

Appropriating 'Right to Livelihood' of the Third Gender

Dr. Ambily P & Adv. Ajoy Jose
Research Associate, National University of Advanced Legal Studies, Kochi
Kerala, India

ABSTRACT:

'Transgenders' are referred as individuals of any age or sex whose appearance, personal traits, or behaviours dissent from stereotypes. Their identity or behavior falls outside the purview of stereotypical gender norms. In this manner, it can be derived that it is community generated. The Constitution of India mandates right to equality as a fundamental right and any form of discrimination is considered as an anti thesis of the same. The Constitution also ensures right to privacy and personal dignity. In spite of the constitutional affirmation of fundamental rights and equality in all spheres, it is to be noted that the third gender continues to be ostracized. Different facets of such deprivation refers to infringement of right to marry, right to claim an identity, right to education, employment, and so on. This leads to their seclusion from the very fabric of civilized society and are subjected to many forms of harassment. Major scenario of discrimination faced by the community is in the matter of employment. This paper explores the different facets of discrimination faced by the transgender community in India.

"I have everything, yet I have nothing."

-Unknown

I. INTRODUCTION

Since In the society, there exists a perception on the way in which men and women are 'supposed' to conduct. 'Transgenders' are referred as individuals of any age or sex whose appearance, personal traits, or behaviours dissent from stereotypes¹ The term 'transgender' or 'third gender' includes a person whose identity or behavior falls outside the purview of stereotypical gender norms. In this manner, it can be derived that it is community generated. The Constitution of India mandates right to equality as a fundamental right² and any form of discrimination is considered as an anti thesis of the same. The Constitution also ensures right to privacy and personal dignity.³ In spite of the constitutional affirmation of fundamental rights and equality in all spheres, it is to be noted that the third gender continues to be ostracized. Different facets of such deprivation refers to

¹ As stated in The Commissioner of *Income Tax and anr v. Smt. K. G. Rukmini Amma*, ILR 2010 Kar.4711. Para 13 states 'in all Central Acts and Regulations, unless there is anything repugnant in the subject or context words importing the masculine gender shall be taken to include females. Thus it is an accepted notion that there are only two gender-male and female.

² India Const. Art 14.

³ India Const. Art 21.

infringement of right to marry, right to claim an identity, right to education, employment, and so on.⁴ This leads to their seclusion from the very fabric of civilized society and are subjected to many forms of harassment.⁵

Major scenario of discrimination faced by the community is in the matter of employment. Reports have pointed out that socio cultural factors are the determining factors that lead to deprivation of transgender right to education and consequentially right to livelihood. The study conducted by Ministry of Social Justice and Empowerment depicted that 70% of the transgender community have at least one experience of being denied a job due to their gender identity and 89% reported of being mistreated at their workplaces.⁶ The outcome of the study reaffirms that societal perception to their identity is the major factor which presents a hurdle in attaining a dignified life and right to livelihood. In spite of constitutional protection⁷ progressive steps by the Indian judiciary⁸ and government initiatives⁹, the transgender community remains in the backdrop of the 'civilised society'. In this paper, the authors explore the reasons for their continuing under privileged status with special reference to transgender community in India. The objective of the study is to identify the work place environment and existence of socio cultural issues related to employment if any.

II. CONSTITUTIONAL MANDATE

United Nations has been instrumental in advocating the protection and promotion of rights of sexual minorities, including transgender persons. The Universal Declaration of Human Rights, 1948¹⁰ and International Covenant on Civil and Political Rights, 1966 (ICCPR) recognize that every human being has the inherent right to live and this right shall be protected by law and that no one shall be arbitrarily denied of that right.¹⁰ Everyone shall have a right to recognition, everywhere as a person before the law. ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation and that everyone has the right to protection of law against such interference or attacks.¹¹ Right to live with human dignity is inherently linked with right to equality¹² and liberty¹³ of an individual.¹⁴ Thus right to life with human dignity,¹⁵ encompasses right to recognition and social

⁴ Dr. Khushboo P. Hotchandani, "Problems of Transgender in India: A Study from Social Exclusion to Inclusion", International Journal of Human Resources and Social Sciences, Vol. 4, April 2017 at p. 75 available at http://www.academia.edu/33006703/PROBLEMS_OF_TRANSGENDER_IN_INDIA_A_STUDY_FROM_SOCIAL_EXCLUSION_TO_SOCIAL_INCLUSION (last seen 26 Sept 2018 at 01.00 PM).

⁵ *Queen Empress v. Khairati* (1884) ILR 6 All 204, wherein a transgender person was arrested and prosecuted under Section 377 on the suspicion that he was a 'habitual sodomite' and was later acquitted on appeal.

⁶ Report of the Expert Committee on Issues relating to Transgender Persons, Survey by Ministry of Social Justice and Empowerment available at socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf

⁷ India Const art. 16, art. 41.

⁸ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

⁹ Kerala becomes First State to Unveil transgender Policy, The Indian Express dated 26 Sept, 2018.

