

“Transgender Persons (Protection of Rights) Act, 2019: Analyzing Its Impact and Shortcomings”

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Abstract

The Transgender Persons (Protection of Rights) Act, 2019 was a landmark legislative step in India aimed at addressing the historical injustices and systemic discrimination faced by transgender individuals. By affirming the rights to self-identification, equality, and access to healthcare, education, and employment, the Act sought to promote inclusion and social justice. However, its implementation has been met with significant criticism and challenges. This research critically analyzes the Act's provisions and their real-world implications, focusing on its impact on the lives of transgender individuals. It examines key areas such as the recognition of self-perceived gender identity, the establishment of grievance redressal mechanisms, and the effectiveness of institutional support structures. Furthermore, the research highlights the Act's shortcomings, including ambiguities in defining critical terms, the inadequacy of punitive measures against discrimination, and its reliance on a certification process perceived as invasive and restrictive by many in the transgender community. Drawing on legal analysis, empirical studies, and stakeholder interviews, this study evaluates whether the Act has fulfilled its intended purpose of empowerment and social integration. It also explores alternative legislative and policy frameworks that could address the Act's deficiencies. By providing a comprehensive critique, this research aims to contribute to the discourse on transgender rights in India and suggest pathways for creating a truly inclusive legal and social environment.

Keywords:

Transgender Rights, Legal Framework, Social Justice, India, Human Rights, The Universal Declaration of Human Rights (UDHR), The International Covenant on Civil and Political Rights (ICCPR)

Introduction

"History owes an apology to members of the LGBTQ community and their families for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries."

By **Justice Indu Malhotra**

The Transgender Persons (Protection of Rights) Act, 2019, (hereinafter referred as an Act) marked a significant legislative milestone in India by aiming to safeguard the rights of transgender individuals and promote their social, economic, and educational inclusion. Enacted following the Supreme Court's landmark judgment in *NALSA v. Union of India* (2014), which recognized transgender individuals as a third gender and affirmed their fundamental rights, the Act sought to operationalize these principles into actionable legal protections. However, despite its intention, the Act has drawn both praise and criticism for its provisions and implementation. The Act provides a comprehensive definition of "transgender persons" to include individuals whose gender does not align with the sex assigned at birth, covering trans-men, trans-women, persons with intersex variations, and genderqueer individuals. It prohibits discrimination in education, healthcare, employment, housing, and public services, mandating equal opportunities for transgender individuals. Additionally, it emphasizes the right to self-perceived gender identity and provides for the establishment of a National Council for Transgender Persons to monitor and evaluate the impact of policies.

Healthcare and social welfare are also focal points of the Act. It obligates the government to ensure access to medical facilities, including gender-affirming surgeries and hormone therapy, and provides for the inclusion of transgender individuals in welfare schemes.

Historical Context Of Transgender Rights In India.

Transgender individuals in India have long faced significant challenges and discrimination, with their existence often considered "unnatural" by socie-

ty. India is home to approximately 700,000 transgender persons, yet their health, rights, and overall wellbeing have largely been overlooked.

The Indian transgender community exhibits a diverse array of gender identities and sexual orientations, distinct from the Western understanding of gender. In 2014, India officially recognized transgender individuals as the "third gender", a significant step towards greater legal recognition and protection. However, the third gender population in India continues to face widespread marginalization across various sectors. Transgender individuals have often been the subject of sociological and psychological studies, but there has been a dearth of research on their specific health concerns, including issues related to bone health. The struggle for transgender rights in India is multifaceted, encompassing legal, social, and cultural challenges. The journey towards transgender rights in India has been marked by a complex web of legal, social, and cultural hurdles, each posing unique challenges and requiring a multifaceted approach to overcome. Historically, the existence of transgender individuals has been viewed as unnatural, leading to widespread oppression and the exclusion of their health concerns and rights from the mainstream agenda. The landmark NALSA decision by the Supreme Court in 2014 and the subsequent enactment of the Act in 2019 have been pivotal in the legal recognition and protection of transgender individuals in India. The Act emphasizes the importance of access to healthcare and prohibits discrimination within the healthcare system, acknowledging the unique health needs of the transgender community. However, the Act has also faced significant criticism, with concerns raised about the provisions on gender self-identification and the lack of adequate representation of the transgender community in the decision-making process.

Defining Transgender Persons: An Exploration

In the context of gender identity and expression, the term "transgender" has emerged as an umbrella concept encompassing a diverse range of individuals whose gender identity or expression differs from the sex they were assigned at birth. Transgender individuals may self-identify in various ways, including as transsexual, gender-fluid, or non-binary, among other identities. The contemporary understanding of transgender identity emphasizes the internal sense of gender, which may or may not align with the biological sex assigned at birth. This concept challenges the traditional binary view of gender, recognizing that gender exists on a spectrum and can be fluid over time. Research suggests that the prevalence of transgender and gender-diverse individuals is higher than previously thought, with some estimates suggesting that up to 3% of young people may identify as gender-diverse.

