

Transgender Rights in India: Constitutional Promises, Judicial Interventions, and Future Obligations

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Abstract

The Indian Constitution guarantees justice, equality, liberty, and fraternity to all citizens, even though transgender persons have historically faced marginalisation and exclusion from these constitutional protections. As dreamt by our Noble Laureate Rabindranath Tagore “where the mind is without fear and the head is held high,” yet this vision remains almost unrealised for many marginalised communities. Landmark judicial interventions, particularly National Legal Services Authority v. Union of India (NALSA, 2014) and Navtej Singh Johar v. Union of India (2018), have repositioned transgender rights within the constitutional framework, affirming dignity, autonomy, and equality. These judicial decisions also highlight Dr. B.R. Ambedkar’s principle of constitutional morality, which emphasises that constitutional values must guide societal change, even when social prejudice persists. The subsequent legislative response, the Transgender Persons (Protection of Rights) Act, 2019, represents progress but at the same time certain limitations are there in realising these rights. This article critically examines the constitutional foundations of transgender rights in India, evaluates the role of the judiciary in expanding these rights, and highlights future obligations. It argues for a vision of transformative constitutionalism where constitutional morality guides social inclusion, ensuring that transgender persons can live with dignity, equality, and freedom from fear.

Keywords: Transgender Rights, Constitutional Morality, Equality and Dignity; Judicial Interventions, Transformative Constitutionalism. NALSA, Navtej Singh Johar

I. Introduction

As dreamt by noble laureate Rabindranath Tagore —“Where the mind is without fear and the head is held high, where knowledge is free”—India’s moral aspiration has always been to create a society where freedom, dignity, and

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equality are not privileges but the birth rights of every individual.²The Constitution of India, which was adopted in 1950, embodied this vision, ensuring that justice—social, economic, and political—becomes a living reality for all. However, even after seventy-five years of constitutional governance, the lived realities of many marginalised communities, especially transgender persons, are still different to this Constitutional promise.

Historically, transgender persons in India occupied respected positions in various socio-religious traditions.³Yet, colonial codification, particularly under the *Criminal Tribes Act, 1871*, systematically criminalised and stigmatised non-binary identities.⁴ In post-Independence, while the Constitution guaranteed equality under Article 14, freedom under Article 19, and dignity under Article 21, the transgender community remained invisible in legal and administrative discourse for decades.⁵

The constitutional vision of justice, equality, and fraternity must be understood through the prism of constitutional morality, a concept as emphasised by Dr. B.R. Ambedkar as the soul of constitutional governance. He cautioned that, “*Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it.*”⁶ In the context of transgender rights, constitutional morality demands that the law not merely protect existing privileges but challenge social hierarchies and prejudice to uphold human dignity.

Therefore, the discussion of transgender rights in India is not just an identity issue; rather, it is a reflection of the continuous conversation between society and the law to realise the Constitution's transformative vision. Judicial interpretation has become the primary catalyst in bridging the gap between constitutional ideals and social realities, ensuring that the rights of transgender persons are not abstract principles but enforceable guarantees.

² RABINDRANATH TAGORE, GITANJALI (1910).

³ ARVIND NARRAIN & ALOK GUPTA EDS., LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW 22–24 (2011).

⁴ Criminal Tribes Act, No. 27 of 1871 (India).

⁵ See INDIA CONST. arts. 14, 19, 21.

⁶ B.R. Ambedkar, Speech in the Constituent Assembly Debates (Nov. 4, 1948), in Constituent Assembly Debates, Vol. VII, at 38 (Lok Sabha Secretariat 1950).

Even today, the dream “where the mind is without fear and the head is held high” remains unfulfilled for many. It is only through a reaffirmation of constitutional morality, supported by judicial vigilance and legislative sensitivity, that India can ensure every individual—regardless of gender identity—truly stands equal before the law.

