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Rights of Third Gender in Contemporary Era: Retrospect and Prospect

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ABSTRACT

The discussion on third gender rights today highlights a significant socio-legal transformation, tracing a path from historical respect through colonial criminalisation to current constitutional acknowledgement. This evolution signifies a growing recognition and validation of third gender identities within legal frameworks, demonstrating a societal shift towards inclusivity and acceptance, as well as addressing long-standing discrimination and marginalisation faced by these individuals. Despite constitutional promises, systemic discrimination, social exclusion and inadequate legal protections continue to deprive transgender persons of civil rights such as voting, marriage, property ownership and access to justice. The article concludes that genuine recognition of gender identity, beyond token legislation, is essential to secure equality and dignity for transgender communities in the contemporary era.

Keywords: *Transgender Rights, Gender Identity, Constitutional Equality, Self-Determination, Transgender Persons (Protection of Rights) Act, 2019*

I. THE CONCEPT OF THIRD GENDER

The concept of gender[1] has traditionally been understood through a rigid binary framework of male and female. Nonetheless, there is a growing acknowledgement within human civilisation that gender identity exists on a broad spectrum. Besides the male and female classification of gender there exists a third gender, which represents an identity under which individuals place themselves outside the conventional binary understanding of gender. This notion invites recognition of diverse gender identities and societal roles that do not conform to the male-female dichotomy, encouraging a broader understanding of gender as a spectrum rather than a binary system. The term "third gender" refers to various identities such as transgender individuals, intersex persons, hijras and other non-binary identities. These groups have historically encountered significant marginalisation, social exclusion and a lack of legal recognition. In recent decades, a global paradigm shift, supported by human rights advocacy

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[1] For the concept of gender, *see* Joan W. Scott, *Gender: A Useful Category of Historical Analysis*, 91 AM. HIST. REV. 1053 (1986), https://doi.org/10.1086/ahr/91.5.1053; Jane S. Upin, *Applying the Concept of Gender: Unsettled Questions*, 7 HYPATIA 180 (1992), https://doi.org/10.1111/j.1527-2001.1992.tb00914.x.

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and judicial activism, has commenced the process of dismantling these outdated binary structures and fostering greater acceptance of diverse gender identities.

As stated above, the concept of the third gender recognises individuals who fall outside the traditional binary classification of strictly male or female. Thus, the third gender denotes an identity that is distinct from being exclusively a man or a woman. It is beyond the binary.[2] In other words, a third gender is a social and cultural category for individuals who are recognised, by themselves or by society, as neither strictly a man nor a woman.[3] In academic literature also, the concept of a third gender pertains to individuals recognised as neither strictly male nor female within their social or cultural contexts. This category, extensively examined in anthropology and gender studies, emphasises gender as a social construction rather than a strict biological binary. Key examples include: (A) hijras in South Asia, who are assigned male at birth but adopt feminine expressions and roles, historically holding significant cultural positions and achieving legal recognition as a third gender; (B) the *wakashu* of Edo-era Japan, recognised for their distinct gender phase before adulthood; and (C) the *mahu* of Polynesia and the *fakaleiti* of Tonga, representing individuals embodying traits of both sexes and fulfilling unique cultural roles beyond the male-female binary. Studies underscore that these identities are not simply intermediary biological states; they are fully realised identities shaped by local economies, spiritual systems and community standards.[4]

In South Asia, hijras are regarded as a third gender. The term hijra denotes a distinctive South Asian subculture of male-bodied, feminine-identified individuals recognised as a third gender. Building on this longstanding cultural recognition, recent legal frameworks in various South Asian nations have explicitly acknowledged hijra as a third gender. Hossain's study of Bangladesh illustrates the transition of this cultural identity into a legal one,[5] showing how recognition there has involved the framing of hijra within a discourse of disability, thereby reinforcing their rights as citizens. While internationally regarded as a step forward for sexual rights in a predominantly Muslim context, local perceptions tend to categorise hijra as individuals born with ambiguous genitals, separating physical identity from desire. This

