



Legal Promises and Social Stigmas Facing Transgenders in India

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Abstract

The transgender community in India has historically been a marginalised group. Even though they are recognised as a separate ‘third gender’, the community experiences significant challenges in contemporary Indian society. Some of the challenges faced by them are a pervasive social stigma against the community, discrimination, and lack of access to proper education, healthcare, and employment opportunities. There has been consistent exclusion of the transgender community from mainstream society and social institutions. The constitution of India provides a blanket of fundamental rights to each and every citizen of the country, including the transgender citizens. The judiciary has also taken some significant measures to affirm the identity and rights of the community. Apart from this, legislative initiatives like the Transgender Persons (Protection of Rights) Act, 2019, also aim to counter the challenges, but they have faced significant issues during implementation due to social stigma. This paper examines legal protections, historical context, judicial interventions, and the overall legislative structure concerning transgender rights in India. It also focuses on the challenges faced by the transgender community in Indian society and offers suggestions to ensure inclusivity, promote equality, and sustain harmony with respect to the community. This paper also analyses the crucial need for an overall societal turnaround in order to ensure the promised dignity and rights of the transgender persons in India.

Key words- Transgender, constitution, community, discrimination, marginalisation.

1.1 Historical Context

The history of the transgender community in India is long and complex and predates the British colonial rule. The evidence of their recognition as a separate gender is found both in ancient Indian texts and the propagated cultural practices throughout the centuries. In ancient Hindu scriptures and texts like the Ramayana and the Mahabharata, such individuals who do not conform to the binary of gender are referred to as ‘tritiyaprakriti’ or

the 'third nature'. These texts are testimonies of the cultural and social acceptance of the non-binary nature of gender in ancient Indian society. In the 'Arthashastra', Chanakya also recognises the existence of eunuchs and mentions their role in the overall social structure.

During the Mughal era (1526-1857), transgender individuals, particularly those belonging to the 'hijra' community, were not only recognised but also held the respectable positions of power and influence in the society. They were given positions such as political advisors, administrators, and the guardians of the royal harems, among others. They were considered to be some of the most loyal and trustworthy people, and this perception allowed them access to some of the most sensitive spaces, including religious spaces like Mecca and Medinaⁱ. The British rule started a dark period for the transgender community in India. The British government criminalised the very existence of transgender individuals through laws like the Criminal Tribes Act (1871) and labelled them as the "habitual offendersⁱⁱ". The legal framework under the British rule only pushed the marginalisation further by stripping them of their social rights and forcing them into inhumane livelihoods. Even though the country got its independence from British rule in 1947, the transgender community remained in the chains of stigma and discrimination that are deeply embedded into the very thread of the Indian social framework.

1.2 Cultural and Social Significance

The transgender community has maintained its relevance in the cultural framework of Indian society despite its crude marginalisation. Hijras are traditionally invited to bestow their blessings upon new-borns and newlywed couples. They are considered to be the bringers of prosperity, fertility, and blessings. But this special role is nothing more than an ornamental recognition and a mere theatrical acceptance in the overall social fabric of the country. The stigma and discrimination against the transgender people remain prevalent in the soul of the society. Transgender individuals find themselves limited to these ritualistic roles that only promote the stereotypes associated with their gender, rather than feeling socially and economically empoweredⁱⁱⁱ.

2. Problems Faced by the Transgender Community

Transgender individuals face a systematic social exclusion in Indian society. It starts with family rejection, which is quite common, as most transgender individuals get disowned by their families during childhood. This rejection forces them to join hijra communities, popularly known as 'gharanas', in search of a sense of belonging at the cost of social exclusion. Educational institutions also fail to provide a safe space for the transgender community, leading to high dropout rates, as the educational system of India has historically lacked gender-sensitive policies^{iv}. Transgender individuals also face consistent harassment in public spaces, as they are generally denied access to basic amenities like restrooms. Housing is another major problem, and landlords don't usually rent out their properties to transgender tenants, which results in homelessness or unsafe living conditions^v.

Employment is one of the most common issues faced by the transgender individuals in India. In spite of legal protections provided under the Transgender Persons (Protection of Rights) Act, 2015, many employers do not provide equal opportunities to the transgender individuals. This forces over 90% of transgender individuals to earn their living through unsafe means like sex work and begging^{vi}. This economic vulnerability is further increased by limited access to vocational training and finance^{vii}.

