society and for not fulfilling the roles expected from a male child.

In the lack of family support, the transgender people find shelter in the Hijra community of the society. As there is lack of education and employment opportunities for them, they earn their livelihood by singing and dancing at events like marriage and child-birth. The ambiguity of their sex causes an odd kind of apprehension in the mind of the people, which is also a cause of trans-phobia.

 Doing what they are doing for their earing they are sometimes charged under Section 268[[6]](#footnote-7)IPC or under Section 294[[7]](#footnote-8). They are often exploited by the police and extracted money from. The complaints are also registered under Section 269 [[8]](#footnote-9)and 270[[9]](#footnote-10)of the Act, or under the Bombay Police Act, 1951. They are also booked under the Sections 7 and 8 of the Immoral Traffic (Prevention) Act of 1956 and these criminalizes hijras soliciting having sex in public places and not under Section 377. There is no stringent action taken against rape on a transgender and many of these sexual assaults goes unreported and unaccounted.

Peculiarly when the entire world is submerged in the rights and laws for gays and different gay people; the Hijras are as yet living in the shadow of dismissal from each fundamental right to equity and instruction. They have just become the theme for investigation and examination for their odd appearances. The world everywhere has overlooked that they are additionally people and have equivalent rights like everyone. The adverse disposition of the individuals and their isolation from the general public has left them with no chance.

**MARRIAGE RIGHTS OF THIRD GENDER IN INDIA**

Marriage is believed to be one of the most essential constituents of a person’sidentity, both in a socio-economic and in a politico-legal sense.[[10]](#footnote-11) The institution ofmarriage, which is a codified and legally identifiable relationship between two people, has immense public significance, as it gathers much footing in respect of the rightsand obligations, especially those related to property, succession, inheritance and such relatedrights, which eventually stem from the solemnization of amarriage.[[11]](#footnote-12)

Today, marriage isnot only a recognized civil right[[12]](#footnote-13) that belongs to each and every member or citizen ofthe state, but also a concept that has both national and international acceptance.[[13]](#footnote-14) It ison this account that it can be said that the enforcement of marriage as an individual’sright is imperative on the state, particularly in regard to all such laws and policies thatemanate from it and, further, regulate the interpersonal domain of marriage.[[14]](#footnote-15)

The right to marry, now a fundamental right in India, which permits people to make it is their decision in the choice of the spouse. Being a fundamental right, it cannot be infringed by the State. Article 21 of the Indian Constitution gives the citizen not just physical existence, but a qualitative life[[15]](#footnote-16). Article 21 has recognized the inherent human dignity as an essential requirement of human existence. Right to marry under this article makes marriage imperative for individual’s dignity and meaningful existence.

Even though Right to Marry is now under Article 21 of the Indian constitution, which means every citizen should be given right to choose their partner and marry them, but still the third-gender in India are not given this right.

In Hindu law marriage is considered as a sacrament and still performed under customary rituals. It is considered to be a holy and sacred union of man and woman. In Hindu texts there are recognized eight types of marriages, in which *gandharva*marriage is considered to be the most pious and sacred. This marriage is the outcome of mutual attraction and consent. This text supports the marriage of third-gender, if performed following all the essential requirements mentioned in the Hindu Marriage Act, 1955. Common customary rituals that are recognized by the status are, *saptapadi* and *kanyadaan.*

Ancient Hindu texts have supported and also evidence of third-gender marriage. In early Vedic period, third-gender had complete liberty to marry and enjoy their married life[[16]](#footnote-17). In Mahabharat there is story of Princess Shikhandi, who married a woman that she loved and then later became a male.

Hindu Marriage Act, 1955 is a way to codify the customary marriages under Hinduism. There are essential requirements laid down to determine who can marry under Hindu Marriage Act,1955. Section 2 (1)(a), mentions that the marriage should be solemnized between a “man” and a “woman”. They are no definition mentioned in the Act of man and woman and they are open to interpretation. There is different method of interpretation of law, in which the most widely accepted means of interpretation is literal rule of interpretation; but when are ambiguity or multiple meanings of same word then the interpretation cannot be limited to the literal rule.

The legal classification of gender clearly identifies two separate classes havingtheir corresponding rights, that is, a man who can legally marry a woman anda woman who can legally marry a man. Despite this seemingly linear segregation,and its consequent assignment of rights, the existence of an unambiguous legalcriterion that could actually enable the working of such segregation is absent.[[17]](#footnote-18) Thoughright to marry is now under Article 21, but if a whole group of people are not allowed to marry just because they do not fit under any definition of Man or Woman, then it is sheer discrimination, and violation under Article 14[[18]](#footnote-19) Indian Constitution.