[2] *See* THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY (Gilbert Herdt ed., Zone Books 1994).
[3] *See* Gayatri Reddy, *Paradigms of Thirdness: Analyzing the Past, Present, and Potential Futures of Gender and Sexual Meaning in India*, 5 QED: J. GLBTQ WORLDMAKING 48 (2018), https://doi.org/10.14321/qed.5.3.0048.
[4] *See* Muhammad Azfar Nisar, *(Un)Becoming a Man: Legal Consciousness of the Third Gender Category in Pakistan*, 32 GENDER & SOC'Y 59 (2018), https://doi.org/10.1177/0891243217740097; Aisarya Dutt Roy, *Beyond the 'Trans' Turn: Gender-Variant Lives and Legal Classifications in Contemporary India*, 82 PROC. INDIAN HIST. CONG. 1389 (2023).
[5] *See* Adnan Hossain, *The Paradox of Recognition: Hijra, Third Gender and Sexual Rights in Bangladesh*, 19 CULTURE, HEALTH & SEXUALITY 1418 (2017), https://doi.org/10.1080/13691058.2017.1317831.

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evolution from a narrative of disfigurement to one of disability has engaged multiple stakeholders, including civil society, the state, international entities and the hijra community itself.

Third gender is also identified under the umbrella of transgender.[6] Transgender and third gender represent significant concepts in the discourse surrounding gender identity, both of which transcend the conventional binary classifications of biological sex. The term "transgender" serves as an inclusive umbrella that captures a diversity of gender identities and experiences, thereby acknowledging individuals whose gender identity differs from the sex they were assigned at birth. On the other hand, "third gender" specifically denotes a category that exists outside the traditional male and female dichotomy, allowing for a more nuanced understanding of gender beyond just these two poles. This distinction is crucial in addressing the complexities and variations in gender identities that challenge societal norms and conventions.[7] In India, a third gender person has legally been identified as a "transgender person". Section 2(k) of the Transgender Persons (Protection of Rights) Act, 2019, as originally enacted, defined "transgender person" to mean:[8]

> "[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."

That definition referred to individuals whose gender identity differs from the sex assigned to them at birth. The category encompassed trans men and trans women, regardless of whether they had undergone medical interventions such as sex reassignment surgery, hormone therapy or laser therapy. Additionally, it included individuals with intersex variations, genderqueer identities and those belonging to specific socio-cultural groups such as kinner, hijra, aravani

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[6] *See* Toby Beauchamp & Benjamin D'Harlingue, *Beyond Additions and Exceptions: The Category of Transgender and New Pedagogical Approaches for Women's Studies*, 24 FEMINIST FORMATIONS 25 (2012), https://doi.org/10.1353/ff.2012.0020.

[7] *See* Jennifer Ung Loh, *Transgender Identity, Sexual versus Gender 'Rights' and the Tools of the Indian State*, 119 FEMINIST REV. 39 (2018), https://doi.org/10.1057/s41305-018-0124-9.

[8] The Transgender Persons (Protection of Rights) Act, No. 40 of 2019, INDIA CODE (2019), § 2(k), as enacted [hereinafter 2019 Act]. Clause (k) was substituted, with effect from May 25, 2026, by the Transgender Persons (Protection of Rights) Amendment Act, No. 3 of 2026, INDIA CODE (2026), § 2(iv) [hereinafter 2026 Amendment Act]. The substituted clause defines "transgender person" by reference to persons having socio-cultural identities such as kinner, hijra, aravani and jogta, or eunuch, persons with specified intersex variations, and persons compelled by force, allurement, inducement, deceit or undue influence to assume a transgender identity, and provides that the expression "shall not include, nor shall ever have been so included, persons with different sexual orientations and self-perceived sexual identities". The 2019 wording is quoted here because the decisions discussed below interpreted it.

