



The Role of Judiciary in Ensuring Social Justice for the Third Gender in Light of NALSA v. Union of India

Shyam Mohan Pandey

Research Scholar, Department of Political Science University of Lucknow, India

Abstract

This paper examines the pivotal role played by the judiciary in advancing social justice for the third gender (transgender and non-binary persons) in India, with particular emphasis on the landmark judgment in National Legal Services Authority (NALSA) v. Union of India (2014). It situates the analysis within broad theoretical frameworks of justice—such as distributive, corrective, and procedural justice—while also considering the liberal world order's emphasis on human rights and equality. Further, the paper traces India's ancient cultural and textual traditions that recognised non-binary gender identities, challenging the misconception that the third gender is a modern or Western concept. By bridging constitutional mandates, judicial activism, cultural heritage, and international normative frameworks, the paper argues that the Indian judiciary has played a transformative role in shaping equitable legal responses for the third gender, even as significant implementation challenges persist.

Index Terms – Third Gender, Transgender Rights, NALSA Judgment, Social Justice, Constitutional Morality, Indian Judiciary

1. Introduction

Justice is the cornerstone of any democratic polity, particularly one as diverse as India. Embedded in the preamble of the Constitution are the ideals of Justice—social, economic, and political. The Indian judiciary, especially the Supreme Court, has increasingly emerged as a guardian of these ideals, tasked with translating constitutional promises into social realities. One of its significant contributions in recent decades has been reinforcing the rights of marginalised communities, including the third gender—a category that refers to individuals who do not identify exclusively as male or female, such as transgender, hijras, and intersex persons.

In NALSA v. Union of India (2014), the Supreme Court recognised transgender individuals as a “third gender” and affirmed their fundamental rights. The judgment was not just a legal milestone; it was a reaffirmation of justice in its many dimensions. To fully appreciate the judiciary's role, we must embed this legal intervention within theoretical perspectives of justice and connect it with India's historical cultural acceptance of gender plurality and global liberal norms.

2 Understanding Social Justice: Theoretical Perspectives

a. Distributive Justice

Distributive justice deals with the fair allocation of resources, opportunities, and benefits within society. Philosophers like John Rawls argue that a just society is one in which inequalities are arranged to benefit the least advantaged. In the context of the third gender, distributive justice demands access to employment, education, healthcare, and welfare, addressing structural disadvantages caused by centuries of marginalisation.

Transgender persons in India historically faced socio-economic exclusion, denial of basic services, and lack of legal recognition. Thus, the judiciary's mandate in NALSA to ensure affirmative measures and non-discrimination aligns with a distributive framework that seeks to level the playing field.

b. Corrective Justice

Corrective justice focuses on remedying specific harms and injustices inflicted on individuals or groups. For the third gender, systematic exclusion from identities that match their lived experience amounts to a profound injustice. The judiciary's role in correcting these injustices encompasses recognition of identity, protection against exploitation, and remedial directives to the executive for inclusive policies.

NALSA acted as a corrective force—acknowledging decades of state neglect and societal stigma—and mandated structural reforms that aimed to reverse entrenched injustices.

c. Procedural Justice

Procedural justice emphasizes fairness in legal and administrative processes. For a marginalised group, it is not enough to have legal rights on paper; the systems that enforce these rights must be accessible and impartial. The judiciary, in NALSA, placed emphasis on due process—urging transparent procedures for gender recognition, welfare schemes, reservations, and grievance redressal.

In essence, the judgment sought to operationalise a procedural framework where third gender persons would be able to assert their rights without bureaucratic or discriminatory hurdles.

d. Recognition Theory

Beyond these classic categories, modern justice scholarship highlights recognition—the idea that justice involves acknowledging the dignity, identity, and agency of historically marginalised groups. Thinkers like Axel Honneth argue that misrecognition leads to social exclusion and psychological harm. The Indian judiciary's embrace of third gender identities in NALSA resonates strongly with recognition theory, treating gender identity not as a pathology or anomaly but as a legitimate aspect of human diversity deserving equal respect.

3 The Indian Judiciary and NALSA v. Union of India

a. Background of the Case

Before NALSA, transgender individuals in India lacked clear legal status. Government records recognised only binary genders—male and female—resulting in legal invisibility. Discrimination was rampant in schooling, jobs, shelters, public services, and even in death certificates.

The National Legal Services Authority (NALSA), a statutory body under the Ministry of Law, Health, and Family Welfare, filed a petition seeking legal recognition of transgender persons and enforcement of their constitutional rights. The Supreme Court heard the cases, considering arguments anchored in constitutional morality, historic injustices, and international human rights norms.

b. Key Legal Findings

In NALSA (2014), the court made several path-breaking declarations:

Right to Self-Identify Gender: The court held that self-identified gender should be respected. A person's self-perception of gender identity cannot be disregarded by the state.

Recognition of Third Gender: Individuals do not have to choose only 'male' or 'female' categories. A separate category for transgender or third gender was recognised.

Fundamental Rights Protection: Transgender persons are entitled to equality (Article 14), non-discrimination (Article 15), freedom of expression (Article 19), and life and personal liberty (Article 21).

Affirmative Action: State governments were directed to consider providing reservations in education and employment to overcome historical marginalization.

Welfare Measures: Recommendations included setting up special schemes for healthcare, livelihood, and social security for the third gender.

c. Judicial Reasoning and Constitutional Morality

The court invoked constitutional morality—a principle that constitutional values prevail over societal biases. While social prejudices are deep-rooted, constitutional morality demands that law uphold fundamental rights and human dignity. The judiciary, thus, rejected majoritarian impulses that marginalise gender diversity.