II. Constitutional Promises and Judicial Interventions

The Constitution of India enshrines a vision of justice, liberty, equality, and fraternity, which forms the normative foundation for protecting every individual’s dignity irrespective of their social or biological identity. While the framers of the Constitution may not have explicitly envisaged the complexity of gender diversity as understood today, the dynamic interpretation of constitutional provisions by the judiciary has progressively expanded their scope to include transgender persons within the meaning of “person” and “citizen.”⁷

A. Equality and the Right to Live with Dignity

Article 14 guarantees equality before the law and equal protection of laws to all persons, forming the bedrock of India’s constitutional democracy.⁸ The Supreme Court has consistently held that the right to equality is not confined to formal equality but extends to substantive equality, ensuring the elimination of discrimination and the protection of vulnerable groups.⁴ Similarly, Articles 19(1)(a) and 21 safeguard the freedom of expression and the right to live with dignity, respectively—rights which are essential for recognising and protecting one’s gender identity.⁵

In *National Legal Services Authority v. Union of India* (NALSA), the Supreme Court undertook a landmark interpretation of these constitutional guarantees.⁶

The Court recognised that the right to self-identify one’s gender—whether male, female, or third gender—is integral to personal autonomy and human dignity protected under Article 21.⁷ It emphasised that gender identity lies at the core of

⁷ State of W.B. v. Anwar Ali Sarkar, A.I.R. 1952 S.C. 75 (India).

⁸ INDIA CONST. art. 14.

one's personality and is vital for the realisation of equality and freedom.⁸ The judgment was revolutionary not only for its recognition of transgender identity but also for introducing the principles of constitutional morality and transformative constitutionalism into the discourse on gender justice.⁹

By invoking constitutional morality, the Court affirmed that constitutional values must prevail over social morality.¹⁰ Justice K.S. Radhakrishnan observed that the State must ensure that "constitutional rights are not held hostage to societal disapproval." This articulation transformed the judiciary's approach from one of passive interpretation to active protection of the marginalised, giving substantive meaning to the constitutional promise of equality.

B. Decriminalisation and the Affirmation of Identity

The jurisprudence developed in *NALSA* found a deeper affirmation in *Navtej Singh Johar v. Union of India*, where the Supreme Court decriminalised consensual same-sex relations under Section 377 of the Indian Penal Code. While the case primarily concerned sexual orientation, the Court's reasoning on dignity, autonomy, and constitutional morality significantly bolstered transgender rights.¹¹ The plurality opinion reaffirmed that "constitutional morality must prevail over social morality," reiterating Dr. B.R. Ambedkar's vision that the Constitution must guide social transformation rather than mirror societal prejudice.

Justice D.Y. Chandrachud's separate opinion in *Navtej* provided a particularly transformative interpretation by asserting that the right to privacy, autonomy, and identity are inseparable from human dignity. This line of reasoning builds upon *NALSA* and *Puttaswamy v. Union of India*, situating transgender rights within the continuum of personal liberty and privacy.¹² Thus, the evolution of judicial reasoning has consistently sought to move beyond mere recognition of transgender identity to affirming their full citizenship within the constitutional framework.

⁹ *Indra Sawhney v. Union of India*, AIR 1993 SC 477 (India).

¹⁰ INDIA CONST. arts. 19(1)(a), 21.

¹¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).

The foundation for acknowledging decisional autonomy in terms of gender and sexuality was established by the right to privacy, which was upheld as inherent to Article 21 in Justice KS. Puttaswamy v. Union of India. "The preservation of personal intimacies, the sanctity of family life, marriage, procreation, and sexual orientation" are all included in privacy, the Court emphasised. When Section 377 of the Indian Penal Code was read down in Navtej Singh Johar v. Union of India, this line of argument won support.

The Court ruled that respect for human dignity, autonomy, and identity is a requirement of constitutional morality. Together with NALSA, these rulings create a triangle of legal precedents that ground transgender rights in the larger conversation about constitutional liberty and dignity.

III. From Judicial Recognition to Legislative Response: A Critical Appraisal

An important turning point in Indian constitutional jurisprudence was the National Legal Service Authority v. Union of India ("NALSA") case, which recognised transsexual status under the constitution. The Supreme Court affirmed that the right to one's self-perceived gender identity is part of the right to live with dignity for the 12th time by interpreting Articles 14, 15, 19, and 21 in an integrated manner. The Court established a revolutionary constitutional vision by establishing the principles of equality, autonomy, and dignity as the foundation for its reasoning. This vision required the State to do more than just refrain from discrimination; it also had to take proactive measures to ensure inclusion. The central and state governments were instructed by the Court to acknowledge transgender individuals as a "third gender" and provide them with the same social welfare benefits as other marginalised groups.

