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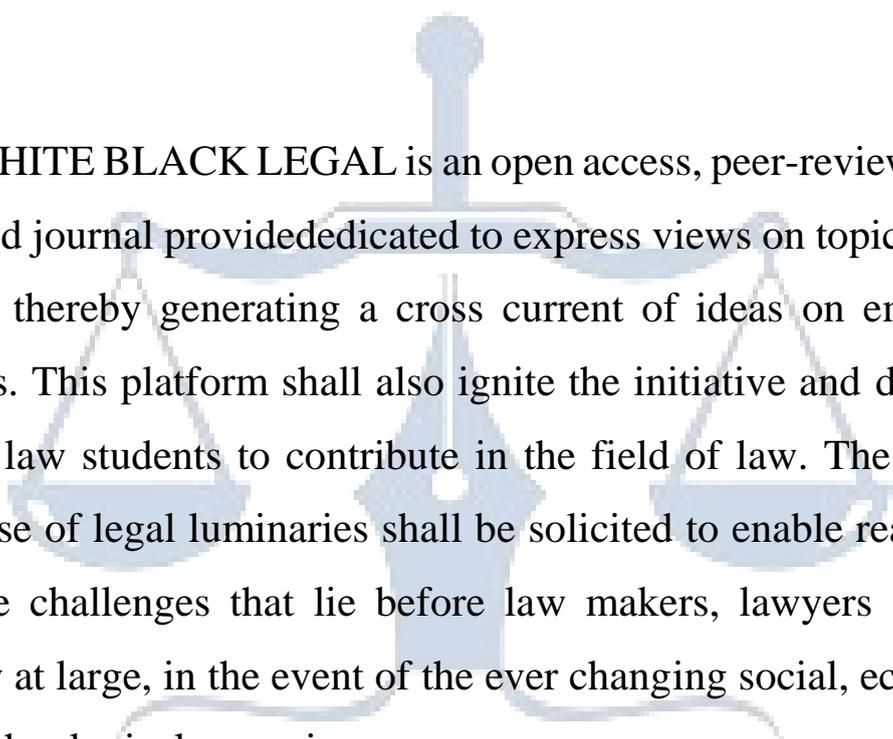


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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

W H I T E B L A C K
L E G A L

‘THIRD GENDER’: JUSTNESS OF THE TERM TO DESCRIBE THE PEOPLE FIGHTING FOR ‘CHOICE OF IDENTITY’

AUTHORED BY - BRAJESH KUMAR¹ & RADHA²

“I am what I am, so take me as I am”.

-Goethe³

ABSTRACT

Ever since the famous Stonewall riots, the fight for the LGBTQI community has all along been for the social and legal recognition of their independent identity as individuals who, neither belong to the gender binary system nor have the ‘natural’ sexual preferences. The fight, though successful to some extent having got the desired recognition in a few countries, still has a long way to go. Even many ‘liberal’ societies are unwilling to accept and adopt the new social order leaving the established gender and sexual norms.

The LGBTQI identity is quite varied and complex with each group, composing this community, having some common but many unique features. It is this uniqueness that has led to the constant expansion of the community with the newly evolved acronym describing them as LGBTQIA+, which stands for lesbian, gay, bisexual, transgender, intersex, queer, asexual and many such other terms which are used by the members of the community to describe themselves.⁴ Unfortunately, the world has failed to comprehend, recognize and respect this uniqueness. The countries, e.g., India, while legally recognising the community, have clubbed them together under the term “Third Gender”, which does not seem to be an appropriate description for these groups as it does not recognise and respect their choice for identity and hence, fails to do

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³ Ganesh Radha-Udayakumar, ‘Section 377: Shakespeare’s Romeo and Juliet and Goethe star in CJI judgment’ *India Today* (New Delhi, 6 September 2018) <<https://www.indiatoday.in/india/story/section-377-cji-dipak-misra-judgment-shakespeare-goethe-1333542-2018-09-06>> accessed 17 January 2025. Johann Wolfgang Von Goethe (1749-1832) was a great German poet, playwright and thinker.

⁴ ‘What does LGBTIQA+ mean?’, (*La Trobe University*) <<https://www.latrobe.edu.au/students/support/wellbeing/lgbtiqa-services/what-lgbtiqa-means#:~:text=LGBTIQA%2B%20is%20an%20evolving,Queer>> accessed 18 January 2025.

complete justice to them.

The LGBTIQA+ community is like a rainbow with each colour having its own charm, significance and distinctions. The hopes and aspirations of each member of the community are deeply linked to these distinctions that the present paper attempts to highlight. Simultaneously, this paper also points out how any recognition, given without taking into account those distinctions, becomes meaningless as they form the core of each member's choice of identity and are the very axle, the community's entire movement revolves around. Every right (to property, marriage, education or employment) conferred and every corresponding obligation imposed on the community members are only subsequent to the recognition of that choice. The paper, in this regard, presents examples of those countries where such rights have been given to the community members based on their distinctive identity.

