

Constitutional Recognition and the Pursuit of Equality and Social Justice:
Third Gender Rights in India

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ABSTRACT

The recognition of third gender rights in India represents a significant advancement in the country's constitutional journey towards equality and social justice. Despite India being a country with rich historical traditions acknowledging diverse gender identities, cultural diversity, particularly the Hijra community, colonial and legal setup systematically criminalized and marginalized these sections of society creating deep-seated social stigma that endures today.

This paper delves into the intricate relationship between constitutional rights and social justice in the Indian context. This particularly emphasizes transformative NALSA v. Union of India judgment which recognized transgender as "third gender" and affirmed their fundamental rights under Article 14, 15, 16, 19 and 21 just like other genders.

The research also examines the objectives and importance of Transgender Persons (Protection of Rights) Act, 2019 as well as evaluates its effectiveness in transforming the constitutional promise into reality. It highlights the gap between the legislature's progressive steps for equality and social justice (legal recognition) and the practical implementation concerning self-identification, access to education, healthcare, employment and the prohibition of discrimination. This explores how third gender individuals face marginalization based on class, caste, regional factors and others thereby creating hindrances to substantive equality. The study includes an analysis of the

constitutional framework, relevant case laws and socio-legal research to better understand the tension between the legal system and prevailing societal taboos.

Ultimately the research work demonstrates that constitutional recognition of third gender, though a notable advancement, is only the beginning of a broader transformative process. True equality and social justice demand not only formal legal acknowledgement but also implementation at the ground level, which can be achieved only through a change in societal attitudes. This examines the interplay between the legislative actions, judicial activism and social realities, and emphasizes the need to bridge the gap between rights on paper and dignity in practice.

Keywords: third gender rights, constitutional recognition, social justice, substantive equality, discrimination.

INTRODUCTION

Ancient Asian histories demonstrate the enduring presence of the gender-diverse communities. From many years people have been recognised as transgender and lived in India at different places. Kamasutra represent Tritiya Prakriti which offers a realistic example of people's sexual life associate with third gender. There has been diverse classification of transgender- based identity throughout India such as Aravanis, Hijras, Kothi etc.

The term transgender derived from a Latin term 'Trans' means 'on other side of' concerning English word gender derived from Latin term 'genus' means 'type' or 'kind', where diverse people come under this category. The categorisation of third gender is mainly termed as Hijras through Indian periphery for last many years.

However, despite of their historical and cultural presence, the transgender community faced marginalization, discrimination and denial of equal treatment. The Criminal tribes Act of 1871 emerged as a turning point for third genders and this British era marked them as criminal through this act just based on their gender identity and this legacy of oppression continues after the independence of India in 1947 too.

The struggle for the recognition of third gender in India represents a crucial intersection of social justice, human dignity and conditional morality. While Indian constitution guarantees fundamental rights to all citizens which includes Equality before law under article 14, prohibition of discrimination based on religion, race, caste sex or place of birth under article 15, right to life and personal liberty under article 21. But transgender community have been excluded from enjoyment of these rights, which creates a distinction between constitutional promise and ground level reality, which necessitate the decades of activism, legal battles, and various social battles.

The landmark decision NALSA v. Union of India of 2014 termed as turning point and most important decision watershed moment in India's journey towards recognising the third gender. Honourable supreme court recognition of transgender person as 'third gender' and affirmation of their fundamental rights under article 14, 15, 16, 19 and 21 of the Indian Constitution, which represents a significant step forward. However constitutional framework alone is insufficient to address this deep-rooted social stigma, economic exclusion and violence faced by the community. This paper determines the trajectory of constitutional recognition for third gender in India and analyse extent to which legal framework have translated into substantive equality and social justice.

HISTORICAL BACKGROUND OF TRANSGENDER

Tracing history is the best way to understand the roots of the concept. The concept of the 'third gender' is intimately woven into the fabric of Indian civilisation, which includes its Cultural beliefs, religious practices, and social structure.¹ A unique position has been held by the Hijras or the third gender over the course of history². The historical narratives reveal a profound recognition of transgender in India. Ancient Hindu scriptures, including Vedas, Puranas, religious texts like Mahabharata and Ramayana contains various references to individuals who transcended the binary gender categorisation. The transgender population in India is an (in)visible population that is embedded in Indian society from a very long time. Transgender are

¹ Dipika Jain and Kimberly M. Rhoten, "Epistemic Injustice and Judicial Discourse on Transgender Rights in India: Uncovering Temporal Pluralism" 26 Journal of Human Values 30-49 (2020)

² Ibid

linked to religious-cultural background and are considered demi-gods. Descriptions of transgender are in epics like Ramayana and Mahabharata (Nanda 1996; Krishna and Gupta 2002) and references of third gender are in Kamasutra also³.

