



## Human rights of third gender under Indian constitution

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**Abstract:** The recognition and protection of human rights are fundamental principles preserved in the Indian Constitution. Among the diverse population of India, individuals who identify as the third gender have long been marginalized and discriminated against. However, through constitutional provisions, legislative developments, landmark judgments, and state initiatives, efforts have been made to uphold the human rights of the third gender community. This article explores the human rights of the third gender under the Indian Constitution, focusing on key aspects such as the right to equality, right to self-identification, right to non-discrimination, and right to dignity. Furthermore, this article discusses landmark judgments such as NALSA vs. Union of India (2014), which recognized transgender individuals as a third gender and affirmed their fundamental rights. It also examines legislative developments, including the Transgender Persons (Protection of Rights) Act, 2019, and state initiatives aimed at supporting the rights of third gender individuals.

**Keywords:** Third Gender, Human Rights, Indian Constitution, Equality, Self-Identification, Non-Discrimination, Dignity, Landmark Judgments.

**Introduction:** The term "third gender" refers to individuals who do not identify strictly as either male or female within the traditional binary gender classification system. These individuals may identify as transgender, non-binary, gender queer, or any other identity that falls outside the conventional understanding of male and female. The concept of a third gender acknowledges and respects the diversity of gender identities beyond the binary, recognizing that gender is a spectrum rather than a fixed category. In various cultures and societies, including India, the recognition of a third gender reflects a broader acceptance of gender diversity and the rights of individuals to self-identify according to their own understanding of gender.

Human rights are crucial for the third gender community as they face discrimination and marginalization in many aspects of their lives. By recognizing and protecting their rights, we can ensure equal opportunities in employment, healthcare, and education. Moreover, it is essential to raise awareness and educate the general public about the challenges faced by the third gender community, fostering empathy and encouraging acceptance. By advocating for their rights, we can build a society that values diversity and respects the dignity of every individual, regardless of their gender identity.

The Indian Constitution, adopted in 1950, enshrines the principles of equality and non-discrimination, guaranteeing fundamental rights to all citizens. Article 14<sup>1</sup> prohibits discrimination on the grounds of

<sup>1</sup> "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

religion, race, caste, sex, or place of birth, ensuring equal protection of the law. Additionally, Article 15<sup>2</sup> prohibits discrimination on these grounds in access to public places and Article 16<sup>3</sup> guarantees equal opportunities in employment. These constitutional provisions lay the foundation for protecting the rights of the third gender community and promoting inclusivity in all aspects of society.

### **Historical and cultural Context of Third Gender in India**

In India, the recognition of a third gender has deep historical and cultural roots, dating back centuries. Here's an overview of the historical and cultural context of the third gender in India:

**Ancient Texts and Mythology:** Indian mythology and ancient texts, such as the Vedas and the Mahabharata, contain references to gender-diverse individuals, known as hijras, kinnars, or aravanis. These individuals were often depicted as having spiritual or divine qualities and were revered in certain communities.

**Traditional Roles:** Historically, hijras, also known as eunuchs, played specific roles in Indian society, such as performing blessings at weddings and childbirth, as well as in certain religious ceremonies. They formed close-knit communities with their own customs, rituals, and social structures.

**Colonial Influence:** During British colonial rule, attitudes towards hijras and other gender-diverse individuals shifted due to the imposition of Western gender norms and the criminalization of certain behaviors associated with hijra communities. This led to social stigma and discrimination against them.

**Legal Recognition:** Despite the colonial-era laws criminalizing hijra identities and practices, independent India has made significant strides in recognizing the rights of transgender and third-gender individuals. Landmark legal cases, such as the NALSA judgment in 2014, have affirmed the rights of transgender people and recognized them as a third gender.

**Legal Reforms:** In 2019, the Transgender Persons (Protection of Rights) Act was passed, aiming to protect the rights of transgender individuals and provide legal recognition of their gender identity. However, the act has faced criticism for certain provisions seen as regressive or inadequate by transgender rights activists.

**Cultural Significance:** Despite legal recognition, third-gender individuals still face significant social stigma, discrimination, and marginalization in Indian society. However, there are ongoing efforts to challenge stereotypes, raise awareness, and promote acceptance and inclusion of transgender and third-gender communities.

