

# Beyond Paper Protection: Rethinking Transgender Rights in India

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## INTRODUCTION

Gender identity is one of the most fundamental aspects of one's life. It refers to an individual's self-identification as a man, woman, transgender, or other identified category. Usually, the gender is assigned at birth, but a small portion of the population incorporates both or certain physiological traits of male and female. However, Gender identity is not usually determined by biological and physiological traits; it's essential to differentiate between sex and gender. Sex is assigned at birth, and gender is shaped by cultural and social construct that shapes how an individual expresses themselves.

In recent years, there has been a growing recognition of the need to respect and affirm diverse gender identities, as individuals who do not conform to traditional gender norms often face discrimination, marginalization, and a lack of legal protection. In the famous case of *NALSA v. UOI*, the apex court held that:

*gender identity and sexual orientation include trans genders and that "each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom, and no one shall be forced to undergo medical procedures [...] as a requirement for legal recognition of their gender identity."*<sup>1</sup>

Following the landmark Judgement, the Indian government introduced and passed the Transgender Rights Act, 2019, which not only provides a statutory framework for the recognition of transgender people but also prohibits discrimination against transgender people.

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<sup>1</sup> AIR 2014 SC 1863.

Section 2(k) of the act defines “Transgender person” as someone whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer, and person having such socio-cultural identities as kinner, hijra, aravani, and jogta. The definition appears to be progressive; it also aligns with the NALSA judgement.<sup>2</sup> At the same time, there is a conflation of intersex and transgender identities, which need separate legal recognition and protection. There is no further clarity for binary and fluid identity, which may not align with the socio-cultural identity.

But the question remains – is the Transgender Persons (Protection of Rights) Act, 2019 truly achieving its purpose? While the Act appears progressive on paper, its implementation and certain provisions have raised serious concerns. Let's decode the concerns one by one.

### **RECOGNITION OF IDENTITY: CERTIFICATION PROCESS UNDER CHAPTER III**

Chapter III of the act begins with a marginal note saying “Recognition of Identity of Transgender Persons”, describes how transgender persons can get a certificate of identity from the District Magistrate. The identity of a person will be determined by a certificate that a magistrate will issue. Now, this process doesn't simply question the problem of self-identification, but the procedure in itself is abusive in terms of the harassment that a person will go through to just get an identity certificate. Moreover, the provision is in clear contradiction to the Act itself, as the Act talks about the self-perceived identity,<sup>3</sup> but this specific part lays out the conditions related to external validation. Critics further argue that this part undermines the autonomy and dignity of individuals and places the matter under state approval, which will not only lead to harassment, but also decision-making is at the helm of administration.<sup>4</sup> There are no clear guidelines related to the timeline under which the application submitted to the District Magistrate is to be approved or rejected, and in case it is rejected, there is no mechanism for appeal.

The Court in the case of *NALSA v. UOI* held that:

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<sup>2</sup> PRIVACY LIBRARY available at <https://privacylibrary.ccgmlud.org/case/national-legal-services-authority-vs-union-of-india> (last visited July 28, 2025).

<sup>3</sup> The Transgender Persons (Protection of Rights) Act, 2019, S. 4(2).

<sup>4</sup> TRANSLAW – SOUTH ASIAN TRANSLAW DATABASE / CLPR available at <https://translaw.clpr.org.in/legislation/transgender-persons-protection-of-rights-act-2019/> (last visited July 28, 2025).

*gender identity is integral to life and would be protected under Articles 19 and 21 of the Constitution of India, as a function of freedom of expression, privacy, and dignity. The transgender community's rights to privacy, self-identity, autonomy, and personal integrity were reaffirmed, and the legal recognition of gender identity was considered part of the right to dignity and freedom guaranteed under Article 21 of the Constitution.*<sup>5</sup>

The court gave importance to self-identity, but Part III is in clear contradiction with this principle. The apex court is, again and again, insisting on self-identity, but the requirement of a certificate creates a bureaucratic process rather than recognizing identity as a matter of personal identity. The need for a certificate undermines the very essence of self-determination and is seen as a regressive step when compared to the progressive stance adopted by the Supreme Court.<sup>6</sup>

Section 6(3) makes the issue more problematic as the wording says that after the issuance of the certificate, there will be a conferment of rights and proof of identity. The conferment of rights is conditional upon the certificate, directly in contradiction to Article 21 of the Constitution. Furthermore, this provision creates a legal paradox: if a person does not possess a certificate of identity, does it mean they are excluded from protections under the Act? Such an interpretation would undermine the very purpose of the legislation, which aims to protect all transgender persons, irrespective of their documentation.

Furthermore, this process inherently creates large repositories of intimate data, which, if mishandled, could lead to severe privacy violations, social stigma, and even violence. The act is silent on how the data will be collected, stored, and used in the future.

## **RIGHTS OF TRANSGENDER PERSONS GIVEN IN THE ACT**

Although the Act gives some rights to transgender which are given below:

*Prohibition against discrimination-* Section 9 of the act states that in matters of employment, no establishment shall discriminate against any transgender person, and the matters related to employment shall not be limited to recruitment, promotion, and other related issues. Further, Section 12 states that every transgender person has a right to reside in the household and the right to enjoy and use the facilities of such household in a non-discriminatory manner. Section

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<sup>5</sup> *Supra* note 1.

<sup>6</sup> *Supra* note 1.

13 states that all the educational institutions funded by the Government or recognised by the appropriate Government shall provide inclusive education and opportunities for sports, recreation, and leisure activities to transgender persons without discrimination on an equal basis with others. These rights are not limited to educational or employment, as section 14 mandates that the appropriate government shall formulate welfare schemes for transgender persons, including their vocational training and self-employment.

All these rights are well written on paper, and there is no provision for breach of the same, no clause for the penalties for non-compliance by the public or private institutions. For instance, there is a specific provision related to employment,<sup>7</sup> but no affirmative action or reservation addresses the systemic marginalization faced by the transgender community. Critics argue that the Act, rather than empowering transgender persons, offers a tokenistic recognition of their rights without structural reforms or accountability mechanisms.

## **CONCLUSION AND SUGGESTION**

Although this legislation was a much-awaited one, it tried to give dignity, equality, and inclusion to transgender individuals in society. But in reality, the legislation falls short in implementing the self-identity concept, which was determined in the NALSA judgement.<sup>8</sup> The need of the hour is to introduce a self-declaration identity model, eliminating the certification process that undermines autonomy and dignity. The Act must also incorporate robust data privacy safeguards, ensuring that sensitive personal information is collected minimally, securely stored, and protected from misuse, with strict penalties for breaches. Although there is a separate section for penalties in section 18, there is a need to amend them further, as the most glaring concern is the relatively lenient punishment prescribed for serious offences like sexual abuse. The second concern is that it lumps together all forms of abuse, physical, sexual, emotional, verbal, and economic, under a single punishment bracket. This fails to recognize the gravity and varying degrees of harm caused by different offences. These measures, coupled with consistent community consultation and awareness programs, can transform the Act from a tokenistic statute into a powerful instrument of social justice and inclusion.

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<sup>7</sup> The Transgender Persons (Protection of Rights) Act, 2019, S. 13.

<sup>8</sup> *Supra* note 2.