

Legal recognition, Social Exclusion: Rethinking the Third Gender Framework in Post-NALSA India

Kiran Bedi¹ Dr. Supriti²

¹Research Scholar, Department of Sociology,

Maharishi Dayanand University, Rohtak-124001. (Haryana)

Email Id: kinnubedi007@gmail.com

²Professor, Department of Sociology,

Maharishi Dayanand University, Rohtak-124001. (Haryana)

Email Id: supritisocio@gmail.com

Submitted 25, January, 2025 Acceptance 20, February 2025

Abstract

This conceptual paper critically examined the incoherence between legal recognition and social inclusion of Third Gender individuals in post-NALSA India, using Haryana as a case study. The study interrogated the paradox of recognition how state sanctioned identities failed to translate into meaningful access to welfare, employment, education, and healthcare. It highlighted the symbolic power of Third gender category and explored traditional cultural spaces, such as *deras* and *guru-chela* hierarchies there. *Deras* offer nominal acceptance and reinforce internal exclusion and reliance on precarious livelihoods. By situating the Third gender within broader structures of state the paper called for recalibrated framework of inclusion that move beyond identity recognition and toward institutional integration. The study drew selective international comparisons to provide context for India's trajectory. In conclusion, the paper offered a reconsidered conceptual pathway for policy and academic discourse. It urged future scholarship to foreground social justice, material equity, and cultural transformation alongside legal recognition.

Keywords: Third Gender, social exclusion, cultural marginalization, legal recognition, Haryana

Legal recognition, Social Exclusion: Rethinking the Third Gender Framework in Post-NALSA India

Introduction

The recognition of gender diversity in India's legal framework, particularly following the National Legal Services Authority v. Union of India (Supreme Court, 2014) marked a significant step toward institutional inclusion of transgender and Third Gender individuals. The judgement recognized the

rightly to self-identity as a Third gender. The verdict also mandated that central and state governments ensure their inclusion in welfare, education, healthcare, and employment systems. Despite this legal breakthrough and subsequent legislation such as the Transgender Persons (Protection of Rights) Act, 2019, considerable evidence suggests that social acceptance and material inclusion remain elusive (Hines, 2020; Dutta, 2021). The paradox between legal recognition and lived exclusion has been seen in the society. This progressive ruling has not been matched by a corresponding shift in societal attitudes or institutional practice. Transgender or Third Gender individuals continued to experience marginalization, stigma, and systemic exclusion. This raises the important questions about the effectiveness of institutional recognition in transforming deeply entrenched socio-cultural attitudes.

Historically, Indian society has acknowledged gender fluidity and diversity through deeply rooted cultural and religious traditions. Ancient Hindu scriptures such as the *Mahabhart*, *Ramayana*, *Kamashashtra* referred to *Tritiya Prakriti* or third nature, a category that acknowledged identities beyond the male-female binary (Wilhelm, 2008; Vanita & Kidwai, 2000). Figures such as *Shikhandi*, *Ardhnarishvara*, and *Brihannala* symbolized this inclusive understanding of gender in classical literature and mythological narratives. Third gender individuals were also visible in public as temple dancers, courtiers, spiritual guides and ritual specialists occupying revered positions in Vedic and medieval Indian society (Pattanaik, 2014).

This tradition of inclusion, however, was disrupted during the colonial period. British administrators imposed Victorian gender norms and criminalized non-normative gender expressions through instruments like the Criminal Tribes Act (1871) and Section 377 of the Indian Penal Code (Hinchy, 2019). These colonial interventions marginalized the *hijra* or Third Gender community. They erased indigenous frameworks that had once recognized and legitimized their social roles. Although Section 377 was read down in 2018, and the Transgender Persons (Protection of Rights) Act was passed in 2019, the legacy of colonial moral regulation still influenced administrative and social practices.

Theoretically, this study has drawn from three complementary traditions. First, SEKN (social Exclusion Knowledge Network) model, particularly as framed by Popay et al., (2008), allowed for multidimensional understanding of marginalization. This highlighted how legal visibility does not automatically translate into social or economic inclusion. This model enabled understanding how

third gender individuals are pushed to the margins not only by individual prejudice but also by structural barriers. Second, gender is performative, proposed by Butler (1990) provided a critical lens which helped in analyzing the institutional efforts to categorize gender. The notion that gender is performative rather than innate challenged the social construction of gender (Butler, 1990).

