

**THE THIRD GENDER AND TRANSFORMING THE WORKPLACE IN
INDIA**

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Abstract

The following is a detailed research paper regarding “The Third Gender and Transforming the Workplace in India”. In the following, the authors have considered Third Gender to be the transgender community, also known as ‘Hijra’ or ‘Kinnar’ in India. The research paper consists of the following heads: Introduction consisting of the current status of the Third Gender in India, Employment of the Third Gender in India, a brief analysis of the case of National Legal Services Authority v. Union of India [WP (Civil) No 400 of 2012], A brief overview of the Transgender Persons (Protection Of Rights) Act, 2019 and other protective provisions under the law for the Third Gender, Recent Developments, wherein transgender people have been employed into various positions in society, and suggestions about making workplaces more gender neutral and inclusive of transgender. The authors concluded the following by calling for social reform and for inclusion of the community.

KEYWORDS: *Third gender, Hijra, Transgender, Workplace, Gender Neutral.*

Introduction

What is “Third Gender”?

Third Gender is a notion in which individuals are classified, either by themselves or by society, as neither man nor woman. This concept is an umbrella term for individuals whose gender identity, gender expression or behaviour does not match their gender assigned at birth or their biological sex.

Biology defines if the chromosomal and anatomical sex of a human being is male, female or one of the unusual variations in this sexual dimorphism that may produce a degree of intersex ambiguity.¹ However in the particular culture in which they reside, the condition of personally identifying as, or being marked by society as a man, a woman or another is typically often determined by the gender identity and gender position of the individual. Not all societies have gender roles that are clearly defined.²

Transgender individuals have a gender identity or expression of gender that varies from the sex they were assigned at birth. Those individuals who are socially, legally and biologically categorized as being either male or female, but who assert that this is not their self-identity and/or expression. Transgender people instead choose to identify by themselves, their own gender identity.³ Other transgender definitions also include individuals who belong to a third gender or who conceptualize transgender as a third gender.

In the workplace⁴ and in accessing public accommodation and healthcare⁵, many transgender people face discrimination⁶. They are not legally protected from prejudice in many areas⁷.

¹Domurat Dreger, Alice (2001). *Hermaphrodites and the Medical Invention of Sex*. USA: Harvard University Press. ISBN 978-0-674-00189-3.

²Alice Schlegel, 'Hopi Gender Ideology of Female Superiority, in *Quarterly Journal of Ideology: A Critique of the Conventional Wisdom*' (1984) vol. VIII.

³Sampoorna (2017). *TG Bill 2016 Factsheet: Bill Provisions & Community Demands*.

⁴ Emilia L. Lombardi, Anne Wilchins, Riki, Preising, Dana Malouf, Diana, "Gender Violence: Transgender Experiences with Violence and Discrimination" [2008]

⁵ Bradford, Judith; Reisner, Sari L.; Honnold, Julie A.; Xavier, Jessica, "Experiences of Transgender-Related Discrimination and Implications for Health : Results from the Virginia Transgender Health Initiative Study" [2013]

⁶ Gay and Lesbian Alliance Against Defamation "Groundbreaking Report Reflects Persistent Discrimination against Transgender Community".

⁷ Whittle, Stephen. "Respect and Equality: Transsexual and Transgender Rights." Routledge-Cavendish, 2002.

THIRD GENDER IN INDIA

In the Indian subcontinent, “Hijra”, or “Kinnar”, who are eunuchs, intersex and transgender people are officially recognized as third gender. A Census report showed the net number of trans people in India to be around 4.9 lakh⁸.

In April 2014, the Supreme Court recognized this community as a ‘third gender’ in law. Justice KS Radhakrishnan declared transgender to be the third gender in the case of *National Legal Services Authority v. Union of India*⁹.

Hijras live in well-defined and structured all-hijra communities, which are led by a guru. These communities have consisted over generations or those who are in abject poverty or who have been rejected by or fled their family of origin. It found that a large percentage of the transgender population received no support from their biological family members¹⁰.

