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Position Of Third Genders In India: A Descriptive Study

Authored By- Muskan Sharma¹

Abstract

The right to equality is the human right of every person. The Constitution of India provides fundamental right to equality to all persons. But there is a category of people those are not able to enjoy their fundamental rights, these are the 'third gender' or 'transgender' community. From a very long time they are facing discrimination. People having a suspicious look on third gender person and sometimes they faced mental as well as physical violence. Undoubtedly, we can say that third gender people also have equal fundamental rights. In the Constitution of India, we use the word 'persons' in place of men or women under Article 14 by which every person whether male, female or a third gender have the right to equality. They are also have a right to life and personal liberty under Article 21 of the Indian Constitution that impliedly give right to live with dignity. Our Constitution does not make any discrimination with the third gender persons but in reality, they face discrimination. After the enactment of Constitution of India our government made many reformist and revolutionary laws to stop the exploitation of weaker sections of society such as for women, children, workers etc. But the government paid very little attention towards the drastic situation of third gender persons. It reflects that we have to work on ground level and adopt a strong executive mechanism to enforce the rights of third gender persons. We have to work on legislative as well as executive level to upheld the living conditions of third gender persons. In this research paper we will discuss about the categories of people fall under third gender, major issues of transgender community and the legal development on the area of third gender's rights by making critical analysis of the Transgender Persons (Protection of Rights) Act, 2019.

Key-Words: Third Gender, Constitution, Equality, Fundamental Rights.

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I. INTRODUCTION:

Traditionally, we made a division of human being in two categories: men and women. Now we are living in 21st century and when we see our categorization of human beings, we find such categorization conservative as well as non-scientific. Apart from male and female there is another category of gender that broadly called as 'third gender' or 'transgender'. The word third gender does not mean to be one single gender but is used to represent various categories of people who does not find themselves to be identify solely as a male or a female. In simple sense, a person who is not described completely as a male or a female, fallen under the category of third gender. Third gender persons are born as a human being but they are not allowed to live a respectful life like humans. They face discrimination in the matters of education, employment, worship or in public places etc. The stereotype mentality of society does not allow them to enjoy their rights and live with dignity. As we talk about India, we find a miserable life conditions of third gender people. In India, the total population of transgender is 4.88 lakh, as per the 2011 census. However, their employment ration is disappointing. But there are some positive steps have been taken by the government that increase the hope of transgender people for a respectful and a worthwhile life. The major step of government towards the welfare of transgender persons is enactment the enactment of the Transgender Persons (Protection of Rights) Act, 2019. The Transgender Persons (Protection of Rights) Act, 2019 provides that neither the government nor the private companies can discriminate against transgender people in any matter.

II. MEANING OF THIRD GENDER:

Before proceed to discussion on the rights of third gender people, we have to know about the categories of people comes under the term of third gender. The third gender also called as 'transgender' and the word transgender was derived from two word, 'trans' which means 'across' and 'gender'. So, the meaning of the word transgender is 'across or beyond the gender'. The Apex Court in their judgement had clearly said that the benefit of 'third gender' would be enjoyed by the transgender community comprising "Hijras, Eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis, etc."² The judgement of the Supreme Court explicitly defines the term transgender. When we trace the legal definition of the transgender we find it in the Transgender Persons Act,

² National Legal Services Authority vs. Union of India & Ors, (2014) 5 SCC 438.

2019. The section 2(k) of the Transgender Persons Act, 2019 defines the term ‘transgender’ as , “transgender person means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.” This is the legal definition of the term transgender. Further, the term transgender is describes as a person whose gender identity is different from the sex they were assigned at birth. For example, a transgender person who was designed³. The International Labour Organisation in their guide⁴.

III. HISTORICAL REFERENCES OF THIRD GENDER IN INDIA:

When we look into our ancient Hindu religious books we find the reference of the transgender in the **Ramayan era**. There is a story about the life of Lord Rama. After being banished, he told his followers that the men and women should wipe their wears and leave him. All of the men and women left. However, a group of people known as the Hijra remained standing before him. They were neither men nor women and refused to leave until Lord Rama returned fourteen years later. This community was praised for showing such loyalty. In ancient India, the Hijras were a community that was respected for being extremely loyal and were well trusted enough to be given important religious and governmental roles.

