

A Discourse on The Transgender Persons (Protection of Rights) Act, 2019

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ABSTRACT: Transgender rights in India have gained significant attention and momentum in recent years. The Hon'ble Supreme Court of India's landmark NALSA judgement in 2014 recognized transgender persons as a third gender, affirming their rights to self-identify and challenging entrenched social norms. The Transgender Persons (Protection of Rights) Act was enacted in 2019 to safeguard the rights of transgender persons and promote their welfare. Despite legislative progress, challenges persist regarding enforcement, social acceptance, and living with dignity. Advocacy and activism continue to play a crucial role in fostering dialogue and striving for a more inclusive society. The journey toward equality and acceptance for transgender persons in India is ongoing with implications for broader societal change.

KEY ASPECTS INCLUDE:

- Recognition of Third Gender: The NALSA judgement laid the groundwork for transgender rights in India.
- Legislative Protections: The Transgender Persons (Protection of Rights) Act aims to protect transgender individuals from discrimination and promote welfare.
- Constitutional Rights: Transgender persons are entitled to Fundamental Rights under the Constitution of India.
- Challenges: Enforcement, social stigma, and limited awareness of rights remain significant issues.
- Advocacy: Continued activism is essential for promoting inclusivity and addressing challenges faced by transgender individuals.

KEYWORDS: Transgender Rights Act, Third Gender Recognition, Discrimination Protection, Advocacy and Activism

INTRODUCTION

Transgender rights in India have gained considerable attention and momentum in recent years, propelled by growing advocacy, social movements, and legal reforms. Traditionally marginalised, transgender individuals have endured systemic discrimination, social ostracism, and limited access to Fundamental Rights and services. The historic recognition of transgender persons as a third gender by the Hon'ble Supreme Court of India in the landmark NALSA¹ judgement in 2014 represented a pivotal moment in the fight for equality. This ruling explicitly affirmed the rights of transgender individuals to self-identify, thereby challenging entrenched social norms.

In 2019, the Transgender Persons (Protection of Rights) Act was enacted, aimed at safeguarding the rights of transgender persons and promoting their welfare. While this legislation brought some legislative acknowledgment to their rights, challenges remain, including issues of enforcement, social acceptance, and the ability to live with dignity. Advocacy and activism continue to play a crucial role in addressing these challenges, fostering dialogue, and striving for a more inclusive society where transgender individuals can fully participate and contribute without fear of discrimination. The journey toward equality and acceptance for transgender persons in India is ongoing, with implications for broader societal change.

BACKGROUND

The ground-breaking NALSA ruling laid the groundwork for the rights of transgender individuals in India by acknowledging 'transgender' as a distinct 'third gender.' It established various protections against discrimination towards transgender persons

¹ NALSA vs. Union of India, (2014) 5 SCC 438

A Discourse on The Transgender Persons (Protection of Rights) Act, 2019

and advocated for their rights. This ruling called for quotas in employment and educational settings for transgender individuals, as well as affirming their right to self-identify their gender without the necessity of undergoing sex reassignment surgery.² The court determined that all transgender individuals are entitled to Fundamental Rights under Article 14 (Right to Equality), Article 15 (Non-Discrimination), Article 16 (Equal Opportunity in Public Employment), Article 19(1)(a) (Right to Free Speech), and Article 21 (Right to Life) of the Constitution of India. In 2020, Parliament officially recognised 'transgender' as a legitimate gender in India.

MEANING OF 'TRANSGENDER'

The Cambridge Dictionary defines the term 'transgender' as an individual whose gender does not match the body (sex) they were born with.³

According to the American Psychological Association, transgender is an umbrella term for individuals whose gender identity, gender expression, or behaviour does not conform to that typically associated with the sex they were assigned at birth.⁴

HISTORY OF TRANSGENDER PERSONS IN INDIA

The transgender community includes Hijras, eunuchs, Kothis, Aravanis, Jogappas, and Shiv-Shaktis, among others. Eunuchs have been present since the 9th century BC, the term originating from Greek and meaning "Keeper of the bed," which reflects the demand for castrated men to guard women's quarters in royal households. It appears that Hinduism, Jainism, and Buddhism recognised the concept of three genders, as inferred from Vedic culture. The Vedas (1500 BC - 500 BC) categorise individuals into three distinct groups based on their nature or prakrti. This classification is also found in the Kama Sutra (circa 4th century AD) and other texts, which describe pumsprakrtistri-prakrti (female nature) and Tritiya-prakrti (third nature). Numerous ancient texts suggest that third-sex individuals were acknowledged in pre-modern India, including those with male or female bodies as well as intersex individuals, often identifiable from a young age. Ancient discussions on the third sex can be found in Hindu law, medicine, linguistics, and astrology. The Manu Smriti (200 BC - 200 AD), a key text in Hindu law, outlines the biological origins of the three sexes: "A male child arises from a higher quantity of male seed; a female child from female seed dominance; when both are equal, a third-sex child or boy-girl twins are produced; if either is deficient, conception fails." Additionally, the Indian linguist Patanjali, in his Sanskrit grammar work, the Mahabhasya (200 BC), notes that Sanskrit's three grammatical genders stem from three natural genders. The earliest Tamil grammar text, the Tolkappiyam (3rd century BC), similarly acknowledges hermaphrodites as a third "neuter" gender alongside a feminine category for unmasculine males.⁵

