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Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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TRANSGENDER PERSONS (PROTECTION OF RIGHTS ACT 2019 SHORTCOMINGS IN POLICY FRAMING AND IMPLEMENTATION)

AUTHORED BY - MANDEEP LOHCHAB¹ & PROFF. (DR.) DALIP KUMAR²

Abstract

The Transgender Persons (Protection of Rights) Act, 2019 (hereafter 'the Act') marks India's legislative attempt to provide a rights-based framework for the protection, welfare, and social inclusion of transgender persons. Enacted in response to the Supreme Court's landmark judgment in NALSA v. Union of India (2014)³, the Act aims to prohibit discrimination, ensure recognition of gender identity, and guarantee access to education, employment, health care, and social security. However, scholars, civil society groups, and transgender collectives have consistently highlighted that the Act suffers from structural deficiencies, conceptual gaps, and implementation barriers. This research paper critically analyses these shortcomings by examining the law's conceptual framework, rule-making process, bureaucratic structures, and the socio-legal realities of institutional implementation. It argues that while the Act represents progress in principle, its framing and execution remain misaligned with constitutional guarantees of dignity, autonomy, and equality.

1. Introduction

Transgender communities in India have historically endured multiple and intersecting layers of discrimination, exclusion, and structural marginalisation. Although they occupy a recognised space in India's socio-cultural milieu—such as hijra and kinnara communities with documented histories—this symbolic visibility has not translated into material equality or substantive citizenship.⁴

For centuries, transgender persons have remained on the fringes of society, deprived of the fundamental rights and social protections that are available to other citizens. Their marginalisation manifests across a wide spectrum of life opportunities: from childhood to

¹ Pursuing Ph.D from Kurukshetra University, Kurukshetra

² Professor at Department of law Kurukshetra University Kurukshetra

⁴ National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

adulthood, from educational institutions to employment spaces, and from access to public infrastructure to inclusion within families and communities.⁵

This marginal status is reinforced by persistent stigma, entrenched prejudice, and institutional neglect, making transgender persons one of the most socio-economically excluded groups in India.⁶

Among the most significant barriers faced by transgender individuals is the challenge of obtaining legal identity documents that correspond with their gender identity. Identity documents such as Aadhaar, passports, PAN cards, voter IDs, and ration cards are essential gateways to exercising constitutional rights, accessing social welfare schemes, availing institutional benefits, and securing dignified employment.⁷

Yet, for many transgender persons, mismatched documents or absence of recognition leads to administrative harassment, denial of services, and exclusion from welfare schemes. The lack of a streamlined and respectful process for updating gender markers has historically made transgender persons vulnerable to scrutiny, suspicion, and discrimination by public authorities and service providers.⁸

In addition to identity-related issues, access to health care remains one of the most neglected areas of transgender rights in India. Transgender persons often face discrimination from medical personnel, lack of trained professionals for gender-affirming care, absence of psychological support services, and unaffordable costs for transition-related procedures. Public hospitals rarely offer transgender-affirming services, and private hospitals impose prohibitively high costs. Moreover, social stigma discourages many transgender persons from seeking timely medical treatment, leading to disproportionately poor health outcomes compared to the general population. The burden of HIV/AIDS, mental health disorders such as depression and anxiety, and violence-related trauma remains significantly high in transgender communities due to systemic neglect.⁹

⁵ Ministry of Social Justice and Empowerment, Annual Report, 2021–22.

⁶ Serena Nanda, *Neither Man nor Woman: The Hijras of India* (Wadsworth, 1990).

⁷ United Nations Development Programme, “Hijras/Transgender in India: HIV, Human Rights and Social Exclusion,” UNDP Report (2010).

⁸ Constitution of India, Articles 14, 15, 19 and 21.

⁹ Ibid

Livelihood opportunities for transgender persons continue to be restricted by societal bias, educational exclusion, and absence of affirmative employment policies. Many transgender individuals face discrimination during school years, resulting in high dropout rates. This educational exclusion severely limits their access to formal jobs, pushing them into stereotyped or marginalised professions such as begging, sex work, and ceremonial performances. Although these occupations have cultural significance in some communities, many individuals pursue them due to compulsion rather than choice. The lack of social protection, workplace inclusivity policies, and targeted skill-development programs further deepens economic vulnerabilities.¹⁰

Social protection mechanisms—including housing schemes, pension programs, and welfare benefits—often overlook the specific needs of transgender persons. Many are denied access due to lack of documentation, absence of family support, or discriminatory attitudes of frontline workers. Homelessness, food insecurity, and lack of social support systems are common, particularly among transgender youth who are often forced to leave home due to family rejection. These intersecting challenges collectively contribute to a cycle of marginalisation, impeding the realisation of constitutional promises of equality and dignity.

