



Between Constitutional Promise and Social Reality: The Unfinished Struggle for Transgender Rights in India

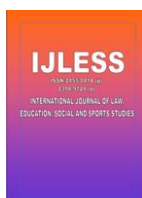
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DOI: [10.33329/ijless.13.3.1](https://doi.org/10.33329/ijless.13.3.1)



Abstract

While India accelerates towards becoming a global economic and technological powerhouse, a significant segment of its population, the transgender community remains tethered to archaic social exclusions. This article examines the dichotomy between India's rapid multi-sectoral progress and its stagnant social morality regarding gender minorities. It traces the etymological, clinical, and socio-cultural evolution of the term "transgender," contrasting its indigenous manifestations with Western clinical frameworks. Furthermore, it analyzes the historical trajectory of gender minorities across the ancient, medieval, colonial, and post-independence eras, evaluates the systemic socio-legal challenges confronting the community, and provides a comprehensive analysis of legislative, central, state, and non-governmental policy interventions. Finally, it outlines the progressive evolution and recent setbacks in judicial jurisprudence, evaluates the ongoing conflict between constitutional and public morality, and proposes structural reforms to secure substantive dignity, equality, and institutional integration.

"The constitutional promise of equality is not a static preservation of past hierarchies, but a transformative weapon meant to dismantle them."- Chief Justice Dipak Misra.¹

Introduction

India's trajectory in the twenty-first century is defined by rapid, multi-sectoral advancement. From becoming a hub for global innovation to making giant strides in space exploration and digital infrastructure, the nation is steadily transforming into a global economic power. However, this narrative of progress is punctured by a glaring socio-legal failure, specifically the continued marginalization of the third gender community. Despite the visibility of progress in transportation and communication, public perception regarding gender identity often lags behind, trapped in stereotypes

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

that fail to reflect the nation's constitutional ethos. The status of transgender persons remains a litmus test for India's commitment to equality, a test the nation is currently struggling to pass.

Etymological, Conceptual, and Etiological Foundations

To understand the legal challenges surrounding gender identity, it is essential to trace the etymological and conceptual evolution of the term "transgender" itself. Etymologically derived from the Latin prefix *trans*, meaning "across, beyond, or on the opposite side of," the term literally translates to being "across or beyond gender." It was originally coined by Columbia University psychiatrist John F. Oliven in his 1965 reference work, *Sexual Hygiene and Pathology*, where he noted that the prevailing term "transsexualism" was misleading because sexuality is not a major factor in primary transvestism.² Over subsequent decades, various transvestite, transsexual, and transgender individuals popularized the term with evolving definitions. A key milestone occurred in December 1969 when Virginia Prince launched a national magazine for cross-dressers, paving the way for broader conversations. By the mid-1970s, "trans-gender" and "trans" were operating as umbrella terms, with "transgenderist" specifically designating individuals who desired to live cross-gender without undergoing sex reassignment surgery, a term later abbreviated as "TG" in educational materials by 1976.

The structural concept of a unified "transgender community" fully coalesced by 1984, establishing the word as a broad, inclusive category. This institutionalization was reinforced by the founding of the Trans-Gender Archive at the University of Ulster by Richard Elkins in 1985, and a formal definition by the International Conference on Transgender Law and Employment Policy in 1992, which codified the term as an expansive umbrella encompassing transsexuals, transgenderists, cross-dressers, and transitioning individuals. That same year, Leslie Feinberg's influential pamphlet, *Transgender Liberation: A Movement Whose Time has Come*, positioned the term to unify all variants of gender nonconformity, increasingly rendering it synonymous with queer political resistance. While the late 1990s and early 2000s relied heavily on binary transition descriptors such as "female to male" (FtM) and "male to female" (MtF), contemporary discourse has superseded these with "trans man" and "trans woman," alongside the broader regular usage of "trans-masculine" and "trans-feminine."

Simultaneously, the scientific and clinical understanding of gender divergence has undergone a profound paradigm shift. Historically mischaracterized as a psychiatric ailment or a behavioral disorder, contemporary medical consensus demonstrates that the origins of gender identity are complex and not rooted in the brain alone, pointing instead to biological causes linked to prenatal gender development. Clinical studies suggest diverse probable etiologies for gender differences, including prenatal hormonal fluctuations, intrauterine exposure to progesterone or estrogenic drugs, chromosomal variations, and complex developmental factors in early childhood bonding. Consequently, modern law has had to shift away from pathologizing gender diversity, moving instead toward a framework of rights, privacy, and bodily autonomy.

