

## CRITICAL ISSUES OF THIRD GENDER IN INDIA: A DESCRIPTIVE STUDY

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### ABSTRACT:

Education is essential for development of any democratic country. India is a democratic country. The spirit of the Indian constitution is to provide equal opportunity to every citizens to grow and attain their potential, irrespective of caste, religion or gender. Everyone has a gender identity as per census 2011, there are around 4.9 lakh 3rd gender in the country who faces social discrimination and harassment. Transgenders were respected early in the society but the situation has changed and they now face discrimination and harassment. The supreme court of India accepted transgender as the third gender on the basis of recommendation of national level committee under the ministry of social and empowerment, government of India. Transgender community is one of the highly marginalized and discrimination in every sphere of life. The right to equality is a 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 who are not able to enjoy there fundamental right; these are the third gender or transgender community. From a very long time they are facing discrimination. People having a suspicious look on the third gender person and sometimes they face mental as well as physical violence. Undoubtedly we can say that third gender people also have equal fundamental rights. Our constitution does not make any discrimination with the third gender persons but in reality, they face discrimination. It reflects that we have to work on the ground level and adopt to enforce the right of the third gender. In this research paper we will discuss about the critical issues of third gender and their legal development by making critical analysis of the Transgender persons (Protection of Rights ) Act 2019.

**Keywords:** Third gender, Constitution, Equality, Fundamental right

### INTRODUCTION

India has achieved significant growth and development. It has improved on crucial human development indices such as levels of literacy, education and health. There are indications, however, that not all disadvantaged groups have shared equally the benefits of the growth process. Among these, the transgender community, one of the marginalized and vulnerable communities in the country is seriously lagging behind on human development indices including education (Rajesh & Naved 2013). What is appalling is that despite affirmative action (reservation policies, Right to Education, etc.) the disparities remain substantial among the transgender community in India. Majority of the population is uneducated or undereducated thereby excluding them from participating in social, cultural, political and economic activities. Along with teachers' apathy towards transgender community, exclusion from society, poverty, continued discrimination, violence are some of the important factors which can be attributed to the poor participation of transgender persons in educational activities.

The life of transgender people is a daily battle as there is no acceptance anywhere and they are ostracized from the society and also ridiculed. They face high levels of stigma in almost every sphere of their life such as health, schools/colleges, employment, social schemes and entitlement. Extreme social exclusion diminishes self-esteem and sense of social responsibility. The community needs to be included in the mainstream development program of the country and be protected from all forms of abuse and exploitation. 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 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. .

## CONCEPT 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 " Transgender, 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, 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, transgender, 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 designed<sup>3</sup>. The International Labour Organisation in their guide<sup>4</sup>.

Herdt (1993b) in his book titled 'Beyond Sexual Dimorphism in Culture and History' writes about how the concept of the third gender entered anthropological literature, challenging the assumed naturalness of binary gender system in the society and how gender fluidity evolved. In the 1970s and 1980s cultural anthropologists and feminist theorists challenged the dichotomy of gender by showing how femininity and masculinity are socially constructed. The anthropological interests in gender and sexual alterity at that time was not new but got a new direction with the validation and support by feminists. The feminist agenda was inspired by social constructionist theory which led to resurfacing of studies of the third gender around the world. Simultaneously, the mushrooming of gay and lesbian studies provided a boost in this research where

the scholars critiqued homophobia and heterosexism to possibly have a system of gender and sexuality that is more liberating.

Nanda (1999), in her book „Neither Man nor Woman: The transgender of India’ discusses how the word trans itself explains that transsexuals are transitional in gender categories and nothing permanent. In her ethnographic research, Nanda opines that Western transsexuals are inferior to transgender in India because of their name. Researchers across the fields have focused on transsexuals as ultimate gender conformist rather than rebellious beings to femininity and masculinity. There has been a widespread usage of third sex framework during the final three decades of the 20th century across cultures to describe the range of identities which has led to questioning of the importance of this gender variant categorization. The emphasis on third sex groups in existence with the larger society has led to the skewed assumptions that these categories are less marginalized than their counterparts in Western cultures (Hall, 2005). Towle and Morgan (2002) in their research paper titled ‘Romancing the transgender native: Rethinking the use of the "third gender" concept’ critique that third sex groups might wrongly entail that the gender binaries (female and male) are sacred and trouble-free, at least for exploring and understanding gender variability. In a three-tier gender system, anyone who falls outside the two normative genders can be transferred to a third group. Research on third sex categories often put the non-normative gender categories into a single group, thus leaving other forms of gender diversity invisible.