A story came out as when lord Rama left for exile he was followed by people, at the edge of forest he asked every men and women to return back but when returned he saw group of people still waiting for him there upon questioning he realised that word 'men and women' not made for the group and hence they stated backed and after this lord blessed them. Transgender also related them with Mohini Avtar of Lord Krishna and lord Shiva in form of Ardhanarishvara.

During Mughal era in India, transgender generally called as transgender held important court position and various section of the government. They were considered religious and blessed. Throughout the Middle Ages, the 'third gender' occupied a multifaceted position inside the royal Courts, particularly during the Mughal period. Frequently, Hijras were assigned the roles of trust and power as Counsellors, and harem guards⁴. In the British colonial period Hijras community was eradicate by different laws they were considered to be separate caste or tribe by colonial administration. The Criminal tribes Act,1871 prescribed punishment up to two years imprisonment and fine or both to all Hijras who were concerned in kidnapping and castrating children and dressed like women to dance in public places. However, in 1952 the Act was repealed but the legacy continues where many local laws reflected the prejudicial attitude against the tribes, including Hijras.

Transgender persons have been recognized as third gender, where the court recognizes the fundamental rights available to the third gender in same manner as to the male and female in India. They transpire as a strong wing of LGBTQ, government introduced various welfare schemes and policy and act called The Transgender Persons (Protection of rights) Act,2019. Lesbian, gay, bisexual, transgender and intersex (LGBTI) people in India face legal and social

³ Swapnil Raj, "*The Journey of same Sex Marriage from Veda to Modern Era: Its recent conflict to recognition in India and Proposed Solution*" 2, International journal for legal research and analysis, 5, 8, (2022) ISSN: 2582-6433 <https://www.ijlra.com/uploads/Swapnil%20Raj.pdf> last visited 5th February 2026.

⁴ M. Michelraj, "*Historical Evolution of Transgender Community in India*" 4 Asian Review of Social Sciences 18 (2015).

difficulties not experienced by non-LGBT persons. Sexual activity between people of the same gender is legal but same-sex couples cannot legally marry or obtain civil partnerships. On 6th September 2018, the Supreme Court of India decriminalized homosexuality by declaring Section 377 of the Indian Penal Code unconstitutional. The Court unanimously ruled that individual Autonomy, intimacy, and identity are protected fundamental rights.⁵

But still they are facing serious problems relating to their normal life as binary gender, they often emerge as victims subject to abuse and discrimination.

EVOLVING CONSTITUTIONAL JURISPRUDENCE ON THIRD GENDER RIGHTS

Evolution of constitutional Jurisprudence on third gender in India represents a hardcore journey of the judiciary, the constitution and practical application of fundamental rights to the marginalized community. The Constitution protects right of third gender persons to live a dignified life by outlawing discrimination based on their gender and sexual orientation.⁶ The third gender community has historically experienced systemic discrimination and exclusion, despite these constitutional guarantees.⁷ Over the decades, through various legislations and judicial interpretations the rights of third gender have transformed drastically through learning from standards of international human rights and persistent efforts made by social activists. This resulted in evolution of an important principle known as “Constitutional Morality” which means when the judiciary interprets the Indian constitution must be guided with the constitutional values itself like equality, dignity, liberty, justice instead of the traditional and social prejudice. In other words, constitutional morality means what constitution promises or guaranteed, not merely what society accepts.

For many years, the fundamental rights guaranteed by Indian constitution including Article 14, (right of equality), Article 15 (prohibition of discrimination), Article 19 (freedom of speech and

⁵ Swapnil Raj, “*The Journey of same Sex Marriage from Veda to Modern Era: Its recent conflicts to recognition in India and Proposed Solution*” 2, International journal for legal research and analysis, 5, 8, (2022) 2582-6433 <https://www.ijlra.com/uploads/Swapnil%20Raj.pdf> last visited 5th February 2026.