Socio-Cultural Dimensions and Demographic Realities in India

In Indian legal and social jurisprudence, while "transgender" operates as a broad, modern umbrella term, the term "third gender" is specifically deployed as a legal and administrative category for those identifying outside the rigid male-female binary classification. Within the Indian matrix, the word transgender has historically been associated with specific socio-cultural groups, most prominently the *Hijras*, an Urdu term derived from the Arabic root *hjr*, signifying the act of "leaving one's tribe." According to the United Nations Development Programme (UNDP), *Hijra* functions as an indigenous umbrella term for sexual and gender minorities, representing India's traditional support system for marginalized groups. This domain encompasses diverse regional socio-cultural identities,

² John F. Oliven, *Sexual Hygiene and Pathology: A Manual for the Physician and the Professions* (2nd edn, JB Lippincott Co 1965).

including the *Shivshaktis*, *Jogtas*, *Jogappas*, *Aradhis*, and *Sakhis*, alongside preoperative, post-operative, and non-operative transsexual persons who identify with a gender opposite to their biological sex. Crucially, contemporary legal frameworks recognize that these traditional communities do not exhaust the definition, as many transgender individuals live independently outside these structural socio-cultural groups.

Quantifying this population remains a profound administrative challenge due to long-standing institutional invisibility. For decades, the Census of India completely failed to recognize the third gender during data collection. A critical baseline shift occurred during the 2011 Census of India, which for the first time officially recorded data on transgender individuals, capturing details related to their demographics, employment, literacy, and caste classifications.³ The 2011 Census recorded 4,87,803 individuals identifying within the "Other" gender category, with the highest concentration observed in Uttar Pradesh, followed by Andhra Pradesh, Maharashtra, Bihar, and West Bengal. However, the demographic data revealed deep systemic vulnerabilities, particularly in education. Except for Kerala, Mizoram, and Daman and Diu, the literacy rate among the transgender population fell drastically below the national literacy average of 74.04%, with a sizable representation of transgender individuals belonging to Scheduled Caste (SC) and Scheduled Tribe (ST) communities, highlighting a severe intersectional deficit.

Historical Evolution: From Reverence to Criminalization

Transgender individuals have been intimately woven into the civilizational, religious, and political fabric of India across millennia, occupying a highly fluid and multifaceted position over distinct historical epochs:

A. The Ancient Era: Spiritual Integration

Ancient Indian texts, including the *Vedas*, *Puranas*, *Ramayana*, and *Mahabharata*, explicitly recognize a third gender category, frequently recorded under the nomenclature of *tritiya-prakriti* or *napunsaka*. Far from being outcasts, they were deeply embedded in spiritual narratives, often associated with deities such as Bahuchara Mata and the composite, non-binary manifestation of Shiva and Parvati as Ardhanarishvara. In epic lore, the *Ramayana* depicts these individuals receiving divine blessings from Lord Rama for their unyielding devotion during his exile. Similarly, the *Mahabharata* highlights characters such as Shikhandi and Arjuna's transient avatar as Brihannala, portraying them as unique individuals endowed with specialized virtues and capabilities. Consequently, the third gender held sacred status, playing instrumental roles in fertility rituals, marriages, and childbirth celebrations. Their cultural integration was further solidified through their roles as repositories and transmitters of music, dance, and oral storytelling. This societal respect manifested materially, as evidenced by architectural engravings at the Khajuraho temples and historical records showing the formal grant of lands, state titles, and economic privileges to third-gender groups.

B. The Medieval Era: Political Authority

The advent of the medieval period, particularly during the consolidation of Islamic rule and the rise of the Mughal Empire, saw the third gender transition into positions of significant institutional power. Recognized as a distinct community with recognized spiritual and secular traditions, *Hijras* and court eunuchs (*Khawajasaras*) became foundational to state administration. Occupying a sophisticated, multifaceted position within royal courts, they were appointed to offices demanding absolute trust and political discretion. They served as royal advisors, military commanders, state administrators, diplomats, and intelligence operatives. Furthermore, they were entrusted with the guardianship of the

³ Office of the Registrar General & Census Commissioner, Ministry of Home Affairs, Government of India, *Census of India 2011: Primary Census Abstract - Data on Other Category* (2011).

imperial harems, ensuring they wielded immense proximity to the sovereign and substantial leverage over state policy.