Hall (2005) argues that queer theory’s uptake of post structuralism had led the new scholars to focus on the overlooking of other less visible gender variant groups because of third sex groups like transgender. In short, the term third sex can create the illusion of only three groups in a society-female, male and other-rather than taking into account various subtle categories between and within the three. In recent years, a number of transgender authors and sexologists with an interest in transgenderism argue that identifying transgender people as third sex gives them personal and political empowerment. A similar conundrum occurs in India around the status of transgender. While transgender in India claim to have a long history a lot of Indians have now embraced lesbian, gay and bi-sexual identities under the influence of globalization and HIV thus rejecting the traditional tag of transgender in India. Socio-cultural linguists who have been working on gender variant communities have been sensitive about these problems and have been critical in the engagement with the third sex concept. The new wave of understanding third sex suggests incorporating embodiment not only biologically but also taking into consideration sociocultural paradigms of society.

## **RIGHTS OF THIRD GENDER IN INDIA**

Transgender community (LGBT) is subjected to discrimination for generations. They are a minority group based on their sexual orientation. They face exclusion from their family and society. They are deprived of their basic rights. LGBT groups are not distinguished from the general population by human rights documents that uphold the fundamental dignity of all people. The edifice of the Constitution of India is built upon justice, equality, liberty and fraternity which requires the safeguarding of the rights of sexual minorities also. There is a special statute called Transgender Persons (Protection of Rights) Act, 2019 for addressing the peculiar issues faced by the Transgender community. The honourable Supreme Court of India has recognised transgender community as third gender. Despite all these protections, third gender is always marginalised in Indian society.

According to D.D Basu, “Human rights are those that have derived from natural law which have devolved out of natural rights.” i The UN High Commissioner for Human Rights issued a report on human rights violations against individuals based on their sexual orientation and gender identity . It is highlighted that LGBTI people face “continuing, pervasive, violent abuse, harassment and discrimination” across the world.ii In National Legal Services Authority of India V Union of India iii court observed that “ Gender identity refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual’s selfidentification as a man, woman, transgender or other identified category. ” Third gender face discrimination in every phase of their life. They are victims of sexually transmitted diseases and gender based violence. Women are more disadvantaged .The Committee on the Elimination of Discrimination against Women expressed its concern over gender based violence , “The issues of HIV/AIDS and other sexually transmitted disease are central to the rights of women and adolescent girls to sexual health .Women in prostitution are also particularly vulnerable to these diseases. States parties should ensure the rights of female and male adolescents to sexual and reproductive health education by properly trained personnel in specially designed programmes that respect their rights to privacy and confidentiality.” iv The third gender faces discrimination in health care. Article 12 of Convention on the Elimination of All Forms of Discrimination against women(CEDAW) 1979 states that “The State Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.” Article 12 of International covenant on Economic social and Cultural Rights (ICESCR) 1966 recognises the right to the highest attainable standard of health without any discrimination . Right to health includes physical health, mental health as well as reproductive health. Implementation of the principle of non-discrimination requires that girls, as well as boys, have equal access to adequate nutrition, safe environments, and physical as well as mental health service . v Social security and social insurance is an inalienable right of a worker.

The third gender faces discrimination in right to work and hence devoid of social security in life .Employment opportunities are not available to them in an equal manner with others. Right to privacy and bodily autonomy is a cherished human right of third gender community. vii The special Rapporteur on Right to Privacy appointed by Human Rights Council reported that “Everyone, irrespective of their biological sex, sex characteristics, sexual orientation or gender identity or expression, is entitled to the full enjoyment of the right to privacy.” viii The significance of human rights in protecting the rights of third gender is clear from the following observations.

