

**UNVEILING MARGINALIZATION: ANALYZING INDIA'S THIRD  
GENDER IN LIGHT OF THE TRANSGENDER PERSONS  
(PROTECTION OF RIGHTS) ACT, 2019**

**Bidisha Das\***  
**Ananya Saikia\*\***

**ABSTRACT**

*This article provides an analysis of the status of the third gender within the Indian societal framework. The term "third gender" in India encompasses diverse groups such as Kinnar, Hijras, Kothis, Aravanis, Jogappas, and Shiv-shaktis, who have historically contributed to the rich tapestry of Indian culture. Despite their significant cultural heritage, the third gender community has faced systemic exclusion and marginalization due to the prevalent heteronormative societal norms. In response to this marginalization, activists have raised compelling challenges, urging for the recognition and inclusion of the third gender within the democratic fabric of India. The objective of this study is to critically examine the indigenous social movement represented by the third gender community, particularly focusing on its distinctive features compared to other social movements. The analysis aims to assess the degree of democratic accommodation and acknowledgment of the third gender community across various spheres of Indian society. Specifically, this research delves into the examination of the legislative framework and pertinent legal studies to understand the dynamics influencing the third gender community's social, health, and economic well-being. It sheds light on the pressing issues related to their rights, health conditions, and livelihood, which have remained conspicuously absent from mainstream media coverage and government policy agendas. This critical analysis seeks to shift the discourse on social justice from mere distribution to formal acknowledgment, particularly addressing the injustices stemming from prevalent societal norms related to sexuality and gender. The article underscores the entrenched socio-cultural biases that have contributed to the persistent marginalization of the third gender community, highlighting the urgency for a more inclusive and comprehensive approach to address their needs within the broader societal context*

**KEYWORD:** *Transgender, Third Gender, Sexual minorities, Binary Gender, Umbrella term*

**1. INTRODUCTION**

The term "transgender" refers to individuals whose gender identity or expression does not align with the sex assigned to them at birth. This diverse community

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\* LLM, JB Law College.

\*\* LLM, JB Law College.

encompasses individuals who may express their gender identity through various means, including clothing choices, behavior, and mannerisms that reflect their internal sense of gender. Some transgender individuals undergo hormone therapy and sex reassignment surgery to align their physical bodies with their gender identity, rejecting the binary constructs of 'male' and 'female' and opting for terms such as 'transgender,' 'genderqueer,' or 'genderfluid.'

Despite their significant presence within society, the third gender population has long been disregarded and overlooked, evident in the lack of recognition by the Indian census until 2011. The collection of data on their employment status, literacy rates, and caste was a groundbreaking step towards acknowledging their existence. However, discrimination, disrespect, and social marginalization continue to plague the transgender community, leading to high rates of unemployment and limited access to public spaces. They often face rejection and are denied entry into essential facilities such as hospitals, hotels, and malls. Moreover, the prevalence of violence against the third gender, including sexual abuse, expulsion from their parental homes, and cyberbullying, has remained a persistent issue.

Alarming statistics highlight the vulnerability of the transgender population, with a reported 53 percent of anti-LGBTQ homicides in 2012 involving transgender women. Financial instability further exacerbates their plight, as many are forced into begging as their primary source of income, rendering them more susceptible to poverty and exploitation. The hidden nature of their community perpetuates a cycle of underreporting and neglect of crimes committed against them, driven by the fear of ridicule and indifference from society. With the rise of the digital era, cyberbullying and hate speech on their social media profiles have added another layer of adversity to their lived experiences.

This introductory overview emphasizes the multifaceted challenges faced by the third gender community in India, underscoring the urgent need for comprehensive socio-legal measures to address their systemic vulnerabilities and secure their rightful place within the societal fabric. This article aims to delve deeper into these pressing issues, offering a holistic understanding of the socio-legal landscape surrounding the third gender community in India.

### **1.1 OBJECTIVE OF THE STUDY**

The primary objective of this study is to provide a comprehensive understanding of the term "Transgender," encompassing both its literal and psychological dimensions. This exploration is vital, given the concealed nature of the third gender population, which subjects them to persistent mistreatment and discrimination within society and even by governmental entities. The lack of

adequate attention and concern from both societal and governmental realms has resulted in frequent violations of their fundamental rights.