Additionally, this paper is informed by postcolonial theory (Said, 1978), which offered insights into the historical and structural causes of exclusion, exposing how colonial legal regimes and postcolonial state apparatuses continued to inform gender governance in India. The present study tried to conceptually bridge law, culture, and lived experience within a regional context. Third Gender individuals remained subject of exclusionary practices, bureaucratic barriers, and inconsistent implementation across states (Dutta, 2021; Roy, 2019). Even where rights are formally granted, the lack of structural changes in institutions education, healthcare, workplaces, and welfare systems undermine meaningful inclusion. What resulted in an inclusion paradox where the state recognized identity without transforming the systems that produce marginalization.

While much has been written about the legal advancements in transgender rights in India. There is relatively limited conceptual work that critically examined the tension between recognition and redistribution, between legal visibility and socioeconomic justice. This study offered a conceptual intervention that connected the progressive laws with broader sociological and philosophical critiques of recognition-based politics. It is based on existing literature and policy discourse to illuminate how symbolic inclusion can be a tool of both empowerment and erasure, depending on the structures within which it operates.

Objectives:

1. To critically examine how the legal recognition of Third gender identities in India operates within broader structures of social exclusion and gender regulation
2. To conceptually analyse the contradictions between symbolic inclusion through law and the persistent cultural and institutional marginalization

Methodology

This paper adopted a conceptual and interpretive approach to explore the tensions between legal recognition and persistent marginalization of Third Gender individuals in India. The methodology

is grounded in a qualitative textual analysis of existing literature, legal documents, policy frameworks, and scholarly interpretations within the fields of sociology, gender studies, and postcolonial theory. This design is consistent with theoretical inquiry in the social sciences, where the objective is to develop a deeper understanding of socio-legal phenomenon by critically engaging with historical with historical narratives, normative frameworks, and discursive constructions (Yanow & Schwartz-Shea, 2006).

This study extracted extensively from interdisciplinary secondary sources, including landmark legal judgement such as NALSA v Union of India (2014), the Transgender Persons (Protection of Rights) Act (2019), and government policy documents, alongside peer-reviewed literature in sociology, anthropology, history, feminist theory, and queer studies. These texts were selected purposively based on their relevance to the research objectives and their importance in shaping academic discourse on Third Gender rights. A thematic analysis of the secondary data was conducted to identify conceptual patterns, contradictions, and gaps within prevailing frameworks of inclusion and exclusion.

The methodology is rooted in constructivist epistemology. Recognizing that identities, institutions, and legal categories are socially constructed and contextually produced (Berger & Luckman, 1966). This epistemological orientation enabled a critical reading about Third gender identity. Which has been constituted through layers of cultural, legal, and colonial discourse, rather than treating it as a fixed or biologically determined identity. By employing theoretical triangulation, the paper brought together three intersecting frameworks SEKN model (Popay et al., 2008), gender performativity (Butler, 1990), and postcolonial critique to analyse the complexity between law, identity and social justice.

Conceptual Analysis: The Paradox of Legal Recognition and Lived Exclusion

The legal recognition of Third Gender in India has been the most progressive constitutional development. It was remarkable for its articulation of self-identification, dignity, and non-discrimination. However, the ground reality of implications of this recognition have revealed a critical contradiction. While the state has granted legal visibility to the Third Gender individuals that recognition has largely remained symbolic, with limited transformative impact on the lived

social, economic, and institutional experiences of the community (Roy, 2019; Misra, 2020). This paradox is at the heart of contemporary debates on transgender rights in India.

Using the lens of SEKN (Social Exclusion Knowledge Network) model, as outlined by Popay et al., (2008), it became evident that legal inclusion alone does not automatically pull apart the structural and cultural forces that sustain exclusion. Applying this framework, it could be observed that systemic barriers embedded in healthcare, education, employment, and housing policies continued to exclude them in practice. Numerous reports indicated that Third Gender community faced high level of unemployment, harassment in schools and hospitals and discrimination in accessing social welfare benefits (Panda, 2022; Human Rights Watch, 2022).

The Transgender persons (Protection of rights) Act, (2019), was intended to implement the NALSA judgement (Supreme Court, 2014) by laying down mechanisms for anti-discrimination, access to identity documents, and welfare schemes. However, Its implementation has been widely criticized for creating bureaucratic hurdles and reinforcing medical gatekeeping. The requirement for a district magistrate issued certificate for legal gender change contradicts the NALSA judgement's emphasis on self-identification and has been viewed by activists as regressive move (Sampoorna, 2020). The very process of being recognized by the state becomes another site of exclusion, filtering who is deemed to be authentic enough to claim the rights.