Keywords: *Third Gender, LGBTIQA+, Gender Identity, Gender Recognition, Community Rights.*

1. INTRODUCTION

God has created this beautiful world consisting of humans, animals, plants and several other biotic and also abiotic things, providing each of the creations with some special features and characteristics, which are essential for their own survival and also for keeping the world in order. Among these, humans can be said to be the most prized⁵ creation as the God has bestowed them with some very special qualities like intelligence, sensitivity, kindness and compassion which most of the other categories may not boast of. Unfortunately, however, humans have forgotten their innate qualities of being sensitive to the needs, innocuous wishes and pain of their fellow beings and also those of being kind and compassionate towards them. Instead, they have (mis)used their intelligence in creating artificial grounds like caste, creed, colour, community, gender and sexuality to discriminate against and oppress others going against the divine order, human values, logic and reasoning and deriving sadistic pleasure from such acts. The raid on the Stonewall Inn, the gay bar in New York, by the city police on the night of June 28, 1969 is an example of one such act. However, much to the dislike of the oppressors, the attack, instead of suppressing and subduing the oppressed, marked the

⁵ As per the Indian mythology, human birth is granted only after 1 cr. 33 lac. other births. *See also_ 'Invaluable Human Birth', The Hindu (Chennai, 4 November 2013) <<https://www.thehindu.com/features/friday-review/religion/invaluable-human-birth/article5314444.ece>> accessed 11 October 2024.*

beginning of one of the largest civil revolutions in the world history which gave courage to a million others, especially, those belonging to the LGBT community, around the world to raise voices against their oppressors and ask for their due. The Stonewall Inn means to the LGBT rights movement what Lexington and Concord meant to the American Revolution.⁶ However, unlike the American Revolution, the global LGBT Rights movement, which started after the Stonewall riots, is yet to attain its objectives and reach its natural end.

Now, the pertinent question to be asked here is what the movement is for. Is it for seeking recognition as humans? Or, is it to seek certain rights and benefits as citizens of a country? Or, is it to claim and assert for something, which was always theirs but has wrongly been denied to them, and that is the right to live as dignified individuals with an identity of their choice and respect for that choice? Unless these questions are understood and answered, no amount of recognition can do justice and bring a desirable end to this movement as such recognitions, at best, can be termed as “partial benefits” but are not what the fight is for. Further, once these questions are answered, every other question, being related to or dependent on their very answers, will automatically get answered. Therefore, it is these very questions that the present article sets out to answer, as precisely and satisfactorily as it can.

2. LGBT MOVEMENT: THE OBJECTIVE(S) BEHIND

The law and the society have always discriminated against homosexual men and women, bisexuals and transgenders on the basis of their sexual behaviour, physical attributes, social behaviour and mannerisms treating them as outsiders and looking at them with either a false sympathy thinking them to be suffering from some sort of mental illness or utter disdain. If the society has discarded them, the law has chosen to punish them and the reasons are not too far to seek. Both believe in the gender binary system according to which, there are only two sexes in this universe- male and female, and if someone does not fall into these two categories or asserts an identity beyond them is either to be medically treated or to be punished under the law. The lesbians, the gays, the transsexuals, the bisexuals, the transgenders, the transvestites, the intersexes, the queers and the asexuals challenge this well-established social belief and practice and seek to assert their non-binary and independent identity, based on their physical attributes, psychological and socio-cultural perceptions and sexual orientation, which is

⁶ Katy Steinmetz, ‘Was Stonewall a Riot, an Uprising or a Rebellion?’ (*Time*, 24 June 2019) <<https://time.com/5604865/stonewall-riot-uprising-rebellion/>> accessed 11 November 2024.

