

Challenges to Legal Protection of Third Gender Individuals

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ABSTRACT

As society becomes more inclusive and acknowledges the diverse identities of individuals, it is crucial that legal systems recognize and respect the rights of individuals who do not neatly fit into traditional binary gender categories. Many countries worldwide have taken significant steps towards recognizing the legal rights of individuals who identify as a third gender or non-binary. International human rights standards, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Yogyakarta Principles, emphasize the fundamental principles of equality, non-discrimination, and respect for the inherent dignity of every individual. These standards provide a solid foundation for affirming the rights of individuals to self-identify their gender and be legally recognized accordingly. Legal recognition of a third gender ensures that individuals are not forced to conform to gender norms that do not align with their identity. It allows them to live authentic lives, free from discrimination, and fully participate in society on an equal footing. Furthermore, legal recognition ensures access to essential services such as healthcare, education, employment, and social security, which should be available to all individuals without any form of discrimination. Several countries have already taken progressive steps towards recognizing a third gender. Germany, Australia, India, Nepal, Canada, and Argentina are some examples of nations that have implemented legislation or court rulings to legally recognize individuals who identify outside the traditional gender binary.

By embracing legal recognition of a third gender, we demonstrate our commitment to upholding fundamental human rights and fostering inclusive societies. It is an opportunity to create a more just and equitable environment where all individuals can exercise their rights and contribute to the betterment of our communities. I kindly urge you to consider supporting and advocating for the legal recognition of a third gender in line with international human rights standards. This can be achieved through legislative reforms, policy changes, and public awareness campaigns that promote equality and respect for individuals of all gender identities. The concept of a third gender refers to individuals who do not identify as exclusively male or female but rather as a gender beyond the binary. This paper examines the legal landscape surrounding the recognition and rights of third gender individuals, analyzes the obstacles they encounter within legal frameworks, and proposes potential strategies to overcome these challenges.

1. Introduction:

The concept of the third gender has deep historical and cultural roots in various societies around the world, often reflecting complex understandings of gender that transcend the binary categorization of male and female. In many cultures, individuals who identify as third gender have been recognized and revered for their unique roles, contributing to social, spiritual, and cultural practices. Historically, several societies, including Indigenous cultures in North America, hijras in South Asia, and Two-Spirit individuals, have long acknowledged the existence of people who embody gender identities beyond the traditional binary. These identities were often integral to religious and cultural practices, serving as shamans, caretakers, or mediators between genders. Many terms for non-heterosexual gender existed in Sanskrit, Prakrit, and Tamil in ancient India, including napunsaka, kliba, kinnara, kimpurush, ubhaylingi, eunuch, pedi, and pandaka. These kinds of words can be found in the Vedas, itihasa, purana, dharma-shastra, kama-shastra, naytya-shastra, ayurveda, and Manusmriti of the Hindus, as well as in Buddhist pitakas and Jain agamas. The community of transgender people includes Hijras, eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shaktis, and others.

Eunuchs date back to the ninth century BC. The Arabic word that means "impotent ones" is where the term "Hijra" originates. Those who identify as "neither man nor woman," "kinnar" a Sanskrit term, or "third gender" a contemporary phrase are referred to as hijra in Indian contexts.

Vedic and puranic literature has also included the concept of Tritiya, prakrti, or napunsaka. The lack of capacity for reproduction has been referred to as "napunsaka." In the epic Ramayana, as Lord Rama is departing for the wilderness after a 14-year banishment from the kingdom, he turns to face his people and requests that they all return to the city. Only the hijras among his followers choose to stick with him since they do not feel constrained by this direction. Impressed by their dedication, Rama grants them the authority to bless people on auspicious occasions such as births and marriage, as well as at inaugural functions that are thought to have established the foundation for the badhai ritual, in which hijras dance, sing, and bestow blessings. Epics featuring non-divine individuals also feature transvestism and gender transitions. One such person is the Mahabharata character Shikhandi. He was first born as Shikhandini, a female, to Panchala's king Drupada. Recognising him as Amba reincarnated, Bhishma declined to battle 'a lady' during the Kurukshetra war. As a result, in order to overcome the nearly unbeatable Bhishma, Arjuna hides behind Shikhandi. Jain texts also provide a thorough allusion to TG, mentioning the notion of "psychological sex." In the Islamic world's royal courts, particularly during the Ottoman and Mughal eras in mediaeval India, hijras were also highly influential.

