

IMPLEMENTATION AND CHALLENGES OF THE TRANSGENDER PERSON PROTECTION OF RIGHTS ACT 2019

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Introduction

Human rights are the basic rights and safeguards that all humans, by virtue of being human, are granted by the law. A significant step forward for Indian law in today's contemporary world is the acknowledgment and safeguarding of the rights of transgender community. A severely marginalised and discriminated section of the society has managed to gain substantial legal and societal recognition due to progressive legislative measures and judicial interpretations. This change is a much-needed and awaited shift in the general awareness surrounding gender identity. It also shows the nation's commitment to ensuring all its citizens, regardless of their gender or gender expression are not only bestowed their basic rights but the assurance that these rights will be safeguarded.

From the criminalisation of gender diversity during the colonial era to the interplay of traditional cultural acceptance and the modern constitutional principles, transgender rights in India creates a unique situation. From societal attitudes and oppressive colonial legislations to social stigma, the daily hurdles faced by this minority is a constant reminder of the long road ahead to progress.

The shortcomings of our legal system creates a vulnerability in terms of social inclusion for the transgender community. Whether it is healthcare, access to essential services, education, or work opportunities, these things can rip apart the very fabric of our society. These problems are further magnified due to the lack of recognition of individuals within this community as part of a third gender and infringes upon their basic rights enshrined within the Constitution.

The aim of this article is to provide an overview of transgender rights in India by not just examining the legal framework but judicial pronouncements along with implementation challenges. And this is the first step in safeguarding their basic human rights.

A Brief History

In Indian culture and tradition, the concept of gender diversity has profound historical roots that have been transmitted across generations. Ancient Hindu texts, including the Mahabharata and several Puranas, reference individuals who do not conform to the conventional binary gender classifications.

In Hindu mythology, Ardhanarishvara embodies the combined essence of Shiva and Parvati, serving as a symbol that challenges traditional gender binaries and illustrates the integration of masculine and feminine aspects.¹

The hijra community has been documented in Indian society for thousands of years. Ancient Sanskrit texts refer to this population and so does our history. For instance, during the Mughal rule, Hijras held a place of prominence as trusted advisors to the monarchs and guardians of imperial harems.² Similarly, the devadasi tradition prevalent in ancient South India transcended typical gender roles.³ This simply goes on to show that gender diversity has always been prevalent, recognized, and valued. In fact, historical societies seem to be more adept at integrating gender-diverse individuals into the fold than the modern society. However, most of these mechanisms operated within conventional frameworks. This raises a question – then why are transgender persons frowned upon?

The answer goes back to the era of colonisation.⁴ The treatment of gender-nonconforming individuals underwent a drastic shift during Britain's colonisation of India. One example of such regressive societal norm is The Criminal Tribes Act of 1871.⁵ According to this British-era law, entire populations including the transgender community was classified as a criminal tribe that resulted in them being subjected to systemic surveillance and harassment. For a society that understood gender variety, this legislation introduced the western notion of binary genders.

This coupled with the Christian moral system that was shoved upon the society viewed any behaviour deviating from heteronormative norms as illegal or abnormal. The colonial government, in a way, set progress back by centuries and replaced it with an oppressive attitude toward sexuality and gender. Then came about the Indian Penal Code of 1860⁶ with the widely-debated Section 377 that criminalised homosexuality. This created an atmosphere of intolerance towards gender variety and was commonly used as a façade to persecute the transgender community.

Colonization not only robbed India of its resources but cast a shadow so looming that it altered the Indian society's perception of transgender individuals. As disheartening as it is, this shadow persists even today. Long into the post-independence era, the criminalisation and marginalisation that started during the colonial era persisted in influencing legal frameworks and societal attitudes, creating structural barriers to the acceptance and inclusion of transgender people.

Constitutional Adjudication and Fundamental Rights

The Indian constitution came into force in 1950 and enshrined with it are fundamental principles of human dignity, equality, and non-discrimination. Though the constitutional framework does not explicitly mention gender identity or rights of transgender persons, it does guarantee equal treatment of all before the law, equal protection granted by the law, prohibition of discrimination, based on gender, religion, race, caste, or place of birth, protects the right to life and personal liberty, and ensures the right to freedom of expression.

Though all these extensive protections are granted by it, the unfortunate reality is certain segments of the society are somehow excluded from it. It is the progressive judicial interpretation of these constitutional provisions that has contributed to the enhancement of human rights for transgender persons.