Thus, the NALSA ruling signalled that gender identity is important to human dignity and personal liberty, marking a change from a charity-based approach to a rights-based constitutional framework.

The verdict further emphasised that upholding the spirit of equality and liberty, even when it clashes with societal morality, is essential to the Constitution's survival. Dr. BR Ambedkar famously coined the term "constitutional morality."

The legislative response came in the form of the *Transgender Persons (Protection of Rights) Act, 2019* ("2019 Act"), enacted ostensibly to give

statutory effect to *NALSA*.¹² However, the Act, while progressive in its intent, fails to embody the transformative spirit of the judgment. Its structure reflects a bureaucratic, rather than emancipatory, approach to recognition. Section 5 mandates that a transgender person must obtain a “certificate of identity” from the District Magistrate to be legally recognised as transgender.⁴ This provision, though seemingly administrative, is substantively regressive because it reintroduces state validation over personal identity—a concept directly at odds with *NALSA*’s affirmation of self-identification as a matter of constitutional right.

Further, the procedure prescribed under Sections 6 and 7 requires additional medical proof and evaluation for those seeking recognition as male or female after undergoing gender-affirming surgery.⁵ This statutory requirement effectively medicalises identity, subjecting an individual’s self-understanding to bureaucratic discretion. Scholars and activists have argued that such a process perpetuates stigma and transforms recognition from a right into a privilege.¹³ The absence of a robust appellate mechanism further compounds this problem, leaving individuals vulnerable to administrative arbitrariness.

Beyond the question of recognition, the 2019 Act exhibits several substantive silences. It omits any explicit recognition of transgender persons’ rights in marriage, adoption, inheritance, and property—domains that define full citizenship in civil life. By excluding these aspects, the Act indirectly perpetuates the structural invisibility of transgender persons in personal law systems. Moreover, while the Act prohibits discrimination in employment, education, and healthcare, it provides no meaningful enforcement mechanism or affirmative obligations on the State.⁷ The penalties for discrimination under Section 18 are minimal and fail to deter systemic violations.

This legislative minimalism stands in stark contrast to the judiciary’s expansive interpretation of constitutional rights in the post-*NALSA* era. In *Arun Kumar v. Inspector General of Registration*, the Madras High Court recognised the right

¹² Transgender Persons (Protection of Rights) Act, No. 40 of 2019, INDIA (2019).

¹³ See Danish Sheikh, *The Transgender Persons Bill: A Critique*, 10 NUJS L. REV. 431, 433 (2017).

of a transwoman to marry under the *Hindu Marriage Act, 1955*, holding that the term “bride” must be read in an inclusive and evolving sense.¹⁴ Similarly, in *Hamsa v. State of Kerala*, the Kerala High Court reaffirmed that *NALSA* forms part of the law of the land under Article 141 and directed that transgender persons be treated with dignity in public employment.¹⁵ These judgments reflect an ongoing judicial effort to infuse statutory interpretation with the values of constitutional morality and inclusivity, even when legislative intent appears restrictive.

The contrast between the transformative vision of the judiciary and the cautious incrementalism of the legislature raises a larger constitutional question: Has the legislative process truly internalized constitutional morality? Dr. Ambedkar had warned that “constitutional morality is not a natural sentiment. It has to be cultivated,” reminding lawmakers that the true measure of democracy lies in how the majority safeguards the rights of minorities.¹⁶ The 2019 Act, while a formal acknowledgment of transgender existence, reveals a continued discomfort within the State to surrender control over the definition of identity.

For the constitutional promise to translate into lived equality, legislative frameworks must move beyond procedural recognition toward substantive empowerment. This would involve ensuring legal parity in personal laws, incorporating affirmative duties on the State to guarantee education, employment, and healthcare access, and institutionalising social welfare mechanisms responsive to the lived realities of transgender persons. Merely codifying rights without addressing their enforceability risks rendering constitutional promises hollow.