acceptable neither to the society nor to the law, which, merely reflects and mirrors the society⁷. Therefore, through their movement, the community seeks to change this social and legal perception about them. They do want to make themselves acceptable to the society but on their own terms and expect the society to look and move beyond the established gender norms and treat them as equals as they are as human as anybody else. Their dressing sense, sexuality, social conduct and mannerisms are as natural as those of anyone else even if it is a bit different and doesn't match with others. They also expect their fellow human beings to trace their past and have a look at history where they will find plenty of LGBT persons, such as the world-conquering king, *Alexander the Great* (a homosexual), *Queen Hatsheput of Egypt* (a transgender), the world-renowned painter, *Leonardo Da Vinci* (a homosexual), who, not only lived happily in the society but also changed the world.⁸ Mythologies are not different either as they also have plenty of LGBT characters and stories related to them. For example, the great Indian epic, *The Mahabhatata*, talks about *Shikhandi*⁹, a woman in her previous life, who was reborn as a transgender to seek revenge from *Bhishma* in the *Mahabharata war*. The *Vishnu Purana* also describes how Lord *Vishnu* became *Mohini*¹⁰ (a transsexual) to lure and deceive demons during the *samudra manthan* (churning of the sea) and how Lord *Shiva* even had sexual intercourse with *Mohini* being fully aware that *Mohini* was, in fact, Lord *Vishnu* himself (homosexuality). Similarly, *Arjuna*¹¹ became *Brihanala*, a trans-woman while in hiding during the *agyatavasa* (living incognito) imposed on them by the *Kauravas*. The *Shiva Purana*, too, depicts *ardhanarishwar*¹² (half male-half female) form of Lord *Shiva* (intersex) etc. Thus, just a look at history and mythology would make people believe that LGBTs are neither patients suffering from some kind of mental disorder needing sympathy and treatment nor aliens to get scared of. It also emphasises that the earlier societies were far more progressive and liberal in their thinking and tolerant and sensitive towards feelings of other people. It will, hopefully, remove all their misgivings about the community and ease the process of acceptance and absorption of the community in the social mainstream, the ultimate objective of the movement.

⁷ Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* 1 (Oxford University Press, Oxford, 2010) <<https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199244676.001.0001/acprof-9780199244676>> accessed 8 November 2024.

⁸ Thom Senzee, '20 LGBT People Who Changed the World', (*Advocate*) <<https://www.advocate.com/world/2016/7/08/20-lgbt-people-who-changed-world>> accessed 28 December 2024.

⁹ Devdutt Patnaik, *Shikhandi: And Other Tales They Don't Tell You* (Penguin Books Limited, UK, 2014).

¹⁰ *Ibid.*

¹¹ Akanksha Kumar, 'The Third Gender and Gender Self-Identification in India: A Review' (2014) 3 (4) *Journal of Politics and Governance* 31.

¹² *Ibid.*

Keeping these objectives in mind, the LGBT movement has continued relentlessly through all these years despite facing numerous obstacles on the way and has made some headway as well which, in turn, have acted as a catalyst to keep the movement alive and kicking.

3. MILESTONES ACHIEVED

The tireless pursuit of the aforementioned objectives has not gone to waste but has, in fact, paid some significant dividends even if the final destination still remains elusive. For example, in 1973, ie just four years after the Stonewall riots, homosexuality was removed from its list of mental disorders by the American Psychiatric Association.¹³ In 1974, *Kathy Kozachenko* got elected to Michigan City Council and became the first LGBTQ American to occupy such a public office.¹⁴ In June 2003, the US Supreme Court struck down a law which criminalized homosexual conduct.¹⁵ In 2005, same-sex marriage was legalized in Massachusetts thus making it the first US State to do so.¹⁶

In 2001, the Netherlands legalized same sex marriages and became the first country in the world to do so.¹⁷ Iceland elected *Johanna Singurdardottir*, a gay, as a head of state in 2009 thus, becoming the first country to do so.¹⁸

A few years back, separate toilets for trans-persons had become a major flashpoint for transgender rights movement in the US as it related to their privacy and dignity. Many incidents of abuse of privacy and personhood of transgenders on use of public toilets were being widely reported and created a sense of fear and insecurity in the minds of such people.¹⁹ This led to one of the victims in Jersey initiating a legal action against a ferry firm citing an incident where she alleged that she was a victim of direct discrimination as she was asked by one of the company staff to use the toilet meant for disabled persons. Further, she also sought removal of the words “Ladies” and “Gents” on toilet doors because use of such words instead of symbols amounted to indirect discrimination. The tribunal found all her allegations of discriminatory behaviour towards her by the firm, due to her changed gender-identity, to be true and therefore, directed

¹³ CNN Editorial Research, ‘LGBTQ Rights Milestones Fast Facts’ (CNN, 2 July 2021) <<https://edition.cnn.com/2015/06/19/us/lgbt-rights-milestones-fast-facts/index.html>> accessed 22 January 2025.

¹⁴ Ibid.

¹⁵ *Lawrence v. Texas*, 539 US 558 (2003).

¹⁶ Kevin Douglas Grant, ‘LGBT Rights Milestones: A Brief Recent History’ (*The World*, 3 October 2011).