C. The Colonial Era: Institutional Marginalization

This long history of socio-political integration was abruptly dismantled by British colonization, which imposed rigid Western, Victorian moral codes onto the historically flexible and pluralistic social fabric of India. Viewing indigenous gender identities with deep puritanical hostility, the colonial administration sought to systematically eradicate the social visibility of the third gender through legislative measures. The primary mechanism of this displacement was the enactment of the *Criminal Tribes Act, 1871*, which branded the *Hijra* community as a "criminal tribe" inherently prone to systemic lawlessness, subjecting them to coercive surveillance, compulsory registration, and arbitrary arrest.⁴ Concurrently, the codification of Section 377 of the Indian Penal Code, 1860, penalized consensual "carnal intercourse against the order of nature," effectively transforming a historically integrated community into legal outcasts and targets of institutionalized police violence.⁵ This legislative shift successfully stripped the third gender of their land grants, socio-economic privileges, and fundamental human dignity, entrenching a legacy of structural destitution that persisted long into the post-colonial era.

Systemic Issues and Challenges Faced by Transgender Persons

Despite modern democratic frameworks, transgender individuals continue to navigate a multi-dimensional array of structural barriers that deeply compromise their survival, citizenship, and fundamental rights:

A. Family Denial and Ancestral Disinheritance

The cycle of marginalization originates within the domestic sphere. The majority of families reject children who exhibit behavioral patterns or gender expressions inconsistent with their assigned sex at birth. Consequently, gender-variant youth are routinely subjected to verbal harassment, psychological coercion, and physical assault by family members attempting to enforce heteronormative compliance. In systemic instances, parents outright disown and evict their children to avoid perceived familial disgrace, public shame, or the end of lineage representation. This domestic eviction carries profound legal consequences, as transgender individuals are systematically blocked from claiming their lawful share of ancestral property or inheriting wealth, driving many to flee their homes in adolescence and seek refuge within traditional *Hijra* kinship networks.

B. Pervasive Social Exclusion and Disadvantages

The isolation experienced within the family unit mirrors a broader societal banishment across economic, cultural, and civic spheres. Transgender individuals suffer acute social exclusion that manifests as systemic homelessness, arbitrary rejection by landlords, and denial of basic civic amenities. This structural exclusion extends to public infrastructure, as illustrated by the complete lack of gender-neutral public restrooms, safe prison accommodations, and inclusive hospital wards. For instance, institutional refusal to house transgender patients in female wards due to cis-normative discomfort, coupled with the high risk of sexual abuse in male wards, effectively isolates the community from safe public healthcare access.

C. Institutional and Legal Non-Entity Status

Although the Constitution of India guarantees universal equality, the third gender has historically been reduced to a functional legal non-entity. This disenfranchisement *de facto* strips them

⁴ The Criminal Tribes Act, 1871 (Act XXVII of 1871), Section 24 (Repealed).

⁵ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1

of the rights and civil privileges enjoyed by mainstream citizens, including restricted social participation, systematic denial of employment, and exclusion from political contestation. This absolute deprivation of civic status operates in direct and continuous violation of Article 14, Article 15, Article 16, and Article 21 of the Indian Constitution, reducing substantive citizenship to an inaccessible abstraction.

D. Harassment, Stigma, and Structural Pathologization

The transgender community remains burdened by over a century of colonial and medical pathologization that historically characterized gender nonconformity as a mental illness, social deviance, or sexual predatoriness. While contemporary social reforms have marginally alleviated this stigma for gay and lesbian individuals, transgender persons remain targets of profound public ridicule and systemic prejudice. This deep-seated transphobia is frequently weaponized by lawmakers to score regressive political points, and it routinely manifests as workplace discrimination, targeted cyberbullying, public harassment, and egregious acts of hate-motivated violence.

E. Deprivation of Basic Needs and Forced Livelihoods

The intersection of family rejection and systemic stigma triggers an immediate breakdown in the fulfillment of basic human needs. Denied access to formal employment, rental housing, and equal public spaces, an overwhelming majority of the community is driven into structural poverty. Because formal corporate and public sectors consistently deny employment to even highly skilled or qualified transgender applicants, many individuals are forced into begging at traffic junctions, trains, and ceremonial events, or entering street-level sex work. These limited survival mechanisms are then circularized by majoritarian society to justify further discrimination and harden public biases.