Recently, in a judgement Madras High Court granted the transgender people their right to marry and choose their partners. In the case of Arunkumar and Another. v The Inspector General of Registration and Ors.[[19]](#footnote-20) upheld the marriage between Arun Kumar and Seerja, a transwoman. The Court said that marriage between a Hindu male and Hindu transwoman would be valid under section 5[[20]](#footnote-21) of Hindu Marriage Act,1955. The Court relied on the decisions of the Supreme Court in NALSA v. Union of India[[21]](#footnote-22), Justice K. Puttaswamy v Union of India[[22]](#footnote-23) and Navtej Singh Johar v Union of India[[23]](#footnote-24) to reiterate that transgender persons have the right to self-identify their gender. It held that sex and gender are distinct, where a person’s sex is biologically determined at the time of birth, which is not the case with gender.

The court said discrimination on the basis of sexual orientation or gender would negate the Article 14[[24]](#footnote-25) of the Indian Constitution. The court on the issue of marriage denied on the grounds that transwoman do not qualify to be “bride” under section 5[[25]](#footnote-26) of Hindu Marriage Act,1955, said that meaning of a word in statue is not “static” and should be interpreted according to the laws and social structure prevalent in present time.

“A marriage solemnized between a male and a transwoman, both professing Hindu religion, is a valid marriage in terms of Section 5 of the Hindu Marriage Act, 1955 and the Registrar of Marriages is bound to register the same. By holding so, this Court is not breaking any new ground. It is merely stating the obvious. Sometimes to see the obvious, one needs not only physical vision in the eye but also love in the heart.” – Madras High Court.

This case is a milestone in the fight for rights of third-gender and transgender people in Indian society. They have been after such long struggle got the right to marry to the individual of their choice. This is the first and only case where such a decision is taken. It is yet left for the Supreme Court of India and the other personal laws to accept trans-gender marriage as legal and valid. Though Supreme Court has given the decision stating Right to marry as a fundamental right yet there is a need for the society to accept of the fact.

**EDUCTAIONAL RIGHTS OF THE THIRD GENDER IN INDIA**

One of the fundamental principles of the equality lies in the acknowledgment and affirmation of the 'right of decision and self-assurance'. Assurance of the sex to which an individual has a place and relates is natural for their privilege of self-assurance and their poise.Acknowledging that Indian laws are substantially binary in nature, recognizing only male and female genders, the Honorable Supreme Court of India in its order in the case of the ‘Nalsa Judgement’[[26]](#footnote-27), declared transgender individuals distinct from binary genders, as the ‘Third Gender’ under the Indian constitution and for the purposes of laws enacted by the parliament and state lTransgender persons are deprived of social and cultural participation and hence they haverestricted access to education, health care and public places which further deprives them ofthe Constitutional guarantee of equality before law and equal protection of laws. It has alsobeen noticed that the community also faces discrimination as they are not given the right tocontest election, right to vote (Article 326), employment, to get licenses, etc. and in effect,they are treated as outcast and untouchable.

India as a society has always propagated the idea of “Vasudev Kutumbhakam” that the whole world is one family, but when it comes to accept the people in our society only, it seems a little difficult task. Besides social and cultural aspects of life politics and decision-making processes arealso out of their reach. Transgender persons have difficulty in exercising basic civilrights. Many transgender students have dropped out of the school because of the ridicule and bad treatment by the peer students and teachers as well.

Each child has option to live with full nobility of life as a typical individual. In our nation numerous gatherings based on destitution, handicap, trouble, denied conditions, are burdened, as transsexual youngsters, are inhabiting edges of the standard society. They are similarly significant like different understudies in the entire advancement cycle of the nation. In changing present situation of comprehensive development round the globe no one could be abandoned the shades. Transsexual kids were never considered as primary aspect of our society from frontier period; however, they could be acceptable human asset for the public progress.

In Indian schools’ appropriate environment for study and development of transgender kids is not available, they start feeling ridiculed and a stigma always surrounds them, which makes it next to impossible for them to study in schools. It should be the responsibility of the school administration to provide a good environment for the students to study in. it is necessary that the administration of the schools and colleges should be sensitized about this topic. According to human right philosophy every child has right to be nurtured at fullest with full and adequate cognitive, psycho-social and emotional and moral support of every system around him/her. Similarly, transgender children also have the right to education like other children and from humanistic point of view they should be nurtured at fullest and it should be clear each and every person who is engaged in educational process at any level so that s/he could contribute in their education inclusively. Teachers must be sensitized regarding the issues related issues transgender, their life and culture, psycho-social and emotional condition and cognitive aspects, cooperation among all the children and relationship of transgender and other students etc.