and jogta. The Kerala High Court considered this definition in *Hina Haneefa v. State of Kerala*, a petition by a trans woman seeking enrolment in the National Cadet Corps.[9] The respondents' counsel statement, as recorded in the judgment, contended that under the definition "transgender is an umbrella term for persons, which can include transsexual, transvestite, Genderqueers and inter-sexual", that "[t]he sexual orientation of a transgender may be hetero-sexual, homosexual, bisexual or asexual" and that "[i]n a normal circumstances these biological features and sexual orientation will not have any impact on the society and organizations in which they function", and prayed that "there is requirement for more detailed categorization of transgender based on their biological features and sexual orientation to assign them male or female gender identity and a need to formulate detailed guidelines on medical and psychological aspects on assigning gender identity to transgender." The Court rejected that contention. It held that under the 2019 Act a transgender person has "a right to be recognized not only as a transgender but also a right to self perceived gender identity", that the absence of guidelines could not justify denying enrolment, and it directed that the enrolment criteria under section 6 of the National Cadet Corps Act, 1948 be amended to include the transgender community.[10] Various cases of this kind continue to come before the courts.

In *Matam Gangabhavani v. State of Andhra Pradesh*,[11] the High Court of Andhra Pradesh examined the rights of Matam Gangabhavani, a transgender individual, regarding reservations in public employment. The petitioner contested a recruitment notification that omitted transgender reservations, claiming that this omission violated constitutional rights and the directions of the Supreme Court in *National Legal Services Authority v. Union of India*.[12] The High Court, while noting the State's failure to act on the Supreme Court's directions, observed:

> "Though the petitioner underwent Sex Reassignment Surgery, as admitted by her, she would fall within the definition of transgender as defined under Section 2(k) of the Act, as such there is no dispute with regard to her identity as transgender. Even the respondent-State also did not dispute her identity, but contended that, as the petitioner herself disclosed her identity as female in the application, she was treated as female for the purpose of recruitment. Thus, the petitioner is undoubtedly a transgender. She also produced certificate issued by competent authority for her identity to claim that she is a transgender. Therefore, the petitioner is a transgender

[9] *Hina Haneefa v. State of Kerala*, W.P.(C) No. 23404 of 2020 (Ker. H.C. Mar. 15, 2021), ILR 2021 (2) Ker. 295 : 2021 (3) KLT 115, ¶¶ 4–5 (recording the counsel statement filed on behalf of respondents 4 to 7).
[10] *Hina Haneefa*, *supra* note 9, ¶¶ 14, 16–17.
[11] *Matam Gangabhavani v. State of Andhra Pradesh*, W.P. No. 16770 of 2019 (A.P. H.C. Jan. 21, 2022), 2022 (3) ALT 32 : 2022 SCC OnLine AP 200.
[12] *National Legal Services Authority v. Union of India*, AIR 2014 SC 1863 : (2014) 5 SCC 438 [hereinafter *NALSA*].

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> and hence the Court has to examine the issue treating the petitioner as a transfemale/transgender for the limited purpose of deciding the present petition only."[13]

The petition was nonetheless dismissed, the Court holding that the impugned notification followed the subsisting rules of reservation; the State Government was, however, directed to undertake the study of the problems faced by transgender persons ordered in *National Legal Services Authority* and to implement that direction within three months.[14]

The third gender, including the transgender community, faces significant challenges, including discrimination, unemployment, inadequate educational and medical facilities and homelessness. Health concerns such as HIV care, depression and substance abuse, and issues related to marriage, child adoption and property inheritance, are prevalent. Despite gaining voting rights, complications surrounding voter identity cards persist owing to the binary classification of gender. Many transgender individuals struggle with their sexual identity in a society where the third gender remains largely marginalised. This demographic often experiences a lack of equal rights and protections under human rights jurisprudence, remaining vulnerable in many countries. Public perception often views them negatively, labelling them as offenders. In India, societal attitudes pose significant challenges for the third gender, exacerbating existing difficulties despite the legal framework's attempts to recognise their needs. The current legislative measures are insufficient to address deeply ingrained social issues, indicating that reliance on laws alone is inadequate. There exists a crucial tension between the judicial approach, legislative efforts and the social realities faced by third gender individuals. To support effectively the emerging rights of the third gender, a substantial cultural shift is imperative, emphasising the need for societal change alongside legal recognition.[15]