F. Exclusion from Educational Opportunities

The cumulative impact of early domestic displacement disrupts the educational journey of transgender youth before they can complete primary schooling. Although Article 21A of the Constitution guarantees the fundamental Right to Education for all children aged six to fourteen, institutional bullying by peers and unsupportive faculty structures effectively drive transgender students out of regular schools. This educational exclusion is verified by the 2011 Census data, which indicates that the literacy rate among the third gender community stands at a meager 46.1%, vastly underperforming the national literacy average of 74.04%.⁶

G. Targeted Violence and Healthcare Disparities

The community experiences a disproportionately high prevalence of targeted hate crimes, physical violence, and sexual assault. These offenses remain chronically underreported due to deep-seated mistrust of law enforcement machinery, systemic police insensitivity, and the absence of robust, survivor-centric protective legal frameworks. Concurrently, the community navigates severe physical and psychiatric healthcare crises. Driven by prolonged social rejection and gender dysphoria, transgender individuals exhibit elevated rates of clinical depression, anxiety, and suicidal ideation, which are severely exacerbated by the complete absence of accessible, affirmative mental health counseling. Furthermore, clinical data highlights an alarming concentration of HIV and sexually transmitted infections (STIs) within the community, directly attributable to the lack of targeted public health interventions, unsafe self-administered hormone therapy, and forced involvement in high-risk survival sex work.

⁶ Office of the Registrar General & Census Commissioner, Ministry of Home Affairs, Government of India, *Census of India 2011: Primary Census Abstract - Data on Other Category* (2011).

Policies and Interventions: Legislative and Administrative Frameworks

While the state has an explicit obligation under Article 41 of the Directive Principles of State Policy to make effective provisions for securing the right to work, education, and public assistance, administrative interventions for the transgender community remained severely limited for decades. The modern policy architecture represents a gradual transition toward structured state-led welfare. A preliminary step occurred on 22 October 2013, when the Government of India constituted an Expert Committee on Transgender Issues under the Ministry of Social Justice and Empowerment (MoSJE), consisting of eighteen academic, bureaucratic, and non-governmental members alongside community representatives. The committee's subsequent report, submitted on 27 January 2014, laid the foundation for national welfare blueprints, which were accelerated by the Supreme Court's mandate in *NALSA*.⁷

A. The Statutory Blueprint: The 2019 Act and 2020 Rules

To formalize these national mandates, Parliament enacted the *Transgender Persons (Protection of Rights) Act, 2019*, which was officially notified on 10 January 2020, followed by the formulation of the *Transgender Persons (Protection of Rights) Rules, 2020*.⁸ This framework introduced several structural mechanisms to govern transgender welfare:

1. *Legal Recognition and Identity Certificates*: Under Section 5 of the Act, individuals are empowered to apply to the District Magistrate for an official Certificate of Identity as a transgender person, which serves as conclusive administrative proof of gender status. Parents or legal guardians retain the right to submit applications on behalf of minors.
2. *State Welfare Obligations*: The statute imposes an explicit mandate on central and state governments to design inclusive welfare programs, establish dedicated rescue and rehabilitation centers, and ensure active community participation across social spheres.
3. *Institutional Obligations and Redressal Machinery*: The Act enforces inclusive education mandates on all public and private educational institutions, requires corporate and public establishments to implement non-discriminatory employment practices, and commands the mandatory setup of localized grievance redressal mechanisms to address workplace transphobia.
4. *Penalties for Targeted Offences*: To address structural exploitation, the statute penalizes acts such as forced or bonded labor, denial of access to public spaces, and physical or psychological injury against transgender persons, stipulating a term of imprisonment ranging from six months to two years alongside corporate or individual fines. However, legal scholars criticize this provision for its ambiguity, noting that it fails to explicitly differentiate or scale punishments for severe psychological trauma or systemic corporate biases.
5. *The National Council for Transgender Persons (NCTP)*: Established as a statutory advisory body under the central government, the NCTP is designed to oversee policy formulation, monitor the implementation of national welfare schemes, and evaluate community integration. Nevertheless, the council faces structural challenges due to the statutory omission of enforceable regulatory or judicial powers to directly resolve community grievances.

⁷ Ministry of Social Justice and Empowerment, Government of India, *Report of the Expert Committee on Transgender Issues* (January 2014).

⁸ The Transgender Persons (Protection of Rights) Act, 2019, No. 40 of 2019. See also Ministry of Social Justice and Empowerment, *The Transgender Persons (Protection of Rights) Rules, 2020* (notified September 25, 2020).