Thus, the imperative for further research and investigation becomes apparent, as it is crucial to delve deeper into the multifaceted challenges faced by the transgender community. By conducting more in-depth research, policymakers and stakeholders can glean valuable insights necessary for the development and implementation of more effective and inclusive laws and policies aimed at promoting and safeguarding the rights of the transgender population. This study seeks to contribute to the ongoing discourse surrounding the rights and welfare of the transgender community, advocating for their rightful place within the societal fabric and advocating for the creation of a more equitable and just legal framework that recognizes and respects their identities and contributions.

## **1.2 RESEARCH METHODOLOGY**

The methodology employed for this research article primarily involved the application of doctrinal research. An extensive study is made to analysis, and interpret various legal documents, including case laws, statutes, research articles, and pertinent literature relevant to the subject matter. This approach facilitated a comprehensive understanding of the existing legal framework and its implications for the third gender community in India. The doctrinal analysis served as a foundational tool in examining the legislative landscape and identifying crucial legal precedents and provisions that inform the discourse on the socio-legal status of the third gender. By critically evaluating the existing legal framework through a doctrinal lens, this article aims to provide an insightful and nuanced exploration of the complexities and challenges faced by the third gender community in the Indian context.

## **1.3 BACKGROUND**

In Indian democracy the issue of transgender rights remains unexplored. However, a major milestone was celebrated in India after the enactment of the Transgender Persons (Protection of Rights) Act, 2019. After the enactment of this act India has become one of the countries to give legal recognition to the third gender identity and provide legal framework which would help them to undergone change in their gender identity. However, it even puts up question of whether legal recognition of the third gender identity will make it contradictory to conventional identities such as caste and class. The judicial precedent on transgender rights has paved way for better understanding of this issue. The celebrated NALSAR judgement clearly conveys the fact that transgender groups were devoid of their fundamental rights and were subjected to discrimination on the basis of their sexual orientation. Their fundamental rights under Article 14,15 19(1) and most importantly Article 21 of the Constitution of India were infringed.

The description of the NALSA judgement was further elaborated in the Navtej Singh Johar vs Union of India (2018), here the Supreme Court look upon concepts like 'constitutional morality' to put forward a rectification for otherwise heteronormative society.<sup>1</sup>

## **2. HOW THIRD GENDER PEOPLE ARE RECOGNIZED SOCIALLY: BIOLOGY VS PSYCHOLOGY**

Social recognition is different from the self-acceptance of one's identity. Usually, social recognition is how the common mass of people thinks about an individual and this mental is usually encased within a stereotypical notion. Any definite image beyond the hetero-normative dichotomy of sexuality, which might in hap with one's self-perception, is seen to be categorized away from stereotype.

The primary use of the term 'gender' was used to refer to feminine and masculine references back in 1960s. In 1968, a writing of Robert Stoller, on trans-sexuality started using the term 'sex' to that will especially refer to the biological characteristics and the term 'gender' that will refer to masculine and feminine characteristic of a person. Infact the concept of 'gender identity' was introduced by Robert Stoller. A Transgender welfare policy was introduced by the Tamil Nadu Government, capacitating them to access free Sex Reassignment Surgery. They were provided with many other facilities such as free housing programme, various citizenship documents, admission in Government colleges, initiating income generation programmes so that they can opt for alternative sources of livelihood other than begging.

Justice Lockhard was amongst the few who argued that 'it should not depend merely on the chromosomes but rather be treated purely psychologically'. Violation of human rights is seen for ignoring the psychological perception of one's gender which results in causing immense discomfort, distress and psychological trauma to the transgender community, this has huge chances of causing disorder like 'gender dysphoria'; further leading to mental disorder.<sup>2</sup>

## **3. DISCRIMINATION OF THE THIRD GENDER**

Despite the existence of numerous national and international policies aimed at the upliftment of the third gender community, they continue to remain an overlooked and marginalized population. Transgender individuals endure a myriad of hardships in their pursuit of basic necessities, often facing the brunt of social and

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<sup>1</sup> Nikhil K. Gupta, "Ruptures and resurgences: Marking the spatiality of transgender identity in India since the enactment of Transgender Persons Act 2019" *FRONTIERS IN POLITICAL SCIENCE* (2022).