EMPLOYMENT OF THIRD GENDER

Transgender people rarely get formal employment, even if they do, they are still largely vulnerable in the workplace. Transgender people are vulnerable to workplace ostracization and harassment. If they get formal employment, they are ridiculed and harassed and hence forced to leave their jobs. Instances such as when a transgender principal in West Bengal had to quit her job because her employer and colleagues refused to cooperate with her and such a person had to write to the President requesting a mercy-killing because Air India Airlines refused to employ her on account of her gender, reveal the level of discrimination, prejudice and exclusion faced by the transgender community. In 2017, Kerala’s Kochi Metro Rail Limited employed twenty-three transgender people. However, eight of them quit their jobs within a month due to refusal by several landlords to give accommodation. They had no choice but to quit their jobs since their employer had no legal obligation to step in and help them fight against such discrimination and prejudice.

Transgender people have experienced discrimination in the workplace and in the area of employment. In particular, they experience discrimination in the form of violation of privacy,

⁸ Nagarajan R.(2014). *First count of third gender in census:4.9 lakh- Times of India.*

⁹ WP(Civil) No 400 of 2012

¹⁰ Times Of India(2016). *Police harass transgender most, says study- Times of India.[Online] The Times of India.*

failure to recruit and harassment that leads to unemployment and ultimately poverty and economic despair.

In the case of *Nangai v. Superintendent of Police*¹¹, the petitioner had applied for the post of a Woman Police Constable. The application tests were carried out by Tamil Nadu Uniformed Services Recruitment Board, Chennai, wherein the petitioner was successful. The petitioner received an order of appointment from the Karur district, Superintendent of Police. During the course of her training at the Police Recruit School in Vellore, she undertook a medical examination. The examination result declared that she was “transgender” on the basis of her genitalia and chromosomal pattern. Her birth certificate, medical history and educational certificates contradicted the result of the medical test. Later on, the Superintendent ordered her termination from the post of Woman Constable. In order to protect her right as a transgender person, the High Court upheld that the petitioner has the right to choose a different gender and the impugned termination order issued by the Superintendent of Police was set aside by the court.

There is a business case to be made for LGBTQ inclusion in Indian workplaces. What should be focused on is trans inclusion, and what follows is a strategy for corporates to accept and implement. However, prior to that, corporates should be encouraged to begin a discussion about trans inclusion in their workplace. The following statistics¹² reveal the requirement for such a discussion and conversation regarding the above.

- Trans people are one of the most discriminated, high risk and vulnerable groups in India.
- There aren't any consolidated, nationwide efforts to reach the transgender community in India. There are 249 schemes from the Governments in India that can be accessed by trans people but only the “Deen Dayal Upadhyaya Grameen Kaushalya Yojana (DDUGKY)” specifies transgender persons as beneficiaries.
- 92% of India's transgender population is unable to participate in any economic activity.

¹¹ (2014) 4 MLJ 12

¹²UNDP. (2017b). *Skilling and Livelihoods for Transgender Community*.

NATIONAL LEGAL SERVICES AUTHORITY V. UNION OF INDIA [WP (CIVIL) NO 400 OF 2012]

This case is considered to be a landmark decision by the Supreme Court in India which declared that the transgender people or the 'Third Gender' would be equally entitled to the constitutional rights given under the Constitution of India and gave them the right to self-identify their gender as per their preferred gender identity. This judgment has been described as a significant move in India towards gender equality¹³. In addition, the court also held that they must be granted reservations in admissions to educational institutions and occupations due to them being regarded as a socially and economically backward group.

TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

The silver line passing through the equality scheme of the Indian Constitution is "enjoyment of life by all citizens and an equal opportunity to grow as humans despite their race, caste, religion, community, social status and gender."

One of the basic precepts of the equality scheme lies in the recognition and acceptance of the "right of choice and self-determination". Determination of gender to which one belongs, relates to and chooses to identify with is fundamental to an individual's right of self-determination and his/her dignity.

Indian laws are largely binary in nature as they recognize only the male and female genders. However, in the landmark case of *National Legal Service Authority v. Union of India*¹⁴, the Supreme Court of India via its order dated 15th April 2014 declared transgender as the "Third Gender" apart from the already recognized genders under our Constitution and for the purposes of laws authorized by the Parliament and State Legislatures.

