



From Formal Recognition to Substantive Equality: A Study of Transgender Jurisprudence in India

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Abstract: *The present Research paper mainly tries to cover Transgender Jurisprudence in India. The substantive equality is the central principle and important component of Transformative Constitutionalism. Transformative Constitutionalism views Constitution as an instrument having immense potential to bring transformation in society. The Transgender persons in India have been given legal recognition as “Third gender” through the NALSA case (2014). Further, another development in the field of Transgender rights in India is the enactment of the Transgender Persons (Protection of Rights) Act, 2019 as well as the recent amendment of 2026 was also made in the 2019 Act with a protective objective. Thus, the present study is an humble attempt to analyze the relevant landmark Judgments, legislative framework for Transgender persons in India. The Research paper is written based on Doctrinal research. The Research paper concluded that despite robust developments regarding Transgender rights in India, the Transgender persons still face several problems ranging from abuse, inaccessibility to basic health care facilities, to education, to employment opportunities and even systemic discrimination. This research paper may contribute in drawing attention towards the lacunae in the Transgender Persons (Protection of Rights) Act, 2019 and the Transgender Persons (Protection of Rights) Amendment Act, 2026 which will create awareness towards the problems faced by transgender persons and the ways through which their social participation and social acceptance can be increased.*

Key Words: *Gender identity, Transgender, substantive equality, Transformative Constitutionalism.*

1. INTRODUCTION:

The present research paper attempts to discuss about the legal provisions meant for transgender in India. The attempt is also made to draw attention towards the socio-economic conditions of transgender with a broader focus on understanding the challenges faced by them.

2. RESEARCH METHODOLOGY:

The Research paper is developed through Doctrinal research. Different sources of data which included relevant Legislation, Judicial decisions, research papers etc. were referred to for developing clear understanding about the research topic.

3. LITERATURE REVIEW:

Some of the existing literature was reviewed to identify the research gaps or to identify the research problem.

4. OBJECTIVES OF THE STUDY:

1. To review the existing literature regarding the developing Transgender Jurisprudence in India.
2. To critically analyze the existing legislative framework for protecting the rights of Transgender persons in India.
3. To study and analyze the Judicial decisions extending legal recognition to Transgender in India.
4. To identify the challenges faced by Transgender persons in India even after the legal recognition of their rights.



5. CONCEPT:

A transgender person in most cases has a sense of feeling of gender identity which is different from the sex which was recorded when he was born based on his physical anatomy. It has been observed that the transgender community has a very long standing history and cultural presence in our society (Lahoti and Agrawal)¹.

If we look at the two terms “Sex” and “gender”, we come to know that these two terms are having different meaning and connotation though they are used in place of each other. If we delve deep into these concepts then we come to know that it is comparatively easy to understand the term “Sex” as compared to the term “Gender”. “Sex” mainly denotes the physical and biological attributes including anatomy, chromosomes etc. in male and female whereas “gender” includes how a person feels from inside regarding his gender identity, his behaviour, different social, cultural role associated with them by the society as male or female. A person is called “transgender”, “gender- non-conforming” or “non-binary” particularly when his behaviour does not match with the general expectations of the society or where his gender identity or inner feeling and sense of gender identity does not match with the sex assigned to him when he was born based on his physical characteristics and attributes (Yadav and Verma 3)².

It has been observed that the individuals around the world face serious and grave abuses irrespective of the fact that they are homosexuals or people believe or assume them to be homosexuals even when they are not. These abuses include not granting the basic right to live freely, safety and security, systemic discrimination in which they are denied access to essential services like health care facilities, learning opportunities, basic right to have a safe place to live etc. (Nagarale 1353-1354)³.

6. EVOLUTION OF JUDICIAL APPROACH:

NATIONAL LEGAL SERVICES AUTHORITY (NALSA) Vs. UNION OF INDIA AND OTHERS, ((2014), 5 SCC 438) marks the significant development in the history of transgender persons. In this case, Transgender persons were given legal and Constitutional recognition as “Third gender”. Further, it was observed that the Gender identity is an intrinsic aspect and component of individual personality and thus, non- recognition of the right of Transgender persons’ right of self identity would be a grave violation of art.14 and art.21 of the Constitution of India. NALSA approached the Supreme Court in this Case and Poojya Mata Nasib Kaur Ji Women Welfare Society also supported the cause of Transgender persons who had been marginalized for a very long time (Mehta 2)⁴.

Legal Issues involved in this case were as follows⁵:

Tanvi Ishrita(456) in her work discusses about following legal issues involved in NALSA case:

1. Whether it is necessary to legally recognize and categorize transgender community as a distinct “third gender”?
2. Whether the person who does not identify himself as male or female has a right to decide their gender identity?