B. Central Government Welfare Schemes

The operationalization of the 2019 Act has been led by MoSJE through targeted administrative measures. On 25 November 2020, the Ministry launched the *National Portal for Transgender Persons*, an end-to-end digital interface allowing individuals to apply for identity certificates and access central welfare schemes without physical interface with state bureaucracies. This digital infrastructure was followed by the launch of the *Support for Marginalised Individuals for Livelihood and Enterprise (SMILE) Scheme* in February 2022. The SMILE scheme establishes a comprehensive rehabilitation model, funding skill-development training, economic self-employment initiatives, and secure shelter support through institutionalized *Garima Greh* (rehabilitation homes). Furthermore, healthcare access was expanded under the *Ayushman Bharat TG Plus* initiative, providing specialized gender-affirmative health coverage, medical transitions, and holistic health insurance. To enforce labor equity, the Department of Social Justice and Empowerment subsequently issued the *Equal Opportunities Policy for Transgender Persons*, providing strict administrative directives to secure equal workplace opportunities. Throughout 2025, MoSJE continued to scale these interventions through continuous capacity-building programs, national awareness campaigns, and inter-ministerial conferences aimed at dismantling bureaucratic stigma.

C. State-Level Proactive Interventions

Because social security and public welfare are concurrent constitutional responsibilities, individual state governments have developed localized legislative policies:

- *Tamil Nadu*: Leading sub-national interventions, Tamil Nadu became the first state to establish a dedicated *Transgender Welfare Board* on 15 April 2008, integrating official and community representatives, while declaring April 15 as *Thirunangai Day* to foster social visibility.
- *Kerala and West Bengal*: In September 2015, the Social Justice Department of Kerala approved the pioneering *State Policy for Transgenders, 2015*, providing academic scholarships and healthcare support. Concurrently, West Bengal established its state welfare board in 2015 to coordinate employment access.
- *Odisha, Himachal Pradesh, and Chandigarh*: These sub-national governments institutionalized their independent transgender welfare boards between 2016 and 2017 to manage localized demographic surveys and distribute identity cards.
- *Karnataka*: The state enacted the *State Policy for Transgenders, 2017* in October 2017, explicitly mandating all educational institutions to implement strict anti-discrimination frameworks, while creating an independent monitoring committee to investigate reports of institutional violence and educational bias.
- *Andhra Pradesh*: In December 2017, the Andhra Pradesh Cabinet passed a comprehensive state policy that introduced specialized social security pension plans specifically tailored for older or destitute third-gender individuals.
- *Subsequent Expansions*: Between 2018 and 2019, specialized state welfare boards were operationalized across Jammu and Kashmir, Delhi, Rajasthan, Uttarakhand, Maharashtra, and Bihar. This administrative grid was further expanded in 2020 with the formal establishment of Transgender Welfare Boards in Uttar Pradesh and Madhya Pradesh to manage large-scale rural community welfare.

D. Non-Governmental Support Networks and Urban Coalitions

Due to persistent gaps in state implementation, non-governmental organizations (NGOs) and community-led collectives have been central to civil rights enforcement. Frontline organizations, such

as the *Naz Foundation (India)* and *Adhhikaar* in Delhi, the *Sahodari Foundation* in Tamil Nadu, *Sangama* in Karnataka, the *Udaan Trust* in Maharashtra, the *Bharosa Trust* and *MAAN Foundation* in Lucknow, *Andhra Pradesh Male Minorities (AMMA)* in Secunderabad, and the *Sangini (India) Trust* in New Delhi, work continuously to provide legal defense, crisis intervention, and socio-economic empowerment.

Concurrently, informal support networks have developed across major metropolitan centers to build horizontal community ties and amplify advocacy. These urban coalitions include *Harmless Hugs* in Delhi, *GayBombay* in Mumbai, *Orinam* in Chennai, *Mobbera* in Hyderabad, *Good as You* in Bangalore, the *Parichay Collective* in Bhubaneswar, *Queerala* in Kochi, and *Queerhythm* in Thiruvananthapuram. These groups engage in continuous networking across local, regional, and national levels, translating constitutional jurisprudence into localized survival infrastructure and legal literacy.

