

FROM RECOGNITION TO REALITY: A CRITICAL ANALYSIS OF THE IMPLEMENTATION OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

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DOI: <https://doi.org/10.34293/shanlax.9789361634130.ch010>

Abstract

This paper investigates the development and implementation of transgender rights in India. The paper deals with the provisions of the Transgender Persons (Protection of Rights) Act, 2019 and the implementation of the Act across India. The work also deals with how transgender persons were recognised in the history of India, how they became historically marginalised in society, and how the Supreme Court of India, in the case of NALSA and other judicial pronouncements, recognised their fundamental rights of identity and dignity.

1. Introduction

Gender identity and sexual orientation are among the most important legal and social issues in today's scenario. Historically, transgender persons have always been part of Indian society, but for a long time they did not receive proper legal recognition or protection, and therefore they became very vulnerable to discrimination and social rejection. The denial of basic rights such as education, employment, healthcare, and a dignified life placed them on the margins of society.

The historic judgment and observations made by the Supreme Court in the case of NALSA shifted the approach of the judiciary towards the rights of transgender persons and recognised them as the third gender, and also extended constitutional protection to them. The Supreme Court clearly observed the importance of self-identification, dignity, and equality for transgender persons.

Subsequently, Parliament enacted the Transgender Persons (Protection of Rights) Act in the year 2019. This Act raises important questions about the true protection of constitutional principles for transgender persons. The Act was enacted with the aim to prohibit discrimination and provide welfare measures, but a number of problems arise regarding certification and weak enforcement of the Act.

In this context, this work critically examines whether the Act enacted by Parliament for the protection of transgender persons has been successful in achieving its objectives, which ensure the rights of equality and dignity of transgender persons.

2. Historical Presence of Transgender Persons in Indian Society

From the inception of society, transgender persons have been considered an integral part of society, and they have existed in India since ancient times.

Indian culture was not strictly confined to only male and female genders.¹ Gender diversity present in Indian society was recognised, accepted, and even respected from the beginning of civilisation.²

The God Ardhanarishwara represents the combination of male and female in one body, which provides the understanding that gender is fluid and interconnected. Another mythological character from the Mahabharata is Shikhandi, who was born as a female but later lived as a male and also played a very important role in the Mahabharata war on the side of the Pandavas.³ Arjuna lived as a transgender person for some time during exile and worked as a dance teacher, taking the identity of a female named Brihannala.⁴ Lord Vishnu also took a female form as Mohini, which shows the acceptance of gender transformation. These are some examples which show that the idea of gender diversity was not only present in society but was also part of mythology.

Ancient India

In ancient India, transgender persons were socially recognised and also possessed various rights; they also had defined roles in society. Transgender persons were part of various religious ceremonies, blessings, and cultural rituals. The blessings given by transgender persons during marriage and childbirth were considered very important.⁵

Ancient texts such as the Kama Sutra⁶ or Kama Shastra acknowledged the existence of transgender persons and referred to them as tritiya panthi. In ancient Indian society, transgender persons were not entirely marginalised from the mainstream; rather, they received social acceptance and had cultural integration.

Medieval India

During the medieval period, especially under the Mughal dynasty, transgender persons held significant administrative and social positions. Transgender persons were appointed as guards of harems, where the queens and daughters of the king resided. There is also evidence that some transgender persons worked as advisers to kings and held prominent official positions in the royal court.⁷

In the medieval period, transgender persons enjoyed respect and authority, and they were integrated within the political structure of the royal court.

British Colonial Period

The position of transgender persons in society was significantly harmed by British colonial rule. Laws such as the Criminal Tribes Act, 1871⁸, and Section 377 of the Indian Penal Code,⁹ which were based on Victorian morality, created a very difficult position for transgender persons in society. The policies introduced by the British changed the entire social scenario. Transgender persons, who were once considered sacred, were now labelled as born criminals.

Subsequently, the position of transgender persons deteriorated, and stigma became attached to them in society.¹⁰ The British rule destroyed the customary practices of transgender persons.¹¹ They were pushed to the margins of society and forced into begging and other informal occupations such as sex work.

3. Position of Transgender Persons under International Conventions

There is no single international treaty, except the Yogyakarta Principles, that specifically deals with the rights of transgender persons. However, the progressive interpretation of existing international conventions provides protection to transgender persons through the principles of equality, dignity, liberty, and non-discrimination.

The Universal Declaration of Human Rights¹² is considered the foundation of human rights. The UDHR provides that all human beings are born free and equal in dignity and rights.¹³ The Declaration also prohibits discrimination of any kind,¹⁴ which includes discrimination based on gender. It further provides the right to life, liberty, and security,¹⁵ along with the right to equality before the law¹⁶ and the right to privacy.¹⁷

The International Covenant on Economic, Social and Cultural Rights¹⁸ focuses on the social and economic rights of individuals. It provides the principle of non-discrimination,¹⁹ the right to work for every person irrespective of gender,²⁰ fair working conditions,²¹ social security,²² and the right to health and education for every segment of society.²³

These rights are very important for transgender persons, who often face exclusion and discrimination in society.