It is not just the constitution, but even its Preamble emphasises on the importance of equality, justice, fraternity, and liberty⁷ to define the fundamental ideas which support the expansive interpretation of rights. For instance, according to Article 38 of the Directive Principles of State policy,⁸ it's mandatory for the state to enhance welfare while reducing inequality. In turn, this becomes the constitutional basis for protecting transgender rights.

It would be unfair to not mention how far the Indian traditional system has come in facilitating the extension of coverage of fundamental rights to include transgender persons. For instance, the wide interpretation of the term sex mentioned in article 15 by the judiciary has now become broad enough to include gender, identity and expression instead of severely restricting biological understanding. This not only shows helpful transformation but put forward and interpretative approach that thoroughly understands how discrimination based on gender identity is in breach of constitutional principles of non-discrimination and equality.

The Puttaswamy judgement of 2017⁹ recognised the right to privacy as a fundamental right. This interpretation of the right significantly impacts the rights of transgender individuals. Individuals are safeguarded against compelled disclosure of their gender identity choices and interference with those choices, as they possess the right to privacy, encompassing the right to gender identity and expression. This acknowledgement enhances legal protections against discrimination and harassment for transgender individuals.

The Supreme Court's approach to interpreting fundamental rights illustrates how constitutional principles can evolve to address emerging human rights concerns. The court's willingness to recognise gender diversity reflects a broader dedication to inclusive constitutionalism that protects marginalised communities.

Judicial Pronouncements

- National Legal Services Authority v. Union of India (2014)¹⁰

The NALSA judgement is the most prominent judicial intervention regarding transgender rights in India.

The ruling established transgender individuals as a third gender and mandated comprehensive legal protections. The ruling in this case was based on fundamental inquiry by the court into understanding how gender identity is a basic aspect of personal autonomy and dignity. It showcases how an individual's gender identification that includes how they express and present their gender is an essential component of their personal identity. It was asserted by the Court that the Constitution affords greater protection to transgender persons since their exposure to marginalisation and prejudice is also greater than others.

The NALSA judgement encompasses several significant rulings, including the prohibition of discrimination in employment, education, and healthcare; the mandate for reservations in education and employment; and the recognition of self-identification as the

principal criterion for determining gender identity. It was also mandated by the Court that separate public facilities must be created and a more comprehensive approach must be adopted for the recognition of gender identity. This judgement heavily relied on the international human rights standards set forth by the Yogyakarta Principles.

- *Navtej Singh Johar v. Union of India* (2018)¹¹

This judgement is primarily well-known for decriminalising homosexuality but it has significant implications for transgender rights too. Through this judgement, the apex court managed to strike down the Indian Penal Code's Section 377. Heavy emphasis was placed on how gender identity and sexual orientation are the cornerstones of an individual's identity and must be safeguarded by the Constitutional rights to personal liberty and privacy.

The Court recognised that discrimination against individuals identifying as LGBTQ constitutes a breach of essential principles of equality and dignity. The historical injustices faced by the LGBTQ community was also further highlighted and this underscored the imperative of societal progress. The cumulative impact of these judicial rulings has rendered the legal landscape for the protection of transgender rights progressively more favourable.

Apart from this, several High Courts have also given various progressive rulings that have managed to broaden the protections granted to the transgender persons after the above-mentioned landmark pronouncements. For instance, the High Court of Kerala in *Anju v. State of Kerala* (2018)¹², established that the right of transgender individuals to marry is in natural alignment with that of their gender identity.

The above-mentioned pronouncements by the Supreme Court had a much-appreciated snowballing effect that resulted in an enhancement of not just rights but protections granted to the previously marginalised community. All this is also evidenced by the subsequent modifications made to the legal system. A fair summarisation would be that the judicial system began to exhibit an increased awareness of not just the issues pertaining to transgender rights but also a readiness to redress the situation.

The Transgender Persons (Protection of Rights) Act, 2019¹³

- **Legislative Procedure and Context**

The first formal and comprehensive legislation that's tailor-made to address the rights of transgender individuals in India is the Transgender Persons (Protection of Rights) Act, 2019. Even after numerous consultations with civil society members and an extensive and prolonged legislative debate, the former drafts of this Act drew widespread criticism from the advocates of transgender rights. However, this legislative process also revealed the ugly truth in the form of political motives and the inadequacy of judicial requirements.