The major development after this is that in the backdrop of the Nalsa case (2014), the Transgender Persons (Protection of Rights) Act, 2019 was enacted protecting the transgender persons against discrimination and atrocities (Narayan 404–414)⁶.

Many landmark judgments were passed after the Nalsa case. Nalsa case addressed the issue of gender identity and rights of Transgender persons. However, the Navtej Singh Johar vs. Union of India, ((2018) 10 SCC 1) case marked major Constitutional transformation by decriminalizing the consensual homosexual conduct between adults in private. Sec. 377 of the Indian Penal Code was struck down as unconstitutional in Navtej Singh Johar case as far as it dealt with homosexuality and in this way, homosexuality was decriminalized. Likewise Arun Kumar vs. Inspector General of Registration and others, (AIR 2019 MADRAS 265) was another landmark judgment in the history of Transgender jurisprudence in India. In this case, a Transgender woman was allowed to be recognized as “bride” under the Hindu Marriage Act, 1955. This judgment further extended the transformative effect created by Nalsa case (Singh 5556)⁷.

The Transgender Persons (Protection of Rights) Act, 2019 makes elaborate provisions for the “welfare measures to be undertaken by appropriate Government” and for “Education, social security and health of transgender persons”⁸.

Despite having the Transgender Persons (Protection of Rights) Act, 2019 and Nalsa Judgment, Transgender persons still face many challenges like discrimination, stereotyping, problem in access to education, healthcare facilities, employment opportunities, discrimination in public spaces etc. This shows a huge gap in formal recognition of their rights and complete change in their social realities and lived experiences (Agarwal)⁹.



7. LEGISLATIVE FRAMEWORK FOR TRANSGENDER EQUALITY IN INDIA:

The Transgender Persons (Protection of Rights) Act, 2019:

Salient features of the 2019 Act are as follows¹⁰:

(Mahech, 2020) discusses that:

1. S.3 of the Act prohibits discrimination against Transgender persons on the ground of Gender identity in the matters of education, employment, health care etc.
2. S. 4 of the Act recognizes the right of the transgender to “self perceived gender identity”. However, S. 6 of the Act which is widely criticized requires certificate to be issued by the District Magistrate to a person who identifies himself as transgender.
3. S. 12 of the Act deals with the “right of residence of Transgender persons”. It provides that every Transgender person has a right to reside in his family household and in this sense, this provision tries to protect Transgender persons against family exclusion and homelessness and if the family care is unavailable then the Transgender person can be placed in Institutional care on the order of the Court as per s. 12(3) of the Act. Though this Section as a whole has protective objective, the provision for Institutional care raises some concerns.
4. S. 6 of the Act makes provision for the “Certificate of identity”. This provision permits transgender persons to apply for the Certificate of Identity to the District Magistrate recognizing their gender as “transgender”.
5. This Act also makes provision for “Revised certificate” as male or female in case the Transgender later undergoes a gender changing surgery.
6. S. 16 of the Act provides for the establishment of National Council for Transgender persons (NCTP) which would be empowered to advise the Central government in the matter of Policy formulation and the evaluation of such policies and programs related to Transgender persons.

8. CRITICAL ANALYSIS OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019¹¹:

Tabssum (11-12) in her work discusses that

1. The definition provided in s. 2(k) of the 2019 Act is over-inclusive as it places “Transgender person” and “people with intersex variations” in the same statutory definition. Even though the legislative intent behind this must be to protect the people who are experiencing gender or sex related discrimination and abuse but this vagueness in the definition may make it conceptually confusing.
2. Sec. 18 of the Act provides statutory protection to transgender persons against abuse and violence. However, the maximum punishment provided under this provision is criticized on the ground of being disproportionate particularly when more serious and grave offences are involved.
3. The Act provides fragmented legislative and statutory framework as it does not address other related rights like marriage related rights, adoption rights etc. Thus, the Act is criticized as it does not provide a clear and comprehensive framework covering all these areas.

9. THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) AMENDMENT ACT, 2026:

Salient features of the Amendment Act of 2026¹²:

1. In the earlier 2019 Act, the definition of Transgender persons was broad and right based approach was taken. However, the Amendment Act, 2026 narrows down the definition of Transgender person and specifies particular categories to be included in the definition of “Transgender person”.
2. The Amendment Act of 2026 makes a provision that District Magistrate on the recommendation of a designated Medical board will issue the Certificate of identity. The designated Medical Board will be headed by a Chief Medical Officer or a Deputy Chief Medical Officer while assistance may also be taken from other medical experts by the District Magistrate when necessary. Further, the provision is made for correction of first name in birth certificate and other official documents by transgender persons after obtaining the Certificate of identity.
3. Under the Amendment Act of 2026, the transgender who undergoes gender change surgery, it is mandatory for that person to obtain a “Revised certificate”. The Amendment Act of 2026 also provides that all the necessary information and details regarding the gender change surgery should be shared by the concerned Medical Institution to the District Magistrate.
4. The Amendment Act of 2026 further strengthens the deterrent framework to prevent offences against transgender persons by introducing certain grave and serious offences like Kidnapping and causing grievous hurt or severe injury in order to force a person to assume a transgender identity and by providing stringent punishment for the same.