Against this background, the Supreme Court’s judgment in **NALSA v. Union of India (2014)**¹¹ emerged as a watershed moment for transgender rights. The judgment recognised transgender persons as a “third gender” and affirmed their fundamental right to self-identification of gender without requiring medical, psychological, or physical certification. The Court held that gender identity lies at the core of personal autonomy, dignity, and privacy under Article 21 of the Constitution. It observed that forcing transgender persons to undergo gender-affirming surgeries or medical evaluations to obtain legal recognition violates the principles of equality (Article 14), non-discrimination (Article 15), and freedom of expression (Article 19). NALSA further directed the central and state governments to implement affirmative action measures, including reservations in education and employment, targeted healthcare initiatives, and social welfare schemes tailored to transgender communities.

The Court also emphasised the need to sensitise society and state institutions—such as police officers, medical staff, educators, and bureaucrats—to reduce prejudice and violence against

¹⁰ The Transgender Persons (Protection of Rights) Act, 2019.

¹¹ NALSA v. Union of India, (2014) 5 SCC 438.

transgender persons. It directed the government to incorporate transgender issues into broader human rights frameworks, acknowledging that formal legal recognition must translate into practical improvements in daily life. In essence, NALSA laid down a comprehensive, rights-based, and autonomy-centric framework for transgender inclusion.

It was in response to these directives that the **Transgender Persons (Protection of Rights) Act, 2019** (hereafter, “the Act”) was enacted. The government described the Act as a progressive step towards eliminating discrimination, ensuring welfare, and providing legal recognition to transgender persons. On the surface, the Act appears to prohibit discrimination in education, employment, healthcare, public places, and access to welfare schemes. It creates institutional mechanisms such as the National Council for Transgender Persons and outlines state responsibilities to promote social, educational, and economic welfare.¹²

However, transgender rights organisations, queer activists, scholars, and community leaders have consistently argued that the Act, in its final form, not only falls short of the transformative vision articulated in NALSA but, in many respects, contradicts it. They contend that the Act suffers from profound conceptual, procedural, and structural deficiencies that undermine its ability to deliver substantive justice. Instead of embodying the principle of **self-identification**, the Act introduces a **bureaucratic certification regime** that requires transgender persons to apply to the District Magistrate for a “transgender certificate.” More problematically, those who wish to identify as “male” or “female” are required to undergo gender-affirming surgery and furnish medical proof—directly contradicting NALSA’s express rejection of such mandatory medical interventions.¹³

These requirements not only violate the right to bodily autonomy but also disregard the lived realities of transgender persons who may not wish to undergo surgery for reasons related to health, financial constraints, personal belief, or identity. Surgery-based recognition also implies a troubling hierarchy: the state recognises transgender identity only conditionally, extending full recognition as “male” or “female” only through medical proof. This approach promotes a medicalised understanding of gender and fails to accommodate non-binary, genderfluid, and gender-nonconforming identities, thereby erasing the diversity within transgender communities.

¹² Amnesty International, “A Law that Ignores Voices,” 2019.

¹³ NALSA v. Union of India, (2014) 5 SCC 438.

The lack of meaningful community consultation during the drafting of the Act further aggravated its disconnect from ground realities. Despite widespread protests, memoranda, and submissions by transgender groups during the legislative process, most recommendations were ignored. Key demands—including adoption of a self-declaration model, stronger anti-discrimination provisions, reservations, and gender-affirming healthcare guarantees—were omitted or diluted. Activists also criticised the Act for failing to provide adequate enforcement mechanisms, grievance redressal processes, or penalties for violations committed by private individuals or institutions.

Another significant area of concern pertains to the Act's welfare provisions. While it mandates that governments formulate schemes related to education, healthcare, housing, and social security, it provides no enforceable timelines, budgetary allocations, or accountability frameworks. The absence of binding obligations has resulted in uneven implementation across states, with many failing to introduce meaningful programs. Even in states where schemes exist, transgender persons face barriers in accessing them due to lack of awareness, bureaucratic apathy, and inconsistent policy interpretation. For instance, rehabilitation centres mandated under the Act are either non-functional, inaccessible, or fail to adhere to standards of dignity and autonomy.

Furthermore, the Act introduces disproportionately mild punishments for offences against transgender persons. Crimes such as physical abuse, sexual harassment, or forced labour attract penalties significantly lower than those under the Indian Penal Code for similar offences against cisgender individuals. This disparity not only signals a devaluation of transgender lives but also reduces the deterrent effect of the law.