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Rachael Thorn, ‘Why Toilets are a Battleground for Transgender Rights’, *The BBC News Online* (England, 8 June 2016) <<https://www.bbc.com/news/uk-england-36395646>> accessed 22 January 2025.

the firm to immediately stop such discriminatory practices and take corrective measures. This was the first decision of such kind since introduction of the Gender Discrimination Laws in the State in 2015.²⁰ Recently, a Florida Court has also held the ban on transgender students from using the restroom that matches their identity as unconstitutional.²¹

The movement has affected and brought changes in social mindsets as well as in law in many other countries including India, where the Supreme Court²² asked the government to stop discriminatory practices against the transgenders, referred as '*Third Gender*' in the judgment, and to grant them all constitutional and legal rights as are available to any other Indian thus, reading the Constitution in line with international documents viz., Universal Declaration on Human Rights (UDHR), 1948, International Covenant on Civil and Political Rights (ICCPR), 1966 and Yogyakarta Principle, 2007 and aligning the domestic laws and practices with those at the international level. In the subsequent judgments, the court decriminalized same-sex relations in private between two consenting adults²³ and also conferred on them the right to privacy²⁴ under Art. 21 of the Constitution. These judgments have brought the community members on the same platform, at least, theoretically, as other fellow Indians are on as far as social, economic and political rights are concerned ensuring for them educational, employment and property rights. The Parliament has enacted a law²⁵ for protection of their rights, welfare and other related matters. Some State governments have also brought legislations to guarantee property rights to transgenders.²⁶ Similarly, it is also good to see '*Third Gender*' (TG/X/Others) alongside Male (M) and Female (F) being mentioned as gender markers on the school/college admission forms and job applications. Right to vote in and to contest elections had already been granted in 2005 itself.

These measures are, undoubtedly, great steps, of course, if implemented sincerely, towards bringing the community, which has for long been on the margins and a victim of neglect and

²⁰ 'Transgender woman wins Condor Ferries toilet sign discrimination case' *BBC* (Jersey, 25 May 2016) <<https://www.bbc.com/news/world-europe-jersey-36376857>> accessed 22 January 2025.

²¹ Li Cohen, 'Federal court rules that transgender students must be allowed to use bathrooms that match their gender' (*CBS News*, 9 August 2020) <<https://www.cbsnews.com/news/federal-court-rules-that-transgender-students-must-be-allowed-to-use-bathrooms-that-match-their-gender/>> accessed 22 January 2025.

²² *National Legal Service Authority v. Union of India*, AIR 2014 SC 1863.

²³ *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1.

²⁴ *K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1.

²⁵ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019) <<https://socialjustice.nic.in/writereaddata/UploadFile/TG%20bill%20gazette.pdf>> accessed 18 January 2025.

²⁶ Anureet, 'Transgender People to Get Rights to Inherit Agricultural Land in U.P.' (*She The People*, 21 August 2020) <<https://www.shethepeople.tv/news/transgender-people-rights-inherit-land/>> accessed 18 January 2025.

apathy, into the main stream of life. However, having said that, one still cannot lose sight of some bigger and pertinent questions calling for urgent answers. *First*, whether these rights or concessions granted to the community are ends in themselves or are merely means to achieve a much larger end, which still remains some distance away. *Second*, can these rights bring a justified end to the movement? The *third* and the most important question, answer to which will itself answer the first two questions, is whether the term “*Third Gender*” or “TG/X/Others”, as the community members are now being referred as, is a just and appropriate description when some new identities are getting added every day with the acronym ‘LGBT’ (Lesbians, Gays, Bisexuals, Transgenders) having become the ‘LGBTQIA+’ (Lesbians, Gays, Bisexuals, Transgenders, Queer, Intersex, Asexual and Others) and presence of many sub-identities (e.g., Transvestites, Transsexuals, Eunuchs etc) within these identities.

4. USE OF ‘THIRD GENDER’: HOW JUST AND APPROPRIATE

Traditionally, ‘gender’ and ‘sex’ have been considered as synonymous terms and ‘gender’ depends on a person’s biological ‘sex’, which is binary ie ‘Male’ and ‘Female’. Therefore, a person’s gender is also either ‘Male’ or ‘Female’ due to his physiology. However, this notion has changed over a period of time and now it is believed that ‘Sex’ is what is between the legs whereas ‘gender’ is what is between the ears. This change of notion made the world look beyond the gender binaries based on physiology and gave birth to the concept of ‘Third Gender’, based on psychological and socio-cultural perceptions and sexual orientation. Under this concept, individuals get categorized, by the society or even by themselves, as neither woman nor man.²⁷ ‘Third gender’ simply means ‘others’ and does not refer to any particular gender identity. It also does not recognize the distinctions among and within different components of the community nor describes their needs and aspirations deeply linked to such distinctions.

‘Third gender’ was adopted as the world could not think of a better term to describe the persons not belonging to gender binary or unwilling to identify themselves as ‘man’ or ‘woman’. ‘Third gender’ also because the world found it less problematic and more convenient to club such persons with differing gender identities together under one single term than to refer to them by

²⁷ Meena Ramanathan and Ananda Balayogi Bhavanani, ‘Understanding the Third Gender: A Yogic Perspective’ (SBVIDY 2018 Conference: Swastha Manas: Mental Health and Well-being through Yoga, Pondicherry, India, 2018) https://www.researchgate.net/publication/326028968_UNDERSTANDING_THE_THIRD_GENDER_A_YOGIC_PERSPECTIVE accessed 18 December 2024.

their *self-chosen gender identities*. Thus, in the countries, which have accepted the ‘existence’ of persons of non-binary genders in their societies, some non-binary gender markers such as “Third gender”, “TG”, “Others” or “X” (unspecified) alongside binary “Male” or “M” and “Female” or “F” have been provided in the official documents to be opted by those who are not or don’t consider themselves or considered by their respective societies to be either a male or a female.