The transgender community was given a high position in Vedic period and Mughal period but faced many problems obstacles in British colonial rules. But now to safeguard the transgender communities because there are many policy and schemes implemented by the government. Through this social-economic status of the transgender community will be developed.¹

However, the recognition and rights of third-gender individuals have faced significant challenges, particularly in contemporary legal frameworks. Many nations grapple with discussing and integrating third-gender identities into their legal systems, leading to important questions about

¹ LABIA, (2013) Breaking the Binary: Understanding concerns and realities of queer persons assigned gender female at birth across a spectrum of lived gender identities, Mumbai: LABIA

citizenship, rights, and identity. The phrases "cisgender" and "transgender" can be used to describe gender categories. Man / male or woman / female are popular terms used to describe the cisgender category, which is rendered as cis man and cis woman.

However, when a person chooses a gender different than the one that was biologically assigned to them, they express this gender through a variety of names and identity phrases, most of which are classified as transgender. Gender violations are also referred to by a number of regional terms and identities in India. Some of these terms, like "Hijras" and "Jogtas," may also have particular sociocultural religious meanings.

2. National Legal Frameworks:

In India, the recognition of a third gender is supported by both legal frameworks and policy measures aimed at ensuring the rights and dignity of transgender and non-binary individuals. Below is a summary of the main components involved,

National Legal Recognition

The Indian Constitution provides a foundation for the protection of rights for all citizens, including transgender individuals. The fundamental rights guaranteed under:

Article 14: Right to equality, ensuring that all individuals are treated equally before the law.

Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth, which has been interpreted to include sexual orientation and gender identity.

Article 19: Right to freedom of speech and expression, allowing transgender individuals to articulate their identities and rights.

Article 21: Right to life and personal liberty, which extends to the right to live with dignity.

In the landmark judgment by the Supreme Court of India, *National Legal Services Authority v. Union of India*², the court recognized transgender people as a third gender. The ruling affirmed that the fundamental rights of the Indian Constitution apply equally to transgender people and gave them the right to self-identify their gender. The NALSA judgment mandated the government to treat transgender people as socially and economically backward classes, providing them with reservations in educational institutions and public employment as per the recommendations for other socially and educationally backward classes. The court also directed the government to create awareness to reduce stigma and to provide essential healthcare services. In, *Navtej Singh Johar v. Union of India*³, Although primarily about decriminalizing homosexuality, this judgment emphasized the need for inclusivity and the protection of LGBTQ+ rights, influencing the discourse around transgender rights. The Supreme Court of India, in *K.S. Puttaswamy v. Union of India*⁴, confirmed that the right to privacy was a fundamental right under Article 21 of the Constitution of India, and further, that the protection of the right. The Constitution of India, as a living document, must keep pace with societal evolution.⁵

The Transgender Persons (Protection of Rights) Act, 2019

The Act prohibits discrimination against transgender individuals in various areas, including employment, education, healthcare, and access to public spaces.

It allows self-perceived identity of gender with the requirement of a certificate from a District Magistrate for legal recognition of a change in gender to male, female, or transgender. Individuals have the right to declare their gender identity and be recognized accordingly. Transgender

² National Legal Services Authority v. Union of India, (2014) 5 SCC 438

³ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

⁴ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1

⁵ Chief Justice of Andhra Pradesh v. L.V.A. Dixitulu, (1979) 2 SCC 34.

individuals can legally change their gender in official documents, including birth certificates and passports. Transgender individuals have the right to inherit property and own assets. The Act mandates the provision of healthcare services, including hormone therapy and gender-affirming surgeries, to transgender individuals. The Act establishes the right to residence and offers a framework for social welfare measures. The Act establishes National and State Transgender Welfare Boards to oversee the implementation of the Act and address the needs of the transgender community. Some states in India have their policies or welfare schemes to support transgender communities, including housing, pensions, and skill development programs. Overall, while India has made significant strides in legally recognizing a third gender and offering protections, the focus remains on improving implementation and addressing societal stigma and discrimination.