Seventy-five years into the Republic, India stands at a crossroads between formal equality and transformative justice. The 2019 Act demonstrates that while the law can recognise identity, only constitutional morality can ensure dignity. The journey from *NALSA* to the present underscores that inclusion is not achieved merely through legislative acknowledgment but through sustained commitment

¹⁴ *Arun Kumar v. Inspector General of Registration*, 2019 SCC OnLine Mad 8779 (India).

¹⁵ *Hamsa v. State of Kerala*, 2021 SCC OnLine Ker 2207 (India)

¹⁶ B.R. Ambedkar, *supra* note 2, at 2.

to dismantling the social hierarchies that continue to marginalise transgender persons.

IV. Constitutional Morality and the Future of Inclusion

The doctrine of constitutional morality occupies a central place in India's constitutional jurisprudence. It serves as a guiding principle that ensures that the exercise of power, both by the State and individuals, conforms to the higher ideals of the Constitution rather than transient popular morality.¹⁷ As Dr. B.R. Ambedkar cautioned during the Constituent Assembly Debates, democracy in India could survive only if those who operate the Constitution respect its spirit.¹⁸ Constitutional morality, therefore, is not about blind conformity to the text of the law but about preserving the ethical core of constitutional governance—justice, equality, and human dignity.¹⁹

A. From Social Morality to Constitutional Morality

The transition from social morality to constitutional morality has been at the heart of India's progressive judicial journey. Social morality often reflects entrenched prejudices, particularly against gender and sexual minorities, whereas constitutional morality demands empathy, equality, and recognition.²⁰ The Supreme Court, especially in *NALSA* and *Navtej Singh Johar*, made this transition explicit. In *NALSA*, the Court categorically observed that constitutional morality must prevail over the social norms that seek to suppress human individuality.²¹ Similarly, in *Navtej Singh Johar*, Justice Dipak Misra underscored that the Constitution “envisages a transformation of society” by liberating individuals from “the shackles of social conventions.”²²

¹⁷ See generally Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* 58 (2009).

¹⁸ B.R. Ambedkar, *Speech in the Constituent Assembly Debates* (Nov. 4, 1948), in *Constituent Assembly Debates*, Vol. VII, at 38 (Lok Sabha Secretariat 1950).

¹⁹ *Id.*

²⁰ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* 35–37 (2019).

²¹ *NALSA v. Union of India*, (2014) 5 SCC 438, 498 (India).

²² *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, 90 (India).

This judicial emphasis on constitutional morality is not a departure from constitutional text but a faithful realisation of its spirit. The Preamble's promise of equality, liberty, and fraternity cannot be fulfilled by adhering to majoritarian morality; it requires dismantling hierarchies that deny equal citizenship. The rights of transgender persons thus represent not merely a struggle for legal recognition but a constitutional obligation to build a society guided by moral courage rather than social prejudice.

B. Transformative Constitutionalism and Substantive Equality

The idea of transformative constitutionalism, which gained prominence through judicial interpretation, captures the Constitution's potential as an instrument of social change. It views the Constitution not as a static document but as a living charter that evolves with time, culture, and consciousness. For the transgender community, transformative constitutionalism means moving beyond formal recognition to achieving substantive equality—a state where social, economic, and political institutions affirm their dignity in practice.²³

Indian courts have increasingly recognised that formal equality—treating unequals alike—perpetuates injustice. Substantive equality, in contrast, requires the law to acknowledge structural disadvantages and to enable empowerment. In this regard, the judiciary's proactive role becomes indispensable, particularly where the legislature fails to align with constitutional ideals.

However, the challenge lies in ensuring that judicial progress translates into tangible social transformation. The *Transgender Persons (Protection of Rights) Act, 2019*, despite being a legislative response to *NALSA*, illustrates this tension. The Act's insistence on bureaucratic certification for gender identity undermines the self-determination principle upheld by the Court. Moreover, the absence of clear provisions on affirmative action, healthcare, and protection from violence indicates a gap between constitutional aspiration and legislative realisation.

