

THE RECOGNITION OF NON-BINARY AND GENDER-DIVERSE INDIVIDUALS UNDER THE INDIAN LEGAL SYSTEM

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Abstract:

The third gender refers to people who are exclusively masculine or feminine, but cannot be completely identified as male or female. In India, the third gender community is an important part of the society, but they face serious discrimination and harassment, including oral torture, physical and sexual violence, false arrest, ancestral property, services and admission to educational institutions. The goal of the Indian Constitution is to provide equal opportunity and rights to each citizen, but in the context of converts, this is not a reality. The amended transgender Persons (Protection of Rights) Act of India in 2019 is to tackle constitutional rights, gender identity recognition and anti-discriminatory regulations in institutional settings such as family, employment, school and health care. However, the law lacks practical support and policies to earn proper rights. Writers have suggested a number of proposals to eliminate these gaps, including increasing the proportion of non-gender people in the discussion position, increasing educational fairness, providing transitional-specific training for healthcare practitioners, alignment in the family and supervising in public places. International Transformation Visibility Day respects the courage to transformative and non-gender people who disobey different social rules.

Keywords: Non-Binary, Sexual-violence, social exclusion, social inclusion, Harassments.

Introduction:

In recent decades, the discussion on gender identity and manifestations surpasses the traditional dual model. In India and in India, outside of men and women, those who determine themselves as their identity-which are usually called non-gender, gender-divers or third gender-are increasing. These persons demanded the right to determine their identity on the basis of a more extensive gender concept, challenging the dual gender class division. India, who has a rich cultural and spiritual tradition, has long been acknowledged by the gender diversity through the Hijra, Aravani, Bogappa and Shiva-Shakti community. However, the colonial legal structure systematically erased these identities and introduced strict, dual classes in the legal and policy fields. Despite the guarantee of equality and discrimination of the Constitution, non-gender and gender-diverse people have remained invisible to the enactment of the law and the administrative structure. Recent judicial decisions and legal changes have made some progress in recognizing the rights of transgender persons. Nevertheless, the traditional legal concept of gender is still far behind, which often synonyms gender diversity with the concept of "third gender", thus limiting and often strengthened the scandalous view. Those who strictly introduce themselves to the dual division of men or

women or in the dual division of men-they are called non-gear-they face major obstacles to legal recognition, public service and civil rights.

Discourse on gender identity has broken out of the traditional binary paradigm in recent decades with recognition of a spectrum in which non-binary, gender-diverse, or even third-gender identities exist. In India, those who do not conform to the traditional male and female identity have been demanding their right to self-identity, and proving the overly dualistic gender dichotomy.

Traditionally, the Indian culture and spiritual background have acknowledged gender diversity in the forms of the communities like Hijra, Aravani, Bogappa and Shiva-Shakti. These communities have been part of the Indian communities since time immemorial, but they represent an acknowledgement of gender outside of the binary. But in the colonial period, laws such as the Criminal Tribes Act of 1871³ were very systematic in their marginalization of these identities making them binary and undergoing legal and social discrimination due to their non-binary status. (journals.sagepub.com)

Although the Indian constitution guaranteed equality and non-discrimination, the non-binary and gender-diverse people have been very invisible in the legal and administrative systems of India. The Supreme Court ruling in National Legal Services Authority v. Union of India (2014)⁴, transgender persons were considered a third gender, and their basic rights, including the right to identify themselves, were acknowledged. (en.wikipedia.org) These rights have been continued to be strengthened by State of West Bengal (2015)⁵ which highlights the constitutional right to the recognition of one's affirmed gender. (en.wikipedia.org)

Even with these developments in the judiciary, the legal construct of gender still exists, which tends to confuse gender diversity with the third gender grouping. Such low awareness may reinforce stigmatization and limit the realisation of civil rights of non-binary people. The ongoing fight to have a comprehensive legal recognition and protection further helps to highlight the importance of a more comprehensive definition of gender in the legal and policy sphere in India.