II. HISTORICAL PERSPECTIVE OF THE RIGHTS OF THIRD GENDER PERSONS

The historical perspective of third gender rights traces a path from ancient cultural acceptance and Vedic-era recognition, through severe colonial-era criminalisation, to modern constitutional and legislative revival.[16] Ancient Indian texts, including Vedic literature, the *Kama Sutra* and epics such as the *Ramayana* and the *Mahabharata*, acknowledged the *tritiya prakriti* or *napumsaka* (third nature or neutral gender). In Sanskrit literature, the concepts of *tritiya*

[13] *Matam Gangabhavani*, *supra* note 11, ¶ 26.
[14] *Matam Gangabhavani*, *supra* note 11 (operative part of the order).
[15] Susie Tharu & Tejaswini Niranjana, *Problems for a Contemporary Theory of Gender*, 22 SOC. SCIENTIST 93 (1994), https://doi.org/10.2307/3517624.
[16] M. Michelraj, *Historical Evolution of Transgender Community in India*, 4 ASIAN REV. SOC. SCI. 17 (2015), https://doi.org/10.51983/arss-2015.4.1.1304.

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prakriti, meaning "third nature", and *napumsaka*, which translates as "non-procreative" or "neuter", are frequently referenced. These terms are essential for understanding gender diversity, as well as phenomena such as homosexuality, intersex conditions and transgender identities in ancient India. They provide a linguistic and cultural framework that acknowledges a spectrum of gender identities beyond the binary classification. This reflects a nuanced recognition of human experience in historical contexts, illuminating the complexity of personal identity in ancient Indian society.[17] Third gender individuals, particularly those belonging to traditional hijra communities, have historically occupied unique socio-cultural roles within society. They have been integral participants in various rituals, notably providing blessings during significant life events such as births and marriages. The societal perception of these individuals has generally been one of basic respect, allowing them the autonomy to form their own communities. This acceptance has, for the most part, been free from systemic state punishment, enabling these groups to maintain their traditions and cultural practices over time.

During the British colonial era in India, certain activities associated with the third gender faced significant criminalisation and stigmatisation. The introduction of rigid Victorian moral frameworks and binary gender laws by British colonial governance had a profound impact on South Asia, including India. These frameworks imposed strict societal norms that marginalised non-binary identities, effectively suppressing the cultural and social recognition of the third gender within the region. This historical context illustrates the broader implications of colonial policies on gender and sexuality, highlighting how colonial governance shaped social attitudes that persist in various forms even today. Under the Criminal Tribes Act, 1871, the colonial administration in India imposed a derogatory classification on hijra and other third gender communities, labelling them as "criminal tribes". This categorisation initiated a series of oppressive measures, including mandatory police registration and continuous surveillance. As a result, these communities faced not only arrests but also profound social exclusion, further marginalising them within society. The Act exemplified the discriminatory practices of the colonial regime, significantly affecting the lives and rights of hijra and third gender individuals.[18] Section 377 of the Indian Penal Code, 1860,[19] criminalised "carnal intercourse

[17] AMARA DAS WILHELM, TRITIYA-PRAKRITI: PEOPLE OF THE THIRD SEX (Xlibris 2003).

[18] *See Naz Foundation v. Government of NCT of Delhi*, 2010 Cri LJ 94 : 160 (2009) DLT 277, ¶ 50.

[19] The Indian Penal Code, No. 45 of 1860, INDIA CODE (1860), § 377, read: "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.–Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section." The Bharatiya Nyaya Sanhita, No. 45 of 2023, INDIA CODE (2023), which replaced the Indian Penal Code with effect from July 1, 2024, omits Section 377 and contains no direct equivalent.

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against the order of nature" and was applied to same-sex relations and to non-binary expression. This provision not only enforced legal penalties against LGBTQ+ individuals but also contributed to widespread societal stigma. The repercussions of such legal frameworks extended beyond individual persecution, significantly affecting communities by undermining their traditional livelihoods. The anti-LGBTQ+ sentiment embedded in these laws fostered an environment of discrimination and marginalisation, inhibiting the social and economic well-being of affected individuals and communities.