⁶ Swechha Malik, *Legal framework for protection of Third Gender Rights in India: Issues and Challenges*, 5 CHANAKYA L.REV. 16 (2024), <https://share.google/OuUsx5xmBQWiRc1s1>

⁷ Ibid

expression) and Article 21(right to life and personal liberty) remained just words not seen practically as Section 377 of IPC denied Transgender persons, the status of equal citizen. Article 14, guarantees all citizens equality before the law⁸. No citizen will be discriminated against. And the people will be treated equally by the law in the country. This is a fundamental right that is guaranteed to all citizens. Transgenders also have the right to be treated equally. If any person feels that they are not treated equally then they can approach the courts of the country. And get justice.⁹

Article 15 clearly states that there will be no discrimination based on religion, race, sex or place of birth.¹⁰ Some citizens of the country have faced discrimination so to protect their interests the constitution makers have protected their interests. According to this article, no citizen can be subjected to disability, liability and restriction. This article in our constitution also provides the power for a state to make special provisions for citizens who are socially and educationally backward. The transgender people act has derived its origin from this part of the constitution.¹¹

Article 16 of the Indian constitution states equality of opportunity in public employment¹². All transgender can be employed in office under the state. Due to this many transgender will be able to be part of the executive of the country. Today, we can see many transgenders being a part of the police force in different states of India. Due to this article in our constitution, the government can reserve seats for economically backward citizens of the country. All people should be able to earn well. Transgender has a certain reservation in the government The Karnataka state has reserved one per cent of government jobs for the transgender community.¹³

In all these article plays a critical role in evolution of third gender where the India recognised transgender. A major step taken by India legislature was passing The Transgender Persons (Protection of Rights) Act, 2019 following the landmark judgment in NALSA v. Union of India.

⁸ INDIA CONST. art.14

⁹Namrata Mathad," *Third Gender and their Constitutional Rights*". SSRN(Feb.1,2024), <https://share.google/LMhSwFIMXJxEb7iu3> last visited 6th February 2026

¹⁰ INDIA CONST. art.15

¹¹ Ibid

¹² INDIA CONST. art.16

¹³ Ibid

Main objective of this Act is to protect the rights of transgender and work for their welfare and upliftment. This act turned out to be a step closure to social justice and inclusion in society. While judicial and legislative actions have strengthened recognition but effective implementation remains essential to achieve.

JUDICIARY AS GUARDIAN: ADVANCING THIRD GENDER RIGHTS

In *National Legal Services Authority v. Union of India*¹⁴ the third gender in India was officially recognised, which was a turning point for the marginalised community. In this case it was held by hon'ble Supreme court that the fundamental rights guaranteed by Indian Constitution to men and women are exactly available to transgender persons well, acknowledging their rights of self determination of their gender identity. In addition to it the court ordered that the third gender category must be provided with official documents like ration cards, passport, PAN cards and other such government documents. The Supreme Court observed that the recognition of transgender persons as a 'third gender' would safeguard their basic human rights.¹⁵ "As a result of the NALSA case, the idea that the third gender is a separate category gained importance. It is imperative to acknowledge that the transgender community has experienced prolonged periods of suffering, humiliation, and anguish. They remained silent and faced hardship, but ultimately, as a result of this verdict, the state of the transgender community has improved. This ruling has a significant influence not only within the borders of India but also on a global scale. A significant violation of human rights occurs when members of the transgender community are prevented from participating in society. India adheres to a democratic system that encompasses all individuals, regardless of their physical or mental state. If we adhere to the requirements of the Rule of Law, then it is imperative that all individuals must receive equal treatment and legal protection of their fundamental rights."¹⁶

¹⁴ (2014) 5 SCC 438.

¹⁵ Swechha Malik, *LegalframeworkforprotectionofThirdGenderRightsinIndia: Issues and Challenges* ,5 CHANAKYA L.REV. 16 (2024), <https://share.google/OuUsx5xmBQWiRc1s1>

¹⁶ Swechha Malik, *LegalframeworkforprotectionofThirdGenderRightsinIndia: Issues and Challenges* ,5 CHANAKYA L.REV. 16 (2024) <https://share.google/OuUsx5xmBQWiRc1s1>