¹⁰ Article 16.

¹¹ Article 17

¹² India Const. art. 14

¹³ India Const. art. 21

inclusiveness.¹⁶ The treatment of third gender as a ‘deviant’ category leads to distorted configuration of these rights. Transgender identities in India seek for a status of ‘third gender contrary to ‘deviant’ category. In this scenario, the crux of debate is right to life with human dignity and other rights that emanate from the concept.¹⁷ Accordingly, right to livelihood and employment is taken as a major theme of discussion. In *Olga Tellis v. Bombay Municipal Corporation*¹⁸ the Supreme Court held that right to livelihood is born out of the right to life, as no person can live without the means of living, that is, the means of livelihood. The Court has observed in this connection:

“....the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean, merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life an equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood.”

The court further opined that if the right to livelihood is not treated as a part and parcel of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. The court thus interpreted right to employment opportunities within the pursuit of right to livelihood by this judgment. Right to gender equality was squarely placed within right to employment opportunities, was well stated by the Supreme Court in *Vishaka v. State of Rajasthan*.¹⁹ Right to employment opportunities of transgender was specifically dealt in *National Legal Services Authority v. Union of India and Ors*.²⁰ This judgment provided a ray of hope for the third community upon their right to livelihood. In the absence of such a right, educated transgenders are not in a position to get employment and they are further victimized for lack of financial support. Thus the Supreme Court judgment had put forward an innovative step towards their empowerment. K.S. Radhakrishnan, J expressed the issue of social exclusion faced by the community thus:

¹⁴ Susanne Baer, Dignity Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism, The University of Toronto Law Journal, Vol. 59, No. 4 (Fall, 2009), pp. 417-468 at p. 418.

¹⁵ Dignity is read into right to life by cases such as *Vikram Deo Singh v. State of Bihar* AIR 1978 SC 597.

¹⁶ *Ibid*

¹⁷ *Kesavanadnda Bharati v. State of Kerala* (1973) 4 SCC 225) and other succeeding judgments elaborated the scope of Art. 21 of Constitution of India.

¹⁸ AIR 1986 SC 180

¹⁹ AIR 1997 SC 3011

²⁰ AIR 2014 SC 1863

“Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society’s unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.”

The court stated that if democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral to his/her personality and is one of the most basic aspect of self-determination dignity and freedom. The court further stated that the true measure of development of a nation is not economic growth but it is human dignity. Accordingly, the right to dignity of the third gender and need for social inclusiveness by providing employment opportunities was well defined by the judiciary. The court further directed the Centre and State Governments to provide social welfare schemes to the community and to extend reservation in educational institutions and for public appointments. This Supreme Court judgment aims to bring transgender at par with other citizens but the attitude of the society remains as a major hurdle.²¹

III. PROGRESSIVE INITIATIVES FOR SOCIAL INCLUSION OF THIRD GENDER

A Right of Transgender Persons Bill, 2014 was the landmark legislative step towards the issue. The Bill seeks to end the discrimination faced by the transgender community. It was introduced as a private member’s Bill Mr. Tiruchi Siva, a Dravida Munnetra Kazhagam (DMK) Rajya Sabha MP. It was unanimously passed in the Upper House but was never debated in the Lok Sabha. It was reintroduced in the Lok Sabha after considerable revision. The Bill was much criticized on the inadequate definition of the third gender and other internal contradictions.²² The Transgender Persons (Protection of Rights) Bill, 2016 was slated to be re-introduced in winter session of Parliament which starts on December 15, 2017. The Bill has not materialised into an Act so far. Lesbian, gay, bisexual and transgender (LGBT) issues are relatively new to India in terms of public discourse and societal understanding. So, the same is reflected in the way employers approach the subject.²³ Only some multinationals such as Google, IBM Corp., Accenture Plc, Barclays and Thomson Reuters Corp.

²¹ *Shanavi Ponnusamy v. Ministry Of Civil Aviation and Anr* (10.08.2018 - SC Order): MANU/SCOR/25247/2018 highlights the social stigma attached to transgender individuals in matters related to employment.

²² See more at http://myparliament.org/Docs/Manual_Transgender%20Protection%20Bill%202016.pdf (last seen 29 Sept 2018, 4:00 PM)

²³ As stated by Mr. Santrupt Mishra, HR director of Aditya Birla Group

have LGBT non-discrimination policies in place in India. In the southern city of Bengaluru, the Solidarity Foundation that champions the cause of transgender people has placed about a dozen with private companies over the last three years.²⁴ However, there are many initiatives by governments and private sector towards the goal of gender justice by providing an opportunity of employment. The ministry of social justice and empowerment is giving finishing touches to its 'umbrella' protection schemes such as providing scholarship and pension.²⁵ Even though the social justice department has initiated projects to bring transgenders into the mainstream by teaching them life skills, social stigma remains a big hurdle.²⁶ But these initiatives provide a myriad of hope to the third gender community in India. Limited government initiatives by few state governments need a special mention in this regard. The Tamil Nadu government in 2014 announced that transgenders are to be appointed in the state's home guard force. The Odisha government became the first state to give transgenders social benefits such as pension, housing and food.