CRITICAL APPRAISAL OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) AMENDMENT ACT, 2026¹³:

Sharma (7431-7434) in her work discusses that:

1. In Nalsa case (2014), the right of gender identity of Transgender persons was recognized as an integral aspect of personal identity linked directly to dignity and autonomy of individual. The *Transgender Persons (Protection of Rights) Act, 2019* also provided for the right to “self perceived gender identity”. However, the amendment of 2026 watered down the effect created by the 2019 Act and Nalsa judgment by taking away this right and leaving the gender identity of Transgender to medical and Institutional approval.
2. Under the Amendment Act of 2026, “Certificate of Identity” has to be obtained from the District Magistrate who will issue it on the recommendation of a designated Medical board and the Medical Institution has to disclose the information of gender change surgery to the District Magistrate. Such provisions may lead to violation of Right to privacy which was recognized in Justice K.S. Puttaswamy (Retd.) and Anr. vs. Union of India and Ors., ((2017) 10 SCC 1).
3. The Amendment Act of 2026 strengthened the statutory framework by providing stringent punishment for certain offences particularly to protect transgender to be forced to assume gender identity as transgender and to protect them against exploitation etc. However, the vagueness in statutory wordings used in this provision leaves a scope for its misuse even against the genuine help and care.

We have to admit that the Transgender Persons (Protection of Rights) Amendment Act, 2026 was enacted with a genuine and protective objective to protect transgender persons against discrimination, abuse and exploitation. Stringent punishment is also provided in the Amendment Act for certain categories of grave and serious offences particularly when children are victims. Thus, this strengthened legislative framework is a welcome step and development in the field of transgender rights in India. A “Certificate of identity” is to be obtained from a District Magistrate who will act on the recommendations of a designated Medical board. Though, this initial verification is necessary but if the issue of gender identity is left for Institutional approval then it may go against the personal autonomy (Bisht, 2026)¹⁴.

UNADDRESSED GAP IN THE LABOUR LAW REGIME ABOUT TRANSGENDER:

Transgender should be protected against Sexual harassment at Workplace. While Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013 provides legislative framework for this issue, employer should formulate clear and more gender inclusive workplace policies so that transgender will be protected against discriminatory treatment at workplace. We should have more gender inclusive laws so as to cover transgender. Thus, it is important that different labour laws in India should bring legal clarity as far as the legal definition of its intended beneficiaries are concerned so that Transgender persons will not be left beyond its protection (Sangwan 5-6)¹⁵.

Transgender persons are equally entitled to dignity, individual autonomy, liberty etc. The individual uniqueness should be respected. The Principle of tolerance and peaceful co existence should be followed. Constitutional protection is accorded to Transgender under Article 15, 14, 21 and 21 A of the Constitution of India. Even though these legal provisions are there for their protection but still transgender face social exclusion and discrimination at multiple settings which include educational institutions, their home etc. They sometimes encounter physical abuse, use of derogatory language, sexual harassment, humiliation in society which can ultimately have a very adverse impact on their psychological and mental health (Biswas and Soora 415–430)¹⁶.

CONTEMPORARY SOCIO-ECONOMIC REALITIES OF TRANSGENDER PERSONS IN INDIA¹⁷:

(Chaddha and Akash 5-6) in their work discussed about the socio-economic conditions of transgender. It is to be noted that transgender persons are historically subjected to social stigma and exploitation. They are considered as one of the marginalized sections of our Indian society. If we talk about socio-economic marginalization of transgender, they sometimes face the problems like homelessness, inadequate or improper housing which may have bad impact on sanitation, personal safety. Proper implementation of welfare schemes meant for them is thus, essential for their socio-economic upliftment. Now talking about the health conditions of transgender, we have to understand that the health care policies should be gender specific so that safe and non discriminatory environment will be provided for transgender. Even due to lack of appropriate legal and administrative recognition, electoral registration and documentation, some transgender may not be able to exercise their electoral rights. Further, due to socio-economic marginalization and family exclusion, transgender may face difficulty to acquire or inherit property. Another dimension of marginalization of transgender is that they sometimes face bullying in the Educational Institution making the education environment unsafe. Another dimension of structural discrimination is sometimes transgender face harassment at workplace, sometimes they



do not have sufficient access to financial opportunities, they are sometimes unemployed or underemployed which further contributes to their economic marginalization making them more vulnerable.