There is no gainsaying the fact that even this recognition as ‘third gender’, no matter how unjust and inappropriate the term may sound, has not been granted easily but is a result of a long and hard fought battle, both inside and outside the courts of law, which is well documented²⁸. The battle continues as a major part of the world is still unwilling to concede even this much recognition. However, it is equally undeniable, at the same time, that designation as ‘third gender’ fails to serve the desired purpose rather it is more problematic and creates more confusion as countries interpret and use the term as per their own convenience which ends up dividing the community by preferring one component over the other, results into denial of their legitimate rights and causes injustice to the very persons it was supposed to be beneficial for.

For example, the Supreme Court of India itself, in its *NALSA*²⁹ judgment, has restricted the use of the term ‘third gender’ to mean “*transgenders only*”, which itself has a restrictive meaning in India and some neighbouring countries. Acknowledging use of the term ‘transgender’ in quite a wider sense world-over, taking gays, lesbians, bisexuals and others within its ambit, the court refused to apply such a wider meaning in the Indian context owing to specific and distinct meaning this term has assumed in India over a period of time.

According to the court,

“...The grammatical meaning of ‘transgender’, therefore, is across or beyond gender. This has come to be known as umbrella term which includes Gay men, Lesbians, bisexuals, and cross dressers within its scope. However, while dealing with the present issue we are not concerned with this aforesaid wider meaning of the expression transgender.”³⁰ (emphasis added)

²⁸ Francis Kuriakose and Deepa Kylasam Iyyer, ‘Rights Through Resistance: What Lies Beyond Legalism for the LGBT Movement?’ (2020) 55 (17) *The Economic & Political Weekly* 28; Brajesh Kumar, ‘*The Legal Status of Transgenders in India*’ (LL.M. dissertation, University of Delhi 2016).

²⁹ *NALSA* (n 22) para 109.

³⁰ *Ibid* para 107.

Further, it *emphasized the fact that how the term 'Transgender' in India has assumed a meaning quite distinct and separate from that prevalent in other parts of the World except in some neighbouring countries.* According to the court, the TG community, In this country, comprise of *Hijras, eunuchs, Kothis, Aravanis, Jogappas, Shiv- Shakthis etc.* In Indian society, transgenders are referred as *Hijra* or the third gendered people.³¹

The court reiterated its stand when a clarification in this regard was sought by the Government.³² According to *Sandip Roy*³³, this clarification means that “despite all of us bandying around the term LGBT, *gays and lesbians will have to fight their own battle. They cannot piggyback on the transgender ruling and be considered a third category of gender and be treated as a socially and economically backward class. They cannot become an "un-minuscule minority" on the coattails of the T in LGBT.*” (emphasis added)

On the other hand, *Gee Imaan Semmalar*³⁴, is quite confused as to who has been referred as ‘third gender’ in the judgment and also points to certain offensive generalisations and references, for example, the claim regarding *Hijras*, despite being third gender, not identifying themselves as women because of lack of reproductive organs and menstruation. Similarly conflation of intersex persons with transgender people and synonymous use of the words “*Hijras*” and “*Eunuchs*”, a colonial era term which refers to “emasculated males” and has already been repudiated by the trans community, is not only wrong but offensive and derogatory, too. Most importantly, he says, *it is not clear from the judgment whether Hijras have the option to choose themselves as 'women' or the 'third gender' based on what they prefer as in one sentence the right to self-determination and personal autonomy is affirmed and in the very next, it is taken away by deciding that only Hijras are to be considered as 'third gender'.* (emphasis added)

Akanksha Mishra³⁵ also echoed this sentiment, in her article, observing that the court was, probably, confused between the two terms, ‘transgender’ and ‘hijra’, frequently using them

³¹ Ibid para 108.

³² Samanwaya Rautray, ‘Lesbians, gays, bisexuals are not third gender, SC clarifies’, *The Economic Times* (1 July 2016).

³³ Sandip Roy, ‘What the Supreme Court Clarification on Third Gender Means for LGBTQ Indians’, *The Huffington Post* (30 June 2016).

³⁴ Gee Imaan Semmalar, ‘Gender Outlawed: The Supreme Court Judgment on Third Gender and its Implications’ (*Round Table India for an Informed Ambedkar Age*, 19 April 2014) <https://roundtableindia.co.in/index.php?option=com_content&view=article&id=7377:because-we-have-a-voice-too-the-supreme-court-judgment-on-third-gender-and-its-implications&catid=120:gender&Itemid=133> accessed 10 February 2025.