The provisions of the Convention on the Elimination of All Forms of Discrimination Against Women²⁴ are also applicable to transgender women. The Convention obligates the State to eliminate all forms of discrimination against women.²⁵ It is also the duty of the State to eliminate gender stereotypes. The Convention further provides the rights to employment and healthcare for transgender women.²⁶

The Yogyakarta Principles²⁷ specifically address issues of sexual orientation and gender identity. They provide the right to the universal enjoyment of human rights, including equality and non-discrimination.²⁸ The Principles support the right to recognition before the law irrespective of gender identity.²⁹ Every person has the right to privacy, which includes the right to choose their gender identity.³⁰ They also provide protection against medical abuse. These Principles strongly support the rights of transgender persons.³¹

International human rights instruments provide a strong foundation for protecting the rights of transgender persons through the basic principles of equality, dignity, and non-discrimination. They also bind their signatories to apply these principles in their domestic laws.

4. Judicial Activism and Development of Transgender Rights in India

After independence, the arbitrary laws made during colonial rule were repealed, but the stigma attached to transgender persons in society continued. Before the historic judgment of NALSA, transgender persons were not considered within the definition of personhood.

The judiciary has played a very important role in the development of transgender rights in India. Even before any specific law was enacted, the judiciary played a crucial role in recognising and protecting the rights of transgender persons.

Before the judgment of NALSA, the courts had not directly addressed issues relating to transgender identity. In the case of Naz Foundation,³² the Delhi High Court decriminalised same-sex relations under Section 377 of the Indian Penal Code. It was observed that discrimination based on sexual orientation violates Articles 14, 15, and 21, and also violates the rights to dignity and privacy, which are essential constitutional values.³³

But unfortunately the decision of the Naz Foundation was reversed in the Suresh Kumar Kaushal case where the supreme court upheld the validity of section 377 of the Indian penal code.³⁴

The historic judgment in the case of National Legal Services Authority³⁵ is considered the most important turning point in transgender rights jurisprudence in India. In this case, for the first time in history, the Supreme Court legally recognised transgender persons as the third gender³⁶ and extended constitutional protection to them. The Court further observed that every person has the right to determine their gender identity and sexual orientation. For recognising transgender persons, a compulsory medical examination is not required. Gender identity must depend on a person's inner sense and not on medical intervention.

The Court interpreted fundamental rights to apply to transgender persons. The right to equality is applicable to all persons, including transgender individuals, and the Constitution prohibits discrimination based on gender identity. The freedom guaranteed under the Constitution includes expression of gender identity, and it also protects the rights to dignity and personal autonomy.³⁷

The Court directed the Central and State Governments to provide legal recognition of gender identity and to consider transgender persons as a socially and educationally backward class. The judgment established transgender rights as fundamental rights and introduced the principle of self-identification, and it attempted to establish constitutional morality in relation to the rights of transgender persons.³⁸

The principles established in the case of NALSA were further reinforced in the case of Justice K. S. Puttaswamy.³⁹ In this case, the Supreme Court recognised the right to privacy as a fundamental right, and it includes sexual orientation and gender identity within the ambit of Article 21.⁴⁰

The judiciary has played a very important role in recognising and protecting the rights of transgender persons in India. To give effect to the principles stated in the case of NALSA, the Central Government enacted a law specifically for the protection of transgender rights in India, namely the Transgender Persons (Protection of Rights) Act, 2019.

5. Evolution and Provisions of the Act

The foundation of transgender rights was laid by the Supreme Court in the case of NALSA.

After this historic judgment, there was an increasing demand from various segments of society to enact a comprehensive law to protect the rights of transgender persons. In the year 2014, Rajya Sabha member Tiruchi Siva introduced a Private Member Bill known as the Rights of Transgender Persons Bill. This Bill was not adopted by the Government, but the provisions contained in it were very progressive.⁴¹

Subsequently, the Government introduced its own Bill in the year 2016, which underwent several changes, and finally, in the year 2019, the Act was enacted, and the Rules were framed in the year 2020.⁴²

In March 2026, a drastic amendment was carried out in the Act, where the definition, procedure for obtaining a certificate, and the punishment provisions were widely changed. The amended definition of a transgender person clearly separates persons with different sexual orientations, such as gay and lesbian individuals, from transgender persons.⁴³ The Act prohibits discrimination of any kind against transgender persons in establishments, whether private or public.⁴⁴

The most important and widely criticised part of the Act is the recognition of transgender identity. A transgender person has the right to official recognition as a transgender person and to choose their own gender identity. To obtain a gender identity certificate, a transgender person must apply to the District Magistrate, and after the application, the District Magistrate issues the certificate; however, such a process is subject to the opinion of a medical board as provided by the Amendment Act.⁴⁵ This provision is against the directions given in the judgment of NALSA.

The Act also casts a duty on the State to carry out welfare measures for the betterment of transgender persons. It also makes provisions regarding healthcare facilities for transgender persons.⁴⁶ The Act also establishes the National Council for Transgender Persons.⁴⁷ The Council has a duty to monitor and evaluate the laws and policies made by the State. Another important part of the Act is that it provides several punishments for various offences. The degree of punishment is relatively high, ranging from six months to life imprisonment.⁴⁸

The provisions of the Act present a mixed picture. On one hand, the Act provides legal recognition and some basic rights to transgender persons, but on the other hand, it violates basic principles of the Constitution of India and the observations made by the Supreme Court in various judgments.