Non-recognition in our legal framework of the third gender has resulted in systematic repudiation of equal protection of law and widespread socio-economic discrimination and prejudice in society at large as well as the Indian workplace. In response to the NALSA Judgment, the Indian parliament has recently enacted the "Transgender Persons (Protection of

¹³Mark E. Wojcik, *Male. Female. Other. India Requires Legal Recognition of a Third Gender*, American Bar Association Section of International Law).

¹⁴ WP (Civil) No 400 of 2012

Rights) Act, 2019”. The bill was introduced in Rajya Sabha on 12th December 2014 and was passed on 24th April, 2015 with cross-party support. This bill was introduced by Tiruchi Siva, a Member of Parliament from Tamil Nadu. 24th April is celebrated as “Transgender Day” following the passage of the Bill in the Rajya Sabha.

The Transgender Persons (Protection of Rights) Act, 2019 states that no government or even private companies can discriminate against Transgender people in employment matters, and that every entity should appoint a complaint officer to deal with the complaints relating to the Act.

The legislature, recognizing the requirement of implementing social welfare schemes and actions that require a long-term approach which will result in the changed perception of the general public has placed positive obligations on all the stakeholders holding an interest¹⁵ in the form of guarantees (from Chapter II to Chapter VIII) such as :

- i. Prevention of discrimination against Transgender persons¹⁶;
- ii. Recognition of identity and self-identification and conferring the right and entitlement to obtain a certificate of identity as proof of recognition from the concerned state authorities.
- iii. Origination and enactment of welfare measures, schemes, programmes towards education, social security, healthcare, effective participation in the society and facilitating access to such schemes and welfares measures by the appropriate State Governments.
- iv. Rescue and rehabilitation measures, including right of residence by appropriate state governments;
- v. Obligations of Establishment¹⁷- Chapter V obligates Establishments to ensure compliance with the Act and provide facilities as maybe prescribed by the Act from time to time. In matters relating to employment including but not limited to recruitment, promotion and other related

¹⁵Stakeholders include the Union Government, State Governments and Establishments (as defined under the Companies Act, 2013).

¹⁶From denial or discontinuation of, or unfair treatment in (a) educational establishments;(b) in relation to employment; (c) healthcare services; (d) access to or enjoyment of any goods, accommodation, service, facility meant for public use; (e) right of movement; (f) right to purchase reside, purchase, rent or otherwise occupy property; (g) opportunity to stand for or hold public office and (h) government or private establishment in whose care or custody a transgender person is in.

¹⁷Establishments – mean anybody or authority corporate established by or under a central or state act or anybody owned/controlled/aided by the government or any company or body corporate or association or body of individuals, firm, cooperative, other society, trust, agency or institution.

issues, no Establishment shall discriminate against a Transgender person and shall provide for adequate grievance redressal mechanism to deal with complaints relating to violations under the Act and at workplace;

- vi. Constitution and establishment of the National Council for Transgender Persons to perform the functions assigned to it under the Act, including but not limited to advising the concerned Stakeholders on formulation of policies, programmes, legislations and welfare measures, to monitor and evaluate the impact of policies and programmes designed for ensuring participation of Transgenders, ensuring redressal of grievances of Transgender Persons and so on;
- vii. Penalties for offences committed against Transgender persons: whoever, (i) compels or entices forced or bonded labour (excluding compulsory government service for public purposes), (ii) denies the right of public passage or use of public places, (iii) forcefully removes from household, village or other place of residence, (iv) commits an acts or intends to do an act causing physical, sexual, verbal, emotional or economic harm and/or abuse, shall be punished with imprisonment which may vary between six months to two years, along with a fine.

The “Transgender Persons (Protection of Rights) Act, 2019” cannot be considered as a completely inclusionary piece of legislation and is only the preliminary step on the legislature’s part. The extent to which the concerned Stakeholders will take assenting steps to necessitate inclusion and prevent non-exclusion and attempts to make Transgender Persons productive members of the society, will be a gradual and taxing process. However, the Act does not lay down consequences of the newly acquired gender status on their rights and entitlements in various spheres and facets of life and is largely non-vocal on the consequences of non-compliance and accountability on part of the Stakeholders at interest.