³⁵ Akanksha Mishra, ‘Third Gender Rights: The Battle for Equality’ (2016) 5(2) CULJ 16.

interchangeably in its order. As a result of this confusion, *the judgment was perceived to concern only 'Hijras' and their recognition as 'third gender', leaving out other gender variants, which also come within the meaning of the term 'transgender'*. (emphasis added)

Undoubtedly, it is submitted, such a narrow interpretation of the term 'transgender' by the court leaves out, from its ambit, other gender identities like gays, lesbians, bisexuals, cross-dressers etc, which also do exist in the Indian society, and hence, leaves them out of the 'third gender' category as well. Simultaneously, it also forces them to identify themselves with either of the existing binary categories to meet the official requirements and deprives them of the benefits of the newly enacted law³⁶ and other social schemes, launched or to be launched by the Government. It is also worth mentioning here that unlike the Supreme Court of India, the Supreme Court of Nepal, in Sunil Babu³⁷, has shown a much liberal approach while using 'third gender' for transgenders taking the word 'transgender' as an umbrella term for all the gender variants.

In countries like Malta, Denmark, Scotland, Canada, Australia, 'X', which is also recognized by the International Civil Aviation Organisation (ICAO), is used in the passports and other public documents as the third gender marker option alongside 'M' and 'F'.³⁸ However, some of these countries have restricted the use of 'X' markers for intersex persons only ie, for the persons born with chromosomes, gonads, sex organs, or genitalia which are different from those found in boys or girls due to court's orders.³⁹ Such a denial again amounts to discrimination against persons who do not belong to the intersex group and compels them to choose one of the gender binaries.

Therefore, it can be said that the gender markers like 'Third gender', 'TG', 'X' or 'Others' create more problems than they solve as *first*, they fail to represent all the gender variant identities due to a narrow interpretation of the term 'third gender' by the courts in many countries and *second*, the term seems to have been designed more out of convenience than to serve the real purpose of describing someone. Such a designation amounts to be a denial of

³⁶ *Puttaswamy* (n 24).

³⁷ Sunil Babu Pant and Ors. v. Nepal Govt. and Ors., (2008) NJA Law Journal 262 <<https://www.icj.org/wp-content/uploads/2012/07/Sunil-Babu-Pant-and-Ors.-v.-Nepal-Government-and-Ors.-Supreme-Court-of-Nepal.pdf>> accessed 11 November 2024.

³⁸ 'Third Gender Marker Options in Europe and Beyond' (*TGEU*, 9. November 2017) <<https://tgeu.org/third-gender-marker-options-in-europe-and-beyond/>> accessed 11 October 2024.

³⁹ Neela Ghosal, 'Transgender, Third Gender, No Gender: Rights Perspectives on Laws Assigning Gender, Part-II' (*Opinio Juris*, 4 September 2020) <<https://opiniojuris.org/2020/09/04/transgender-third-gender-no-gender-rights-perspectives-on-laws-assigning-gender-part-ii/>> accessed 11 October 2024.

right to choose and be known by one's self-chosen identity, a basic human right⁴⁰ as granted under the Yogyakarta Principles⁴¹. The Principle 3 *inter alia* requires States to:

“...

b) *Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity*;

c) *Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person's profound self-defined gender identity; ...*⁴² (emphasis added)

The discussion above does clearly suggest that a restricted or liberal use of third gender markers ('TG', 'Others', 'X') notwithstanding, these gender markers do not describe the persons choosing them as aptly and justly as 'M' or 'F'. Moreover, this is not something that the whole movement has been centred around. It was certainly not for getting bundled together under a general and insignificant term like 'third gender', which neither signifies them nor represent their hopes, aspirations and uniqueness. Rather it has always been about *Right to Self determination* ie, the right to choose one's own identity- an identity that signifies a person, makes one proud and gets one respect for *what one is or perceives oneself to be*. The use of 'third gender', agreed to by the LGBT members merely as an interim measure, miserably fails to serve that purpose. If that is the case, a question does arise- Do we need such terms and markers denoting them at all or should they be just done away with?

5. 'THIRD GENDER' OR 'NO GENDER'

'Gender identity', as also discussed in the *NALSA*⁴³, refers to a person's individual perception about his/her own gender which may or may not be in keeping with his/her biological sex ie,

⁴⁰ UNCHR 'Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law' (2012) UN Doc HR/PUB/12/06 <<https://www.ohchr.org/documents/publications/bornfreeandequallowres.pdf>> accessed 8 January 2025. See also Juneau Gary and Neal S. Rubin, 'UN Matters: Are LGBT Rights Human Rights?' (*Psychology International*, June 2012).