Healthcare is another significant challenge faced by the transgender people in India. Many healthcare providers lack the awareness and gender-affirming care training, which often leads to discrimination and, in some cases, outright denial of treatment. This creates a sense of paranoia and forces transgender individuals to avoid seeking medical help when needed. Such issues translate into severe consequences for the mental and physical wellbeing of transgender individuals, making untreated issues like HIV/AIDS very common in the community^{viii}

Apart from these issues, legal challenges also contribute to the alienation of the transgender individuals from the social strata. Despite the Supreme Court's ruling^{ix} which recognised transgender individuals as the 'third gender' and guaranteed them equal constitutional rights as other genders, the gaps remain in the implementation of the ruling throughout the society. The Transgender Persons Act requires the approval of the district magistrate, which is a highly criticised aspect of the act, as it translates into the invasion and stands contrary to the self-identification upheld by the judiciary^x. Such legal barriers create a hindrance in the participation of transgender individuals in normal civic life, as they make it difficult to obtain identity documents^{xi}. Marriage and adoption challenges also remain significant, as the Transgender Persons Act only recognises the marriage between cisgender and transgender individuals. Adoption laws also do not explicitly mention a transgender individual's right to adopt a child.

3. Constitutional Protections

The Indian Constitution guarantees fundamental rights to each and every citizen of India, irrespective of their caste, religion, sex, or other identities. Although the transgender community was not particularly mentioned in the constitution of India at its genesis, over the course of time, judicial interpretations and dynamic socio-legal frameworks have extended these protections to the transgender individuals of the country. These protections safeguard dignity, equality, and access to opportunities for the transgender community like everybody else.

3.1 Right to Equality (Article 14)

Article 14 of the Indian Constitution guarantees "equality before the law" and "equal protection of the law" for all persons. The terminology is crucial here because the term 'person' is inclusive of transgender individuals. The landmark case of *NALSA v. Union of India* (2014)^{xii} reaffirmed the essence of Article 14 by legally recognising transgender people as the 'third gender' and stating that denying transgender people the "equality before the law" directly violates Article 14.

The *NALSA* judgement also focused on the nature of equality and stated that it is not merely formal but substantive. It requires considerable action to uplift the marginalised communities like the transgender community. This interpretation laid the groundwork for a progressive step towards an institutional change concerning the education, healthcare, and employment of the transgender community^{xiii}

3.2 Prohibition of Discrimination (Article 15)

Article 15 of the Indian Constitution prohibits all forms of discrimination on the grounds of religion, race, caste, sex, or place of birth. In the landmark *NALSA v. Union of India* judgement, the honourable Supreme Court re-examined and expanded the definition of 'Sex' in order to include the gender identity. This interpretation explicitly safeguarded the rights of the transgender community and included them in the protective umbrella of Article 15. It became an important tool for transgender rights activists and advocates to counter discrimination in workplaces and public and educational spaces^{xiv}. Despite the protection of Article 15, transgender individuals

still face discrimination in different social institutions, but the NALSA judgement has surely helped them in their legal battle for rights and dignity.

3.3 Equality of Opportunity in Public Employment (Article 16)

Article 16 is another major step towards the inclusion of the transgender community in the social strata, as it guarantees the equality of opportunity in the matters of public employment to all citizens and reaffirms the rules of Article 15. In the NALSA judgement, the Supreme Court directed state and central governments to provide reservations for the transgender community in public sector jobs in order to further the affirmative action measures.

This was a significant provision, as it was directly aimed at improving the economic stability of transgender individuals. But, according to studies, a significant majority of transgender individuals remain confined in informal and unsafe sectors like sex work and begging to earn their livelihood^{xv}. This shows that constitutional guarantees further the betterment on paper, but the real impact can only be made through systematic implementation.