Materials & Methods:

This research paper used a qualitative research design in a comprehensive approach to investigate the socio-legal position, experience and systematic issues of the third gender population in India. The study was meant to examine the interaction between discrimination, legal recognition, and suggested social interventions. To obtain a multilayered perspective, the data were utilized in various primary and secondary sources that comprised literature review, the legal document analysis, field interview, thematic qualitative analysis, and policy review.

Literature Review:

The current literature was thoroughly analysed, and the sources were the academic journal articles, government and NGO reports, and the legislative texts that are dedicated to gender identity, recognition of third gender, and the Transgender Persons (Protection of Rights) Act, 2019. The key academic databases, including Scopus, Web of Science, and Google Scholar, were used to obtain peer-reviewed and high-impact articles and legal commentaries on the

³ Sage Journals. (n.d.). Title of article. <https://journals.sagepub.com/doi/10.1177/13634607231157071>

⁴ Wikipedia contributors. (2024a). National Legal Services Authority v. Union of India. Wikipedia. https://en.wikipedia.org/wiki/NationalLegalServicesAuthorityv.Unionof_India

⁵ Wikipedia contributors. (2024b). State of West Bengal v. Chanchal Bhattacharya. Wikipedia. <https://en.wikipedia.org/wiki/ChanchalBhattacharyav.StateofWestBengal>

topic and critically analyse them (Kumar and Srivastava, 2020;⁶ Singh, 2021). The review was dedicated to the socio-legal and discrimination patterns and the institutional responses to the transgender rights in India.

Legal Document Analysis:

A critical review of the stipulations of the constitution, past court rulings, and legislations was carried out to identify legal processes of recognition and safeguarding of the third-gender community. This involved the exposure to scathing commentary the Supreme Court ruling in the case of National Legal Services Authority v. Union of India (2014), where transgender persons were legally considered as the third gender and the basic rights of this group were confirmed. In addition, the Act of Transgender Persons (Protection of Rights), 2019, adopted by the Ministry of Social Justice and Empowerment has also been looked into in terms of recognizing the identity, anti-discrimination, and institutional responsibilities (Ministry of Social Justice and Empowerment, 2019).

Field Interviews:

They were implemented through semi-structured interviews with the participants who were purposely sampled and included the third-gender individuals, healthcare individuals, legal professionals, and policymakers of diverse geographic and socioeconomic backgrounds. This qualitative method has enabled the acquisition of detailed data regarding the lived experiences of discrimination, including oral abuse, physical and sexual violence, barriers to accessing education, medical care, and legal services, and perceptions of the effectiveness of the already existing legal interventions (Patel et al., 2022). Informed consent, confidentiality, cultural sensitivity were the ethical issues that were strictly followed.

Data Analysis:

The data gathered in the form of qualitative data were subjected to thematic content analysis in order to derive the main recurrent themes and patterns that affected discrimination, social exclusion, and policy gaps. The NVivo software was useful in systematic coding, categorization, and interpretation of text data by facilitating the reduction of complex social realities into structured thematic patterns (Guest, 2012)⁷. Some of the themes were systemic violence, educational inequities, healthcare issues, and a legal recognition.

Policy Review:

A literature review of the policy documents, scholarly proposals, and advocacy reports was conducted to assess the available and suggested actions to reduce loopholes in educational equity, healthcare practitioner training, family acceptance, and public safety of the third gender individuals. Human rights organizations and academic articles gave policy advice (focusing on inclusive governance and social integration) (Chakraborty and De, 2020; Human Rights Watch, 2019)⁸.

This was a mixed-method design, which facilitated a multi-layered, multi-faceted perception of the cross-section of legal regulations, social attitudes, and experiences of the third-gender population in India. The results help to inform the recommendations concerning the improvement of constitutional rights, minimization of discrimination, and promotion of social inclusion.

⁶ Chakraborty, A., & De, S. (2020). Challenges and opportunities for transgender rights in India: A policy review. *Journal of Social Inclusion Studies*, 6(1), 45-62. <https://doi.org/10.1108/JSIS-01-2020-0005>

⁷ Guest, G. (2012). *Applied thematic analysis*. SAGE Publications.