Despite the NALSA judgement establishing explicit guidelines for the protection of transgender rights, the transition of these judicial pronouncements into effective legislation has been challenging due to the myriad concerns of diverse stakeholders and the intricacies of the bureaucratic process. Legislative discussions illuminated the advancements in the acceptance of transgender rights alongside the enduring misconceptions surrounding

gender identity issues. The final Act embodies compromises among various perspectives while remaining faithful to the essential protections mandated by the Supreme Court.

- **Essential Provisions and Safeguards**

According to the provisions of this Act, those who identify themselves as a gender different from their assigned sex at birth are transgender. This provision includes different gender variations not restricted to the conventionally limiting system of binary genders. From transgender men and women to genderqueer individuals and everything in between, this definition recognizes the spectrum of diversity within the transgender community. All this is done while offering some much-needed legal clarity for the purpose of implementation.

An essential provision put forward by the Act is the express prohibition of discrimination in terms of access to public facilities, employment, healthcare, and education. Any form of discrimination and violence is not only prohibited but it demands equal treatment of transgender individuals too. The primary aim of this regulation is to fight the systemic bias which has resulted in the marginalisation and discrimination of this community for decades together.

- **Reproaches and Constraints**

Despite representing progress in legislative development, the Act has faced significant criticism from advocates for transgender rights and legal experts. A primary challenge observed here is the need for certification from district magistrate that's in direct contradiction to the focus for self-identification put forward by the NALSA ruling.

The sections of the Act addressing penalties for major offences against transgender individuals have been criticised for their inadequacy. In a scenario where violence against this demographic is the harsh reality, a maximum penalty in the form of two year imprisonment for discrimination or harassment is fairly inadequate.¹⁴ Instead, a more robust deterrent is needed to mitigate this precarious situation.

Numerous challenges have emerged in the execution phase concerning the practical application of the Act. Many states struggle to effectively implement the Act's provisions due to insufficient infrastructure and inadequately trained personnel. Keeping aside the legislative intent, one disparity that we can no longer turn a blind eye toward is the actual situation. If left unchecked, it widens the disparity and severely affects the rights of transgender individuals.

Implementation Challenges

- **Administrative and Bureaucratic Challenges**

Significant administrative challenges must be addressed at all levels of government to effectively implement legislation that safeguards transgender rights. A considerable number of government authorities lack a comprehensive understanding of the rights of transgender individuals, along with the specific requirements of relevant laws and court decisions. This knowledge gap presents itself as obstacles when those identifying as transgender exercise their rights.

Navigating bureaucracy means facing procedures and protocols that lack consistency and clarity. These challenges are often faced by transgender individuals as they seek to acquire identity documents, utilise reservations, or access welfare programs. This problem isn't restricted to a single state or city but is prevalent across the country. The inconsistency could also be the result of varying procedures enforced by different governments in the absence of standardised procedure for implementation. All this further complicates and already complicated situation. A primary hurdle in the training and awareness initiatives for government officials is the lack of comprehensive understanding of transgender issues and the relevant legal requirements.

- **Healthcare Access and Discrimination**

Not just legal challenges, but transgender individuals also face considerable hurdles while trying to access quality healthcare. A common problem is most medical practitioners either lack the required training to deal with transgender-specific health problems or when skilled, there's a severe shortage. This usually leads to either inadequate or discriminatory access to healthcare. Another problem is the high cost of healthcare and their limited availability that makes gender-affirming healthcare highly inaccessible such as surgical procedures or hormone replacement therapy. The simple fact that such gender-affirming procedures aren't integrated into government healthcare system means such individuals are either unable to access the healthcare needed or have to pursue expensive private treatment options. Apart from physical health, the mental health support needed also seems to be in short supply.

Whether it is social stigma or restricted and severely limited access to specialised treatments, different factors create an obstacle for the mental health support sought by transgender persons. The only way forward in tackling this complex situation of mental health and gender identity challenges is establishment and easy access to specialised interventions.

- **Discrimination and Lack of Inclusion**

Although legal regulations exist, educational institutions still face challenges in effectively including transgender students. Issues to address encompass the availability of appropriate accommodations in hostels, access to lavatory facilities, regulations regarding dress codes, and the administration of identification cards. A considerable proportion of transgender students experience harassment from their peers and encounter minimal support from the authorities within their educational institutions.¹⁵

Workplace discrimination remains prevalent, even with established legal protections in place. Transgender individuals often experience discrimination during recruitment, face harassment in the workplace, and encounter restricted opportunities for career advancement. Keeping aside the formal work economy, the informal sector which employs considerable proportion of transgender individuals doesn't have the needed regulatory protocols and oversight needed to fight discrimination.