Hijras held significant positions in the royal courts of the Islamic world, particularly during the Ottoman Empire and the Mughal era in medieval India. They emerged as prominent figures, serving as political advisors, administrators, generals, and guardians of harems. Regarded as intelligent, trustworthy, and fiercely loyal, Hijras had access to various social circles, enabling them to play a vital role in the political landscape during the Mughal period. Moreover, they held esteemed roles within Islamic religious institutions, especially in safeguarding the holy sites of Mecca and Medina. As trusted individuals, they were able to influence government decisions and often received substantial financial rewards for their proximity to royalty. Consequently, Hijras frequently emphasised the significance of their status during that era.⁶

At the onset of British rule in the Indian subcontinent, certain Indian states granted the hijra community protection and advantages, which facilitated their inclusion in the community. These benefits included access to land, food rights, and small monetary allowances from nearby agricultural households. However, British legislation eventually terminated these privileges, as land rights were not passed down through hereditary lines.⁷

Beginning in the 18th century, colonial rule significantly altered the situation. Early European accounts revealed that they were repulsed by hijras, struggling to comprehend the high respect afforded to them in royal courts and other institutions. By the latter half of the 19th century, the British colonial administration aggressively sought to criminalise the hijra community and suppress

² Ajay Singh Solanki, 'India's New Law on The Protection of Rights of Transgender Persons', *Back to Diversity and Equality Law Committee Publications*(International Bar Association). Available at: <https://www.ibanet.org/article/0f3ae21b-0170-4bf7-95dd-45b07ef1caf6>

³ Available at: <https://dictionary.cambridge.org/dictionary/english/transgender>

⁴ Available at: <https://www.apa.org/topics/lgbtq/transgender-people-gender-identity-gender-expression#:~:text=Transgender%20is%20an%20umbrella%20term,they%20were%20assigned%20at%20birth.>

⁵ M. Michelraj, 'Historical Evolution of Transgender Community in India', Vol.4 No. 1 *Asian Review of Social Sciences* 17-19 (2015).

⁶ Ibid at 18

⁷ Ibid

A Discourse on The Transgender Persons (Protection of Rights) Act, 2019

their tribes across various regions of India. The Criminal Tribes Act of 1871 classified hijras involved in child kidnapping and castration while masquerading as women for public performances. Offenders faced penalties of up to two years in prison and/or fines. This history prior to partition under scores the precarious conditions that hijra endured until recently. However, the Act was repealed in 1952, and its legacy persists. Many local laws reflected prejudicial attitudes against certain tribes, including hijras.⁸

Objective: To recognize transgender persons as a third gender and protect their rights, promoting their welfare and inclusivity in society.

RIGHTS OF TRANSGENDER PERSONS UNDER THE CONSTITUTION OF INDIA

The Constitution of India guarantees certain Fundamental Rights to all individuals, including transgender persons. These rights are as follows:

- **Article 14 (Right to Equality):** No one may deny any “person” equality before the law or equal protection under the law. The use of the gender-neutral term “person” indicates that sex or gender identity shall not serve as a basis for discrimination in law.
- **Article 15 (Prohibition on Discrimination on various grounds including Gender):** This article prohibits any form of discrimination based on race, religion, caste, sex, or any combination thereof. This implies that discrimination or mistreatment of transgender individuals infringes upon their Fundamental Rights.
In the case of **Mx. Alia SK vs. The State of West Bengal and Ors**⁹, the court held that transgender individuals have the right to seek admission to universities. The judgement is significant because it underscores the role of the courts in ensuring that special accommodations and adjustments are made to include transgender individuals in the public university application and admission process where none currently exists.
Article 19 (Freedom of Speech and Expression): This right grants every citizen the freedom of speech and expression, which encompasses the ability to publicly express one's gender identity.
- **Article 21 (Right to Life):** Article 21, addressing the protection of life and personal liberty, stipulates that no individual shall be deprived of their life or personal liberty except in accordance with the procedure established by law.
In the case of **Nangai vs. Superintendent of Police**¹⁰, the Hon'ble Madras High Court recognised that compelling someone to undergo a medical examination for gender violates Article 21. It upheld an individual's right to self-identify their gender.

OTHER LANDMARK JUDGMENTS

In the case of **G. Nagalakshmi vs. Director General of Police**¹¹, the Hon'ble Madras High Court observed that, in the absence of any special law, any individual has the liberty to choose their sexual or gender identity and upheld the petitioner's right to select their own gender.

In **Puttuswamy vs. Union of India**¹², the Hon'ble Supreme Court recognised the constitutional right to privacy that is inherent in the right to life, equality, and fundamental freedoms. This includes the right to engage in intimate relationships of one's choosing, as well as the right to sexual orientation and gender identity.