⁴¹ A set of international principles relating to sexual orientation and gender identity prepared by a distinguished group of international human rights experts in Yogyakarta, Indonesia in 2006, in response to well-documented patterns of abuse. It is a universal guide to human rights which affirm binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfil that precious birthright. See 'Introduction to the Yogyakarta Principles' (*Yogyakarta Principles*, 2006) <<https://yogyakartaprinciples.org/introduction/>> accessed 11 November 2024.

⁴² Ibid Principle 3.

⁴³ *NALSA* (n 22).

the sex assigned at birth. His/her other expressions of gender, including dress, speech and mannerisms may also be quite different. Such a strong internal feeling may also lead the person to resort to medical, surgical or other means to change his/her physical appearances or functions accordingly. Therefore, in short, the term ‘gender identity’ refers to an individual’s self-identification as a man, a woman, a transgender or any other identified category. Keeping this definition and also the earlier discussions in this paper in mind, one does reach a conclusion that the use of ‘third gender’ and related gender markers to describe a person’s gender identity is totally inappropriate and unjustified. So, the question arises whether this practice should be discontinued.

In March 2017, the intersex organisations and independent advocates from Australia and New Zealand met, discussed and released a joint consensus statement in Darlington (Australia), hence, known as ‘Darlington Statement’⁴⁴, which *inter alia* talks about doing away with gender classification while emphasising on their right to *bodily integrity, physical autonomy and self determination*. According to this statement,

“...sex and gender binaries are upheld by structural violence. Additionally, attempts to classify intersex people as a third sex/gender do not respect our diversity or right to self determination. These can inflict wide-ranging harm regardless of whether an intersex person identifies with binary legal sex assigned at birth or not.”⁴⁵ (emphasis added)

Further, it says,

“...Undue emphasis on how to classify intersex people rather than how we are treated is also a form of structural violence. The larger goal is not to seek new classifications but to end legal classification systems and the hierarchies that lie behind them.”⁴⁶ (emphasis added)

Therefore, approving the decisions taken at the Malta Agreement⁴⁷, it recommends:

“...

⁴⁴ ‘Darlington Statement’ (Intersex Human Rights Australia, 10 March 2017) <<https://ihra.org.au/darlington-statement/>> accessed 5 October 2024.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Third International Intersex Forum, 2013 was held in Valletta, Malta which was attended by representatives of 30 intersex organisations from all continents. A joint public statement, issued at the end of the summit, is known as ‘Malta Agreement’ (Intersex Human Rights Australia, 2 December 2013) <<https://ihra.org.au/24241/public-statement-by-the-third-international-intersex-forum/>> accessed 5 October 2024.

- c. *As with race or religion, sex/gender should not be a legal category on birth certificates or identification documents for anybody.*
- d. *While sex/gender classifications remain legally required, sex/gender assignments must be regarded as provisional. Given existing social conditions, we do not support the imposition of a third sex classification when births are initially registered.*⁴⁸ (emphasis added)

Principle 31 of the ‘Yogyakarta Principles+10’⁴⁹ *inter alia* mandates States to:

*“Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality,”*⁵⁰
(emphasis added)

In fact, some countries have already started the practice. Netherlands, for example, has removed gender markers from national identity documents while Germany has issued identity cards without sex or gender markers. Even earlier, codification of such personal characteristics as race, religion, or marital status has been removed by many countries from their identity documents.⁵¹

Neela Ghoshal also supports such practices arguing that all that an identity document does is to ensure the personal identity of the person presenting the document. Therefore, according to her, adding race or *gender markers to the document cannot and will not create any additional clarity* if a person’s appearance is different from and does not correspond with the stereotypes associated with the markers their documents bear.⁵² However, she feels that some alternative measures would be required to track and prevent gender discrimination.⁵³

⁴⁸ *Darlington Statement* (n 44).

⁴⁹ Some additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles, 2006, see ‘The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles’ (Geneva, 10 November 2017) <http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf> accessed 5 November 2024.

⁵⁰ *Ibid.*

⁵¹ *Neela Ghosal* (n 39).

⁵² *Ibid.*

⁵³ *Ibid.*

Thus, it can be inferred from the discussion above that doing away with gender markers will not cause a pandemonium or make lives complex. On the contrary, a shift from a system of using inapt gender markers like 'Third gender' to that of 'No gender' will make life much easier, especially, for LGBTIQIA+ people as being forced into unwanted gender boxes has been causing a lot of undue hardships and is a great injustice to them.

6. CONCLUSION

The LGBTIQIA+ movement, which started globally from the day of Stonewall Inn attack⁵⁴, is a fight to seek an independent identity for the each individual belonging to the community based on his or her choice. This is because the identity of each component of the community is as varied as the colours of rainbow and has its own uniqueness and characteristics. Similarly, their hopes and aspirations are also as varied as their identities. As discussed earlier in this paper⁵⁵, general term like 'third gender' cannot describe them or their unique features aptly and justly, that too, with arbitrary interpretations of its meaning because even anthropologists and sociologists have talked about fourth, fifth and more genders. On the contrary, it sounds derogatory and unjustified to such persons and its use was accepted merely as a temporary measure hoping that States will soon move beyond that and recognise the demand for choice of identity of the community.