Many provisions of the Act are also inconsistent with international conventions such as the Universal Declaration of Human Rights⁴⁹ and the Yogyakarta Principles.⁵⁰

6. Implementation of the Transgender Persons (Protection of Rights) Act, 2019 in India

Across India, the implementation of the Act is very uneven and inconsistent. The Act provides a basic legal framework which is not fully consistent with the fundamental rights and observations of the courts in various cases. The main problem arises in the implementation of the Act.

1. High Implementation States

There are some states in India where relatively strong implementation of the Act has been carried out, and various schemes and institutional mechanisms have been provided.

Tamil Nadu is considered one of the most progressive states in implementing transgender welfare policies. The State established a Transgender Welfare Board in the year 2008 and issued identity cards for transgender persons.⁵¹ The State also provides free sex reassignment surgery, housing schemes, and educational support for transgender persons.⁵² The State of Kerala has also adopted a rights-based approach towards transgender persons. The State framed a Transgender Policy in the year 2015 and provides financial assistance schemes, skill development programmes, and has carried out various gender-neutral initiatives.⁵³ The State also provides healthcare support, educational scholarships, and the process of recognition is relatively easy. The State of Karnataka provides 1% reservation for transgender persons.⁵⁴

Tamil Nadu, Kerala, and Karnataka show that the State can play a crucial role in protecting the rights of transgender persons.

2. Moderately Implementing States

There are certain states in India which have taken some steps but lack comprehensive or effective implementation.

The State of Maharashtra has welfare schemes for transgender persons and also has inclusive skill development programmes.

However, there is no strong institutional framework, and there is a lack of awareness among officials.⁵⁵ The Union Territory of Delhi has proposed policies for transgender welfare and provides financial assistance programmes,⁵⁶ but these policies are not fully implemented, and there is a lack of coordination between departments. The State of West Bengal has also introduced various welfare schemes in education, healthcare, and employment.⁵⁷

These states show partial compliance with the Act, but monitoring is very weak. The states have transgender councils, but these councils do not function effectively.

3. States with Weak Implementation

Across India, many states remain largely ineffective in implementing the Act due to administrative and structural barriers.⁵⁸ A number of states show limited commitment towards implementation. Uttar Pradesh, the largest state in India, shows very slow progress in implementation.⁵⁹ There is no comprehensive transgender welfare policy in the state, and there is limited awareness among officials. There are also various difficulties in accessing identity certificates. The Transgender Welfare Board exists only on paper, and the council has not been effectively established even after several years of enactment of the Act. The State of Bihar has one of the weakest implementation records, as it mainly depends on central government schemes and does not have its own schemes.⁶⁰ Some initiatives have been announced by the State of Madhya Pradesh, but implementation is poor due to lack of coordination between departments and weak execution of schemes.⁶¹

The true success of the law does not depend only on the provisions of the Act. The implementation of these provisions determines the actual benefits for marginalised sections of society. Without proper institutional mechanisms, awareness, and enforcement, the Act cannot achieve its objective of ensuring equality and dignity for transgender persons.

7. Conclusion and Suggestions

The journey of transgender rights in India is a shift from invisibility and marginalisation to legal recognition and constitutional protection. Historically, transgender persons held a very prominent position in society, but due to colonial laws and social stigma, they were pushed towards systematic exclusion. The judiciary has played a very remarkable role in re-establishing rights-based jurisprudence. The judiciary recognised transgender persons as a third gender and provided protection of fundamental rights under Articles 14, 15, 19, and 21 of the Constitution of India.

Parliament enacted the law in the year 2019 for the betterment of transgender persons. However, there is a visible gap between legal recognition and actual implementation of the provisions of the Act at the ground level. The analysis of implementation of the Act provides knowledge about a deeply uneven landscape across India. States like Tamil Nadu, Karnataka, Kerala, and Andhra Pradesh have taken progressive steps, whereas many other states in India continue to exhibit weak implementation of the Act.

The recent amendment in the Act complicates the certification procedure. The amendment also violates basic fundamental principles provided by the Constitution of India and various provisions of international covenants, along with the judicial observations made by Indian courts in cases like *NALSA* and *Puttaswamy*.

Suggestions

1. The law must reform the principle of self-identification without any mandatory medical or bureaucratic verification.
2. The Central Government must issue or formulate binding guidelines for all states. This will ensure uniform implementation of the Act.
3. In many states, transgender welfare boards exist only on paper; therefore, such bodies must be made functional in all states.
4. The National Council for Transgender Persons is a very weak body; therefore, it must be improved with enforcement authority similar to that of a Human Rights Commission.
5. In society, other persons and transgender persons are not situated at equal economic and political status; therefore, according to the guidelines of *NALSA*, reservation should be provided in education and public employment.

The success of law does not lie only on paper but in its implementation at the ground level. There is a need to shift from a formal welfare-oriented approach to a substantive rights-based approach.

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