Need for legislative intervention leading to the Act, 2019:

Act 2019 marks a significant milestone in the journey towards ensuring the rights and dignity of transgender individuals in India. This act aims to provide a comprehensive framework for the recognition of the transgender identity, prohibit discrimination, and facilitate access to healthcare, education, and employment opportunities for this marginalized community. The need for legislative intervention in this domain stemmed from the longstanding societal and legal challenges faced by the transgender population in India. Historically, transgender individuals have been subjected to widespread social stigma, discrimination, and exclusion, often deprived of basic rights and opportunities. Despite the Supreme Court's landmark judgment in the National Legal Services Authority v. Union of India case in 2014, which recognized the right to self-identify one's gender, the lack of comprehensive legislation left many aspects of transgender rights unaddressed.

Impact of the Act

The Act's implementation has brought greater visibility to transgender issues in India and prompted discussions about their rights in various social and legal contexts. It has encouraged institutions and organizations to adopt more inclusive policies and created a framework for addressing grievances related to discrimination. Additionally, the recognition of transgender persons in welfare schemes and affirmative action initiatives has provided opportunities for their social upliftment.

The Act, 2019, enacted in India, represents a significant milestone in the country's efforts to protect the rights and wellbeing of transgender individuals. The Act provides a comprehensive definition of "transgender persons" to include individuals whose gender does not align with the sex assigned at birth, covering trans-men, trans-women, persons with intersex variations, and genderqueer individuals. It prohibits discrimination in education, healthcare, employment, housing, and public services, mandating equal opportunities for transgender individuals. Additionally, the Act emphasizes the right to self-perceived gender identity and provides for the establishment of a National Council for Transgender Persons to monitor and evaluate the impact of policies.

The Act's emphasis on healthcare and social welfare is a significant aspect, as it obligates the government to ensure access to medical facilities, including gender-affirming surgeries and hormone therapy, and provides for the

inclusion of transgender individuals in welfare schemes. However, despite the enactment of the law, many transgender and gender-variant persons in India continue to struggle to access essential health care services, often due to systemic issues such as discrimination based on their gender identity and the complex bureaucratic processes for the legal recognition of their gender identity.

The Act's provisions on healthcare, while well-intentioned, have faced criticism for their overly medicalized approach to gender identity recognition. The requirement for transgender individuals to undergo certain medical procedures, such as sex reassignment surgery, in order to legally change their gender is viewed as a violation of their right to self-determination and bodily autonomy.

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Legal Recognition of Transgender Persons:

India in the 21st century claims to be striving for gender equality and gender neutrality, yet the judiciary still fails to acknowledge and take into consideration "gender neutrality" when it comes to crimes relating to sexual offences. No one can deny any "person" equality before the law or equal protection of law. Transgender Persons are not treated as an equal part of society due to lack of social acceptance. Transgender Persons are usually abandoned and have fewer means for survival and avenues for gaining livelihoods. Supreme Court of India judgment granting legal recognition to transgender persons. Commenting on the broader idea of social justice and equality in the drafting of the Indian Constitution, Dr. B.R. Ambedkar,

"Equality may be a fiction but nonetheless one must accept it as a governing principle."

As quoted in Dr. Ambedkar and the Dynamics of Indian Federalism by Balraj Puri, highlighting the essence of equality for marginalized communities, including transgender persons. Michael Kirby (Former Justice of the High Court of Australia) once said, "The denial of rights to individuals on the grounds of their sexual orientation or gender identity is a form of oppression that any society committed to justice must remedy."

In a lecture on Human Rights and Sexual Orientation delivered at King's College, London, 2013. Ruth Bader Ginsburg, "Real change, enduring change, happens one step at a time. Transgender persons deserve equal dignity under the law, and the Constitution demands nothing less."

The Act has been hailed as a landmark legislation, as it legally recognizes the existence of a third gender in addition to the binary male and female categorization. The Act empowers transgender individuals to self-identify their gender and obtain a certificate of identity from the District Magistrate, facilitating their legal recognition and access to rights and entitlements.

Employment and Education Opportunities:

The Act mandates the appropriate government to formulate welfare schemes and programs to facilitate the employment and education of transgender persons. This includes reservations in educational institutions and public employment, as well as the provision of skill development programs and access to social security benefits.

Some may argue that the Transgender Persons Act may have appealed better to the transgender persons and been more comprehensive and effective had it provided for reservations (affirmative action) for transgender persons in educational institutions and employment.