Overall, the historical and cultural context of the third gender in India is complex and multifaceted, reflecting both longstanding traditions of acceptance and reverence, as well as more recent challenges and struggles for recognition and rights in the face of societal norms and legal frameworks.

### **Constitutional Framework for Human Rights in India**

The Indian Constitution guarantees several fundamental rights that afford protection and equality to all citizens. These rights include the right to equality, which prohibits discrimination based on gender, caste, religion, or sex. Additionally, the Constitution guarantees the right to freedom of speech and expression, allowing individuals to freely express their opinions and ideas. The right to life and personal liberty ensures that every individual has the right to live with dignity and without any interference from the state or others. Furthermore, the Constitution also guarantees the right to education, ensuring that every citizen has access to

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<sup>2</sup> “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them.”

<sup>3</sup> “There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.”

quality education and opportunities for personal growth and development. Overall, the constitutional framework for human rights in India provides a strong foundation for promoting equality, justice, and inclusivity in society. Analysis of how these rights apply to the third gender Community reveals that the right to life and personal liberty is especially significant for this marginalized group. The constitutional provisions in India apply to the rights of the third gender in the following ways:

#### **Article 14: Right to Equality:**

Article 14 ensures that all individuals are equal before the law and prohibits discrimination on grounds of sex, gender, or any other status. This provision ensures that the third gender has the same rights and opportunities as individuals, including access to education, employment, and healthcare.

#### **Article 15: Prohibition of Discrimination:**

Article 15 prohibits discrimination on the basis of sex, gender, or any other status. This provision protects the third gender from discrimination in various spheres of life, including public employment, educational institutions, and access to public places.

#### **Article 21: Right to Life and Personal Liberty:**

Article 21 guarantees the right to life and personal liberty to all individuals. This provision ensures that the third gender has the right to live with dignity and autonomy, free from discrimination, harassment, and violence.

#### **Article 19: Freedom of Speech and Expression:**

Article 19 protects the freedom of speech and expression, which includes the right to express one's gender identity without fear of censorship or discrimination. This provision allows the third gender to advocate for their rights, raise awareness, and participate in public discourse.

Overall, these constitutional provisions serve as the foundation for ensuring the rights of the third gender in India, guaranteeing equality, dignity, and non-discrimination under the law. However, challenges remain in translating these provisions into effective policies, programs, and societal attitudes that promote the full inclusion and empowerment of the third gender community.

#### **NALSA vs. Union of India (2014):**

One of the landmark judgments relevant to the rights of the third gender in India is the NALSA vs. Union of India case<sup>4</sup>. The case was filed by the National Legal Services Authority (NALSA) seeking legal recognition and protection of the rights of transgender individuals in India. The petition highlighted the discrimination, marginalization, and violation of fundamental rights experienced by transgender people. The Supreme Court recognized transgender individuals as a third gender, affirming their right to self-identify their gender identity. The judgment upheld the fundamental rights of transgender people, including the right to equality, non-discrimination, and the right to live with dignity. It directed the government to take measures to provide equal opportunities for transgender individuals in education, employment, healthcare, and other areas. The court also ordered the government to recognize transgender people as a socially and economically backward class, entitled to reservations in education and employment. The NALSA judgment was a significant milestone in the recognition and protection of the rights of transgender individuals in India. It provided legal recognition of the third gender, affirmed their fundamental rights, and called for affirmative action to address the discrimination and marginalization faced by transgender people.

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<sup>4</sup> *W.P.(C) No. 400/2012* was initiated for protection of rights of the transgender community. The landmark judgment in the case of NALSA vs. Union of India (2014) 5 SCC 438 recognizes transgenders to be the third gender amongst other guidelines to the government.