3.4 Right to Life and Personal Liberty (Article 21)

Article 21 of the constitution guarantees one of the most crucial fundamental rights, the right to life and personal liberty to all individuals. The apex court has interpreted this right as the right to have autonomy over one's body as well as the identity. In the NALSA judgement, the court observed and held that denying legal recognition to an individual's self-identified gender directly violates Article 21. The court also said that such denial undermines the dignity and personal liberty of the individual. This interpretation was highly in favour of the transgender community, as it ensured their access in areas like housing, healthcare, education, and freedom from violence. As an implication of this, courts have directed governments to establish gender-affirming healthcare services and provide housing to homeless transgender individuals, as it is a part of their administrative obligations under the guidelines of Article 21^{xvi}.

3.5 Freedom of Speech and Expression (Article 19)

Under Article 19(1)(a) of the Indian Constitution, every citizen gets the right to speak and express themselves. This right also covers the rights of the transgender community to express their gender identity through attire, behaviour and other forms of expression without the fear of violence, restriction and discrimination. The apex court stated in the NALSA judgement that forcing transgender individuals to conform to the gender binary norms violates Article 19(1)(a). It is a crucial provision, as it empowers the transgender community to challenge the norms of the society that suppress their identities, and it fosters a culture of inclusivity and acceptance^{xvii} (Bhatia, 2019).

3.6 Directive Principles and Fundamental Duties

In addition to the fundamental rights provided by the constitution, directive principles under part IV ask the state to promote justice and equality for all marginalised groups, including the transgender community. Article 39(a) promotes equal justice, Article 41 provides the right to work, and several other such provisions are aimed at uplifting transgender communities. Apart from this, fundamental duties under Article 51A(e) call upon the citizens of the country to renounce social practices that are derogatory towards women and other marginalised groups, including the transgender community^{xviii} (Rajkumar & Menon, 2022).

4. Judiciary on Transgender Rights

The judiciary has played a crucial role in affirming and establishing the rights of transgender individuals in India over the last few decades. Through landmark judgements and observations and interpretation of the constitution, the judiciary has expanded the protections provided by the constitution and established the legal status of transgender individuals as the “third gender” in order to include the transgender community in the same umbrella as other genders and citizens. Some cases have played a revolutionary role in this transformation and inclusion.

4.1 Navtej Singh Johar v. Union of India (2018)^{xix}

In this case hon'ble the Supreme Court decriminalised consensual same-sex relationships by striking down parts of the colonial-era Section 377. This case primarily addressed homosexuality, but it had broader implications in society and for transgender individuals. The community was often targeted under Section 377 due to societal misconception and stigma, and the striking down of 377 ensured their comparative safety in everyday life. This judgement also noted that discrimination based on sexual orientation and gender identity violates the principles of Articles 14, 15, and 21 and affirmed the right to privacy and autonomy over personal relationships.

4.2 Swati Bidhan Baruah v. Union of India^{xx}

In this ongoing case filed in 2020, the Transgender Persons (Protection of Rights) Act, 2019, is challenged by the petitioners. The petitioners are arguing that certain sections of the act are in direct violation of the fundamental protections provided by the constitution of India under Articles 14, 15, 16, 19, and 21. The requirement of a district magistrate's approval for gender recognition and the failure to provide reservations in education and employment are two major criticisms of the act by the petitioners. It is an important case because it focuses on the persistent problem of the ground reality of transgender rights in India. The gap between the court directives and the implementation of the said directives. The directives of NALSA ensure affirmative action, but such provisions remain absent from the statutory framework established by the Transgender Persons Act. This gap creates the hindrance in the translation of court directives into ground reality.

4.3 NALSA v. Union of India (2014)^{xxi}

The judgement of the Supreme Court of India in National Legal Services Authority v. Union of India (NALSA) was a major turning point for transgender rights in India. The judgement that was delivered on April 15, 2014, recognised transgender as the “third gender” and affirmed the long-due fundamental rights of the transgender community. As already mentioned in the earlier section in detail, the court noted that non-recognition of the third gender directly violates the protections provided under Articles 14, 15, 16, and 19 of the Indian Constitution. It further said that a citizen's right to self-identify one's gender identity is an integral part of Article 21, which covers the right to life and personal liberty^{xxii}.

The NALSA judgement was monumental as it upheld the constitutional principle of self-identification and related it to psychological perception instead of biological identity. It provided a safer environment for transgender individuals because it rejected the reliance on medical procedures such as the sex reassignment surgery as a prerequisite for identifying as a transgender. The judgement that gender identity is a matter of personal autonomy and dignity under Article 21.