Public and Governmental Sensitization:

The Act also emphasizes the importance of public and governmental sensitization towards the transgender community. It mandates the appropriate government to take measures to create public awareness, address discrimination, and ensure the protection of the rights and interests of transgender persons. While the Transgender Persons Act represents a significant step forward, it has also faced criticism and challenges. Some of the key issues include the lack of consultation with the transgender community during the drafting

process, the requirement for a "committee" to certify one's gender identity, and the exclusion of certain intersex individuals from the definition of transgender persons. The Act, marks a crucial milestone in India's journey towards the legal recognition and empowerment of transgender individuals. Despite the challenges, the Act has the potential to pave the way for greater inclusion, equality, and social justice for the transgender community in India.

Highlights The Key Principles Of Prohibition Of Discrimination, Recognition Of Identity, And Provision Of Welfare Measures.:

"Recognition of gender identity lies at the heart of the fundamental right to dignity. Gender identity is integral to one's personality and is one of the most basic aspects of self-determination, dignity, and freedom."

-- Justice D.Y. Chandrachud

The Act, enacted by the Indian government, represents a landmark legislation aimed at safeguarding the rights and welfare of transgender individuals in the country. This Act, which builds upon the Supreme Court's landmark NALSA judgment, establishes a comprehensive framework to address the complex issues faced by the transgender community, including discrimination, identity recognition, and the provision of welfare measures. In terms of identity recognition, the Act allows transgender persons to self-identify their gender and obtain a certificate of identity from the District Magistrate. This affirmation of their gender identity is a critical step towards addressing the longstanding societal stigma and discrimination faced by the transgender community.

The Act's provisions are grounded in the constitutional principles of equality, non-discrimination, and the right to self-identification, as articulated in the NALSA judgment. The Act prohibits discrimination against transgender persons in various spheres, including employment, healthcare, and education, thereby ensuring that they can exercise their fundamental rights on an equal footing with the rest of the population. Furthermore, the Act mandates the provision of welfare measures by the government, including measures for their social, economic, and educational empowerment. This includes measures for skill development, employment, healthcare, and the creation of separate HIV Sero-Surveillance Centres, among other initiatives. By establishing these comprehensive protections and welfare measures, the Act, seeks to create a more inclusive and equitable society for transgender individuals in India, upholding the constitutional values of dignity, equality, and non-discrimination. The Act's emphasis on the rights and welfare of transgender persons is firmly rooted in

the constitutional framework of India.

Shortcomings and Criticism:

While the Act, marked a watershed moment for gender inclusivity in India, it is not without significant criticisms. Despite its positive intent, the Act has faced substantial criticism from transgender activists and legal experts for several reasons:

Healthcare Gaps:

The Act vaguely mentions provisions for healthcare without ensuring specific entitlements such as free gender-affirming surgeries or counseling services. This omission disproportionately affects economically weaker sections within the transgender community. Lack of access because there aren't enough clinicians who know enough about the issue is the largest obstacle to health care that transgender people report. Additional obstacles include socioeconomic, health system, financial, and discriminatory impediments as well as practitioners' lack of cultural competency. Transgender people encounter interpersonal and structural barriers to healthcare access that contribute to their postponement or avoidance of healthcare, which can lead to poor physical and mental health outcomes. While there are broad guidelines available across the world for standards of health care, one particular area of health and transgender young has been the cause for substantial debate, discourse and even research.

Lack of Penal Provisions:

The Act prohibits discrimination but fails to prescribe penalties for violations, leaving it toothless against societal and institutional biases (Law Commission Report on Transgender Rights, 2020). The rights of trans people are protected by a range of international and regional mechanisms. Yet, punitive national laws, policies and practices targeting transgender people, including complex procedures for changing identification documents, strip transgender people of their rights and limit access to justice. This results in gross violations of human rights on the part of state perpetrators and society at large. Globally, transgender persons face severe social isolation, which increases their susceptibility to HIV and other illnesses, such as mental health issues, restricts their access to work and school, and eliminates their chances for social and economic growth. Furthermore, regular incidents of extreme violence against transgender people are a manifestation of anger and aggression against a group

of people who do not fit the conventional conventions around gender. Frequently, this brutality goes unpunished.

They are met with ridicule from the society and are considered mentally ill, socially deviant and sexually predatory.

Trans people face a legal system that often does not protect us from discrimination based on our gender identity.

Ambiguity in Self-Identification Process:

While the Act affirms the right to self-identify, it paradoxically mandates certification by a district magistrate, creating barriers to accessing this right. Activists argue that this requirement undermines the principle of self-identification established by the Supreme Court. The Act mandates individuals to obtain a certificate from a District Magistrate for recognition as a transgender person, which undermines the principle of self-identification emphasized by the Supreme Court in *NALSA v. Union of India*. Critics argue that this requirement perpetuates external validation, which is against the ethos of personal autonomy.