3. International Perspectives and Standards:

The legal recognition of a third gender is increasingly seen as a crucial aspect of upholding international human rights standards. There has been a growing recognition that legal systems need to accommodate individuals who do not identify strictly as male or female.

Universal Declaration of Human Rights (UDHR): The United Nations (UN) has made significant strides in addressing the rights of transgender and non-binary individuals, through various reports, resolutions, and guidelines. These efforts reflect an increasing recognition of the rights of all individuals, regardless of gender identity or expression. Guidelines for the Inclusion of Gender Identity in National Legislation was also given by UN. These guidelines encourage states to adopt inclusive legislation that protects the rights of transgender and non-binary individuals, ensuring access to healthcare, legal recognition, and protection from violence and discrimination. Article 1 states that all human beings are born free and equal in dignity and rights. Legal recognition of a third gender seeks to uphold this principle by ensuring that all gender identities are recognized and respected.

The UN Human Rights Council has adopted several resolutions that emphasize the importance of protecting the rights of all individuals, including transgender and non-binary people. Notable resolutions include: Resolution on Human Rights, Sexual Orientation and Gender Identity: This resolution calls for states to respect and protect the human rights of LGBTQ+ individuals and addresses the violence and discrimination faced by them, including transgender and non-binary individuals. It urges states to take necessary measures to end discrimination based on sexual orientation and gender identity.

The UN High Commissioner for Human Rights has published reports focused on the rights of transgender individuals, outlining the challenges they face and recommendations for states. Key reports include:

“Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity” (2015): This report details various forms of violence and discrimination that transgender and non-binary individuals encounter worldwide and emphasizes the need for protective measures.

“The Right to Privacy in the Digital Age” (2021): This report examines the impact of technology and data collection on the privacy rights of individuals, including transgender and non-binary people, highlighting risks of discrimination and violence.

The UN has also engaged in awareness-raising campaigns to promote the understanding of transgender and non-binary issues among member states and civil society organizations.

Observance of events such as the International Day Against Homophobia, Transphobia, and Biphobia (IDAHOT) helps highlight the struggles faced by transgender and non-binary people and promotes advocacy for their rights. The UN collaborates with non-governmental organizations to improve advocacy efforts for LGBTQ+ rights at local, national, and international levels.

International Covenant on Civil and Political Rights (ICCPR): Articles 2 and 26 of the ICCPR prohibit discrimination on various grounds, including gender. Recognizing a third gender can be seen as fulfilling the obligation to prevent discrimination based on gender identity.

Yogyakarta Principles: The UN has also issued guidelines to assist member states in implementing policies that uphold the rights of transgender and non-binary individuals. Although not officially a UN document, these principles have been supported by various UN bodies and outline international legal standards on the rights of LGBTQ+ persons, focusing on issues of gender identity and expression. These are a set of principles on the application of international human rights law in relation to sexual orientation and gender identity. Principle 3 specifically addresses the recognition of each person's self-defined gender identity, advocating for legal recognition. The Yogyakarta Principles also make it abundantly evident that, although sexual orientation influences how one is perceived to be lesbian, gay, or bisexual, gender identity influences transgender people's perceptions of themselves.

In the context of 'sexual orientation' and 'gender identity' being different in concept, it is recommended that the terms 'sex' and 'gender' should not be used interchangeably (as are often used presently) and only the term 'gender' should be used in various official documents including identity documents, application forms, returns, reports, etc.⁶

Committee on the Elimination of Discrimination against Women (CEDAW): Although focusing on women's rights, CEDAW's broader gender discrimination framework can be intersected with gender identity to push for inclusive policies.

European Court of Human Rights (ECHR) and Inter-American Court of Human Rights (IACtHR): Both have delivered rulings recognizing the rights of transgender individuals, which set important precedents for the legal acknowledgment of gender diversity.

Sustainable Development Goals (SDGs): Goal 5 aims to achieve gender equality and empower all women and girls. Gender recognition laws contribute to this goal by ensuring inclusivity and equal rights.