The Constitutional Matrix and Judicial Jurisprudence

The Constitution of India stands as the supreme founding text from which all fundamental protections and individual civil liberties emanate. Part III of the Constitution explicitly guarantees these sacrosanct protections, with Article 14 establishing equality before the law and equal protection of the laws, and Article 15(1) strictly prohibiting the state from discriminating against any citizen on grounds only of religion, race, caste, sex, or place of birth. Where the legislature historically stagnated, the constitutional courts systematically mobilized these provisions to carve out enforceable rights for gender minorities:

A. Legal Recognition and the Expansion of Part III

The modern framework of transgender rights was inaugurated by the Supreme Court of India in its landmark ruling in *National Legal Services Authority (NALSA) v. Union of India*.⁹ For the first time in post-colonial history, the apex court interpreted the immutable marker of "sex" within Articles 15(1) and 16(2) to encompass not merely biological characteristics, but internal psychological gender identity and sexual orientation. The Court held that the right to self-determine one's gender identity as male, female, or transgender is an inalienable component of personal freedom, protected directly under the right to equality. Furthermore, the judiciary expanded the scope of Article 19(1)(a) (Freedom of Speech and Expression) and Article 21 (Right to Life, Dignity, and Personal Autonomy) to establish that gender expression—through clothing, speech, behavior, or medical transition—is intrinsically shielded from majoritarian or state interference.

B. Securing Public Employment and Local Governance Rights

This foundational doctrine was rapidly deployed by provincial High Courts to dismantle systemic civil exclusions. In *Ganga Kumari v. State of Rajasthan*,¹⁰ the petitioner was summarily rejected from an appointment as a police constable following a medical examination that revealed her transgender status, with selectors declaring her ineligible under binary recruitment terms. The Rajasthan High Court reversed this rejection, noting that the gender-neutral expression "person" utilized within Articles 14 and 21 guarantees protections to all human beings independent of binary classifications. The ruling firmly established that gender identity is an inseparable facet of human sexuality, barring selectors from practicing institutional discrimination, and ordered the state to immediately re-employ Ganga Kumari.

This democratic integration was mirrored in local governance structures through the judgment of the Bombay High Court in *Anjali Guru Sanjana Jaan v. State of Maharashtra*.¹¹ In this instance, the selectors had arbitrarily rejected the nomination papers of a transgender woman seeking to contest

⁹ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438

¹⁰ *Ganga Kumari v. State of Rajasthan*, 2016 SCC OnLine Raj 10243

¹¹ *Anjali Guru Sanjana Jaan v. State of Maharashtra*, 2021 SCC OnLine Bom 4522

local body elections from a ward explicitly reserved for female candidates. The High Court set aside the administrative rejection, ruling that a transgender person who self-identifies as a woman retains an absolute constitutional and statutory right under the 2019 Act to contest elections from seats reserved for women, thereby reinforcing the community's access to institutional political power.

C. The Right to Marry and the Expansion of Personal Laws

The judicial expansion similarly transformed the domestic sphere by validating non-binary relationships under existing family law statutes. In *Arun Kumar v. Inspector General of Registration*,¹² a Hindu cis-male and a transgender woman who self-identified as a woman solemnized their marriage in accordance with traditional rituals. The matrimonial registrar subsequently refused to register the union, asserting that a transgender woman could not fulfill the statutory definition of a "bride" under Section 5 of the *Hindu Marriage Act, 1955*. The Madras High Court struck down this administrative obstruction, ruling that the term "bride" cannot be statically confined to biological females, but must dynamically encompass trans women who perceive and express themselves as women. The Court held that denying registration violated the fundamental rights to privacy and choice of spouse under Article 21, creating a vital precedent for domestic legal protection.

D. Access to Public Amenities and Dignity Infrastructure

The judiciary also turned its focus to the material deprivation of basic civic amenities, recognizing that the lack of public infrastructure amounts to a spatial denial of citizenship. In *Jasmine Kaur Chhabra v. Union of India*,¹³ a public interest litigation (PIL) was instituted before the Delhi High Court highlighted that transgender persons are routinely denied access to public sanitation facilities, subjecting them to severe public humiliation, physical discomfort, and health hazards. Recognizing that third-gender individuals possess an absolute right to safe, independent public infrastructure distinct from binary male and female spaces, the High Court issued strict structural directives commanding municipal authorities to construct dedicated, accessible transgender public restrooms within a strict, court-mandated timeline, thereby cementing infrastructure access as a component of the Right to Life.