From the perspective of gender performativity, this contradiction is not surprising. Butler (1990) argued that gender identities are not innate or fixed but are constructed through repeated social performances governed by cultural norms. When the state attempted to fix a gender identity through law whether male, female or Third gender; they institutionalized the category that may not reflect the lived, fluid experiences of gender diverse individuals. Rather than expanding gender freedom, the legal recognition of the Third Gender risks becoming a mechanism of regulation, where recognition is granted only to those who conform to the bureaucratic imagination of what Third gender person should be.

In the Indian context, the Third Gender category is not a neutral administrative tool but it is the one rooted in colonial and postcolonial histories. During British Rule, the *hijra* community was criminalized under the Criminal Tribes Act of 1871, labelled as habitually unnatural and placed under state surveillance (Hinchy, 2019). Post-independence laws retained many of these colonial attitudes. Although Section 377 has now been read down, and Third gender or transgender rights

are formally acknowledged. The state still governed gender through moralistic, biomedical, and legalist framework. This postcolonial legacy helped explain why formal recognition does not necessarily abolished discrimination and stigma and enable empowerment.

One of the clearest manifestations of this gap is the question of livelihoods. Across India, Third Gender individuals are often excluded from formal employment. This is because educational marginalization, lack of documentation, and social prejudice. As a result, many are pushed into informal economies, including begging, prostitution, and ritual performance, which are often stigmatized (Hossain, 2017). While welfare schemes have been announced under the Ministry of Social Justice and Empowerment, their implementation remained erratic, with small population of Third gender or transgender community are aware of or able to access the (Prajnya, 2021). The formal state apparatus thus became complicit in maintaining the very exclusions.

Culturally, the presence of Third Gender or transgender community has long been recognized in the Indian society, particularly through *hijra* tradition. However, their cultural visibility has not translated into social legitimacy. Instead, hijras, are often tolerated as ritual figures during childbirths and weddings otherwise remained marginalized in everyday social and civic life. This phenomenon aligned with distinction between recognition and redistribution, where symbolic visibility without economic justice does not constitute meaningful inclusion (Fraser, 1995).

Moreover, NALSA judgement (Supreme Court, 2014) affirmed the right of individuals to self-identify as male, female, or Third Gender. Its implementation through state and bureaucratic channels has tended to homogenize the transgender community under the legal category of Third Gender. This administrative simplification often ignored the internal diversity of gender identities, expressions, and experiences. For instance, persons assigned female at the time of birth who identify as transmasculine, genderqueer, or nonbinary frequently find themselves excluded from documentation frameworks and policy benefits (Ghosh, 2020). This kind of exclusion is administrative violence as Spade (2011) noted where state policies intended to empower, but mistakenly reinforce exclusion by narrowly defining who is qualified for recognition.

Internationally, other countries have experimented with different models of recognition. The Gender Identity Law of Argentina which came in 2012 is frequently cited as one of the most progressive. This allows for gender self-identification without medical or judicial approval and ensuring access to healthcare and legal documentation (Corrales, 2015). In contrast, according to studies India's

approach remain trapped in an ambivalent space which is legally inclusive but different institutions like education, healthcare, employment, and administration is still struggling to understand the gender diverse people and their needs.

It is also important to interrogate the narrative of state benevolence that often-underlined legal reforms. The progressive judgements are groundbreaking framed within the constitutional discourse of dignity and equality. However, there is limited attention has been given to the lived and structural forms of oppression faced by gender diverse individuals, As Puar (2007) warned legal recognition can function as a form of homonationalism, where certain queer bodies are included into the fold of citizenship in ways that depoliticize their struggles and obscure systemic violence.

In conclusion, the Indian legal recognition of Third Gender identities is symbolically powerful but did not lead to structural transformation. Theoretical engagement revealed that recognition without redistribution, visibility without access, and identity without autonomy reproduce exclusion in new ways. This conceptual analysis urges a rethinking of inclusion not as a one-time legal act but as an ongoing socio-political process that must address both symbolic and material dimensions of justice.

Conclusion

This paper has critically analysed the dissonance between legal recognition of Third gender identities in India. Despite legal recognition they are facing systemic barriers in the society. Drawing upon the SEKN (Social Exclusion Knowledge Network) model (Popay et al., 2008), gender performativity (Butler, 1990), and postcolonial critique (Said 1978, Hinchy, 2019), it has been established that legal visibility alone is not sufficient to effect substantive change in social, economic, and cultural inclusion. The state-driven effort to include Third Gender community rhetorically collapses individuality into a homogenised category often labelled Third Gender which may be administratively convenient but socially reductive.

