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## Transgender Rights and Legal Recognition

### Abstract

The Transgender Persons (Protection of Rights) Act of India, amended in 2019, aims to address the constitutional rights of non-binary people, gender identity recognition, and anti-discrimination regulations in institutional settings like family, employment, school, and healthcare. However, the Act lacks practical support and principles for substantively accessing rights. This article examines the experiences of 15 transgender individuals in Kolkata, India, and the challenges they face in securing their rights.

The authors suggest several proposals to address these gaps, including increasing the proportion of non-binary persons in negotiation positions, enhancing educational fairness, and providing transgender-specific training for healthcare practitioners. They also highlight the importance of overcoming marginalization in families and hypervisibility in public places for non-binary gender populations to progress towards claiming social and economic rights. The International Transgender Day of Visibility honours the courage of transgender and non-binary persons defying heteronormative social norms.

### Introduction

The Yogyakarta plus 10 principles have officially included LGBTIQ+ identities in human rights talks, and a growing body of research has shown that we are living in a historic time where rights for people who identify as gender non-conforming are being acknowledged. This raises questions about why LGBTIQ+ communities are only beginning to acknowledge these rights later than other groups. Human rights praxis and theory are essential components of human rights practice, as they co-construct the procedures involved in human rights practice.

However, there are still significant gaps and delays between the creation of laws and their practical application, creating obstacles and fights for access to rights. Most research on LGBTIQ+ populations within the human rights framework has focused on the legal side of the policies, while little has been done on the variety of non-binary gender identities and the unique obstacles to their rights present in their daily lives.

The state of human rights advancement for LGBTIQ+ groups varies between nations, with some countries executing homosexuals and others permitting gay marriage. Post-colonial scholars have highlighted that focusing only on legal rights while ignoring systems that restrict access to those rights, such as authoritarianism, neoliberalism, patriarchy, and class, reduces human rights to mere legal modifications that impact practice in extremely narrow contexts.

In South Asia, new laws and administrative rulings have been adopted to acknowledge the identities of transgender and other gender-nonconforming persons. The Bangladeshi government recognized hijra<sup>4</sup> as a "third gender" in 2013, leading to the creation of a distinct category for the gender question on voter registration forms. The Transgender Persons (Protection of Rights) Bill was passed into legislation in Pakistan that same year, granting non-binary individuals constitutional rights.

India's Supreme Court overturned the applicability of Section 377 of the Indian Penal Code in 2018, signalling the transition of people of colour from criminality to citizenship. The Transgender Persons (Protection of Rights) Act, which has undergone revisions throughout time, has been critically analyzed from the viewpoints of the transgender community while adhering to substantive access and application of human rights ideas.

Non-binary people in India have long faced both hypervisibility as adbhut and invisibility as citizens with rights, despite historical and cultural norms and recent legislative acknowledgement. Reducing the gap between the formulation of legal rights and real access to rights can be achieved by understanding the structural/institutional processes and their intersectionality, identifying hurdles, and developing workable solutions.

## Transgender Persons (Protection of Rights) Act of India

The National Legal Services Authority (NALSA) in India ruled in 2014 that the rights of persons with gender identities should be protected. This ruling established social assistance programs, and guidelines for legal recognition, and provided a standard for the enlargement and defence of their constitutional rights. The Rights of Transgender Persons Act was introduced in 2014 and was approved by the Rajya Sabha.

However, the MSJE later presented a different piece of legislation in the Lok Sabha in 2016 under the title "Transgender Persons (Protection of Rights) Bill." This legislation was exclusive and ignored input from community-led discussions, leading to harsh condemnation from the LGBTIQ+ community for breaching their human rights.

The Lok Sabha established a Standing Committee to address requests for Bill changes submitted by gender-diverse groups. A new version of the Bill with 27 revisions, including a better definition of a transgender person, was passed by the Lok Sabha on December 17, 2018. This bill was revised in 2019 and became an Act with 23 subclauses and nine clauses.

This essay offers a fresh perspective by examining the Act's possible effects from the viewpoints of transgender and other gender-diverse populations. The primary goal is to show how legislative

changes and regulations impact community members' day-to-day existence, specifically looking at their expectations and concerns about the provisions of the Trans Act since 2014.