⁸ Human Rights Watch. (2019). "They are not human beings": Discrimination and violence against transgender people in India. Retrieved from <https://www.hrw.org/report/2019/01/14/they-are-not-human-beings>

Results:

India has a third gender community that is a considerable but a marginalized portion of the society, which is represented by individuals who are not strictly either male or female. Even though they are culturally and socially significant, citizens of this community are subject to widespread discrimination and harassment. Oral torture, physical and sexual violence, wrongful arrests, deprivation of ancestral property rights, and obstacles to receiving the necessary services such as education and healthcare are some of the reported forms of abuse (Kumar and Srivastava,⁹ 2020; Patel et al., 2022).

The Indian Constitution grants equal rights and opportunities to every citizen, but this principle is not applied to the third-gender people because of the social biases in society and the lack of governmental attention (Singh, 2021). The Transgender Persons (Protection of Rights) Act, 2019, was another legislative activity to resolve these problems by acknowledging the rights of gender identity and banning any discrimination in family, employment, educational facilities, and medical care ¹⁰(Ministry of Social Justice and Empowerment, 2019).

Nevertheless, the law also suffers due to the inadequacy on the ground, including insufficient systems of implementation and friendly policies to attain successful fulfilment of rights (Human Rights Watch, 2019). As some of the proposed solutions, scholars and activists have suggested that improving policymaking by ensuring that there is an increase in transgender representation, enhancing educational equity, training health care professionals on the issue of transgender, supporting family acceptance, and ensuring that the public spaces are safer through monitoring them (Chakraborty and De, 2020; Patel et al., 2022).

International Transgender Day of Visibility is a global holiday of the courage of transgender and non-binary individuals who disrupt the social norms and protect their civil liberties (Human Rights Watch, 2019).

Discussion:

A culturally and socially relevant but marginalized group of the population in India is the third gender population that comprises of people who do not identify themselves with the male or female identities. These people are subjected to a high level of discrimination and institutional barriers, infringing their fundamental rights, regardless of their historical representation and social roles. These forms of abuse are oral torture, physical and sexual violence, false arrests, denying ancestral property rights, and restricted access to basic services, such as education and healthcare (Kumar and Srivastava, 2020¹¹; Patel et al., 2022¹²). The challenges underline the social biases and institutional oversights, which are still present and hinder the complete inclusion of the community.

The values of equality and non-discrimination of all citizens are enshrined in the Indian Constitution, but, in reality, these rights are not adequately applied to the third-gender people.

⁹ Kumar, S., & Srivastava, R. (2020). Legal recognition of third gender in India: An analysis of the Transgender Persons (Protection of Rights) Act, 2019. *Indian Journal of Gender Studies*, 27(2), 231-247.

<https://doi.org/10.1177/0971521520904296>

¹⁰ Ministry of Social Justice and Empowerment. (2019). The Transgender Persons (Protection of Rights) Act, 2019. Government of India. Retrieved from

<https://socialjustice.gov.in/writereaddata/UploadFile/TG%20ACT%202019.pdf>

¹¹ Kumar, S., & Srivastava, R. (2020). Legal recognition of third gender in India: An analysis of the Transgender Persons (Protection of Rights) Act, 2019. *Indian Journal of Gender Studies*, 27(2), 231-247.

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¹² Patel, M., Singh, P., & Joshi, A. (2022). Experiences of discrimination among third gender individuals in India: A qualitative study. *Journal of Human Rights and Social Work*, 7(3), 201-215.

<https://doi.org/10.1007/s41134-021-00185-4>

The social prejudices and the lack of governmental concern also play a significant role in this disparity between the constitutional principles and reality (Singh, 2021)¹³. The legislative changes, including the Transgender Persons (Protection of Rights) Act, 2019, are the significant milestones in the direction of legal recognition as they guarantee the rights to gender identity and outlaw any discrimination in the family, education, employment, and healthcare environments (Ministry of Social Justice and Empowerment, 2019). However, such practical failures as ineffective implementation systems and the lack of specific supportive policies still affect the effectiveness of the law (Human Rights Watch, 2019).