Constitutional morality, in this context, becomes both a moral compass and a corrective mechanism—a reminder that legislative compliance with

²³ *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, 327 (India).

constitutional mandates must be measured not by formal enactment but by substantive justice.²⁴

C. Future of Inclusion: Towards a Culture of Equality

The future of transgender inclusion in India rests on the State's ability to institutionalise constitutional morality across its structures. This requires a multi-dimensional approach—legal, administrative, and social. Laws alone cannot transform lived realities unless accompanied by education, sensitisation, and representation. Schools, workplaces, and public institutions must internalise constitutional ethics so that dignity and equality become everyday practices rather than exceptional judicial declarations.

The judiciary's expanding role must continue, but it must also be complemented by participatory policymaking. The recognition of transgender persons as a "third gender" was a judicial milestone; the next step lies in ensuring socio-economic justice through targeted welfare schemes, reservation in education and employment, and accessible healthcare.

At the same time, civil society and academia have a constitutional duty to sustain dialogue and critique. As Ambedkar warned, political democracy cannot survive without social democracy—the recognition of liberty, equality, and fraternity as principles of life. The ability of citizens to sustain constitutional morality outside of legislators and courts is what determines its longevity.

In the end, achieving transgender rights is a matter of justice more than kindness. It is a restatement of the notion that all people, regardless of how they identify, are equally entitled to the guarantees made by the Constitution. India's dedication to Tagore's vision—where "the head is held high and the mind is without fear"—can only be realised after 75 years of constitutional democracy if no one's dignity is dependent on their adherence to the rules of the majority. Therefore, the path to inclusion is not only legal but also morally profound, requiring bravery to live out the Constitution both in deeds and in spirit.

²⁴ See generally Sujit Choudhry, *Constitutionalism in India: The Social Foundations of Institutional Design* 83–85 (2018).

V. Conclusion

The lived realities of marginalised people continue to challenge the revolutionary spirit of the Indian Constitution 75 years after it went into effect. It takes judicial interpretation, legislative sensitivity, and community commitment to continuously restate the constitutional guarantees of justice, liberty, equality, and fraternity. The path from invisibility to constitutional recognition represents both progress and unfulfilled obligations for transgender individuals.

The Supreme Court's rulings in *Navtej Singh Johar v. Union of India* and *National Legal Services Authority v. Union of India* were significant turning points in the constitutional defence of transgender rights. By placing the abstract concepts of equality and dignity inside the framework of identity, autonomy, and human value, these rulings gave them life. . Yet, the legislative response through the *Transgender Persons (Protection of Rights) Act, 2019* remains only a partial fulfilment of these constitutional aspirations.²⁵ While the Act formally acknowledges transgender persons as citizens entitled to protection, its procedural hurdles and lack of affirmative measures reveal a continued distance between recognition and realisation.

The concept of constitutional morality appears in this context as a promise and a principle. It serves as a reminder to the State that the Constitution is a moral code as well as a set of laws. Dr. B.R. Ambedkar's concern that the success of the constitution depends not only on its text but on the conduct, restraint and democratic culture of those who work for it. Enacting rights is only one aspect of the State's duty; another is fostering a constitutional culture in which equality and dignity are accepted as societal norms rather than judicial exceptions.

In this way, transformative constitutionalism is not limited to the legal system. Every institution—political, administrative, and social—must internalise the emancipatory vision of the Constitution. Educational systems must dispel stereotypes, equal opportunity must be guaranteed by job structures, and safety and respect for gender diversity must be guaranteed in public areas. For constitutional morality to flourish, social morality must change, even though the law can set the stage.

²⁵ The Transgender Persons (Protection of Rights) Act, No. 40 of 2019, (India).

Tagore's vision, "Where the mind is without fear, and the head is held high," serves as a reminder of the moral reason driving our legal system as India commemorates 75 years of its constitutional journey. Many transgender citizens are still working towards that goal. India's democracy's future rests on its ability to ensure that everyone may live out the promises made in the constitution and that no one is forced to conceal their identity to exercise their rights.

In the final analysis, the Constitution's success will not be measured by the eloquence of its text or the length of its guarantees, but by the extent to which it enables every person, regardless of gender, to live with dignity, equality, and freedom. That, indeed, would be the truest realisation of both Tagore's poetic dream and Ambedkar's moral vision- a society where constitutional morality becomes a way of life.