Given these conceptual inconsistencies, procedural flaws, and implementation failures, this research paper undertakes a systematic critique of the Transgender Persons (Protection of Rights) Act, 2019. First, it analyses the internal contradictions within the Act's framing, particularly the tension between self-identification and state-controlled recognition. Second, it evaluates administrative barriers created through certification procedures and the absence of strong institutional mechanisms. Third, it examines gaps in welfare provisions and the challenges of policy implementation across states. Finally, it compares the Act with global best practices—particularly self-declaration models adopted in Argentina, Malta, Ireland, and Portugal—to highlight pathways for reform.

By situating the Act within constitutional jurisprudence, international human rights standards, and lived experiences of transgender communities, this research aims to offer a comprehensive and critical understanding of the law. It argues that while the Act marks a symbolic step towards transgender inclusion, its structural shortcomings hinder its transformative potential. Meaningful reform must therefore place autonomy, dignity, and community participation at the centre of policymaking.

Methodology

This research employs a **qualitative doctrinal methodology**, drawing from primary legal sources, judicial decisions, statutory texts, and secondary academic literature. The study critically analyses the Transgender Persons (Protection of Rights) Act, 2019 in the context of constitutional jurisprudence, international human rights frameworks, and policy implementation in India.

The research methodology includes:

1. Doctrinal Legal Analysis:

Examining the Act, 2019 along with relevant rules, government notifications, parliamentary debates, and the Supreme Court judgment in *NALSA v. Union of India* (2014). This helps identify inconsistencies between the Act and constitutional principles.¹⁴

2. Comparative Review:

Analysing legal frameworks of other jurisdictions such as Argentina, Malta, Denmark, and Ireland that follow self-identification models, to evaluate global best practices.

3. Policy and Document Analysis:

Reviewing governmental schemes, National Council for Transgender Persons reports, and state-level implementation guidelines to understand ground-level challenges.

4. Secondary Literature Review:

Consulting scholarly articles, research papers, queer studies works, NGO reports (e.g., from Humsafar Trust, Queer Collective, SAATHII), and international documents like Yogyakarta Principles.

5. Theoretical Framework:

Using feminist legal theory, human rights theory, and the principle of transformative

¹⁴ *NALSA v. Union of India*, (2014) 5 SCC 438.

constitutionalism to evaluate whether the Act upholds constitutional values of dignity, autonomy, and equality.

The research does not rely on empirical fieldwork; rather, it adopts a critical-analytical approach grounded in textual interpretation and comparative analysis.

Hypothesis

The central hypothesis of this research is that the Transgender Persons (Protection of Rights) Act, 2019, despite its stated objective of protecting transgender persons, fails to adequately uphold the constitutional principles of self-identification, dignity, and equality due to conceptual flaws, bureaucratic certification requirements, weak enforcement mechanisms, and poor implementation.

Sub-hypotheses include:

1. The Act deviates from the *NALSA* judgment by undermining the right to self-identification.¹⁵
2. Mandatory certification and surgical requirements are discriminatory and violate bodily autonomy.
3. Welfare provisions under the Act remain largely symbolic due to lack of enforceability and budgetary support.
4. The Act overlooks global rights-based best practices by adopting a medicalised and bureaucratic approach.
5. Implementation gaps across Indian states demonstrate inadequate institutional preparedness and low political commitment.

Literature Review

The literature on transgender rights in India has expanded significantly since the *NALSA* judgment, with scholars critically analysing the socio-legal status of transgender persons and the effectiveness of state-led reforms. This section reviews key academic works, policy documents, and studies relevant to the research.¹⁶

1. Judicial and Constitutional Scholarship

Scholars such as Arvind Narrain, Ratna Kapur, and Gautam Bhatia have examined the

¹⁵ *NALSA v. Union of India*, (2014) 5 SCC 438.

¹⁶ *NALSA v. Union of India*, (2014) 5 SCC 438.

transformative potential of *NALSA v. Union of India* (2014). Their analyses highlight the judgment's recognition of self-identification as central to gender identity and its grounding in constitutional morality. They argue that NALSA marked a shift towards an autonomy-based model of rights.

2. Critiques of the 2019 Act

Authors including Upendra Baxi, Prabha Kotiswaran, and Akshay Khanna have pointed out major deficiencies in the Transgender Persons Act. They note that the bureaucratic certification process contradicts NALSA and imposes unnecessary medical scrutiny. Scholars widely critique the Act for imposing lighter punishments for violence against transgender persons, reflecting structural discrimination.