This community-based approach is essential because the central government changed the problematic definition of "transgender" in the current version of the Act only as a result of nationwide protests. LGBTIQ+ groups have effectively stopped rights-violating provisions in the past and will continue using human rights, recognition, and empowerment as a framework to assess the Trans Act.

## Substantive rights access and the practice of human rights

Academics argue that the difference between the enactment of laws and rights and their actual application for marginalized communities is due to various social, political, and economic structures. The substantive rights access framework helps understand the underlying processes behind this gap and identifies obstacles to claiming and accessing rights. The real capacity of groups to execute their rights is referred to as substantive access.

Stigmatized populations have significant limitations in public spaces, which serve as potent safeguards against further marginalization. Understanding the mechanisms that maintain excluded people's dual status as highly visible and invisible is crucial for discussing substantive rights access and practice. The 2019 Trans Act, the third legislative reform, allows us to critically analyze the discrepancy between legal rights and practice.

Transgender and non-binary people experience systemic discrimination and prejudice daily, beginning at an early age. The National Legal Services Authority (NALSA) ruling in *NALSA v Union of India* recognized the transgender population as the "third gender" and granted them legal recognition, but the rights promised only exist on paper. The Supreme Court has suggested reservations be made for transgender people in public employment and education, but this directive has not yet been implemented.

The Transgender Persons (Protection of Rights) Act, 2019 was introduced in response to the ruling in *NALSA v. Union of India*, ordering the Central Government and State Governments to take measures for the welfare of the transgender community and treat them as a third-gender safeguard their rights under Part III of the Constitution and other laws made by Parliament and the State Legislature.

## Recognition of the Identity of Transgender Persons

The 2019 Act permits a transgender person to self-perceive their gender identity and to be recognized as such. The laws also address the granting of gender-neutral certificates and certificates of identification. A certificate of identification designating one's gender as "transgender" may be requested from the District Magistrate by a transgender person. Only after undergoing surgery to transition from male to female identity may the person receive an updated certificate.

## Rights and Entitlements

The Central Government is required by this Act to grant the transgender community the following rights:

- **Discrimination is Prohibited:** Discrimination against a transgender person is outlawed by this Act. This includes denial of services or unfair treatment in the following areas:
  - I. healthcare;
  - II. employment;
  - III. access to or enjoyment of public goods, facilities, and opportunities; (v) freedom of movement;
  - IV. right to live, rent, or otherwise occupy property; (vii) opportunity to hold public or private office; and
  - V. access to a government or private establishment in whose care or custody the transgender person is.
- **Right of residence:** Every transgender person is entitled to live in and be a part of his home. A competent court may order the placement of a transgender person in a rehabilitation centre if the individual's immediate family is unable to provide for them.
- **Employment:** A transgender person is not subject to discrimination in the workplace, including in terms of hiring or promoting policies, by either the public or private sector. To handle complaints against the Act, each business must choose a person to serve as a complaint officer.
- **Education:** Without prejudice, educational institutions that receive funding or recognition from the appropriate government must offer transgender students inclusive instruction, sports opportunities, and recreational amenities.
- **Health care:** The government has to take action to give transgender people access to medical facilities, such as sex reassignment surgery and dedicated HIV surveillance centres. The government would give comprehensive medical insurance plans for transgender people and overhaul the medical curriculum to accommodate their health challenges.

## Establishment of the National Council for Transgender Persons

Furthermore, the Act permits the establishment of a National Council for Transgender Persons. The National Council's responsibilities include:

1. advising the Central Government on the creation of laws, policies, programs, and projects about transgender people;
2. keeping track of and assessing the results of policies and programs intended to achieve equality and full participation of transgender people;

3. supervising and coordinating the work of all government departments and other governmental and non-governmental organizations that deal with issues about transgender people;
4. addressing the complaints of transgender people,
5. carrying out any other duties as may be assigned by the Central Government.

## Offences and Penalties

The following offences against transgender people are recognized by the Act:

1. forced or bonded labour (apart from mandatory government service for public purposes);
2. denial of access to public areas;
3. expulsion from the home and village; and
4. abuse on any level, including physical, sexual, verbal, emotional, or financial.

These offences include fines in addition to jail terms ranging from six months to two years.

## Case

A measure to safeguard transgender rights was approved by the Indian parliament, but it falls short in several ways. Since the first trans rights bill was proposed in 2016, allied human rights groups and trans activists have criticized the proposals. Ultimately, the legislators disregarded the issues brought out by the activists. India's new law would thereby undermine the rights of transgender persons rather than honour and elevate these long-persecuted groups.