Since governments, courts and societies seem to be reluctant to do that, it will be far better in such circumstances that we should gradually move towards 'No gender' system⁵⁶ where requirement for gender identification and use of gender markers, especially in public documents, is completely done away with. In the meantime, such identification and use of markers should be done only where doing so is required by law for legitimate purposes as mandated under 'Yogyakarta Principles+10' and should, at the same time, be made amendable ie leaving it to the person concerned to change or remove completely the marker once opted for as recommended under the 'Malta Agreement' and the 'Darlington Statement' discussed above. However, it is equally important that some alternative mechanisms should be thought of to stop gender discrimination.

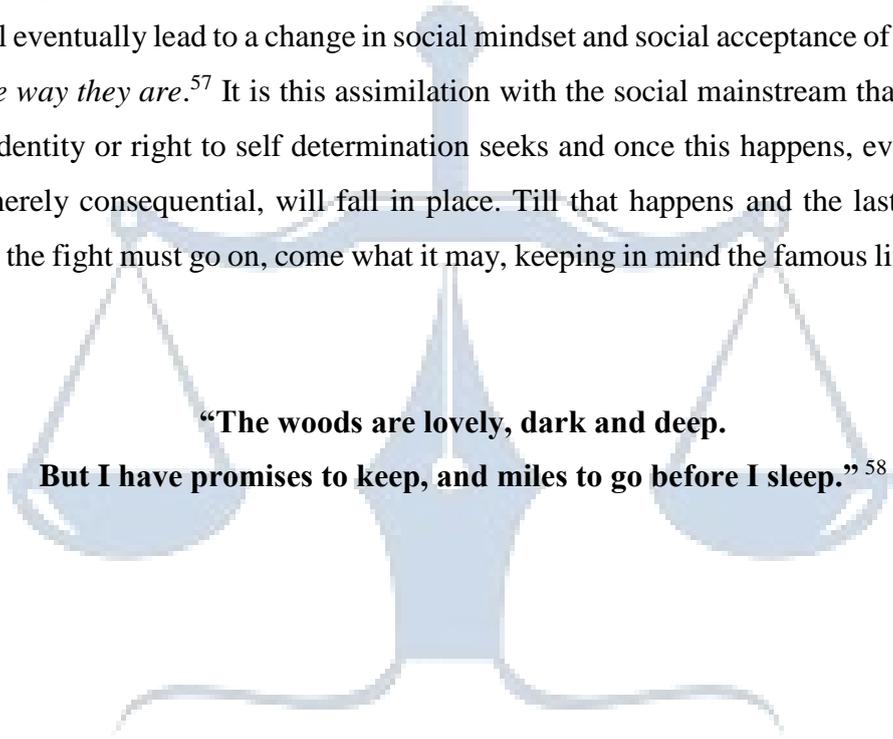
It is suggested that our schools can be very helpful in removing the social barrier around, the

⁵⁴ Katy Steinmetz (n 6).

⁵⁵ Refer to the discussion under the sub-topic, 'Use of 'Third Gender': How Just and Appropriate', of this paper.

⁵⁶ Refer to the discussion under the sub-topic, 'Third Gender' or 'No Gender', of this paper.

taboo attached with and the discrimination and violence against this community by introducing their pupils to varied gender colours at very early stage of their learning through inclusion of chapters on celebrated personalities like *Alexander the Great* or *Leonardo Da Vinci* in the syllabus telling students not only about what they achieved in life but also that *who they were* and how their gender colour did not make them useless, unsuccessful or despicable. Students should also know about the kind of societies these people lived in which might have been technologically backward but was definitely advanced and liberal in their thoughts. Such lessons will eventually lead to a change in social mindset and social acceptance of all the gender variants *the way they are*.⁵⁷ It is this assimilation with the social mainstream that the fight for choice of identity or right to self determination seeks and once this happens, everything else, which is merely consequential, will fall in place. Till that happens and the last frontier gets conquered, the fight must go on, come what it may, keeping in mind the famous lines by Robert Frost:



**“The woods are lovely, dark and deep.
But I have promises to keep, and miles to go before I sleep.”⁵⁸**

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⁵⁷ Refer to the discussion under the sub-topic, ‘LGBT Movement: The Objective(s) Behind’, of this paper.

⁵⁸ Robert Frost, ‘Stopping by Woods on a Snowy Evening’ (Poetry Foundation) <https://www.poetryfoundation.org/poems/42891/stopping-by-woods-on-a-snowy-evening> accessed 11 November 2024.