3. Policy and NGO Reports

Studies by NGOs such as the Humsafar Trust, UNDP India, SAATHII, and the National Human Rights Commission have documented the ground realities of transgender lives. These reports highlight ongoing issues such as employment exclusion, police harassment, healthcare discrimination, and lack of legal awareness. They confirm that most transgender persons are unable to access welfare schemes due to documentation barriers.

4. Sociological and Anthropological Studie

Anthropologists like Serena Nanda and Gayatri Reddy have written foundational works on hijra communities, documenting their cultural roles, identity practices, and struggles for survival. These studies show that while hijras have ritual visibility, they lack legal and social acceptance, which reinforces systemic marginalisation.

5. International Legal Frameworks

Literature on global transgender rights—particularly in countries with progressive laws (Argentina 2012, Malta 2015, Denmark 2014)—emphasises self-identification, depathologisation, and strong anti-discrimination protections. Comparative scholars argue that legal recognition of gender identity should be free of medical or bureaucratic requirements.

6. Theoretical Perspectives

Queer theory scholars such as Judith Butler and Dean Spade critique state control over identity and highlight the need for community-led models. Feminist legal theory authors emphasise bodily autonomy and critique state paternalism. Indian literature on transformative constitutionalism, especially by Dr. B.R. Ambedkar scholars, also underscores that law must dismantle social hierarchies rather than reinforce them.

Overall, the literature converges on a common conclusion: **the Act represents progress in principle but fails in its substantive commitment to autonomy, equality, and community empowerment.**

Research Questions

1. To what extent does the Transgender Persons (Protection of Rights) Act, 2019 uphold the constitutional principles of self-identification, dignity, and equality as articulated in *NALSA v. Union of India*?
2. What are the major conceptual and definitional inconsistencies within the Act, and how do they affect transgender persons' access to rights and entitlements?
3. How does the bureaucratic certification process under the Act hinder or facilitate the recognition of gender identity in practice?
4. What are the key implementation challenges faced by transgender persons at the state level in accessing welfare schemes, healthcare, housing, and legal protections under the Act?
5. How do global best practices—particularly self-identification models—compare with the Indian legal framework, and what lessons can India adopt?
6. Does the Act provide sufficiently strong anti-discrimination, enforcement, and grievance redressal mechanisms? If not, what reforms are necessary?
7. What role has community consultation (or the lack of it) played in shaping the strengths and weaknesses of the Act?

2. Background and Context

2.1 Historical marginalisation of transgender communities

Transgender persons—including hijras, kinnars, intersex persons, gender-nonconforming individuals, and non-binary people—have existed in Indian society for centuries. Although culturally significant in certain rituals, their socio-economic position remains vulnerable due to:

- Limited access to formal education
- Exclusion from employment
- Police harassment and criminal profiling
- Family rejection and homelessness
- Lack of access to identity documents

- Absence of gender-affirming health care

These systemic exclusions informed judicial interventions such as *NALSA* and necessitated legislative action.

2.2 The *NALSA* judgment and its guiding principles

The Supreme Court's directives included:

- Recognition of transgender persons as a "third gender"
- Right to self-identification without medical or psychological certification
- Reservation in education and public employment
- Access to separate HIV sero-surveillance centres
- Framing of social welfare schemes

While the Act acknowledges many of these, it departs from critical principles—especially autonomy and self-determination.

3. Overview of the Transgender Persons (Protection of Rights) Act, 2019

The Act includes provisions on:

- Prohibition of discrimination
- Right to self-recognition of gender identity
- Certificate of identity issued by the District Magistrate
- Protection from denial of services, residence, and education
- Formation of a National Council for Transgender Persons
- Punishment for offences against transgender persons

While the objectives appear progressive, the Act's operationalisation raises serious concerns explored in the following sections.

4. Shortcomings in Policy Framing

4.1 Absence of genuine community consultation

Despite multiple protests and memoranda submitted by transgender activists, the 2019 Act did not reflect substantive feedback. Legislative drafting lacked:

- Involvement of transgender collectives
- Expert inputs from queer studies scholars, health professionals, or legal practitioners
- Empirical evidence on lived experiences

The result is a law disconnected from ground realities.

4.2 Flawed recognition of gender identity

The Act contradicts *NALSA* by imposing bureaucratic certification:

- A District Magistrate issues a “transgender certificate”.
- For change to “male” or “female,” proof of surgery is needed.

This violates the constitutional principle of self-identification and medical autonomy. It also discriminates between transgender identities by creating a hierarchy: “transgender” vs “male/female after surgery.”

4.3 Lack of clarity on non-binary identities

The Act treats “transgender” as a fixed category, ignoring:

- Non-binary
- Genderfluid
- Agender
- Intersex identities

It collapses diverse experiences into a single administrative label.