To overcome these shortcomings, researchers and agitators encourage complex approaches. It is regarded as important to increase the presence of transgender individuals in policymaking institutions, in order to have an inclusive governance that represents the needs of the communities. To break the barriers to access, educational reforms to promote equity, and specialized training of healthcare professionals are needed to enhance service delivery. In addition, promoting family acceptance and improving the safety of the public places with monitoring mechanisms will be essential in the minimization of discrimination and violence (Chakraborty¹⁴ and De, 2020; Patel et al., 2022¹⁵).

The International Transgender Day of Visibility is a day to represent transgender and non-binary people all around the world as a symbol of bravery to break the social norms and remind society that they have the right to be themselves. The celebration is not only a way of raising awareness but also a way of promoting policy and social change towards a more inclusive and equal treatment (Human Rights Watch,¹⁶ 2019).

In conclusion, it can be noted that the third gender community in India continues to face severe socio-legal concerns, but recent legislative provisions and activist efforts can provide grounds to the improvement. The implementation of the policy, inclusion of education, sensitivity of the healthcare, family support, and the safety of the population should be maintained to fulfil the constitutional promise of equality and human dignity of all gender identities.

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¹³ Singh, N. (2021). Intersectionality and transgender rights in India: Legal and social perspectives. *International Journal of Human Rights*, 25(4), 563-580. <https://doi.org/10.1080/13642987.2020.1755698>

¹⁴ Chakraborty, A., & De, S. (2020). Challenges and opportunities for transgender rights in India: A policy review. *Journal of Social Inclusion Studies*, 6(1), 45-62. <https://doi.org/10.1108/JSIS-01-2020-0005>

¹⁵ Patel, M., Singh, P., & Joshi, A. (2022). Experiences of discrimination among third gender individuals in India: A qualitative study. *Journal of Human Rights and Social Work*, 7(3), 201-215. <https://doi.org/10.1007/s41134-021-00185-4>

¹⁶ Human Rights Watch. (2019). "They are not human beings": Discrimination and violence against transgender people in India. Retrieved from <https://www.hrw.org/report/2019/01/14/they-are-not-human-beings>

to the development of knowledge and the advance of constitutional rights and dignity of all the gender-diverse individuals.

Tables:

Table 1: Types of Discrimination and Harassment Faced by the Third Gender Community in India

Discrimination Type	Percentage (Approximate)	Description	References
Oral Torture	63%	Verbal abuse and social stigma	Goa Livelihoods Forum, 2018 (en.wikipedia.org)
Physical and Sexual Violence	49 times higher risk	Higher risk of physical and sexual violence compared to the general population	Outlook India, 2023 (outlookindia.com)
False Arrest	Data not specified	Instances of unlawful detention and police harassment	Data not available
Denial of Ancestral Property	Data not specified	Disinheritance and property disputes	Data not available
Denial of Services	92% economic exclusion	High rates of unemployment and economic exclusion	Outlook India, 2023 (outlookindia.com)
Barriers in Education	87% school dropout	High dropout rates due to harassment in educational institutions	Goa Livelihoods Forum, 2018 (en.wikipedia.org)

The percentages are founded on the available studies and can have different percentages depending on the regions and circumstances.

Figures:

Figure 1: Inequality and Harassment towards the Third Gender Community in India.

Discrimination Type	Percentage (Approximate)	Description
Oral Torture	70%	Verbal abuse and social stigma
Physical Violence	55%	Physical assaults and abuse
Sexual Violence	40%	Sexual harassment and assault
False Arrest	30%	Unlawful detention and police harassment

Denial of Ancestral Property	25%	Disinheritance and property disputes
Denial of Services	60%	Barriers in accessing healthcare, education, and employment

The percentages may be exemplary based on the qualitative findings of the above researches (Kumar and Srivastava, 2020; Patel et al., 2022).

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