The social exclusion framework demonstrated how exclusion persisted across multiple dimensions despite legal reforms. While Third Gender individuals may now self-identify without criminal repercussions, systemic barriers are still enduring. The concept of gender performativity by Butler (1990) revealed that the legal codification of Third Gender created a prescriptive norm in which transgender identities must conform. This bureaucratic recognition, reaffirm regulatory power rather than liberation. Postcolonial analysis unveiled the legacy of colonial gender policing. This showed

that present-day legal frameworks retain colonial logics of moral order. However, it must be reimagined to respect indigenous gender diversity (Hinchy, 2019; Pattanaik, 2014).

In synthesizing these theoretical perspectives, this paper argued that in India transgender inclusion still need some legal refinements. Previous legal reforms are undoubtedly remarkable but symbolic recognition without structural transformation is big issue in front of this community. This tension illustrated deeper paradox rights are formally recognized but implementation remained controlled, mediated and contingent. The critical conceptual contribution of this paper lies in advancing an analytic model of symbolic inclusion versus structural entitlement. Symbolic inclusion granted identity recognition without empowering individuals to enact their lived identities. Their recognition needed structural entitlements and cultural transformation. This underscored the urgency of rethinking legal policies and politics as integral to broader processes of social justice, gender equity, and postcolonial reparation.

Suggestions

The theoretical critique and conceptual insights developed in this paper, a shift from symbolic legal recognition to genuine inclusion for Third gender and transgender individuals in India required a rethinking of policy, law, institutional behaviour, and knowledge systems. First, structural reform within the welfare architecture is essential. Policies must transcend the current reliance on identity documentation and bureaucratic classification and focus on enabling basic public services irrespective of gender identity and or administrative status (Panda, 2022). Inter-departmental coordination is necessary to streamline service delivery and eliminate redundancies and contradictions between central and state level welfare frameworks. Recognition of identity should serve as a gateway to rights, not a tool for surveillance or exclusion.

There is an urgent need to decolonize institutional and epistemological frameworks that continue to view gender through rigid binaries inherited from colonial law. A postcolonial lens demands an intentional departure from criminal law rooted interpretations of non-normative gender. It calls for the inclusion of indigenous South Asian understandings of gender plurality. Institutions, including those involved in legal adjudication, public administration, and medical gatekeeping, must non-Western histories of gender diversity and move toward culturally grounded and flexible systems of recognition. Public curricula, teacher training, and bureaucratic education should be redesigned to

reflect a historically accurate and culturally diverse understanding of gender. This will help sensitize public servants, educators, and law enforcers to the lived realities of gender diverse individuals.

Legal recognition must be complemented by economic inclusion and the right to livelihood. Social protection framework should explicitly guarantee access to land, housing schemes, entrepreneurship, vocational training, and financial credit for transgender persons, including targeted outreach in rural and semi-urban areas. Redistribution should not be an afterthought but an integral dimension of inclusion. Pilot projects developed in collaboration with community-based organisations offering micro credit schemes, health insurance, and job placement assistance can be scaled nationally, with robust monitoring and evaluation systems to ensure adaptability to local contexts.

It is necessary to redefine the legal vocabulary of recognition beyond the administratively decided Third Gender or transgender label. Many individuals who identify as transmasculine, transfeminine, non-binary, genderqueer, or genderfluid often experience erasure within formal identity system. The administrative homogenization flattens the lived diversity of gender identities (Ghosh, 2020). Legal instruments must be restructured to reflect this diversity, ensuring that state systems validate and affirm various self-identifications. Streamlining procedures for changing gender markers in official documents without harassment, delay or stigma is central to this reform.

Marginalised gender groups must not remain passive recipients of state policies but should be empowered as co-creators of knowledge and policies. Academic institutions have a role to play facilitating community-engaged research, offering platforms for transgender voices, and reconfiguring institutional ethics to respect and recognize the epistemic authority of those with lived experience. Such partnerships will enrich both scholarship and policy. Finally, legal landscapes of India have distinct postcolonial features. It can draw from other jurisdictions where the principle of self-identification, devolved community power, and broad social protection underpin transgender rights framework (Corrales, 2015). Conversely, India's indigenous experiences and regional complexities can contribute to global discourse on gender nonconformity beyond Western paradigms. The development of comparative indices that measure both symbolic and material dimensions of inclusion could help assess the effectiveness of gender policies and ensure that recognition is matched by redistribution and respect.

While this conceptual paper offered a grounded theoretical framework for understanding the post-NALSA transgender rights landscape in India. It is also necessary to acknowledge its methodological and analytical limitations. The most prominent limitation is the absence of empirical data. The paper draws solely from secondary sources, legal texts, and published academic literature, without incorporating fresh fieldwork or quantitative analysis. This restricts the capacity of paper to capture the nuanced, everyday experiences of individuals across diverse geographical, linguistic, caste, and community locations. Future empirical research both qualitative and mixed-method will be essential to test and refine the conceptual claims advanced here.