Overall, the UN's efforts to promote the rights of transgender and non-binary individuals reflect a commitment to ensuring equality and non-discrimination based on gender identity and expression. By establishing frameworks for advocacy, protection, and accountability, the UN plays a vital role in advancing the rights of marginalized communities and fostering a more inclusive society. However, challenges remain, and ongoing efforts are necessary to translate these principles into meaningful action on the ground. Integrating a legal recognition of third gender within national laws aligns with these international human rights standards by promoting equality, dignity, and non-discrimination for all individuals, irrespective of their gender identity.

The recognition of a third gender has been an evolving issue within various regional human rights systems, prompting different initiatives and legal frameworks to address this matter. The two

⁶ The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity: http://www.yogyakartaprinciples.org/principles_en.htm.

notable systems the Council of Europe and the Inter-American Court of Human Rights plays a very important role for addressing the rights of the third gender.

4. Legal Challenges Faced by Third Gender Individuals:

Challenges remain in effectively implementing and enforcing the provisions of the Transgender Persons (Protection of Rights) Act. Despite legal recognition, transgender individuals continue to face significant social stigma and discrimination in various aspects of life. Addressing these challenges requires a coordinated approach involving government action, societal change, and sustained advocacy. Legal reforms are crucial but need to be supported by education, public awareness, and institutional changes to foster an inclusive environment for third gender individuals. Upholding the rights of third gender individuals, often referred to as non-binary, genderqueer, or transgender, involves complex challenges and requires multi-faceted implementation strategies. International human rights frameworks advocate for legal recognition of third gender individuals. They emphasize the right to self-identification and the right to be legally recognized according to one's gender identity, without being forced into binary classification as male or female. While the legal framework is progressive, there have been criticisms regarding the actual implementation and effectiveness. Some activists and members of the transgender community have raised concerns about the bureaucratic process for gender certification and the limited impact of welfare measures.

As a third gender individual, there are several legal challenges that you may face. Following few are mentioned below,

1. **Legal recognition:** Many legal systems still recognize only two genders, male and female. This can create difficulties for third gender individuals who seek official recognition of their gender identity. Obtaining legal recognition can be challenging, and it may require navigating complex legal processes, such as changing gender markers on identification documents or obtaining updated legal documents that reflect their gender identity.

2. **Discrimination:** Third gender individuals often face discrimination and prejudice in various aspects of life, including employment, housing, education, and public services. Discrimination can be both overt and subtle, and it may be based on societal norms, lack of awareness, or biased attitudes. In some cases, existing anti-discrimination laws may not specifically protect third gender individuals, making it difficult to seek legal recourse.

3. **Healthcare Access:** Another challenge faced by third gender individuals is accessing appropriate healthcare. Many healthcare systems are designed around binary gender models, making it difficult for individuals who do not identify within those categories to receive gender-affirming care. This can include challenges in accessing hormone therapy, undergoing gender-affirming surgeries, or receiving inclusive healthcare services.

4. **Documentation and identification:** In many jurisdictions, identification documents such as passports, driver's licenses, and birth certificates require individuals to select either male or female gender markers. This poses challenges for third gender individuals who may wish to have identification documents that accurately reflect their gender identity. Some countries are beginning to introduce gender-neutral options or third gender markers, but progress is slow and inconsistent.

5. **Family and marriage rights:** Third gender individuals may face challenges in terms of family and marriage rights. In some jurisdictions, they may encounter difficulties when it comes to legal

recognition of their partnerships, adoption, or parental rights. This can result in legal uncertainties and obstacles in accessing various family-related benefits and protections.

6. Privacy and Dignity: Third-gender individuals may face invasive scrutiny and forced disclosure of their gender identity in various settings, violating their privacy and dignity.

7. Cultural and Social Barriers: Beyond legal challenges, social stigma and cultural perceptions can create barriers to full participation in society.

8. Immigration and Asylum: Individuals may face legal challenges in immigration processes, where their gender identity is not recognized, or they may lack appropriate legal documentation.

It's important to remember that different nations' laws and societal perceptions of people who identify as third gender continue to develop and advance in different ways. Some jurisdictions are taking steps to address these legal challenges and provide greater recognition and protection for third gender individuals. However, significant work remains to be done to ensure equal legal rights and protections for all individuals, regardless of their gender identity.