Among the new law's most serious shortcomings is the legal gender recognition process, which allows transgender individuals to change their documentation to reflect their identity.

A new law in India establishes a two-step procedure. A person must first apply to the District Magistrate in their area for a "transgender certificate." This can be carried out based on the self-declared identity of the individual. When a certificate holder wants to alter their legal gender to male or female, they can file for a "change in gender certificate," which instructs authorities to make the change. But to go to the next phase, the patient must show the District Magistrate proof of surgery, certified by a hospital official, and the official must be "satisfied with the correctness of such certificate" for the individual to move on.

This gives one government entity an incredible amount of authority to decide which transgender persons "qualify" to be accepted for who they are. Additionally, it forces people to undergo medical operations they may not want to, which is against international and Indian legal precedent and a violation of their fundamental rights.

Indian courts have always maintained that transgender individuals should be recognized by the government according to their terms, free from prejudice or coercion.

In *NALSA v. India*, the Indian Supreme Court declared in 2014 that transgender individuals should be acknowledged as a third gender and granted access to all basic rights, as well as some privileges in the workplace and school. In a bench memo, Justice K.S. Radhakrishnan mandated that state

and federal authorities acknowledge "transgender persons' right to decide their self-identified gender." "Any push for [sex reassignment surgery] for announcing one's gender is unethical and illegal," the court stated unequivocally.

The fundamental connection between the right to legal gender recognition and other rights was established by a Delhi High Court decision in October 2015. A transgender person's feeling or experience of gender is vital to their basic identity and sense of being, according to Justice Siddharth Mridul, who affirmed the 19-year-old transgender man's right to remedy harassment by his parents and the authorities. To the best of my knowledge, everyone is entitled, under the law, to be accepted for the gender they have chosen.

The contents of the new law not only go against court decisions but also against international norms for legal gender recognition. Legal and medical procedures should be kept apart, according to international norms and best practices, which include those of many United Nations organizations, the World Medical Association, and the World Professional Association for Transgender Health.

In 2015, nations should start "[i]ssuing legal identity documents, upon request, that reflect preferred gender, eliminating abusive preconditions, such as sterilization, forced treatment, and divorce," as advised by the Office of the UN High Commissioner for Human Rights. Governments should "take all necessary legislative, administrative, and other measures to fully recognize each person's self-defined gender identity, with no medical requirements or discrimination on any grounds," according to a 2015 report from the World Health Organization and the Asia-Pacific Transgender Network.

Numerous international human rights accords protect the right to be recognized as an individual before the law, which is essential to upholding each person's dignity and value. Other fundamental rights, such as the freedom of speech, the right to privacy, the right not to be arbitrarily arrested, and the right to work, education, health, safety, access to justice, and the freedom to travel about, all depend on legal gender recognition.

India's activists intend to contest the new law on this and several other fronts. The fact that discrimination against trans individuals is specifically forbidden by law in several areas, including employment, education, and health care, provides a strong foundation for contesting discriminatory legal measures. While acknowledging intersex individuals, the new legislation provides no special rights for them. Improvements on that front should also be guided by the momentum to shield intersex youngsters from medically unnecessary "normalizing" surgery, such as a 2019 ban on operations in Tamil Nadu.

To put it simply, any medical procedures should not be linked to the process of being recognized by the law or having authority over one's own body. However, medical care ought to be easily accessible if a person needs it for their personal identification or transition process.

# Has the government and the judiciary failed to respect transgender person's rights and added to their struggles and marginalisation?

## Lack of Reservation for Transgender community

The Supreme Court declined to consider a request for clarification on giving transgender people reservations on March 27, 2023. The petitioner sought clarification on the intended reserve for transgender people in the 2014 NALSA decision, which was made in the NALSA verdict. The petitioner argued that the Supreme Court had ordered the Union and the States to regard transgender people as a socially and educationally backward class and provide them preferential treatment in public employment and education.

The petitioner claimed that the NALSA ruling conveyed the idea that transgender people would be regarded as OBCs and have a vertical reservation. However, the court did not specify how the reservation should be applied, leading many states to not yet implement such reservations. The petitioner argued that reservations for transgender and intersex individuals should be established based on gender and disability, as has not been done for women and persons with disabilities.