Homosexual and transgender individuals constitute a significant segment of society penalised by Section 377 of the Indian Penal Code. The LGBT community is compelled to conform to societal norms and endures harassment, exploitation, cruelty, and humiliation. The Hon'ble Supreme Court, in the case of **Navtej Singh Johar vs. Union of India**¹³, affirmed that LGBTQ+ individuals in India are entitled to all constitutional rights, including the liberties protected by the Constitution of India.

⁸ Ibid

⁹W.P. NOS. 21587 (W) OF 2019

¹⁰(2014) 4 MLJ 12

¹¹(2014) 7 MLJ 452

¹²(2017) 10 SCC 1

¹³Writ Petition (Criminal) No. 27 of 2016

A Discourse on The Transgender Persons (Protection of Rights) Act, 2019

CHANGES UNDER THE NEW ENACTMENT

Some of the key features of the law relating to transgender persons include:

- **Definitions:** This includes clear definitions of 'person with intersex variation'¹⁴ and 'transgender person'¹⁵ to prevent discrimination, neglect, harassment, and intimidation against transgender individuals within educational settings, as well as defining 'institution' to ensure the protection and support of transgender individuals.
- **Non-discrimination:** The law prohibits discrimination against transgender individuals in educational institutions, employment or job opportunities, healthcare services, and access to public facilities and benefits. It further upholds their right to free movement, property ownership, and the ability to hold public or private office.¹⁶
- **Certificate of Identity:** Individuals have the right to self-identify their gender, and District Magistrates (designated government officials) are required to issue a 'certificate of identity' as a transgender person without demanding any medical or physical examinations. Individuals who undergo gender-affirming surgery have the right to apply for a new certificate that reflects their updated gender.¹⁷
- **Equal Opportunity Policy for Transgender Individuals:** All establishments must establish an equal opportunity policy for transgender individuals, including precise details as mandated by law.¹⁸
- **Complaint Officer:** Each establishment must designate an officer tasked with addressing complaints from transgender individuals.¹⁹
- **Welfare Schemes:** The government is responsible for creating welfare schemes and programmes that are attuned to the needs of transgender individuals, ensuring they are non-stigmatising and non-discriminatory.²⁰
- **Medical Care Facilities:** The government must establish dedicated HIV surveillance centres for transgender individuals, offer medical care services including sex reassignment surgeries and hormonal therapies, and ensure that the costs for these procedures are covered by a comprehensive insurance scheme.²¹
- **National Council for Transgender Persons (NCT):** The purpose of establishing the NCT is to advise the government on policy formulation, monitor its implementation, and address grievances from transgender individuals.²²
- **Offences and Penalties:** Crimes against transgender individuals, including forced or bonded labour, denial of access to public spaces, physical, emotional, or sexual abuse, and other violations of the Transgender Persons Act, carry penalties ranging from a minimum of six months to a maximum of two years in prison, along with monetary fines.^{23and24}

CONCLUSION

There has long been a critical need to raise awareness among communities and organisations regarding the recognition of the rights of transgender individuals and the necessity of treating them with basic human dignity, equal to other genders. This is especially important in education, employment, healthcare, and public benefits. The Transgender Persons Act represents a significant step in India towards granting essential rights and identity to transgender people, signalling progress towards a more inclusive society.

¹⁴ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s 2 (i): "person with intersex variations" means a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes or hormones from normative standard of male or female body."

¹⁵ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s 2 (k): "transgender person" means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, gender queer and person having such socio-cultural identities as *kinner*, *hijra*, *aravani* and *jogta*."

¹⁶ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s 3

¹⁷ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s 5

¹⁸ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s 8

¹⁹ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s 11

²⁰ Supra note 19

²² The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s 16

²³ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s 18

²⁴ Supra note 3

A Discourse on The Transgender Persons (Protection of Rights) Act, 2019

Social stigma has restricted opportunities for transgender individuals across various aspects of their lives, and awareness of their rights has been inadequate. The government's initiative to recognise and safeguard their rights is praiseworthy.

With the enactment of this law, India aligns itself with the human rights standards established by the United Nations in 2015. Importantly, the decision to exclude the criminalisation of begging by transgender individuals, which was included in an earlier draft of the bill, helps to alleviate the harassment faced by those who may have limited means of support. The prior requirement for medical evaluations to secure an identity certificate has also been eliminated, alleviating potential trauma for transgender individuals.

However, the Act has shortcomings. The definition of a 'transgender person' is vague and excessively broad, including individuals with intersex variations, which can be misleading.

Moreover, the penalties for offences under the Act are confined to a maximum of two years imprisonment and a fine, which may not sufficiently address severe violations such as sexual abuse or harassment. Furthermore, the Act neglects other essential rights, including marriage, adoption, and maternity rights, representing a missed opportunity for enhanced inclusivity. One may hope that these lacunas will be efficiently addressed by the Parliament in the near future to truly enable transgender persons to live a life of freedom and dignity.

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