Lack of Robust Anti-Discrimination Mechanisms:

Although the Act prohibits discrimination, it does not prescribe clear enforcement mechanisms or penalties for violations, leaving transgender persons vulnerable to continued systemic biases. Gender-diverse and trans people around the world are subjected to levels of violence and discrimination that offend the human conscience:

Inadequate Provisions for Healthcare and Welfare:

The Act's provisions on healthcare are vague and do not address the high costs and limited availability of gender-affirming procedures. Additionally, it lacks specific measures to tackle mental health challenges faced by transgender individuals.

Exclusion from Marriage and Adoption Rights:

The Act does not address critical issues like the right to marry, adopt, or inherit property, leaving transgender individuals without legal recognition in personal laws.

Representation Concerns in the National Council:

Critics argue that the National Council for Transgender Persons does not adequately represent the transgender community, as it includes a majority of government-appointed officials. Despite its positive intent to promote transgender rights and protections, the Transgender Act has faced substantial criticism from transgender activists and legal experts for several reasons. Another major concern is the Act's treatment of transgender individuals within the criminal justice system. The Act perpetuates the outdated and reductive notion that an individual's gender identity should be determined solely by their genital status, which can lead to transgender people being incarcerated in facilities that do not align with their gender identity. This approach not only fails to uphold the dignity and human rights of transgender individuals, but also raises significant safety concerns. Furthermore, the Act has been criticized for its limited scope and lack of robust enforcement mechanisms. While the Act provides some protections against discrimination, it does not address the myriad of challenges that transgender individuals face in areas such as healthcare, employment, and housing.

One of the key criticisms of the Act is its approach to identity recognition. The Act requires transgender individuals to undergo a screening and certification process to legally change their gender, which many activists argue is an unnecessary and invasive requirement that fails to respect the right to self-identify. Additionally, the Act does not adequately address the needs of non-binary or gender non-conforming individuals, leaving them in a legal gray area.

Overall, the Transgender Act, while well-intentioned, has fallen short in addressing the needs and concerns of the transgender community in India. Continued advocacy and legal reform will be necessary to ensure that transgender individuals can fully exercise their rights and live with dignity and self-determination. One of the key healthcare-related critiques of the Act is its approach to gender-affirmative procedures. The Act requires transgender individuals to undergo a lengthy bureaucratic process to legally change their gender, which can delay or prevent access to essential gender-affirming healthcare. This medicalized model of legal recognition fails to respect the right to self-determination and can have serious implications for the health and well-being of transgender individuals.

Despite the directives of the Supreme Court and the enactment of the Act, many transgender and gender-variant people in India still struggle to

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Despite the directives of the Supreme Court and the enactment of the Act, many transgender and gender-variant people in India still struggle to

access essential health care services. This is largely due to systemic issues such as discrimination, lack of trained healthcare providers, and the exclusion of gender-affirming procedures from many health insurance programs.

The Transgender Persons Act, 2019: Evaluating the Impacts and Challenges in India

Act, marked a significant legislative milestone in India by aiming to safeguard the rights of transgender individuals and promote their social, economic, and educational inclusion. Enacted following the Supreme Court's landmark judgment in *NALSA v. Union of India*, which recognized transgender individuals as a third gender and affirmed their fundamental rights, the Act sought to operationalize these principles into actionable legal protections.

However, despite its intention, the Act has drawn both praise and criticism for its provisions and implementation. On one hand, the Act emphasizes the importance of access to health care and obligates the State to ensure that transgender persons are not discriminated against by the health care system. The existence of the third gender has been a part of Hindu Vedic literature for aeons, and the transgender population in India forms a unique gender group with diverse gender identities.

Conclusion

We are a country that celebrates diversity in culture, creed, religions so vibrantly that the whole world talks about our 'Unity in Diversity' concept, but the ugliest side of our society is not accepting all the genders equally. Despite the fact that all genders are legally treated with respect, transgender people are nonetheless taboo in our culture. Unfortunately, gender is a big factor in how people are judged in our society. Despite being referred to as "third gender," transgender people are unable to live in love and serenity.

While the Act, represents a progressive step toward recognizing the rights of transgender individuals in India, its shortcomings highlight the need for a more inclusive and actionable framework. Addressing these gaps through amendments and enhanced implementation mechanisms is essential to ensure that the Act truly serves as a tool for empowerment and equality for the transgender community. Moving forward, consultation with the transgender community in policymaking will be crucial to bridging the gap between legal recognition and lived realities.

Several international treaties prescribe that transgender persons should not be subject to discrimination. The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) recognize that no person shall be arbitrarily denied their legal rights. The manuscript urges countries to take immediate action to address human rights violations against transgender individuals, emphasizing the need to fulfill international obligations, combat HIV epidemics, advance gender equality, foster social and economic development, and end pervasive violence.

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