Karnataka became the first state to provide the transgender community with 1% of horizontal reservation in 2021. The state government of Karnataka became the first to offer a 1% reservation for transgender individuals in civil service positions, regardless of caste. This ruling resulted from an intervention made in the *Sangama v. State of Karnataka* case by Jeeva, an organization advocating for the rights of sexual minorities and transgender people. The state government then released an amendment allowing for horizontal reservations, ensuring that reserves for transsexual people would be guaranteed regardless of caste classification.

Horizontal reservations are important because they apply to all caste groups and allow separate reservations within each vertical category. One per cent of ST, SC, OBC, and General Merit seats will go to transgender people, which is how reservations for women and those with disabilities operate at the moment. Many people favour the notion of establishing horizontal reservations because they believe it will increase equity and homogeneity in society.

States with unique regulations about the transgender population include the Bombay High Court, the Madras High Court, and the Bihar government. The Supreme Court declined to consider the plea on March 27, 2023, as the petitioner sought clarification on the intended reserve for transgender people.

## Discriminatory policies barring blood donation

The Union government defended its policies in March 2023, stating that transgender, female sex workers and gay men are recognized as demographic groups with higher HIV and TTI prevalence.

The Ministry of Health and Family Welfare responded to a Supreme Court notice in March 2021, filing an affidavit.

A transgender community member, Santa Khurai, filed a petition arguing that the categorization should be declared unconstitutional under Articles 14 and 15 of the Constitution. The government argued that the concerns belong in the executive's domain and that public health should be considered, considering the consequences of unfair treatment. The affidavit stated that people at risk for HIV and Hepatitis B or C are not subject to the recommendations, but specific population groups are included.

## Lack of protection under criminal laws

The Transgender Persons (Protection of Rights) Act, 2019 was enacted in India in 2019, but it failed to meet the high standards set for it and worsened existing socio-legal issues. As of 2023, transgender women still lack the legal right to equality before the law and equal protection under it. The 2019 Act's provisions and penalties are discriminatory, as they deny transgender women the same legal protections as cisgender women under several criminal statutes, including the Indian Penal Code.

Section 18 of the Act imposes a minimum sentence of six months, which can escalate to two years in jail and a fine for any act of abuse or violence directed towards a transgender person. This discrimination affects both gender identification as a woman and gender identity as a transgender woman. Section 5 of the Act undermines the right to self-perceived gender identity, requiring transgender individuals to seek a certificate of identification from the District Magistrate through a rigorous legal process. The NALSA ruling's guidelines for self-determination without medical assistance are also at odds with this provision. Efforts to weaken the NALSA ruling have led to the marginalization, oppression, and disregard of those already marginalized and oppressed.

## Recent Minor Gains for the Community of Transgender People

In the March 2023 case of Jasmine Kaur Chhabra v. UOI & Ors., the Delhi High Court ordered the Delhi government to build transgender-friendly public restrooms in the capital within eight weeks or face personal appearances from senior officials. The court acknowledged the New Delhi Municipal Council's response, stating that paperwork exists but nothing has been done to address the issue. The court requested guidelines for maintaining public restrooms clean to comply with the Swachh Bharat Mission rules and the NALSA ruling.

The petition argues that every individual has the fundamental right to use separate public restrooms, regardless of gender, and that it is against Articles 14 and 21 to deny transgender or third-gendered people access to these facilities. The National Council of Education Research and Training (NCERT) informed the Madras High Court of a gender-inclusive draft manual, "Integrating Transgender Concerns in Schooling Processes," which aims to increase inclusivity in schools, stop gender-based violence, and provide gender-inclusive curricula and gender-neutral clothes and toilets.



## Conclusion

India still faces significant challenges in recognizing the transgender population as a different gender category, despite the official recognition of their existence in 2019. The Transgender Persons (Protection of Rights) Act of 2019 was passed, but the transgender population continues to face marginalization and often hides their gender identification. The government and courts must work together to transform society into one that is progressive and accepts everyone.

Penal laws must be interpreted and amended to reflect socio-cultural developments, and the government and state governments must provide necessary consideration and assistance. The transgender population has been marginalized and left out of the Union Budget for 2023. The current status of the transgender community reflects the structural inability of the Indian State's three branches to consider transgender people as equal citizens. The system must work to mainstream the rights, welfare, protection, and well-being of the transgender community, rather than denying their vulnerability and powerlessness.