Under the contemporary legal and constitutional framework in India, third gender persons are gradually receiving a positive place. In *National Legal Services Authority v. Union of India*,[20] the Supreme Court of India delivered a landmark ruling recognising transgender individuals as a legal "third gender". The Court affirmed self-identification as a fundamental right under Articles 14, 15, 19 and 21, independent of medical reassignment surgery. Further, in *Navtej Singh Johar v. Union of India*,[21] the Supreme Court took a significant step by reading down Section 377, which resulted in the decriminalisation of consensual same-sex relations. This decision plays a crucial role in alleviating the direct legal threats that queer and non-binary individuals face, contributing to greater legal recognition and protection of their rights. Besides this, Parliament has enacted the Transgender Persons (Protection of Rights) Act, 2019 to prohibit discrimination in education, employment and healthcare, though implementation challenges and debates regarding its self-identification procedures persist. Further, the Bharatiya Nyaya Sanhita, 2023 (BNS) provides that the pronoun "he" and its derivatives "are used of any person, whether male, female or transgender", and that "transgender" shall have the meaning assigned to it in clause (k) of section 2 of the Transgender Persons (Protection of Rights) Act, 2019.[22] Thus the general penal law of India expressly extends to third gender persons.

III. Rights of third gender persons in international human rights law

International human rights law plays a crucial role in safeguarding the rights of third gender and transgender individuals. It does so by employing a broad interpretation of fundamental human rights treaties, which collectively secure essential rights such as equality, privacy and protection from discrimination. This comprehensive framework aims to ensure that all individuals, regardless of gender identity, experience fair treatment and respect in alignment with

[20] *NALSA*, *supra* note 12.
[21] *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321 : (2018) 10 SCC 1.
[22] The Bharatiya Nyaya Sanhita, No. 45 of 2023, India Code (2023), § 2(10) & expl.

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international human rights standards.[23] The Universal Declaration of Human Rights, 1948 (UDHR) asserts that all humans are born free and equal in dignity and rights, applicable universally without regard to sex or gender identity.[24] Article 1 of the UDHR is uncompromising in its generality of application: "All human beings are born free and equal in dignity and rights." Article 12 of the UDHR protects privacy. These Articles apply to third gender persons.

The International Covenant on Civil and Political Rights, 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) also recognise the rights of the third gender through their guarantees of gender equality. The UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights have read the ICCPR and the ICESCR as prohibiting discrimination on the grounds of sexual orientation and gender identity. This interpretation underscores the commitment of these committees to uphold and protect the rights of individuals regardless of their sexual or gender identity, reinforcing the principle of non-discrimination in international human rights law.

In 2007 (supplemented in 2017) the Yogyakarta Principles were introduced, addressing the application of international human rights law in the context of sexual orientation and gender identity. The Principles serve to establish a recognised standard regarding the right to legal gender recognition, emphasising the importance of acknowledging and protecting the rights of individuals based on their sexual orientation and gender identity. The Yogyakarta Principles are pivotal in shaping legal norms and advancing human rights for marginalised communities, offering a comprehensive guideline for states and institutions to follow in ensuring equality and non-discrimination.[25]

IV. Rights of third gender persons in countries other than India

United Kingdom law protects gender equality within its legal framework. As the Supreme Court of India summarised the position in *National Legal Services Authority*:

> "Reference in this connection may be made to the Equality Act, 2010 (UK) which has consolidated, repealed and replaced around nine different anti-discrimination legislations including the Sex Discrimination Act, 1986. The Act defines certain characteristics to be 'protected characteristics' and no one shall be discriminated or treated less favourably on grounds that the person possesses one or more of the

[23] Jatindra Kumar Das, Human Rights Law and Practice 257 (PHI Learning 2022).
[24] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, arts. 1, 12 (Dec. 10, 1948).
[25] The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Mar. 2007), https://yogyakartaprinciples.org/principles-en/; The Yogyakarta Principles plus 10 (Nov. 10, 2017).