In addition to this, the court also directed governments to make changes in policies and categorise transgender individuals as socially and economically backward classes, which enabled the community to access affirmative action such as reservation in education and employment. The judgement also noted the dire need for easy access to healthcare facilities and the establishment of separate healthcare facilities for transgender individuals and tailored HIV surveillance programs to ensure that specific needs of transgender individuals are met ^{xxiii}.

4.4 Impact of Judicial Interventions

There is no denying the fact that judicial activism has played a major role in advancing the rights of transgender individuals in India. The NALSA judgement was a watershed moment for transgender rights in India, and the recognition of transgender as the “third gender” followed by other court directives was a major win for the activists and the community. From reservations to welfare schemes and from healthcare facilities to access to public facilities, the NALSA judgement compelled the governments to redesign their policies.

Apart from this, judicial interventions have also played a pivotal role in creating a public discourse that is more sensitive towards gender diversity and have challenged deep-seated stigma in society. This has fostered greater acceptance of transgender identities in Indian society^{xxiv} (Narain, 2018). By framing transgender rights as a part of the very fabric of fundamental rights and the morality of the Indian Constitution, the courts have raised the issues of the transgender community and made them a part of mainstream social and political debates. However, as already mentioned, there are still issues of proper implementation of judicial directives at the state levels, and resistance from conservative factions of the society remains. But nonetheless, judiciary and judicial activism remain a critical force against the social resistance, and victories, no matter how little they are, translate into a bigger and more significant movement in the fight for transgender rights in India.

5. Transgender Persons (Protection of Rights) Act, 2019

The Transgender Persons Act was adopted to counter the systematic discrimination and exclusion of the community from Indian society. It is a legislative measure to codify protections and include the community in the mainstream social strata. The act was introduced in the parliament on July 19, 2019, passed by both the Lok Sabha and the Rajya Sabha, and received the presidential confirmation on December 5, 2019. It came into effect on January 10, 2020. Although the Act is a significant milestone in the recognition of transgender rights in the country, it faced some criticisms for its inadequacies and procedural limitations.

A transgender person was defined by the act as a person whose gender identity is different from the gender assigned at birth^{xxv}. It includes transgender men, transgender women, intersex persons, and other individuals with socio-cultural identities such as ‘Hijras’ and ‘Kinnars’. But this broad definition has been criticised for combining transgender identities with intersex variations, which are distinct biological conditions. Critics argue that such mixing undermines the autonomy of intersex individuals and fails to adequately represent non-binary identities ^{xxvi}.

One of the major provisions of the Act is the prohibition of discrimination against transgender individuals in areas such as education, healthcare, housing, access to public facilities, and property rights. The Act criminalises such discrimination and protects the community against all forms of physical, verbal, and sexual violence and abuse^{xxvii}; however, the penalties prescribed under the Act are considered weaker in comparison to similar

offences against cisgender individuals^{xxviii}. The Act also ensures that transgender individuals have the right to have a self-perceived gender identity.^{xxix} But it requires a certificate issued by the district magistrate, which is argued to be^{xxx} against their fundamental rights, as discussed in *Swati Bidhan Baruah v. Union of India*. It creates an unnecessary bureaucratic barrier and goes against the NALSA judgement.

There are many healthcare provisions under the Act that include the establishment of separate HIV surveillance centres and gender-affirming healthcare services such as hormone therapy and SRS. Apart from that, it also directs medical insurance schemes that are tailored to the needs of transgender individuals. These provisions are commendable, but there remain some implementation gaps and lack of suitable infrastructure, lack of trained professionals, and disparities across states^{xxxi}.

The act also establishes the National Council for Transgender Persons (NCT), which is tasked with overseeing implementation and advising governments across the country on the formulation of policies and monitoring of welfare schemes^{xxxii}. However, the NCT has faced criticism from activists for inadequate representation from the marginalised subgroups of the transgender community, which in turn limits the proper effectiveness of the NCT.