5. Countries recognizing Third Gender Identities:

The legal recognition of a third gender has become an important aspect of promoting inclusivity and acknowledging the rights of individuals who do not identify within the traditional binary genders. This article explores the concept of legal recognition of a third gender in accordance with international human rights standards. Case studies of countries that have implemented legal measures to recognize a third gender will be examined, highlighting their efforts and the impact of such recognition.

1. Germany: Germany is widely regarded as a pioneer in legally recognizing a third gender. In 2018, the country introduced a law allowing parents to leave the gender entry blank on their child's birth certificate, recognizing a third gender option. This law aimed to accommodate individuals who do not identify as strictly male or female, providing them with legal recognition and protection.

2. Australia: Australia has made significant progress in recognizing the rights of individuals who identify as a third gender or non-binary. In 2019, the Australian Capital Territory became the first jurisdiction in Australia to legally recognize a third gender option on official identification documents such as driver's licenses and birth certificates. This recognition helps affirm the identities of individuals and ensures their equal treatment in various aspects of life.

3. India: In a landmark ruling in 2014, the Supreme Court of India recognized the rights of individuals who identify as transgender. The court ruled that transgender individuals should be legally recognized as a third gender and granted them the same legal rights and protections as male and female citizens. This ruling marked a significant step towards inclusivity and combatting discrimination based on gender identity.

4. Nepal: Nepal has been recognized globally for its progressive approach to recognizing a third gender. In 2007, the country's Supreme Court directed the government to legally recognize a third gender category and ensure equal rights and opportunities for individuals who identify outside the male/female binary. This recognition paved the way for transgender individuals in Nepal to access legal documents, healthcare, education, and employment without facing discrimination.

5. Canada: Canada has taken steps towards recognizing a third gender on official identification documents. Some provinces, such as Ontario, British Columbia, and Newfoundland and Labrador, now offer options beyond the traditional male and female categories. This recognition acknowledges the rights and existence of individuals with diverse gender identities and promotes inclusivity within society.

The legal recognition of a third gender is a significant step towards promoting inclusivity, equality, and human rights. Through case studies of countries like Germany, Australia, India, Nepal, and Canada, we can observe the positive impact of recognizing a third gender on individuals' lives. These countries have taken proactive measures to align their legal systems with international human rights standards, ensuring that individuals who identify outside the traditional binary genders are treated with dignity and respect.

6. Suggestions and Recommendations:

1. Implement policies allowing individuals to self-identify their gender on official documents like passports, driver's licenses, and IDs without excessive medical or bureaucratic requirements.
2. Enact robust anti-discrimination laws that include gender identity and expression, ensuring equal treatment in employment, education, healthcare, and housing.
3. Ensure access to gender-affirming treatments and procedures as well as general healthcare that is respectful and knowledgeable about third gender issues.
4. Provide training sessions for medical staff to deliver compassionate and informed care to third gender individuals.
5. Integrate comprehensive gender studies in educational curriculums to promote understanding and acceptance from an early age.
6. Develop campaigns to raise societal awareness, debunk myths, and reduce stigma associated with the third gender.
7. Encourage businesses to create inclusive policies and practices, ensuring a workplace free from harassment and discrimination.
8. Implement measures to increase employment opportunities for third gender individuals, supporting their economic stability and independence.
9. Provide access to legal aid for those facing discrimination or violation of rights.
10. Support the creation and operation of advocacy groups that work on policy changes and public representation.

7. Conclusion:

In conclusion, the difficulties in obtaining legal recognition for those who identify as third gender underscore the complexity of gender identity in modern society. Significant obstacles still exist, despite advancements in some areas. These include stigmatizing social norms, discriminatory legislation, and a lack of knowledge. These barriers prevent third gender people from fully participating in society as well as from exercising their own rights.

It is critical to support comprehensive legal reforms that uphold the rights of people who identify as third gender, encourage inclusivity, and increase public understanding of gender variety in order to address these issues. Societies can advance towards more equality and justice by creating a legal and social framework that accepts various gender identities, which will ultimately be beneficial to humanity as a whole.

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