In the **Muslim period**, Hijras rose to topmost positions as political advisors, administrators, army generals as well as guardians of the harems. In the period of Khilji Sultanata, Malik Kafur was a eunuch person reached the position of the commander in the army of Allaudin Khilji. Babur, the founder of Mughal Empire in India wrote his memoir Baburnama in which he said that he had a sexual attraction towards a boy named Baburi in Kabul.

In the **British period**, the third gender community faced humiliation. The officers took a

³ <https://www.cancer.gov/publications/dictionaries/cancer-terms/def/transgender>

⁴ Inclusion of lesbian, gay, bisexual, transgender, intersex and queer (LGBTQ+) persons in the world of work: A learning guide. 2022, ISBN: 978-92-2-036727-8 (PDF)

suspicious thought about such community. Section 377 of Indian Penal Code, 1860 made illegal any “unnatural offences” that became a tool for Britishers to humiliate third gender community. Until the date of 6th September 2018 when section 377 become unconstitutional⁵, section 377 was used as justification to mistreat and punish Hijras, queers, and the LGBTQ+ community. In the colonial era, western concept of hating with transgender community spread in our country. Due to this third gender community in India from a well-respected role as pillars of religious and governmental society to being social outcasts. They are denied educational, and employment opportunities.

IV. MAJOR ISSUES OF THIRD GENDER

PEOPLE:

- a. **Discrimination By Family:** Transgender people struggle for equal treatment starts at their home level. They face discrimination on the hands of their own family. As soon their family know about their gender they start doing discrimination with them and sometimes they are thrown out from their own homes. Because of stereotypical mentality of their families they loss their everything in a single second.
- b. **Lack of Educational Opportunities:** Due to the series of discrimination starts from their family stage, transgender people are not able to successfully pursue at least their primary education. The Constitution of India under Article 21A provides Fundamental Right to Education to all children between 6 to 14 years of age. Unfortunately, transgender could not easily get their basic fundamental right to education. According to 2011 census of India, the population of transgender people in India was 4.9 lakh out of them only 46% of people were literate. Such literacy ratio is less as compared to 74% literacy rate of general population⁶.
- c. **Lack of Employment Opportunities:** As per the Transgender Persons (Protection of rights) Act, 2019, discrimination against a transgender person, including unfair treatment or denial of

⁵ Navtej Singh Johar & Ors vs. Union of India, AIR 2018 SC 4321.

⁶ A Sociological Study of Third Gender Community in India: Special reference to Mysore District of Karnataka. Volume 10-Issue 9 (2022) pp: 38-41.

service in relation to employment, education, healthcare etc. is prohibited. Perhaps, this is only a scratch on the surface. Since transgender persons are not given sufficient educational opportunities, this further results in not finding employment opportunities. Sometimes despite having sufficient educational qualifications they are deny to get a job. Further workplaces conditions also are not so favorable for transgender people. They suffer discrimination by their colleagues. According to study conducted by the National Human Rights Commission in 2018, 96% transgenders are denied jobs. Among the respondents, around 89% of transgenders said that there are no jobs for even qualified ones.

- d. **Health Issues:** Due to physical as well as mental discrimination with transgender people they largely suffered major mental health issues. They have higher prevalence rates of mental ill health compared to the rest of the population. A study that is based on primary data provides that HIV rates are every high in Hijra community. No counseling services are available to them at present. Third gender community have no access to bathroom/toilets at public spaces⁷. It creates health problems for them.