## **Transgender Persons (Protection of Rights) Act, 2019:**

The Transgender Persons (Protection of Rights) Act<sup>5</sup>, 2019, was passed by the Indian Parliament with the aim of protecting the rights of transgender individuals and providing legal recognition of their gender identity. The law was enacted to address the discrimination, marginalization, and lack of legal recognition faced by transgender people in India. The Act defines transgender persons as individuals, whose gender does not match the one assigned at birth, including trans men, trans women, and intersex persons. It provides for the right of transgender persons to self-perceived gender identity and the right to identify as male, female, or transgender. The Act prohibits discrimination against transgender persons in education, employment, healthcare, and other areas. It also mandates the government to take measures to ensure their inclusion and equality. The Act mandates the government to provide welfare measures, including healthcare, education, and social security, to transgender persons. It establishes a National Council for Transgender Persons to advise the government on policies and programs related to transgender welfare.

The Transgender Persons (Protection of Rights) Act, 2019, has faced criticism from transgender rights activists and advocacy groups for various reasons, including Concerns about certain provisions seen as regressive or inadequate, such as the requirement for transgender individuals to undergo a screening process to be recognized as transgender. Lack of consultation with transgender communities during the drafting process. Calls for amendments to ensure that the law effectively addresses the needs and rights of transgender individuals and reflects their input and experiences. Despite the criticisms, the enactment of the Transgender Persons (Protection of Rights) Act, 2019, represents a significant legislative development in recognizing and protecting the rights of transgender individuals in India. However, there is ongoing debate and advocacy for amendments to strengthen the law and ensure its effective implementation.

### **State initiatives and policies supporting the rights of third gender individuals**

Several states in India have implemented initiatives and policies aimed at supporting the rights of third gender individuals. Here are some examples:

**Kerala:** Kerala was one of the first states in India to introduce a transgender policy in 2015, known as the "State Policy for Transgender in Kerala."The policy focuses on various aspects such as social inclusion, healthcare, education, employment, and legal recognition of transgender individuals.

**Tamil Nadu:** Tamil Nadu has implemented several initiatives to support the rights of transgender individuals. In 2008, Tamil Nadu became the first state to appoint a transgender individual, Rose Venkatesan, as a newsreader for a Tamil TV channel. The state also provides welfare schemes and vocational training programs for transgender persons.

**Maharashtra:** Maharashtra government introduced the "Maharashtra State Transgender Policy" in 2017 to address the socio-economic and health-related issues faced by transgender individuals. The policy aims to provide housing, healthcare, education, skill development, and employment opportunities for transgender individuals.

**West Bengal:** West Bengal has implemented various initiatives to support the rights of transgender individuals. In 2015, the West Bengal government launched a scheme to provide monthly financial assistance to transgender individuals above the age of 18 who are not covered under any social security schemes.

**Karnataka:** Karnataka government launched the "Nirman" scheme in 2017 to provide skill development training to transgender individuals and facilitate their employment in various sectors. The state also provides financial assistance for sex reassignment surgeries and medical treatments for transgender individuals.

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<sup>5</sup>. 10th January, 2020, vide notification No. S.O. 135(E), dated 10th January, 2020, see Gazette of India, Extraordinary, Part II, sec. 2(ii).

These state initiatives and policies are aimed at addressing the unique challenges faced by third gender individuals and promoting their inclusion, welfare, and empowerment in society. However, there is a need for continuous efforts to ensure the effective implementation of these policies and to address the remaining gaps in protecting the rights of third gender individuals across India.

### **Conclusion:**

In conclusion, the recognition and protection of the human rights of the third gender under the Indian Constitution represent a significant step towards fostering inclusivity and equality. The landmark decision by the Supreme Court of India in the NALSA v. Union of India case in 2014 acknowledged the rights of transgender individuals, affirming their constitutional right to self-identify and be recognized as a third gender.

However, despite legal advancements, there is still a need for continued efforts to ensure the effective implementation of these rights. Discrimination and social stigma persist, hindering the full realization of human rights for the third gender in various aspects of life, such as education, employment, and healthcare.

To address these challenges, a comprehensive approach is essential, encompassing legal reforms, awareness campaigns, and inclusive policies. Society at large must embrace a more accepting and understanding attitude towards the third gender, fostering an environment where they can live with dignity and without fear of discrimination. It is imperative for both the government and civil society to work collaboratively to bridge the existing gaps and promote a society that upholds the principles of equality and human rights for all, irrespective of gender identity.

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