<sup>2</sup> Shilpa Khatri Babbar, "The Socio-Legal Exploitation of the Third Gender in India" 21 *IOSR JOURNAL OF HUMANITIES AND SOCIAL SCIENCE* (2016).

economic exclusion as a consequence of discrimination based on their gender identity. Researchers, activists, and advocates working closely with this community have encountered the harsh reality of transgender individuals being denied shelter, employment opportunities, and access to essential healthcare facilities, while also enduring mistreatment and violence.

### **3.1 SEX DISCRIMINATION**

The prevailing societal rejection of individuals who do not conform to traditional gender norms perpetuates a system of discrimination, leaving the transgender population oppressed and marginalized. The absence of a comprehensive sex-based anti-discrimination statute has further exacerbated their vulnerability, contributing to their continued societal invisibility and oppression.

### **3.2 SEXUAL ORIENTATION DISCRIMINATION**

The misconception that the third gender population is synonymous with being gay often subjects them to harassment and prejudice. It is unjust and discriminatory to judge individuals based on their choice of attire and their non-conformity to conventional gender expressions.

### **3.3 DISCRIMINATION BY THE MEDICAL ESTABLISHMENT**

Transgender individuals frequently encounter mistreatment and bias when seeking medical treatment for sexually transmitted diseases (STDs), HIV/AIDS, and in the process of undergoing sex reassignment surgery. The lack of sensitivity and understanding within the medical fraternity further exacerbates their already vulnerable position.

### **3.4 DISCRIMINATION IN USING PUBLIC TOILETS**

The refusal of access to public toilets designated for conventional gender binaries imposes yet another form of discrimination on those who choose to embrace their non-conforming gender identity, forcing them to endure the daily struggle of accessing safe and appropriate facilities.

### **3.5 DISCRIMINATION IN EMPLOYMENT/EDUCATION**

Education remains a significant barrier for many transgender individuals as they are frequently denied admission to mainstream educational institutions, leading to a lack of formal qualifications. Consequently, they encounter difficulties in securing gainful employment, facing discrimination from employers unwilling to recruit individuals from the transgender community. These discriminatory practices often push them into vulnerable occupations, such as sex work or begging, to sustain their livelihood.

### **3.6 DISCRIMINATION IN THE FAMILY**

Within their own families, transgender individuals are often victims of domestic violence and rejection, primarily stemming from the lack of acceptance of their differing sexual orientation. Consequently, many are compelled to engage in activities deemed socially unacceptable, as they find themselves alienated from their families and support networks.

Analyzing these discriminatory practices necessitates a deeper examination of the legislative framework in place and its shortcomings. For instance, the Transgender Persons (Protection of Rights) Act, 2019, though a significant step forward, still lacks the comprehensive provisions necessary to address the intricate challenges faced by the third gender community. The current legislative landscape necessitates critical evaluation to identify gaps and loopholes that contribute to the perpetuation of discrimination and marginalization. For example, while discussing the Karnataka transgender welfare policy, a comprehensive analysis of its implementation and effectiveness in addressing the multifaceted needs of the transgender community is imperative. Such analysis will shed light on the discrepancies between policy intent and on-ground realities, guiding future legislative reforms towards a more inclusive and just society.

## **4. LAWS IN INDIA**

India has adopted revolutionary changes when it comes to providing rights to the third gender. India Government have starter using the term 'third gender' for transgender community, they have provided the option of 'other gender/sex' in various document or application forms.<sup>3</sup> The dynamic of treating third gender population have changed after the historic NALSA judgement and decriminalization of Section 377 of the Indian Penal Code.

The Ministry of Social Justice and Empowerment provides them Transgender certificate and identity card which makes it easier for them to access all the facilities provided to the general public. National welfare schemes like SMILE (Support for Marginalized Individuals for Livelihood and enterprise) aims to provide a better life for transgender person that are involved in the act of begging and can live their life with dignity and respect.