V. ROLE OF JUDICIARY TOWARDS THIRD GENDER RIGHTS: THE NALSA JUDGEMENT:

The role of Indian Judiciary must be highlighted as they work tremendously to stop discrimination with third gender people in India. The Supreme Court of India in their recent judgements recognized third gender community and delivered positive judgements towards welfare of third gender community. Some of these major judgements of Supreme Court in India related to third gender community's issues are as follows:

❖ **NALSA VS. Union of India and Ors.**⁸: The Supreme Court gave legal recognition to transgender community. By this judgement transgender persons finds a equal place for them in the eyes of law. The court provides that transgender persons also have equal fundamental rights under Article 14, 15 and 16 of the Constitution of India. The Article 14 of the Constitution of India use term 'person' that does not restrict itself to the dual concept of man and woman. Thus, Hijras/

⁷ A Sociological Study of Third Gender Community in India: Special reference to Mysore District of Karnataka. Volume 10-Issue 9 (2022) pp: 38-41.

⁸ (2014) 5 SCC 438.

transgender persons who are neither male or nor female also fall within the expression ‘person’ and are entitled to legal protection of laws in all spheres of State activity. It held that all persons have the constitutional right to self-identity their gender. Further, it directed Union and State governments to allow transgender persons to access reservations in public education and employment.

CONSEQUENCES OF JUDGEMENT: Transgender community never forget the role of Supreme Court towards their welfare. The NALSA judgement acted as direction to government to enact a law for transgender community to prohibit discrimination against them. The judgement was definitely a constructive step towards humanization of the judicial system and was a major step towards elimination the injustice done to almost five million people who were running from one place to another without any identity. This judgement provide a separate legal identity to all transgender community. As a consequence of the judgement of Supreme Court of India, in 2019 a bill was passed by both houses of Parliament. The bill after taking assent from President of India on December 05, 2019 become an Act called “The Transgender Persons (Protection of Rights) Act, 2019”.

VI. A CRITICAL REVIEW OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019:

As a consequence of NALSA judgement of the Supreme Court the government passed The Transgender Persons (Protection of Rights) Act, 2019. Transgender people have a big hope with this Act. They think such Act as a guarantee of equal rights or equal treatment for them. The object of this act is to prohibit discrimination against transgender community by providing offences and penalties for such discriminatory acts. Whether this Act fulfils the 100% expectations of transgender community or not? It is a major question. If the Act provide solutions of all problems or issues face by transgender community then this Act treats as a successful measure towards welfare of third gender community. Let’s find out how much Transgender Persons Act, 2019 effective to solve the problems of transgender people;

- a) **Provide Legal Recognition:** As we discuss above non-recognition of identity of transgender people consider a big issue by them. It creates problem of making welfare schemes for them. The Transgender Persons Act, 2019 try to deal with the problem of recognition of self-identity of transgender people. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India⁹. Further the Supreme Court stated in the NALSA case judgement that the recognition of one's gender identity lies at the heart of the fundamental right to dignity. Chapter III of The Transgender Persons (Protection of Rights) Act, 2019, A person who recognized as transgender shall have a right to self-perceived gender identity. This provision give autonomy to transgender persons to be recognized according to their choice. It gives right to self-autonomy to them.
- b) **Provide Procedure for Certificate of Identity:** The Act provides a certificate of identity. Section 5 of Transgender Persons Act provides that to be recognized as third gender a person may make an application to the District Magistrate to issue a certificate of identity as a transgender person. The parents or guardian of minor child can also make application for gender identity certificate for their minor child. Such gender identity certificate acts as an official recognition of a person as a transgender. The gender identity certificate of transgender person may solve the problem of legal recognition of transgender people.
- c) **Welfare Measures by Government:** The Act make an obligation for government to provide welfare measures for transgender people. This is not wrong to say that transgender community is a section of society who has suffered dicrimination at every level for a long time. They always deny for equal treatment. The Transgender Persons Act made a government obligation to take necessary steps for welfare of transgender community. It is the duty of government to ensure the participation of transgender persons in society. The Act further provides that government shall formulate welfare schemes and programmes that helps transgender people's rescue, rehabilitation and protection.
- d) **Provide Penalty For Offencies Against Transgenders:** The discrimination with transgender people in employment sector is one of the major problem of transgenders. The

⁹ Anuj Garg vs. Hotel Association of India, (2008) 3 SCC 1.