There has been a major shift in the rights of Transgender in India. Government is formulating many policies for the welfare of transgender. NGOs, even private companies are also contributing towards it. However, the major barrier is that transgender persons are not aware about many such programs and policies. Thus, it is important to create awareness through different platforms, cultural events, through media so that they can get an access to these policies and Institutional mechanisms meant for their betterment and Empowerment. Further, political inclusion of transgender is not enough unless and until transgender persons are aware about their voting rights. Support from family and society, Institutional facilitation is also important. Further, they should also be able to participate in the political discussions. In this manner, formal recognition will then culminate into substantive equality (Verma and Mohd. Kaif 10)¹⁸.

CONSTITUTIONAL PROTECTION OF EQUALITY AND TRANSGENDER RIGHTS IN INDIA:

Now, if we talk about the rights based approach, art. 14 of the Constitution of India comes into our mind which guarantees “equality before law and equal protection of law”. It imposes positive obligation on the State to take necessary affirmative measures and also imposes negative obligation to refrain from arbitrary or discriminatory treatment. However, “equality” and “equity” are not two identical concepts and should not be used interchangeably. Making equal employment opportunities available to transgender is not enough. Transgender should be able to work in safe working environment free from any discrimination, fear, harassment where equal opportunities of advancement will also be given to them. In this way, their lived experiences can change. In this way, equality in law will convert into equality in fact where the transgender can exercise the Constitutional protection accorded to them under art.14 of the Constitution of India (Maheshwari and Kulshreshtha 1314-1315)¹⁹.

10. THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) RULES 2020:

The Transgender persons (Protection of Rights) Rules 2020 provide important mechanism to implement the Transgender persons (Protection of Rights) Act, 2019 by providing proper framework for the same. The 2020 Rules provide that “Transgender Protection Cell” has to be there so as to respond to violations of transgender rights. These rules further talk about formulating “equal opportunity policies” which become relevant to employment opportunities. The Rules further make provision for “Grievance redressal mechanism”, also lay down procedure for applying and obtaining the “Certificate of identity” by transgender persons. In this way, the Rules of 2020 mainly provide an implementation framework or Institutional foundation to implement the Transgender persons (Protection of Rights) Act, 2019 so that the Transgender equality can be achieved (Tiwari, Rahul, et al.)²⁰.

GLOBAL PERSPECTIVE ON GENDER IDENTITY:

The Gender Identity Law (2012) followed in Argentina places the “self perceived Gender identity” at the Center rather than placing over reliance on the medical procedure to confirm the Gender identity. However, in India, in NALSA case (2014), transgenders’ right to self identify their gender identity was recognized but the statutory framework provides administrative certification process through which this recognition can be given effect to. Further, the Netherlands example requires specific attention here as the Netherland’s Government moved towards reducing the use of Gender markers on identity documents (Jain 209)²¹.

Now coming to the insurance benefit for the transgender, the major problem is that most of our existing insurance mechanism mainly revolves around the binary assumption of sex/gender ie. male and female. The emerging Insurance framework however, marks the beginning of the movement to make insurance policies more gender inclusive (Gupta)²².

Transgender persons are entitled to legal protection as well as the Constitutional protection. They should be provided education facilities, Institutional support and family care. They also deserve a life of dignity. Employers should provide employment opportunities to them. Family, society, civil societies etc. should be involved in this process of promoting social inclusiveness. It is our moral duty to ensure that transgender persons live a life free from discrimination. It is also necessary that transgender should be provided safe working environment. Separate toilets can be built for them. Keeping the mental health risks in mind which transgender may be subjected to due to social stigma and other problems, timely counselling services should be provided to them. Further, anti discrimination measures or policies should be properly implemented and periodically reviewed so that measures will actually have any practical significance (Faria)²³.



In this way, transgender rights can be related with basic human rights. Transgender persons should be able to participate in all the spheres of life without being excluded because of their gender identity (Kshatriya and Verma)²⁴.

11. CONCLUSION:

In this way, the judgment of NALSA vs. Union of India (2014) is a turning point in the Transgender jurisprudence in India. Through this judgment, Governments were directed to take affirmative measures for the protection of Transgender. Even the Legislative framework is also made in the form of Transgender Persons (Protection of Rights) Act, 2019 prohibiting discrimination against Transgender in many areas. However, this formal recognition of their rights is not enough if transgender still faces social exclusion or discrimination in various areas.

Thus, proper anti discrimination and gender inclusive policies at workplace should be formulated, health care facilities should be designed keeping in mind the needs of transgender persons. Strong enforcement of the 2019 Act and accountability can be ensured only when the Grievance redressal mechanism and Transgender protection cells are strengthened, legal aid services are provided to transgender, increased participation of transgender in policy making is ensured so that they can share their views and opinions. This will be a step from formal equality to substantive equality.

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