### **4.1 CONSTITUTIONAL RIGHTS OF THE THIRD GENDER**

As the Preamble to the constitution guaranties justice social, economic and political equality of status, thus, the most mandatory right the Transgender community deserve is the right to equality under Article 14 and right to

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<sup>3</sup> Shilpa Khatri Babbar, "The Socio-Legal Exploitation of the Third Gender in India" 21 *IOSR JOURNAL OF HUMANITIES AND SOCIAL SCIENCE* (2016).

prohibition of discrimination on the ground of religion, race, caste, sex or place of birth. Article 19 (1)(a) provides them the freedom to express their gender identity and claim themselves as third gender. Article 21 provides them the right to live with dignity and to protect their privacy. The Centre and the state Government have asked to entitle the transgender community with reservation in educational institutions and employment to improve their situation in the society.<sup>4</sup>

#### **4.2 THE ROLE OF JUDICIARY ON TRANSGENDER RIGHTS**

Judiciary have played a major role is improving the condition of the transgender community. After the historic NALSA judgement of 2014, the condition of transgender population has been improved, the mainstream population started recognizing them. The Indian Government started making welfare schemes for the betterment of their life. The landmark judgements of Suresh Kumar Kaushal Vs Naz Foundation and Navtej Singh Johar Vs Union of India has brought historic revolution to the LGBTQ community by decriminalizing Section 377 of the Indian Penal Code.

#### **4.3 TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019**

The Supreme Court directs the Government to provide legal recognition to the ‘third gender’ and ensure them protection and safety and provide them benefits like reservation in education and employment. According to the Act the definition of transgender person is ‘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’.

Section 3 of the Act provides for prohibition against discrimination for unfair treatment in educational establishments, employments or services, denial or discontinuation in healthcare services, unfair treatment with regards to access to enjoyment or use of any goods, accommodation, service, facility, benefits etc. unfair treatment with right to reside.

Section 4, 5 and 6 of the Act provides provision for recognition, application and issue of certificate of identity.

Section 8 of the Act imposes obligation on the Government towards the upliftment of third gender by making various welfare schemes and non-

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<sup>4</sup> Pinki *et.al*, “Status of Transgender in India: A Review” 6(2) *INTERNATIONAL JOURNAL OF HOME SCIENCE* (2020).

discriminatory scheme and take necessary steps for the rescue, protection and rehabilitation of transgender persons.

Section 12 ensures them Right to residence; Section 14 of the act talks about giving vocational training to the community that can enable them to generate employment sources and self-employment. The Act talks was forming a National Council for Transgender Persons under Section 16 which will scrutinize all the mechanism of the schemes and redressal mechanisms and the most important Section is Section 18 which provides offences and penalties against offences committed against transgender person.

This enactment has tried to bring the hidden population into the mainstream society to move and express freely with their queer identity.<sup>5</sup>

## 5. RESULTS AND FINDINGS

Mere legal recognition of transgender population does not end the point of concern. As every issue in the politics of recognition has some aspect of redistribution of justice like social activism of transgender groups. The recognition of third gender is only one aspect the major part is more challenging before the state and transgender community. As the path of such challenges are wide, let us take you through few instances here.

No matter how much activists tries to fight for transgender community but the main concern depends upon Government that will decide whether to prioritize upon the rights of the transgender. The issue of providing justice and recognition to the third gender were latent from time immemorial but has now taken pace as major activism movements has taken place.

Besides recognition one of the issues that rises is that of right to inheritance of a transgender person. A heteronormative trajectory is followed when it comes to laws on succession and inheritance. For instance, the Hindu Succession Act, defines 'heirs' as 'any person male or female, who is entitled to succeed to the property'. The Act provides a list of heirs which provides a stereotypical gender-based legitimate legal heirs and excludes transgender person from the legal ambit. While the right of cis-male and cis-female heirs are now recognized but the recognition of the right of inheritance of transgender person is yet to be achieved. The Hindu Succession Act also clearly delimits the gender difference. The heteronormativity has led to castaway and subordination of transgender persons and it is seen clearly in the Chapter on definitions and interpretation of the Hindu Succession Act that "unless otherwise requires, words importing the masculine gender shall not be taken to include females" this abovementioned

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<sup>5</sup> The Transgender Persons (Protection of Rights) Act, 2019 (Act No. 40 of 2019).



heteronormative perspective becomes evident throughout the Act. Interestingly after all the massive revolutionary movements and landmark judgements for the betterment of the transgender community this aspect is still ignorant and silent. This framework of law represents an utter disregard for such important matter like right to inheritance of transgender person, thus making their status a hidden one.

As informed by the Insurance Regulatory and Development Authority (IRDA), no specific provision is provided to third gender people to cover any risk faced by them. Mostly the coverage of insurance facilities is subjected to heteronormative perceptions and therefore the transgender person is bound to declare their gender identity as per heteronormative understanding to be eligible to be insured or become a beneficiary, such unwanted expression is violative of their human rights and further leads to demeaning their sexuality. The deliquescence of one's sexuality is the main problem with such framework.