This judgment marked a shift from legal formalism to substantive justice, where the meaning and purpose of law were aligned with the lived realities of affected communities.

4 Liberal World Order and Human Rights Paradigm

a. The Liberal Framework

The liberal world order, shaped significantly by post-World War II international law and human rights instruments, emphasises individual autonomy, equality before law, non-discrimination, dignity, and protection of minorities. Universal declarations like the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (ICCPR), and Yogyakarta Principles recognise the rights of all individuals, including those with diverse gender identities.

India, though not formally bound by some of these instruments, interprets its own Constitution through similar values. The Indian judiciary often draws upon global norms to interpret fundamental rights expansively. In matters of sexual orientation and gender identity, international human rights discourse provided a persuasive backdrop for judicial reasoning.

b. Intersection with Domestic Law

The liberal world order posits that state neutrality is essential in areas of identity and personal autonomy. In NALSA, the Supreme Court echoed this by emphasising that gender identity is an inherent aspect of personality and that the state must not impose stereotypes. The Indian Constitution, especially post-Keshavananda Bharati and Maneka Gandhi, has been interpreted through this broader human rights lens—placing individual dignity at the centre of fundamental rights jurisprudence.

c. Critiques and Limitations

While the liberal framework champions universal rights, critics argue that it sometimes abstracts individual experiences from social realities. In the Indian context, judicial pronouncements alone cannot uproot deep-seated social stigma attached to gender diversity. The judgment, therefore, must be complemented by societal reforms and political will to translate legal recognition into tangible social justice.

5 The Ancient Indian Cultural Context

A common misunderstanding is that gender diversity is a Western import. However, ancient Indian culture and texts have long recognised multiplicity in gender and sexuality. Understanding this heritage enriches the contemporary justice discourse and demonstrates that inclusion is not alien to Indian society.

a. Vedic and Epic Literature

Ancient Sanskrit texts mention individuals known as tritiya prakriti (third nature) and other gender expressions that transcend the male–female binary. The Kama Sutra (by Vātsyāyana) categorises people with diverse gender expressions and acknowledges sexual relations beyond binary genders. These portrayals are descriptive rather than derogatory, indicating social presence and, at times, acceptance.

In the epics, characters with non-normative gender roles appear. For example:

Shikhandi in the Mahabharata is born female but lives as male and plays a crucial role in the Kurukshetra war.

The presence of eunuchs and gender fluid individuals in royal courts and as attendants to deities suggests historical recognition of diversity.

b. Temple Traditions and Social Roles

In South India and other regions, hijra communities have age-old cultural roles—especially associated with blessings in weddings and childbirth. Temples dedicated to gods like Ardhanarishvara (a composite of Shiva and Parvati representing the unity of masculine and feminine principles) symbolically affirm gender fluidity and balance.

These cultural practices illustrate that gender diversity was not merely tolerated but woven into religious, social, and spiritual life—challenging the colonial narrative that pathologised non-binary identities.

c. Colonial Disruption

British colonial law, particularly the Criminal Tribes Act of 1871, criminalized hijras and other gender-variant communities. The colonial regime imposed rigid binary classifications and pathologised indigenous gender expressions. The post-colonial legal system inherited these biases, which lingered until contemporary judicial reforms began addressing them.

Thus, NALSA is not a novel invention; it is a restorative recognition of indigenous cultural acceptance disrupted by colonialism.

6 Impact of NALSA and Continuing Challenges

a. Legal and Policy Advances

Since NALSA, the Indian judiciary and executive have taken various steps:

Identification documents (like passports and voter IDs) can include a third gender option.

Anti-discrimination protocols have been introduced in some institutions.

Welfare schemes and health services have been expanded to be more inclusive.

The judgment also paved the way for Justice K.S. Puttaswamy v. Union of India (2017), where privacy and autonomy were further affirmed, strengthening protections for gender identity in the ambit of personal liberty.

b. Social and Institutional Barriers

Despite judicial progress, challenges remain:

Implementation Gaps: Many government departments still struggle to operationalise the court's directives.

Education and Awareness: Social stigma persists, affecting school attendance, employment, and family acceptance.

Healthcare Inequities: Access to gender-affirming healthcare remains inconsistent and often unaffordable.

Violence and Discrimination: Reports of harassment, abuse, and hate crimes continue, reflecting a gap between legal recognition and lived realities.

Thus, while NALSA has set a legal framework, substantive social justice requires multi-institutional engagement—from legislatures, executive agencies, civil society, and educational systems.

7. Conclusion

The judiciary's role in ensuring social justice for the third gender in India represents a transformative chapter in constitutional governance. *NALSA v. Union of India* is not merely a legal milestone but a profound affirmation of human dignity, equality, and liberty. By interpreting constitutional mandates through distributive, corrective, and recognition-oriented lenses, and aligning with liberal human rights principles, the judiciary has bridged constitutional ideals with marginalised lived experiences.

Furthermore, anchoring this jurisprudence within India's ancient cultural acceptance of gender diversity enriches the contemporary justice narrative, indicating that inclusion is both a constitutional necessity and a civilisational continuity.

However, law alone cannot erase centuries of discrimination. Social justice requires sustained efforts—policy implementation, public education, affirmative action, and cultural transformation. The judiciary's role, while pivotal, is part of a larger democratic process that must involve the state, civil society, and communities themselves.

In sum, India's journey toward social justice for the third gender reflects the dynamic interplay of law, culture, and democratic values, reminding us that justice must not just be declared—it must be lived.

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