RECENT DEVELOPMENTS

The law declared many forms of discrimination and prejudice against Hijras to be illegal and banned the forcing of Hijras to beg or leave their homes. Other benefits include the creation of a committee that focuses on helping the Hijra community pursue education by giving access to scholarships and textbooks among other needs. The bill has also allowed for Hijras to be recognized as socially and economically disadvantaged which qualifies Hijras for benefits from India’s Affirmation Action program.

In addition to legal successes, there have also been gains in societal acceptance and integration of the Hijra community. India has accomplished many achievements, which highlight India's path to progress. Some are listed below:

- Joyita Mondal became India's first third gender judge.
- Tamil Nadu Police Services appointed India's first Hijra police officer.
- Natasha Biswas became India's first third gender beauty pageant winner.
- Kochi Metro Rail Ltd. became India's first public company to provide mass employment to Hijras.
- Kerala, in 2015 was the first Indian state to formulate a transgender policy to protect the community from discrimination and prejudice¹⁸.
- In 2018, VLCC trained nearly two dozen trans people to be beauty therapists. They will be trained for jobs in VLCC and other beauty and healthcare firms in Hyderabad¹⁹. A gender sensitization workshop was held for VLCC staff at the SR Nagar branch in Hyderabad. Noted trans rights activists such as M Rachana, Chandramukhi and Vyjayanti Vasantha Mogli spoke about trans identity²⁰.

Such success stories in the Hijra community shows the sign of nationwide societal change. There is hope that the social stigmas that have plagued the Hijra community will be completely erased. It is clear that Hijras face many challenges even in modern times. Widespread societal stigmas and discrimination against this community were promoted for centuries. Such discrimination and elimination of this societal perception is extremely difficult to negate and eliminate completely.

If efforts are continued to be taken, in both the legal and societal sphere, then India can be the society which brushes aside the discrimination and prejudice and make up for the century's worth of oppression which the third gender faced and create a nation which is inclusionary of people of all backgrounds, sexual orientations and gender identities.

¹⁸ PTI, 'Kerala becomes first state to unveil transgender policy' *The Economic Times* (Thiruvananthapuram, 12 November 2015)

¹⁹ Sagar Malviya & Sreeradha D Basu, 'VLCC Breaks the Transgender Ceiling' *The Economic Times* (Mumbai, 7 May 2018)

²⁰ Dailyhunt, 'Think NHRC Report on Transgenders is Horrifying, Here's What You Can Do to Help' (14 August 2020)

Some Indian companies have already included many LGBTQ inclusive policies and advantages such as²¹:

1. **Same – sex partnership benefits:** Same sex partners are recognized and benefits which are at par and equal to married spouses are given.
2. **Equal opportunity policy:** This policy covers sexual orientation and gender identity without any discrimination.
3. **Gender Neutral adoption leave:** A leave of three months will be given to primary care giver

Suggestions

Preparing the Indian workspace to be more trans-inclusive will be a Herculean task, as societal change in India in this aspect has been growing, but in a very slow pace. Department of Social Justice and Empowerment issued the following recommendations, in order to address discrimination and violence against the transgender community, in workplaces:

- a) The private sector needs to sensitize employers and employees on issues of transgender persons.
- b) Anti-discrimination policies must be instituted and meaningfully applied to the processes of hiring, retention, promotion, and employees benefits.
- c) Workplace sexual harassment policies should be made trans-inclusive.