Kerala emerged as the first state to unveil transgender policy envisaging ending the societal stigma towards the sexual minority group and ensuring them non-discriminatory treatment.²⁷ The state Department of Social Justice has issued the policy to enforce the constitutional rights of transgenders (TGs), taking into account the Supreme Court judgement (2014) and the findings of the recent Kerala State TG Survey. Kerala State TG Survey during 2014-15 is identified as a positive move by the government in understanding the issues faced by transgenders statistically. Survey was conducted among 4000 community members in Kerala. The outcome of the study is an indicator of issues related to transgenders in Kerala. The statistical data is stated thus:

Considering the issue of employment opportunities, literacy rate among TGs in Kerala is only 7%, 58% drop out before completing tenth grade and only 11% have regular jobs. Out of those in employment, 78% have not revealed their transgender identity in workplaces. The major factor that is a determining factor of employment issues is related to lack of social inclusiveness. Only 31% feel that people appreciate even their physical presence, 51% hide their gender identity from their own family and 57% feel that they are an unwanted member in the family. Majority of the surveyed transgenders feel discomfort while facing others in the society and 76% wish to get acceptance in the society, majority have shown suicidal tendency and self violence due to depression. Many reported that they have faced abuse, insults, discrimination, threatening and mental torture being in public. Thus their employment issues are largely related to lack of

²⁴ Id at 22.

²⁵ Government set to launch umbrella scheme for transgender community, dated an 28, 2016 at//economictimes.indiatimes.com/articleshow/50749264.cmsutm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last seen 23 Sept 2018, 3:15 PM)

²⁶ The Indian Express dated 24 Sept 2018.

²⁷ Indian Express dated October 01, 2018

IV. CONCLUSION

Recognition of transgender as a third gender is not a social or medical issue, but a human rights issue.²⁸ This statement highlighted the current state of facts as well as the goal to be achieved by the society. Even in the present scenario, third gender community faces many issues related to the need of social inclusiveness. The right to chose one's gender identity is an essential part to lead a life with dignity within the ambit of Article 21. Determining the right to personal freedom and self determination, the Supreme Court rightly observed that the gender to which a person belongs is to be determined by the person concerned. They cannot be discriminated against on the ground of gender as it is violative of Articles 14, 15, 16 and 21. The Court also protected one's gender expression by invoking Article 19 (1) (a) and held that no restriction can be placed on one's personal appearance or choice of dressing subject to the restrictions contained in article 19(2) of the Constitution. The study on third gender employees lead to the understanding that the overall well being of the community is challenged by issues such as lack of adequate housing, shelter and protection from the government and other authorities with respect to affirmation of employment opportunities. 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. They face challenges from their peers itself during education and many drop out before completing elementary level of education. It is further noted that those who have successfully completed education is unable to find out adequate opportunities. Seldom does a skilled individual from this community get into formal employment due to the policy of hiring only from either the male or female gender. The transgender community faces stigma and discrimination and therefore has fewer opportunities as compared to others. Society's non-acceptance narrows down their life choices considerably.

V. SUGGESTIONS

Ensuring the right to get access to education and vocational training is the foremost step needed to address the issue of lack of employment opportunities. Special educational quota or reservation may ensure all government and public authorities to provide education and employment opportunities to the third gender without any discrimination. The major issue which the third gender faces is discrimination and differential treatment from their native family, educational institutions, public places and the society at large. The government should initiate programmes and campaign to create awareness among the society to accept them as part of the society itself. The development programmes to uplift the community should go hand-in-hand with the awareness

²⁸ Justice K.S. Radhakrishnan, See *National Legal Services Authority* case supra note 8.

programmes as both are supplementary and complimentary in nature. An extensive reform for inclusiveness of third gender in the workforce assuring employment opportunities need to be adopted. Separate labour laws ensuring rights for the third gender are to be implemented and third gender need to be included within the ambit of the term 'persons' in such legislations. Labour laws relating to sexual harassment should be inclusive of third gender and free legal aid to those aggrieved need to be provided. Their struggle for a dignified life and employment need to be adequately addressed by means of special provisions such as accommodation, transport to workplace and setting up a grievance cell specific to workplaces. Separate toilet facilities are to be provided. Employers and other employees need to be sensitised to ensure that the third gender is included within the system and a friendly environment is created. Anti discrimination policies need to be meaningfully implemented in such a way that discrimination in atmosphere of employment is eradicated. The third gender need to be enlightened with education and providing adequate opportunities of employment as this would empower them to live with human dignity. Self employment grants may also be extended. Moreover, the society, the family members of third gender, employers and the government need to be reminded that social inclusiveness is not merely the right of the third gender, but it is more of a duty of the counter part as well.