In *Ganga Kumari v. State of Rajasthan*,¹⁷ “the petitioner has applied for the post of Constable as a female candidate; she has cleared the Physical Standard Test on the parameters fixed for a female candidate. In such a situation, as the documents are in tune with her gender declaration and no doubt has been expressed about her external characteristics and gender behaviour, the petitioner’s candidature ought to have been considered as ‘female’ while granting appointment and there should be no impediment in offering appointment to her. The posts advertised were ‘gender-neutral’ or non-specific, therefore, the petitioner was entitled to appointment as a Constable. Sex of a person may have some relevance while providing a posting at a sensitive place, which requires a person of a specific gender, looking to the nature of the duties, required to be discharged. In view of the above, it is held that the sex determination of the petitioner, which she had to undergo in a bid to get employment was arbitrary and violative of right to privacy guaranteed by Article 21 of the Constitution of India.”¹⁸

The landmark case of *Navtej Singh Johar and Ors. V. Union of India and Ors.*¹⁹ Resolved the contentious issue regarding the constitutionality of Section 377 of the Indian Penal Code, which had previously been addressed in *Suresh Kumar Koushal & Anr. V. Naz Foundation*²⁰ case. In a historic judgment delivered on September 6, 2018, a five-judge Constitution Bench of the Supreme Court partially struck down Section 377, declaring it unconstitutional insofar as it criminalized consensual sexual conduct between adults in private. The Court held that Section 377, to the extent it penalized consensual sexual acts between adults, violated the fundamental rights enshrined in Articles 14, 15, 19, and 21 of the Constitution of India. The apex court emphasized that while the original intent of Section 377 was to protect women and children from sexual abuse and unnatural offenses, consensual sexual relations between adults of the LGBTQ community caused no harm to society and fell within the protected sphere of personal autonomy and dignity. The Court recognized that members of the LGBTQ+ community possess the fundamental right to privacy, which encompasses physical intimacy and the freedom to express

¹⁷ Writ Petition (Civil) No. 14006 of 2016 decided on November 13, 2017.

¹⁸ *Ganga Kumari v. State of Rajasthan*, MANU/RH/1466/2017 (High Ct. Raj. Nov. 13, 2017), available at <https://share.google/2emQ62mVnHwSSMen3> last visited 8th February 2026.

¹⁹ (2018) 10 SCC 1.

²⁰ Civil Appeal No. 10972 of 2013.

one's sexual orientation without fear of criminal prosecution. In delivering this progressive judgment, the Supreme Court explicitly overruled its earlier decision in *Suresh Kumar Koushal & Anr. v. Naz Foundation*, which had upheld the constitutional validity of Section 377. This judgment marked a significant milestone in India's constitutional jurisprudence, providing long-awaited legal recognition and dignity to the LGBTQ+ community and affirming that discrimination based on sexual orientation violates the core values of equality, liberty, and dignity guaranteed by the Indian Constitution.

In the case of *Jasmine Kaur Chhabra v. Union of India*²¹, a public interest litigation (PIL) was submitted with the intention of drawing attention to the fact that the transgender community do not have access to adequate public bathrooms or toilets. Transgender people possess the right to have different toilets from men and women since they are now seen as a third gender. In this particular case, the Delhi High Court issued an order to the government directing them to construct such toilets within the allotted time²².

TRANSGENDER RIGHTS: NAVIGATING PROGRESS AND OBSTACLES

Through the landmark judgements had recognised transgender as third gender but that's not sufficient for the ground reality as practically they go through major issues like discrimination against third gender in educational institutions has been prevalent in today's scenario, the third gender kids are been harassed by their classmates and are not treated equally by the teachers, staffs. They also encounter problems within the healthcare sector of the nation, since doctors refuse to provide medical treatment to them due to their gender identity²³. Another significant problem faced by third gender people is poverty.²⁴ Third gender people are being denied entry into public places and religious places which is clearly inhumane but it is still carried out by the

²¹ Writ Petition (Civil) No. 2997/2021 decided on May 13, 2024.

²² Swechha Malik, *Legal framework for protection of Third Gender Rights in India: Issues and Challenges*, 5 CHANAKYA L.REV. 16 (2024), <https://share.google/OuUsx5xmBQWiRc1s1>.