> 'protected characteristics'. The Act also imposes duties on Public Bodies to eliminate all kinds of discrimination, harassment and victimization. Gender reassignment has been declared as one of the protected characteristics under the Act, of course, only the transsexuals i.e. those who are proposing to undergo, is undergoing or has undergone the process of the gender reassignment are protected under the Act."[26]

Transgender rights in the United States (US) exist within a complex framework shaped by a mixture of federal court rulings, executive actions and varying state laws. These elements interact dynamically, resulting in significant variations in rights and protections for transgender individuals across different jurisdictions. Legal battles have intensified over the years, with courts interpreting federal civil rights laws,[27] such as Title VII of the Civil Rights Act,[28] to include protections against discrimination based on gender identity. Executive orders from various administrations have also played crucial roles, influencing policies related to healthcare, military service and access to facilities. At the state level, laws can differ significantly, reflecting a range of attitudes towards transgender rights, from progressive protections to restrictive measures. This evolving landscape underscores the need for ongoing legal advocacy and public awareness to support the rights and dignity of transgender individuals in the US.

In Australia, transgender persons are protected under both federal and State or Territory law, although the procedure for legal recognition of gender differs from one jurisdiction to another.[29] Bolivia's Constitution of 2009 expressly prohibits discrimination on the grounds of sexual orientation and gender identity, a constitutional guarantee that few countries provide.[30] Finland's legislation on sexual and gender minorities is regarded as among the most developed in Europe; same-sex relationships between men and between women are lawful, and since April 2023 legal recognition of gender has rested on self-determination rather than on medical examination.[31]

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[26] *NALSA*, *supra* note 12, ¶ 35.
[27] *See, e.g.*, *Bostock v. Clayton County*, 590 U.S. 644, 140 S. Ct. 1731 (2020).
[28] Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to 2000e-17. As construed in *Bostock*, *supra* note 27, Title VII protects transgender employees from dismissal and workplace discrimination based on gender identity.
[29] AJAY MAJUMDER & RABIN TARAFDER, A SCIENTIFIC ASPECT OF TRANSGENDERS 239–266 (Notion Press 2019) [hereinafter Majumder & Tarafder]; *see also* Sex Discrimination Act 1984 (Cth) s 5B (Austl.), inserted by the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (Cth).
[30] CONSTITUCIÓN POLÍTICA DEL ESTADO [Constitution] Feb. 7, 2009, art. 14(II) (Bol.); Majumder & Tarafder, *supra* note 29, at 239–266.
[31] Majumder & Tarafder, *supra* note 29, at 239–266; Press Release, MINISTRY OF SOCIAL AFFAIRS AND HEALTH (Fin.), *Act on Legal Recognition of Gender Enters into Force on 3 April 2023* (Mar. 3, 2023), https://valtioneuvosto.fi/en/-/1271139/act-on-legal-recognition-of-gender-enters-into-force-on-3-april-2023.

V. Rights of third gender persons in India and the role of the judiciary

The rights of third gender or transgender persons in India are located in the Constitution of India, which guarantees them equality, dignity and protection against discrimination. Specifically, Articles 14, 15, 19 and 21 serve as the legal foundations for these rights. Article 14 ensures equality before the law, Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth, Article 19 grants the freedom of expression, and Article 21 safeguards the right to life and personal liberty. Collectively, these provisions establish a framework aimed at promoting and protecting the rights of transgender individuals in India, affirming their status as equal citizens with inherent human dignity.[32]

The Transgender Persons (Protection of Rights) Act, 2019 established formal protections for transgender individuals, specifically addressing discrimination in key areas such as education, employment and healthcare. Additionally, the Act as enacted provided a legal framework that recognised self-perceived gender identity and outlined procedures for identity certification, thereby affirming the rights and dignity of transgender persons in society.[33] However, the 2019 Act has been widely criticised, particularly regarding bodily autonomy, medical certification and the lack of comprehensive welfare provisions. Key criticisms of the 2019 Act include the violation of self-perceived identity, as it mandated individuals to obtain a District Magistrate's certificate for recognition, undermining self-determination. The certification process was criticised for infringing privacy rights under the Constitution, imposing an undue burden on transgender individuals not faced by cisgender persons. Furthermore, the Act lacked provisions for affirmative action, such as reservations in education and employment, which raised concerns about equality. Critics also highlighted disproportionate penalties for abuse against transgender individuals, suggesting leniency compared with similar offences against cisgender women. Additionally, the Act conflated transgender and intersex identities, failing to recognise the diversity of the community, and was passed without sufficient consultation with grassroots organisations. Several of these provisions have since been altered by the Transgender Persons (Protection of Rights) Amendment Act, 2026, which substituted the definition in section 2(k), omitted section 4(2), amended sections 6 and 7 and substituted section 18.[34]

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[32] India Const. arts. 14, 15, 19, 21; *see* National Human Rights Commission & Kerala Development Society, Study on Human Rights of Transgender as a Third Gender (2017).