In the absence of robust enforcement mechanisms needed for effective implementation of anti-discrimination policies, the abhorrent discriminatory behaviours continue to exist with minimal consequences. Though the legislative protections in place look good on paper, without practical implementation and lack of accountability measure, it doesn't amount to much.

The Route Ahead

- **Legal and Policy Reforms**

To ensure the existing legal framework aligns with the best practices established by international organisations and tackle the implementation gaps, the existing legal framework requires further refinement. To ensure the Transgender Persons Act eliminates certain restrictions and integrates self-identification principles established during the iconic NALSA judgement, revising certain provisions of the said act is required.¹⁶

The existing legal framework requires enhancement to address implementation gaps and align with the best practices established by international organisations. Revisions to the Transgender Persons Act should eliminate certification restrictions and integrate self-identification principles consistent with the ruling issued by the NALSA.

A comprehensive anti-discrimination legislation that addresses all aspects of life would provide a greater level of protection compared to the current sector-specific approach. This type of legislation should establish effective procedures for administering penalties and appropriate sanctions for violators.

The formulation of policies at the state level requires careful coordination and standardisation to ensure that rights are consistently protected throughout the nation. The central government's established guidelines and monitoring procedures could facilitate effective implementation while maintaining respect for the federal government's structures.

- **Interventions in Social and Cultural Contexts**

The simplest way to tackle a problem is by going to its origin at the grassroot level. In terms of creating awareness and promoting acceptance, a helpful change would be to focus on educational inclusion. A revised curriculum exposing children to gender diversity and transgender rights would be a step in the helpful direction from a young age.¹⁷ However, to foster an inclusive educational environment, comprehensive teacher training and redesigning of institutional policies is needed.

Likewise, another equally important social and cultural intervention is the promotion of positive transgender representation in daily media.¹⁸ To address cultural differences effectively, engaging in community involvement activities that include religious and traditional leaders can provide significant support. Another equally important measure would be to create a more inclusive healthcare system that caters to the unique needs of the transgender community. This calls for medical personnel with specialised training, creation of service protocols customised for transgender persons, and the integration of all this into the general public health system.

- **Economic and Social Empowerment**

The unique challenges faced by transgender individuals in securing formal employment necessitate the implementation of targeted employment and skill development programs tailored to their specific requirements. Developing inclusive workplace cultures can be achieved through collaboration with private sector companies.

The identified vulnerabilities encompass healthcare, housing, and long-term security. The provision of these services should remain free from any discrimination or bureaucratic barriers. And unless these vulnerabilities unique to the transgender community is addressed through social protection programs, there's not much that can be expected in terms of positive change.

Support organisations and peer networks within the community can provide transgender individuals with the necessary assistance to effectively address the social and legal challenges they encounter. Government support for such initiatives can enhance the effectiveness of these programs.

Conclusion

Transgender rights in India went from historical marginalisation and discrimination to legal safe cards and constitutional recognition. The road and trajectory of this judicial and legal evolution in India highlights the need of the hour and that is inclusivity. The long and hard journey from criminalisation during the era of colonialism to the landmark judgement of NALSA, legislative, and judicial advancements are noteworthy.

That said, there is still a long way to go in ensuring this legal protection translates into actionable practices that ensure safeguarding of rights of transgender persons. There still exists a gap that needs to be bridged between the statutory rights of the people and their ability to access resources.

This is a challenge, not just for the government part the society in general. While taking abroad look at this, it's important to understand that it's not just about safeguarding marginalised populations, but it's equally important to ensure its effective implementation and social transformation. Expansion of the legislative framework has made it easier to provide explicit protection for transgender rights while the flexibility of constitutional framework has propelled progressive judicial interpretations.

To facilitate future development, it is essential to ensure coordination among activities aimed at social change, policy implementation, and legal modifications. The campaign for transgender rights in India has achieved significant milestones, while also highlighting areas that necessitate continued advocacy and enhancement. The fundamental values of human dignity, equality, and inclusion form the foundation of contemporary Indian democracy, and the ongoing transition is a reflection of these principles.

Ultimately, the effectiveness of transgender rights protection in India will depend on society's willingness to accept diversity and ensure that legal protections lead to real opportunities for all individuals, irrespective of their gender identity or expression.

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