E. Decriminalization and the Philosophy of Transformative Constitutionalism

The broader emancipation of gender and sexual minorities required the systematic dismantling of colonial penal frameworks. This struggle began with the historic ruling of the Delhi High Court in *Naz Foundation v. Government of NCT of Delhi*,¹⁴ which decriminalized consensual homosexual acts by declaring Section 377 of the Indian Penal Code unconstitutional under Articles 14, 15, and 21. Although this progressive holding was temporarily reversed by the Supreme Court in *Suresh Kumar Koushal v. Naz Foundation*,¹⁵ the apex court ultimately corrected its jurisprudence in the landmark decision of *Navtej Singh Johar v. Union of India*.¹⁶

The Supreme Court unanimously struck down Section 377 to the extent that it penalized consensual adult sexual acts in private. Chief Justice Dipak Misra anchored the ruling within the doctrine of "transformative constitutionalism," declaring that the text of the Constitution must actively guide the evolution of society from archaic prejudices to a pragmatic framework where individual freedoms are fiercely guarded. The Court affirmed that individual choices conducted consensually cause zero societal risk, and emphasized that judicial determinations must be guided exclusively by

¹² *Arun Kumar v. Inspector General of Registration*, 2019 SCC OnLine Mad 9271

¹³ *Jasmine Kaur Chhabra v. Union of India*, 2021 SCC OnLine Del 3412

¹⁴ *Naz Foundation v. Government of NCT of Delhi*, 2009 SCC OnLine Del 1762

¹⁵ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1

¹⁶ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1

"constitutional morality" rather than majoritarian social morality. This jurisprudence was structurally reinforced by the nine-judge bench decision in *K.S. Puttaswamy v. Union of India*,¹⁷ which declared that personal privacy, bodily integrity, and choice of orientation are absolute components of Article 21, enabling gender minorities to step into the public sphere with structural dignity.

Constitutional Morality versus Public Morality: Jurisprudential Setbacks

Despite this expansive trajectory, the realization of comprehensive equality hit a profound institutional barrier in the Supreme Court's ruling in *Supriyo alias Supriya Chakraborty v. Union of India*.¹⁸ The *Supriyo* verdict represents a significant jurisprudential regression, illustrating a defensive retreat from the radical potential of transformative constitutionalism. In this instance, the five-judge bench evaluated whether the right to marry could be legally extended to same-sex and non-heterosexual couples under existing statutory instruments like the *Special Marriage Act, 1954*.

The Court ultimately refused to grant legal recognition to marriage equality, ruling that the judiciary lacks the institutional authority to legalise non-binary marriages, as doing so would require rewriting statutory language, which falls within the exclusive domain of Parliament. While the Court recognized that transgender individuals in heterosexual alignments retain a right to marry under current personal laws, it effectively barred broader marital recognition for queer pairings. It limited its intervention to directing the Central Government to establish an administrative committee to address the collateral material grievances of same-sex couples, while holding that non-heterosexual couples remain ineligible to jointly adopt children under existing regulatory guidelines.

From a critical jurisprudence perspective, the *Supriyo* ruling reflects an institutional deference to "public morality" over the principles of "constitutional morality." The state's primary arguments against marriage equality asserted that legalizing non-binary unions would induce widespread social instability, disrupt traditional cultural values, and that Indian society was structurally unprepared for such a radical shift. By succumbing to these arguments, the Court permitted majoritarian social expectations to restrict the fundamental liberties of a minority group. Constitutional morality dictates that an action or identity cannot be suppressed merely because the majority of a population perceives it as unconventional or socially disruptive.

Historically, highly entrenched, majoritarian practices such as *Sati*, child marriage, the enforcement of forced widowhood, and *Triple Talaq* were widely defended under the guise of public morality and cultural preservation. Yet, the state and the courts systematically deployed legislative weapons to banish those discriminatory structures and execute social transformation. By denying non-binary couples the fundamental right to choose their spouse and establish a recognized family unit, the *Supriyo* framework left the community exposed to systemic precarity, underscoring that the judicial protection of transgender rights remains vulnerable to majoritarian pressure.