[33] 2019 Act, *supra* note 8, §§ 3, 4(2), 5–7, as enacted.

[34] 2026 Amendment Act, *supra* note 8, §§ 2(iv), 3, 4, 5, 7. The Act received the assent of the President on March 30, 2026 (Gazette of India, Extraordinary, pt. II, § 1, No. 8, Mar. 30, 2026) and was brought into force on May 25, 2026 by Ministry of Social Justice and Empowerment Notification S.O. 2620(E) (May 22, 2026).

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The Indian judiciary has been essential in establishing, safeguarding and promoting the rights of transgender individuals in India. It acts as a vital link between the constitutional guarantees afforded to these persons and the legislative measures implemented to realise those rights. This role underscores the judiciary's capacity not only to interpret laws but also to address gaps in legislative action concerning the rights of marginalised communities, ensuring that the promises enshrined in the Constitution are effectively translated into actionable and protective frameworks for transgender persons. In this context, in *National Legal Services Authority v. Union of India*,[35] the Supreme Court elaborately discussed the scope and ambit of the rights of transgender persons. But the principles laid down in this case by the Court conflict with the 2019 Act.

VI. Conclusion and Suggestions

Transgender and third gender rights in India are established within a multifaceted legal context that comprises several pivotal legislations. The landmark Supreme Court ruling of 2014, known as the *NALSA* verdict,[36] recognised the fundamental rights of transgender individuals, affirming their existence and their right to self-identification. This ruling laid a foundational framework for subsequent legislative action. Further, the Transgender Persons (Protection of Rights) Act enacted in 2019 legally enshrined these rights, aiming to protect transgender persons from discrimination and to promote their welfare in various spheres of life, including education, employment and healthcare. However, the legal landscape has become more complex with the Transgender Persons (Protection of Rights) Amendment Act, 2026, which received the assent of the President on 30 March 2026 and came into force on 25 May 2026.[37] The amendment introduces a medical board, termed the "authority", whose recommendation the District Magistrate must examine before issuing a certificate of identity, raising concerns about privacy and autonomy for transgender individuals. Critics argue that this could reinforce stigmatisation and hinder access to rights, thereby complicating the experiences of transgender and third gender people in India. In short, the interplay of these legal decisions and reforms reflects an evolving but contentious approach towards the rights of transgender and third gender individuals in the nation, marked by a tension between recognition and regulatory oversight.

The following recommendations are aimed at improving legal recognition and protection for transgender individuals. First, self-identification should be restored by aligning legal

[35] *NALSA*, *supra* note 12.
[36] *NALSA*, *supra* note 12.
[37] 2026 Amendment Act, *supra* note 8, §§ 2(ii), 4(a) (inserting the definition of "authority" as a medical board headed by a Chief Medical Officer or Deputy Chief Medical Officer, and requiring the District Magistrate to examine its recommendation under section 6(1) of the 2019 Act); *see also supra* note 34.

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recognition with the 2014 *NALSA* ruling, specifically by eliminating the requirement of mandatory medical board approval and clinical gatekeeping. Second, the legal definition of transgender persons should be broadened to encompass all non-binary persons, trans men and trans women, thereby avoiding restrictions based on traditional socio-cultural identities. Third, anti-discrimination enforcement should be strengthened by establishing independent grievance redressal cells in workplaces, educational institutions and hospitals to address and penalise instances of harassment. Lastly, grassroots consultation is essential: community leaders and transgender advocates should be engaged directly before any policy or legislative change is implemented. This comprehensive approach aims to foster an inclusive and supportive environment for the transgender community.

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