4.4 Ambiguous definitions and conceptual confusion

The Act defines “transgender person” in vague language, mixing psychological terms with biological descriptors, creating confusion and inconsistencies with international standards such as the Yogyakarta Principles.

4.5 Inadequate penalties for violence and discrimination

The punishment for offences (up to two years) is disproportionately low compared to penalties under general criminal law for similar crimes. This reveals a serious conceptual flaw that undermines deterrence.

5. Implementation Shortcomings

5.1 Certification hurdles and administrative burden

The certificate-based process results in:

- Lengthy bureaucratic delays
- Invasive questioning
- Medical proof requirements
- Arbitrary decisions by District Magistrates
- Lack of uniform implementation across states

Many transgender persons avoid the certification due to stigma or procedural complexity.

5.2 Poor implementation of welfare provisions

The Act mandates welfare schemes but provides no enforceable framework. States lack:

- Budget allocation
- Monitoring mechanisms
- Timelines for implementation
- Inter-departmental coordination

Schemes such as housing, scholarships, and skill development remain inconsistent across states.

5.3 Lack of accountability and grievance redressal systems

The Act lacks:

- Independent oversight bodies
- Complaint procedures
- Penalties for non-compliance by government agencies
- Frameworks for monitoring discrimination

As a result, discrimination in health care, education, and employment often goes unreported.

5.4 Failure to integrate healthcare rights

While the Act mentions health care, it does not ensure:

- Gender-affirming treatment
- Hormone therapy
- Psychological counselling
- Insurance coverage
- Training of medical professionals

Most transgender persons remain dependent on expensive private services.

5.5 Weak functioning of the National Council for Transgender Persons

The National Council suffers from:

- Limited decision-making power
- Tokenistic representation
- Over-reliance on bureaucrats
- Lack of transparency in its functioning

Its advisory nature restricts its effectiveness.

6. Judicial and Constitutional Critique

The Act is inconsistent with:

6.1 Constitutional rights

- Article 14: Equality
- Article 15: Non-discrimination
- Article 19: Freedom of expression (including gender expression)
- Article 21: Dignity and autonomy

6.2 Departure from NALSA directives¹⁷

The requirement of certification and surgery violates the right to self-identify.

6.3 Failure to recognise horizontal discrimination

The Act prohibits discrimination but does not specify penalties for private entities.

6.4 Lack of socio-economic rights enforcement

The Act promises welfare benefits but does not create enforceable entitlements.

7. Comparative Analysis with Global Standards

Countries like Argentina, Malta, Ireland, and Denmark follow **self-declaration models**, requiring no medical proof. International best practices emphasise:

- Autonomy and privacy
- Depathologisation of transgender identity
- Legal recognition without medical intervention
- Anti-discrimination provisions with clear enforcement
- Comprehensive healthcare support

India's Act lags behind global rights-based frameworks.

8. Recommendations for Reform

8.1 Shift to a full self-declaration model

Remove the requirement of certification and medical proof.

¹⁷ NALSA v. Union of India, (2014) 5 SCC 438.

8.2 Ensure meaningful community participation

Include transgender-led organisations in rule-making and monitoring.

8.3 Strengthen penalties for violence and discrimination

Align punishment with general criminal law.

8.4 Introduce enforceable socio-economic entitlements

Guarantee:

- Housing rights
- Education quotas
- Employment reservations
- Social security benefits

8.5 Expand healthcare protections

Provide:

- Free gender-affirming care
- Insurance coverage
- Training for healthcare providers

8.6 Establish independent grievance redressal mechanisms

Create state-level and national-level ombudsman bodies.

8.7 Amend definitions to include non-binary identities

Adopt inclusive terminology aligned with global standards.¹⁸

9. Conclusion

The Transgender Persons (Protection of Rights) Act, 2019 represents a significant legislative milestone for gender minorities in India. However, the Act's flawed conceptualisation and weak implementation undermine its transformative potential. The insistence on bureaucratic certification contradicts constitutional principles of dignity and autonomy, while the failure to create enforceable welfare entitlements leaves transgender communities marginalised. The absence of community consultation and unrealistic administrative frameworks further limit

¹⁸ Amnesty International, "A Law that Ignores Voices," 2019.

real-world impact.

For the Act to fulfil its promise, India must shift towards a rights-based, inclusive, and community-centred approach that recognises gender diversity beyond binary norms. Effective implementation requires political will, financial investment, and collaboration with transgender leaders who understand the lived realities of discrimination. Without substantive reforms, the Act risks remaining symbolic rather than truly emancipatory.

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