There should be modification in the syllabus of the schools and the method of teaching should be changed, which should not make the transgender students to be left out. Mindset of our society, educational and work sector should change. Transgender children already go through a lot of stigma in their early life and they should now be comforted. The literature should be modified and made more gender neutral or inclusive of third gender. The teachers should be sensitized about third-gender and how to treat them equally.

Keeping in mind the Supreme Court Judgement of 2014, recognizing “third-gender”, the Union HRD ministry asked to make necessary changes in order to include third gender children among socially and educationally backward class of children.Right to education,2009 emphasized on the education of transgender children in mainstream schools and gave a boost to Article 21A guaranteeing universal elementary educationparticularly children of marginalized groups. Transgender children will be able to takeadmission under disadvantaged category. This may rise a hope in transgender children and persons that now they could study with full dignity like normal students. There are other initiatives too taken by Indian states, like by the State of Odisha a scheme for promotion of transgender equality and justice has been launched, named, SWEEKRUTI. In 2017 , India’s first transgender school opened by a group of transgender for upliftment of transgender children.

Non-recognition of the Third Gender in the Indian legal framework has resulted in systematic denial of equal protection of law and widespread socio-economic discrimination in society at large as well as in Indian workplaces. In the wake of the Nalsa Judgment, the Indian parliament recently enacted the Transgender Persons (Protection of Rights) Act,2019. This act prohibits discrimination against transgender by either denying or unfairly treating them at workplace, educational institute or healthcare services.

They are given certificate of identity as a proof of recognition. There also establish National Council of Transgender Person. They are punishment for offences against transgender.

**CONCLUSION AND SUGGESTION:**

Every individual born on this earth is a human before any gender or sex. In modern age, civilization guarantees every individual with some rights and duties. These rights are the essence of sustainability in this society. Human rights are essential for good and quality life. Other rights have some angle to it be is social, political or economical, but human rights are bare necessity. Transgender people being human beings should be bestowed with human rights. They should have a life of dignity, where they can study what they want to and marry who ever they want to. There should be no fear of prejudice, for choosing a career and life-partner.

India has come a far way in development for transgender, and yet there is a long way to go for Indian laws and society. There is one instance where a transgender is given the liberty to marry who ever they want too, and yet there are so many cases pending. Education is the right of every child, but still transgender students have to face so much of discrimination that they are forced to drop out from school, there is a need for change in the educational system, in order to accept transgender students. There are many policies formulate in favour of transgender yet they are exploited.

The term 'mainstreaming' came from the objective to draw attention to gender equality into the mainstream or core of development activities. Gendermainstreaming is one strategy for promoting gender equality. It means exhibiting the experience, knowledge and interest of women, men and transgender to bear on the development agenda. It may require changes in goals, strategies and actions so that women men and transgender can influence, participate in and benefit from development process. Thus, the goal of mainstreaming gender equality is the transformation of unequal social and institutional structures into equal and just structures for all the gender.

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3. Halder A, 'Education Inequality and Global Justice for The Third Gender. Hijras In India' <https://www.grin.com/document/295334> accessed 2 September 2020 [↑](#footnote-ref-4)
4. Ibid, note 2 [↑](#footnote-ref-5)
5. Supra, note 1 [↑](#footnote-ref-6)
6. A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage. [↑](#footnote-ref-7)
7. Whoever, to the annoyance of others:

does any obscene act in any public place, or

sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both. [↑](#footnote-ref-8)
8. Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both. [↑](#footnote-ref-9)
9. Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. [↑](#footnote-ref-10)
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17. Theodore Bennett, Cuts and Criminality: Body Alteration in Legal Discourse 167 (Burlington, VT: Ashgate Publishing, 2015). [↑](#footnote-ref-18)
18. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. [↑](#footnote-ref-19)
19. W.P. (MD) NO. 4125 OF 2019 AND W.M.P. (MD) NO. 3220 OF 2019 [↑](#footnote-ref-20)
20. Conditions for a Hindu marriage. —A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely: —

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of the marriage, neither party—

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity 3;

(iii) the bridegroom has completed the age of 4 [twenty-one years] and the bride, the age of 5 [eighteen years] at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two; [↑](#footnote-ref-21)
21. AIR 2014 SC 1863 [↑](#footnote-ref-22)
22. WRIT PETITION (CIVIL) NO 494 OF 2012 [↑](#footnote-ref-23)
23. WRIT PETITION (CRIMINAL) NO. 76 OF 2016 [↑](#footnote-ref-24)
24. Supra note 18 [↑](#footnote-ref-25)
25. Ibid, note 22 [↑](#footnote-ref-26)
26. Supra, note 23 [↑](#footnote-ref-27)