Furthermore, this institutional friction has intensified following the enforcement of the *Transgender Persons (Protection of Rights) Amendment Act, 2026*.¹⁹ This statutory revision completely removed the right to self-perceived gender identity originally codified under the 2019 Act. Under the 2026 framework, legal gender recognition is strictly contingent upon a mandatory evaluation and positive recommendation by a state-appointed medical board, followed by executive clearance from a District Magistrate. This legislative shift has triggered nationwide constitutional challenges before the Supreme Court, with petitioners asserting that subjecting personal identity to mandatory medicalized

¹⁷ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1

¹⁸ *Supriyo alias Supriya Chakraborty v. Union of India*, (2023) SCC OnLine SC 1348

¹⁹ *The Transgender Persons (Protection of Rights) Amendment Act, 2026, enforced May 25, 2026*.

gatekeeping directly violates the principles of privacy and autonomy established in *NALSA* and *Puttaswamy*.²⁰

Way Forward: Structural Reforms and Strategic Imperatives

For India to bridge the gap between its high constitutional declarations and street-level statutory execution, the state, judiciary, and civil society must implement targeted, systemic institutional adjustments:

- **Universal Free Education and Safe Classrooms:** Implement state-funded, completely free education for all transgender children from primary school through the twelfth grade under a reformed Article 21A framework. Educational institutions must institute strict anti-bullying and gender-sensitization policies, backed by punitive measures against faculty and students who perpetrate transphobic harassment.
- **Enforcement of Institutional Accountability:** Issue comprehensive directives to law enforcement agencies to mandate the immediate registration of first information reports (FIRs) in cases of transphobic harassment, domestic abuse, and hate crimes. State legislatures must amend the Indian Penal Code to introduce specialized penal enhancements for derogatory public remarks, targeted cyberbullying, and dishonorable statements directed at third-gender individuals.
- **Media Mobilization and Public Literacy Campaigns:** Mobilize state media channels, digital platforms, and journalism networks to execute large-scale, continuous public education campaigns. These interventions must focus on de-stigmatizing gender variance, dismantling colonial stereotypes, and educating parents on the biological and developmental realities of children born with gender differences.
- **Affirmative Medical Protocols and Specialized Training:** Mandate the Ministry of Health to enforce specialized, affirmative medical curricula across all medical colleges. Healthcare practitioners must be trained to cater to the unique endocrinological and psychiatric requirements of transgender patients without enacting pathologizing biases, while making gender-affirmative care universally accessible.
- **Mandatory Legislative Impact Audits:** Establish independent, statutory monitoring commissions at both central and state levels to execute continuous legislative impact audits. These entities must possess independent, quasi-judicial powers to investigate failures in policy implementation, penalize corporate establishments that violate non-discriminatory labor laws, and provide practical remedies to aggrieved citizens.
- **Universal Access to Free Legal Aid:** Operationalize specialized, state-funded transgender legal aid cells across all District Legal Services Authorities (DLSAs). These cells must provide free, uncompromised legal representation to help third-gender individuals contest ancestral disinheritance, secure housing rights, and navigate identity certification procedures.
- **Inter-Sectoral Coalitions and Research Funding:** Allocate targeted state research grants to academic institutions, civil society organizations, and non-governmental collectives to maintain updated, accurate data on transgender demographics, literacy rates, and economic employment indices. Executive planning departments must continuously collaborate with urban grassroots coalitions to adapt welfare schemes to evolving socioeconomic realities.

²⁰ *Supreme Court of India Notice on Transfer Petitions regarding the Transgender Persons Amendment Act*, Diary No. 18432 of 2026.

Conclusion

The enduring struggle of the third gender community to secure basic legal recognition and self-identity exposes a deep systemic fissure within the narrative of modern India's multi-sectoral advancement. While the nation accelerates its economic, digital, and technological footprint across the global arena, its social architecture remains tethered to colonial prejudices and majoritarian biases that routinely exclude a vibrant segment of its citizenry. Transgender individuals are not mere abstract statistics, passive subjects of welfare charity, or isolated social causes; they are our fellow citizens, our family members, and co-equal owners of India's democratic promise.

The Constitution of India explicitly guarantees equality, justice, and absolute personal dignity to every individual, entirely independent of their gender identity or biological expression. As legal professionals, jurists, and scholars, it is our distinct responsibility to ensure that these constitutional guarantees are actively enforced rather than suspended as abstract texts. Dismantling generational transphobia requires an unyielding institutional commitment to transformative constitutionalism. We must pledge to think, write, and litigate for transgender rights, recognizing that the complete emancipation of the third gender is not merely a matter of majoritarian moral compassion, but an absolute constitutional imperative. Together, through unified legislative equity and structural societal reform, India can build an inclusive, equitable, and genuinely just society where every human being can live with authenticity, autonomy, and pride.