The Act also places a prohibition on the forced displacement of transgender individuals from their households by their families,^{xxxiii} but at the same time it allows courts to place displaced individuals in rehabilitation centres. This provision has faced criticism from transgender rights activists, as it fails to counter familial stigma and, on the contrary, through the rehabilitation orders by courts, participates in the displacement of transgender individuals.^{xxxiv}

Challenges Faced by Transgender Individuals in the Internet Era

The internet is a vital space for activism and community building, but at the same time, it is also a reflection of the ills of the society. For transgender individuals, the internet amplifies opportunities but also comes with certain risks. Online abuse is a major drawback of the internet for transgender people. It provides hateful factions of the society an anonymous space to propagate their hate and anti-trans propaganda. Transgender individuals are massively targeted by cyberbullying, hate speech, doxxing, and threats on social media platforms. Additionally, the lack of gender-inclusive structure of online apps such as banking and e-commerce often forces transgender persons to misrepresent their identity and conform to the binaries of gender. This leads to a systematic exclusion from the social strata and essential services (Rao & Nikhita, 2023)^{xxxv}. Apart from this, the lack of mental health support in both the physical and virtual spaces worsens the overall situation of cyberbullying. According to a study, many mental health professionals lack the gender-sensitive training which is crucial when dealing with transgender individuals. This leads to discriminatory practices and a feeling of exclusion and alienation in transgender individuals. Some community-led initiatives like the Mitr Clinic, which provide tailored counselling services to transgender individuals, have faced funding cuts and other financial challenges over the years, which has resulted in their diminished reach^{xxxvi} (National Board Journal, 2024).

Intersectional vulnerabilities are another major challenge faced by the transgender community. The harassment, bullying, and similar threats are magnified in online spaces for transgender individuals belonging to marginalised groups. Dalit transgender people are most often at the target of such harassment while having

fewer resources to seek recourse and counselling^{xxxvii}. This intersectional discrimination and marginalisation underscores the need for stringent policies and changes in law in order to address such issues.

Suggestions and Conclusion

The transgender community in India faced a plethora of challenges even after seven decades of independence. These challenges require a multidimensional approach in order to ensure the safety, dignity, and empowerment of transgender individuals. It is very crucial to strengthen legal protections in order to address procedural barriers that overshadow the dignity and autonomy of transgender persons over their identity. The amendment of the Transgender Persons (Protection of Rights) Act, 2019, is the need of the hour in order to strike down the requirement of district magistrate's approval for gender identity certificates because it contradicts the NALSA order and various fundamental rights. Apart from that, it is crucial to make the penalties more stringent in order to deter violence and discrimination against transgender individuals and provide them with safe and harmonious social space. Legal reforms are also necessary to promote affirmative actions and make the transgender community a legitimate participant in the social strata by providing them with reservations in education and employment as directed by the Supreme Court of India.

Additionally, public awareness campaigns should be promoted in order to counter social stigma and marginalisation of the transgender community in India. These campaigns should include various social institutions like educational spaces, healthcare spaces, workplaces, law enforcement agencies, and most importantly, the general public. Gender-sensitisation training should be a norm for all types of public and private institutions in order to ensure dignity and respect for transgender individuals. There should be gender-neutral public services like unisex toilets, among other things.

Healthcare access remains an important hindrance in the empowerment of transgender individuals. Governments should restructure healthcare policies and build both the infrastructure and environment that are inclusive of transgender individuals. Public hospitals should have clinics that are dedicated to the needs of transgender individuals, offering gender-affirming care such as hormone therapy, mental health counselling, and sex reassignment surgery (SRS). New policies should be adopted to counter this double and layered marginalisation of transgender individuals. Community-based organisations (CBOs) led by individuals belonging to the transgender community play a very important role in providing advocacy and support services to the victims. All types of governments, from local to national, should collaborate with such organisations to design and implement policies and welfare programmes to prioritise the most pressing issues of the community. Such organisations should also be strengthened through funding and support from the government in order to amplify their efforts. There is no denying the fact that there have been some major positive changes in the last few decades through judicial interventions towards recognising the rights of transgender individuals in India. But, on the flip side, there are still some major issues of implementation. Issues like social stigma, systematic discrimination, abuse, lack of support, and lack of opportunities are still some of the major challenges faced by the transgender community in India. Structuring an inclusive society is the need of the hour, and it demands a multidimensional approach. Social justice and the promises of the constitution should include all citizens of the country. It is the responsibility of each and every branch of democracy to ensure that those promises are kept.

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