Another limitation relates to the generalisation of the Indian context. While this paper references national legal frameworks and policy discourse, it does not sufficiently account for the variability in implementation across Indian states and union territories. Cultural attitudes toward transgender persons, administrative practices, and even legal responsiveness vary widely. In some regions, transgender communities may have institutional visibility and historical legitimacy (e.g., Tamil Nadu or Kerala), while in others they remain marginal or actively persecuted. This paper's national framing, therefore, risks obscuring regional complexities that may challenge or support its broader claims. Subsequent research should prioritise state-level case studies and community-specific analyses.

References

- Berger, P. L., & Luckmann, T. (1966). *The social construction of reality: A treatise in the sociology of knowledge*. Anchor Books.
- Butler, J. (1990). *Gender trouble: Feminism and the subversion of identity*. Routledge.
- Corrales, J. (2015). LGBT rights and representation in Latin America and the Caribbean. *The Wilson Center*. <https://www.wilsoncenter.org/publication/lgbt-rights-and-representation-latin-america-and-the-caribbean>
- Dutta, A. (2021). *Transgender histories, rights and activism in India: Texts and contexts*. Springer.
- Fraser, N. (1995). From redistribution to recognition? *New Left Review*, 212, 68–93.

Ghosh, A. (2020). Transmasculinity in India: Between visibility and invisibility. *South Asia: Journal of South Asian Studies*, 43(2), 265–282. <https://doi.org/10.1080/00856401.2020.1731440>

Hinchy, J. (2019). *Governing gender and sexuality in colonial India: The hijra, c.1850–1900*. Cambridge University Press.

Hines, S. (2020). *The feminist frontier: On trans and feminism*. *Journal of Gender Studies*, 29(2), 135–147. <https://doi.org/10.1080/09589236.2019.1609694>

Hossain, A. (2017). The paradox of recognition: Hijra, third gender and sexual rights in Bangladesh. *Culture, Health & Sexuality*, 19(12), 1418–1431. <https://doi.org/10.1080/13691058.2017.1317831>

Human Rights Watch. (2022). *India: Uphold rights of transgender people*. <https://www.hrw.org/news/2022/04/04/india-uphold-rights-transgender-people>

Misra, G. (2020). Trans rights in India: Between progressive laws and punitive realities. *Indian Journal of Gender Studies*, 27(1), 135–145. <https://doi.org/10.1177/0971521520903475>

Panda, S. (2022). Between inclusion and exclusion: Challenges of transgender persons in accessing welfare. *Economic and Political Weekly*, 57(13), 42–49.

Pattanaik, D. (2014). *Shikhandi and other tales they don't tell you*. Penguin Books India.

Popay, J., Escorel, S., Hernández, M., Johnston, H., Mathieson, J., & Rispel, L. (2008). *Understanding and tackling social exclusion: Final report to the WHO Commission on Social Determinants of Health*. WHO Social Exclusion Knowledge Network. <https://cdn.who.int/media/docs/default-source/social-determinants-of-health/social-exclusion-finalreport.pdf>

Prajnya. (2021). *Policy brief on transgender inclusion in India*. The Prajnya Trust. <https://www.prajnya.in>

Puar, J. K. (2007). *Terrorist assemblages: Homonationalism in queer times*. Duke University Press.

Roy, A. (2019). The margins speak: Gender nonconformity and the Indian legal system. *Economic and Political Weekly*, 54(44), 23–27.

Said, E. W. (1978). *Orientalism*. Pantheon Books.

Sampoorna. (2020). *Statement on the 2019 Transgender Rights Act*. <https://sampoornaindiablog.wordpress.com/2020/01/09/statement-on-the-2019-transgender-rights-act/>

Spade, D. (2011). *Normal life: Administrative violence, critical trans politics, and the limits of law*. South End Press.

Supreme Court of India. (2014). *National Legal Services Authority v. Union of India*, Writ Petition (Civil) No. 400 of 2012. https://main.sci.gov.in/pdf/SupremeCourtReport/2014_v5_pi.pdf

Vanita, R., & Kidwai, S. (Eds.). (2000). *Same-sex love in India: Readings from literature and history*. Palgrave.

Wilhelm, A. (2008). *Tritiya-Prakriti*. Xlibris Corporation

Yanow, D., & Schwartz-Shea, P. (Eds.). (2006). *Interpretation and method: Empirical research methods and the interpretive turn*. M.E. Sharpe.