The United Nations Development Program (UNDP) reported that “States have over-emphasised sexual orientation but have taken limited action to protect transgender rights. States have also not addressed discrimination faced by LGBTI persons on multiple grounds, such as age, religion, economic status etc” ix States must follow their human rights obligations to protect the LGBT population . The States need not draft new legislations, existing human rights frame work is enough to protect the third gender. States shall make hate crime laws to protect individuals from violence on the basis of sexual orientation and gender identity .States shall punish those who are doing torture and cruel, inhuman and degrading treatment of LGBT persons and shall take preventive measures. State laws shall decriminalise private, adult, consensual same-sex relations and sexual acts. x According to Honourable Supreme Court of India, “the issue of

transgender is not merely a social or medical issue but there is a need to adopt human right approach towards transgenders which may focus on functioning as an interaction between a person and their environment highlighting the role of society and changing the stigma attached to them.” xi

## HISTORICAL PERIOD 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 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 unconstitutional<sup>5</sup>, 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.

## CRITICAL 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 population<sup>6</sup>.

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 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 spaces<sup>7</sup>. It creates health problems for them.

## STATUS OF TRANSGENDER EDUCATION

Third Gender i.e. Transgender is a new sex in Indian Constitution. This new sex emerges with a major population. They are deprived of social and cultural participation and hence they have restricted access to education, health care and public places which further deprives them of the Constitutional guarantee of equality before law and equal protection of laws.<sup>a</sup>

**Educational Status:** No formal education for transgender is popular in Indian context. They are deprived from family and school environment, transgender discontinue their education and risk their future career opportunities. A close analysis of various reports and discussion with community and stakeholders suggest that transgender are most uneducated or undereducated, become reluctant to continue schooling. The average qualification is secondary (Matric) or senior secondary level. The enrolment is significantly low and dropout rate at the primary and secondary level is still very high. They are hardly educated as they are nor accepted by the society and therefore do not receive proper schooling. Even if they are enrolled in an educational institute, they face harassment and are bullied every day and are asked to leave the school or they drop out on their own. It is because of this that they take up begging and sex work. it mandatory for the Government to provide inclusive education for transgender students and provide adult education to them.

Beside these some transgender on working reputed place, ManabiBandyopadhyay working as a principal to a government college in West Bengal and AmrutaAlpeshSoni as the advocacy officer for the states of Punjab, Haryana and Chhattisgarh for the National AIDS Control Project.

In India, some states work for the betterment of transgender. Tamil Nadu has been the only state which has successfully pioneered transgender inclusion by introducing the transgender (*aravani*, as they are locally called) welfare policy. According to the policy, transgenders can access free Male-to-Female Sex Reassignment Surgery (SRS) in the Government Hospital, a free housing program, various citizenship documents, admission in government colleges with full scholarship for higher studies, and alternative sources of livelihood through formation of self-help groups and initiating income generation programmes (IGP). It was also the first state to form a Transgender Welfare Board in 2008 with representatives from the transgender community. In March 2009, Tamil Nadu government set up a telephone helpline called

“Manasu” for transgenders, an initiative which was responsible for the formation of India’s first helpline for the LGBTQIA community in 2011 at Madurai.

The Chhattisgarh government is also making efforts to empower the transgender community by drafting an action plan for the welfare of around 3000 eunuchs in the state.

Tripura government which announced in July an allowance of Rupees 500 per month to the transgender people in the state to ensure their financial independence. The West Bengal government is not far behind. On October 1st, 2015 the government has requested the Kolkata Police to recruit transgenders in the Civic Police Volunteer Force (CPVF) to end the stigma and discrimination against the community.

**Social Status:** The transgender community faces stigma and discrimination and therefore has fewer opportunities as compared to others. They are hardly educated as they are not accepted by the society and therefore do not receive proper schooling. Even if they are enrolled in an educational institute, they face harassment and are bullied every day and are asked to leave the school or they drop out on their own. It is because of this that they take up begging and sex work. They are forced into sex work which puts them at the highest risk of contracting HIV as they agree to unprotected sexual intercourse because they fear rejection or they want to affirm their gender through sex. They are viewed as ‘vectors’ of HIV in the society. Other sexually transmitted infections such as rectal gonorrhoea, syphilis, rectal Chlamydia, etc., add to the risk of HIV