Similar instance of discrimination can be seen in the rules of pension which are made according to heteronormative family. According to pension rules of the country only a heterosexual couple is entitled to claim pension if one of spouse dies and excludes transgender couple from the pension rule of India. The definition of 'family' in fact sticks to firm heteronormative paragon. The current definition of family mentioned under the pension rule and various other statutes has drawn a definite boundary beyond which any expressions are remarked as illegitimate. This outcast transgender couple from rest of the society.

It is sad to see that facilities that were provided by the Government for giving the skill development training to generate self-employment by the Ministry of Skill Development and entrepreneurship has not enrolled enough number of transgender people as an information shared under the Right to Information Act. As per data only four transgender persons were enrolled under Skill development training programme during 2018-2019 and eight in 2019-2020. Further demeaning data are seen in terms of successful placement of enrolled candidates. Such circumstances are only due to the presence of stereotypical notion of gender orientation and leading to outcast and suppression of third gender population.

However, such challenges can only be answered in a democratic way. Only through the participation of the legislature, judiciary and civil societies the redefinition and revision of our norms and perceptions can be achieved.<sup>6</sup>

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<sup>6</sup> Nikhil K. Gupta, "Ruptures and resurgences: Marking the spatiality of transgender identity in India since the enactment of Transgender Persons Act 2019" *FRONTIERS IN POLITICAL SCIENCE* (2022).

## 6. CONCLUSION AND SUGGESTIONS

The Transgender Persons (Protection of Rights) Act, 2019 represents a landmark legislation in India, serving as a significant stride towards the protection and upliftment of the transgender community. However, a critical examination of the Act reveals several inherent deficiencies, necessitating the consideration of crucial amendments and enhancements to ensure its efficacy. The inclusion of suggestions below is vital to augment the Act's impact and address the persisting challenges faced by the transgender community:

1. **Broadening the Definition of Transgender:** Section 2(k) of the Act could be revised to encompass a broader spectrum, including the LGBTQ+ community, along with the inclusion of cisgender individuals, cross-dressers, and transvestites within the definition of transgender. This inclusive approach would recognize the diversity within the gender spectrum and ensure comprehensive protection for all gender non-conforming individuals.
2. **Preserving Autonomy in Identity Expression:** Revisiting the provisions related to sex reassignment surgery is crucial, granting transgender individuals the discretion to choose whether to undergo such procedures or to embrace their inherent gender identity without any compulsion for certification. Upholding their autonomy in determining their identity is paramount to safeguarding their rights and personal agency.
3. **Enhanced Representation in Policy-Making:** Ensuring adequate representation of transgender individuals in the National Council is imperative, granting them a substantial voice in the policy-making process. This inclusive approach would facilitate a more comprehensive understanding of the challenges and needs of the transgender community, enabling the formulation of more relevant and effective policies.
4. **Strengthening Legal Safeguards:** Urgent revisions are needed to fortify penalties for offenses committed against transgender individuals, as the current terms of imprisonment are often inadequate in proportion to the gravity of the crimes. Stricter enforcement measures and enhanced punitive measures would serve as a deterrent against further discrimination and violence, ensuring the protection and security of the transgender community.
5. **Establishing a Dedicated Enforcement Agency:** The establishment of a specific agency dedicated to enforcing the provisions outlined in the Act is essential. Without such dedicated oversight, the effective implementation of the Act remains at risk, potentially undermining its intended purpose and compromising the safeguarding of the transgender community's rights and well-being.

In conclusion, the Transgender Persons (Protection of Rights) Act, 2019, while crafted with a focused intent to elevate the status of the transgender community and integrate them into the societal mainstream, necessitates critical amendments and comprehensive implementation measures. By affording the transgender community the means to acquire new skills and pursue dignified self-employment opportunities, the Act endeavors to uplift their social standing, mitigating their dependence on activities such as begging and sex work. Additionally, the Act's provisions enable the reporting of crimes committed against transgender individuals, signifying a crucial step toward bringing this marginalized community out of the shadows and into the light of social inclusion and recognition. A more detailed discussion and analysis of the legal provisions, coupled with the proposed suggestions, are imperative for ensuring the effective implementation and success of the Act's objectives.