Upliftment of the transgender community has to be collective effort and empowering this community at the workplace would go a long way in reducing social stigmas and also uplift them economically. Some of the steps that organizations can undertake to create a more trans inclusive environment are as follows:

- **Sensitization and Education:** Before introducing any change within the system, it would be imperative for organizations to educate its workforce towards gender inclusiveness, and greater acceptance for Transgenders in the corporate environment. The method of documentation, hiring

²¹ Nayanika Nambiar, Parmesh Shahani, "A Manifesto for Trans Inclusion in the Indian Workplace" [2018] 'Godrej Indian Culture Lab'

and recruitment procedures should be evaluated for discriminatory treatment of transgender people. Employees should know about the bullying and harassment policies also what constitutes such behaviours, and how to report it if they witness or experience it. The Leaders in the organisations should also be evaluated based on their inclusion efforts²².

- **Privacy Protection:** The privacy of the individual applying should be of importance. The candidate must decide whether to disclose one's trans status and history or not. There should be protection from non-consenting disclosure of trans history, because for a few individuals, their history is a part of their past and it's upon their discretion to disclose it or not²³. Disclosure or non-disclosure shouldn't be a ground for termination under any circumstance.²⁴
- **Active Trans hiring Efforts Through HR:** Active efforts towards hiring trans people in their organization should be made. A corporation must advertise that it is inclusive and doesn't discriminate. One way to do that is to avoid gendered language and use of gendered pronouns. The company's non-discrimination and inclusive policies should be on the company website and in job announcements in newspapers²⁵. The initial job application filled out by the applicant could contain the following gender categories: Male; Female; Trans; 'I prefer to self-identify as'. The job applicant could specify one's gender identity on an optional basis. Companies such as Infosys and Goldman Sachs have gender as a non-mandatory category²⁶.
- **Policy Review:** Organizations must review and update their existing policies and manuals. It would be only beneficial to include suggestions of a person from the Transgender community itself, so as to make sure that the policies reflect the way an organization would approach the Third Gender. Workplace harassment policies should be gender neutral. Gender neutral adoption leave and same sex partnership benefits should also be made available. The organization should not deny benefits based on gender identity or expression. Any violation should be thoroughly investigated and appropriate action should be taken against it.

²²Humsafar Trust (2018). *Humsafar Trust Manual for Corporates*.

²³Stonewall. (2016). *Trans Inclusive Policies and Benefits*.

²⁴UN GLOBE. (2018). *Recommendations for an inclusive workplace for trans and gender nonconforming staff members, dependents, and other stakeholders of the UN System*.

²⁵Human Rights Campaign Foundation (2016). *Transgender Inclusion in the Workplace: A Toolkit for Employers*.

²⁶Community Business. (2012). *Creating Inclusive Workplaces for LGBT Employees in India*.

- **Anti - Harassment Policies:** Similar to requirements under the POSH Act, organizations must put in place adequate grievance redressal mechanisms to deal with the harassment complaints.
- **Gender Neutral Washrooms:** Employees should have access to washrooms that confer with their identity. Transgender are repeatedly subject to humiliation and harassment as they are forced to use their non-preferred washrooms.
- **Dress Code Policy:** Workers should be allowed to dress according to their gender expression and identity
- **Preplacement Sensitization:** Introducing transgender individuals to the workplace might prove to be a culture shock. There are several aspects to consider that one would otherwise take for granted. To prevent such a shock, it is necessary to implement a preplacement programme sensitization at the workplace.
- **Recruitment:** Organizations must keep in mind that Transgender people have been subject to years of discrimination leading to social, economic and skill backwardness, and thus recruitment criteria must be revised as such. Organizations must also strive to provide training programmes to reinforce knowledge and skills.

Conclusion

India has a long way to go to achieve total equality in the society for all its individuals. Transgenders, owing to their gender identity and expression are facing basic human rights violations in many ways possible. In the workplace, they are ostracized and harassed which prevents them from working peacefully, hence being forced to leave their jobs. This societal mindset needs to be corrected through various efforts in different fields. Society prevents transgenders from attaining well-paying jobs which leads to them suffering from immense poverty and economic despair. Once efforts are taken in normalizing their inclusion in the workplace, their talents and knowledge can be utilized which will empower the whole community. One should keep in mind that transgenders are firstly humans before anything else, thus, they should be treated like every other human regardless of gender identity. Inclusion of transgenders and ensuring a discrimination free workplace for them will lead to a more progressed and developed country in every sector and sphere.

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