²³ Sireesha Jaddidi and Gunjan Sharma, "Position of Transgender in Contemporary India: An Analytical Study" 4 International Journal of Law Management and Humanities 2754 – 2768 (2021)

²⁴ Dipayan Chowdhury and Atmaja Tripathy, "Recognizing the Right of the Third Gender to Marriage and Inheritance under Hindu Personal Law in India" 3 BRICS Law Journal 43-60 (2016).

society²⁵. They are subjected to verbal insults, unwarranted beatings, and exclusion from the society²⁶. The act of referring a third gender person as a 'non-human' and subjecting him to physical violence for the same purpose is inherently inhumane.²⁷ There is a large amount of discrimination directed towards transgender individuals in public venues like restaurants, movie theatres, and shopping malls.²⁸

Nearly 75% of the respondents consisting of 37 third genders claim that the face problems in disclosing their gender identity which violates their constitutional rights of Right to Personal liberty, Dignity, Freedom of expression, and Empowerment. They also claim that there is right against violence, Discrimination and exploitation and Right to work.²⁹ 90% of the third gender community members comprising 45 members out of 50 members feel that they are deprived of the right to contest elections and the right to vote in the Assembly and Parliament elections. Legal experts point out that, denial of political rights is treated as a legal non-entity in violation of Article 14, 15, 16 and 21 of the Constitution of India.³⁰ Three-fourths of the third gender community members comprising of respondents stated that they do not have access to any sort of formal education. The Census data of 2021 also discovered the low literacy level in the community, just 46%, compared to 74% literacy in the general population. They state that due to lack of encouragement from other citizens there is low literary rate among them.³¹ 50% of the third gender community members consisting of 25 third genders revealed that they are suffering from various sexual transmitted diseases. Due to their physical exclusion, they have been restricted access to health services like HIV care and hygiene, depression, hormonal pill abuse, tobacco and alcohol abuse and physical torture by their mentors and many more.³²

²⁵ G.K. Venugopal, "A Sociological Study of Third Gender Community in India: Special reference to Mysore District of Karnataka" 10 Journal of Research in Humanities and Social Science 38-41 (2022).

²⁶ Dr. Dilip Pandey, "Protection of Rights of the Third Gender Persons in India" 10 International Journal of Scientific and Research Publications 133-138 (2020).

²⁷ Akanksha Mishra, "Third Gender Rights: The Battle for Equality" 5 Christ University Law Journal 9-21 (2016).

²⁸ Abhinav Kumar, "Non-Recognition of Third Gender: A Failure of Indian Legislation" 4 International Journal of Law Management and Humanities 121-131 (2021)

²⁹ Dr. G.K. Venugopal, "A Sociological Study of Third Gender Community in India": Special Reference to Mysore District of Karnataka, 10 Quest J. Rsch. Humans. & Soc. Sci. 38 (2022).

³⁰ Ibid

³¹ Dr. G.K. Venugopal, "A Sociological Study of Third Gender Community in India": Special Reference to Mysore District of Karnataka, 10 Quest J. Rsch. Humans. & Soc. Sci. 38 (2022).

³² Ibid

CONCLUSION

The constitutional recognition of third gender make a transformative process in pursuit of equality and social justice, however, it also reveals the gap between legislative actions and ground level reality simultaneously.

NALSA v. Union of India, landmark judgment recognising third gender turned out to be a watershed moment in Indian constitutional Jurisprudence affirming fundamental rights such as Article 14,15,16,19 and 21 to third gender equally as to male and female. The judicial recognition, decriminalization of section 377 in landmark judgment of Navtej Singh Johar case and enactment of The Transgender Persons (Protection of Rights) Act 2019 represents a progress step towards Constitutional morality breaking the social prejudice.

Despite of these landmark judgements the promise of equality and social justice remain largely unfulfilled as the journey between legal recognition to social acceptance has been fraught with various obstacles that no legislative action can immediately dismantle. While judiciary playing a significant role as guardian of fundamental rights proving extending those to one of the most marginalized community in the country.

Social justice in true sense demands a comprehensive, multi-prolonged approach that is far beyond the court rooms and legislative halls. It requires a judicial activism, robust implementation, awareness campaigns and a constitutional promise of equality and dignity at every level of society.

The empowerment of transgender community requires dismantling all social stigma from centuries through concrete planning and action at every institutional level. Educational institutions take step where transgender kids can involve themselves as other does without fear of harassment, exclusion etc. Health care system must adopt inclusive approach providing marginalized community with non-discriminatory medical services and other facilities.

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Moving forward not just require legal framework and compliances but a shared moral consciousness.