**Challenges of Transgender Education:** The nomenclature “*third gender*” is a problem in itself: it treats sexuality as a ladder-like structure in which the lowest rung is occupied by the queer community. Although it provides them with legal recognition, it does not alleviate them of their adverse conditions as they continue to be a part of the marginalized section of society and are not considered equal to the rest of the Indian population. India has finally been able to successfully adopt the inclusion principle which was for a long time hoped for but not acted upon, it is also important to bring to attention the various ways in which it has been a failure. The third gender people will be considered as OBCs. The Supreme Court of India said they will be given educational and employment reservation as OBCs. The apex court also said states and the Centre will devise social welfare schemes for third gender community and run a public awareness campaign to erase social stigma. The Supreme Court said the states must construct special public toilets and departments to look into their special medical issues.

**1. Inclusion in School/ college and University:** Inclusion of transgender with school and college is a big challenge. It is so challenging to provide equal opportunity of education to transgender because there is a problem of inclusion with male and female gender students.

**2. Use of disrespectful names and pronouns:** When a transgender youth identifies as a particular gender (irrespective of biological sex), it is respectful to the youth's human dignity to use the name chosen and the pronouns appropriate to that particular gender. To persevere intentionally in the use of a prior name and other pronouns is to be deliberately disrespectful. Transgender youth can understand and sympathize with some confusion, so long as there is continuous, good faith progress in using the proper name and pronouns.

3. **Lack of access to appropriate restroom facilities:** Transgender people often lack safe access to public restrooms. They may be assaulted if they use the restroom that conforms to their gender identity or forced to use a restroom that does not conform to their gender identity. Transgender people often have no safe access to locker room facilities that conform to their gender identity. Wherever dress codes are enforced, they may create problems for transgender youth.

4. **Confidentiality:** Transgender youth may have unsupportive families and may even face violence and/or ejection from their home if their gender identity or gender expression is disclosed to the family.

5. **Lack of ideal personality:** Transgender youth often feel alone in the world. Few programs for youth employ transgender people; few libraries offer information about biological sex and gender, gender identity, or being transgender.

### Solutions of transgender education

1. **Made effort for inclusion:** There is a need for prepare an environment where transgender feels secure. Teacher and community people can play an important role in inclusion. India is facing acute shortage of skilled manpower in different sectors. There is a need to provide vocational education and training to teachers and other school members. At the secondary and higher secondary levels vocational training should be provided to the transgender that they prepare for their job.

2. **Names and/or pronouns:** Use the name and/or pronouns appropriate to the young person's chosen gender identity. Remember that it is everyone's essential dignity to be called by our chosen name, and it is everyone's right to be recognized as the person we see ourselves to be. Please apologize if you use the wrong pronoun or the wrong name.

3. **Access to restroom facilities:** Educate staff and youth about gender identity. Make sure that everyone understands that transgender youth. If possible, designate gender-neutral restrooms and locker rooms (toilet facilities that anyone may use, irrespective of gender identity or gender expression). Educate staff and youth about gender identity.

4. **Confidentiality:** Make sure that the program maintains confidentiality with regard to the gender identity, gender expression, sexual orientation, and sexual behavior of *all* the youth in the program.

5. **Ideal Personality:** Search out transgender support groups and GLBTQ youth-serving organizations in your area. Make sure that these groups and organizations are included on your resource lists.

6. **Provide financial assistance:** Government should provide fee-waiver, fee-reimbursements, scholarships, free textbooks, free hostel accommodation and other facilities at subsidized rates for students belonging to the transgender in order to make higher education and professional education accessible by the community.

7. Special coaching should be provided to the candidates for competitive examinations.

**8. Establishment of anti-discrimination cell:** All the educational institutions/universities should establish an anti-discrimination cell to monitor any form of discrimination against the transgender community. On the line of strict anti-ragging cell, there should be zero tolerance towards any incidence of the discrimination or complain.

**9. Research:** There is need for a focused institutionalized mechanism of research and academic activities to generate more data/information to identify and understand the problems related to various aspects of their life and help frame policies through research and academic program that would bring an effective and long-term change in their lives.

## 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 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.

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