Transgender Persons Act try to deal with such issue also. The provides that there shall be no discrimination against any transgender person in matter of employment. Every establishment shall have a grievance redressal mechanism that deal with complaints related to discrimination with transgender persons. Further if any transgender person compels to do forced or bonded labour or denies a transgender person to move in a public place or provides any injury harm to life safety or health of transgender persons then the accused shall be liable for punishment for a imprisonment for a term which shall not be less than six months that may extends to two years and with fine. It may be notes that harm may be physical or mental. The penalty provision of Transgender Persons Act, 2019 may be act as a force measure to stop people to do any discrimination with transgender people. But such penalty provision should be more elaborated. There should be expressly mentioned such acts that provide mental injury to transgender people.

e) **Establishment of National Council:** The provision for establishment of the National Council for Transgender Persons is a tremendous feature of Transgender Act. The Council shall establish by Central Government to perform functions such as; giving advice about policy and planning for transgender persons, monitor and review the impact of policies programmes for transgender persons. Further, the council has a power to redress the grievances of transgender persons. Unfortunately, there is no provision for powers for council of transgender persons. It is one of the short coming of this particular Act.

❖ **Review:** The Transgender community had a big expectation with The Transgender Persons (Protection of Rights) Act, 2019. Although the Act does not fulfil all expectations of transgender people. It cannot be termed as an exhaustive legislation to solve all the problems of transgender community. As a primary step it should be appreciated. By enacting The Transgender Persons (Protection of Rights) Act, 2019 the government give a hope to transgender community that government is vigilant about the protection of transgender persons. One of the major drawbacks of the said Act is that no person of transgender community was involved in the drafting committee of the Act. It reflects that the government only by their self-assumptions made this Act for transgender community. Further, the specified punishment for offences against transgender people should be more according to nature of discrimination with them. The new Act⁶ is completely silent on the procedure and type of medical aid that will provide by government to

transgenders. Further, in the case of **National Legal Services Authority vs. Union of India**, the apex court held that the transgender community would be now considered as socially and educationally backward class. According to the judgement the Supreme Court of India assures that the transgender community should be kept in the preview of OBC's. But the government does not provide any provision for reservation for transgender community in the Transgender Persons Act that was largely expected with the government and even directed by the Supreme Court in their judgement. The provision for reservation would be an excellent step that ensure representation of transgender community in education or employment sector. It is a harsh reality that being marginalized section of society transgenders are forced to work as dancers, strippers, basically sex workers¹⁰. The government should consider the reality of transgender people life conditions. As a weaker or marginalized section of society transgender community should be provided reservation at central level by central government. After consider the whole Act we can conclude that the government needs to do a lot for the welfare of transgender community. There should be mechanism to directly communicate with transgender community and find out what are the real and expedient necessity of them. Transgender community should be given reservation at national level by the government.

VII.CONCLUSION:

It is a harsh reality of present time that a particular section of our society has been doing struggle for a long time for recognition of their self-identity as transgender. Undoubtedly, the transgender community has an equal fundamental rights under the Constitution of India. But due to lack of awareness in our society they suffer discrimination at various stages of their life. The Indian Judiciary should be praised by their recent reformist judgements on transgenders people rights. Due to the judgements of the Supreme Court transgender community find a light of hope. They got moral confidence to see the recognition of transgender community by the Supreme Court. But without any executive action it all doesn't matter. As a primary step, the Transgender Persons (Protection of Rights) Act, 2019 is an admirable step of government towards transgender community welfare. But there are some major loop holes seen in the law that have to be considered by the government for further improvisation. The reservation policy for transgender people that was expected by the community was not seen in the Transgender Persons Act. The government

¹⁰ 2021, Non-Recognition of Third Gender: A Failure of Indian Legislation, Volume 4 I Issue 3, [ISSN 2581-5369].

should provide reservation to transgender community at national level particularly in education and employment sector which will help in bringing transgender community on the line of equality in the society. Lastly, we can conclude that without bringing awareness in the society it is not possible to ensure a respectful position of transgender people in the society. It is upon government to run awareness programmes in the society that will make people aware about transgender people rights.

