

Beyond Declaratory Constitutionalism: Intersectional Affirmative Action, Evidentiary Inversion, and Corporate Regulatory Enforcement under India's Transgender Legal Regime

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ABSTRACT

The adjudication of transgender and gender non-conforming identities within Indian constitutionalism has reached a defining inflection point. The first decade following the historic pronouncement in *National Legal Services Authority (NALSA) v. Union of India* (2014) established the de jure recognition of self-identified gender and affirmed the constitutional mandate of transformative non-discrimination under Articles 14, 15, 16, 19, and 21. The enactment of the Transgender Persons (Protection of Rights) Act, 2019 codified initial baseline prohibitions against discrimination across public and private spheres. However, a pronounced divide remains between constitutional morality and everyday economic reality.

This research paper advances past foundational statutory critiques to formulate an operationalized, next-generation legal framework for economic inclusion. By examining statutory developments, administrative directives, and high-court jurisprudence up to 2025, this inquiry identifies four institutional bottlenecks: the theoretical and administrative conflation of vertical caste quotas with Article 15(3) horizontal affirmative action; the evidentiary dead-end created by traditional fault-based criminal standards under Section 18 of the 2019 Act; the systemic unenforceability of Rule 12 Equal Opportunity Policies across corporate and unorganized labor sectors; and persistent administrative gatekeeping within the National Portal certification machinery. Expanding the doctrinal literature review, this paper conducts a comparative regulatory audit of comparative models in the United Kingdom, the United States, and South Africa. It outlines concrete legislative amendments to incorporate an inverted burden of proof, establish a statutory National Commission with civil court powers, and integrate protections directly into the four consolidated Central Labour Codes.

Keywords: Substantive Equality, Horizontal Reservation, Intersectional Jurisprudence, Burden of Proof Inversion, Rule 12 EOP Audit, Central Labour Codes, Transformative Constitutionalism.

1. INTRODUCTION AND COMPREHENSIVE PROBLEM FORMULATION

The trajectory of contemporary Indian constitutional law has increasingly transitioned from a traditional colonial framework toward transformative constitutionalism. Transformative constitutionalism posits that the founding document cannot function merely as an administrative machinery for state governance; it must serve as an active mechanism for dismantling deeply entrenched social hierarchies, systemic caste prejudices, and institutionalized heteronormative hegemony. For transgender, intersex, and socio-culturally distinct gender-diverse communities—known historically and regionally as Kinnars, Hijras, Aravanis, Jogtas, Kothis, and Shiv-Shaktis—the denial of civil and legal personality was systematically institutionalized through British colonial statecraft, most notably via the Criminal Tribes Act of 1871. This statutory weaponization of social bias effectively criminalized gender non-conformity, expelling gender-diverse populations from formal labor participation and entrenching intergenerational cycles of poverty, informal mendicancy, and unorganized sex work.

The modern judicial renaissance initiated by the Supreme Court of India in *National Legal Services Authority (NALSA) v. Union of India* (2014) dismantled the binary conception of sex, ruling that the fundamental right to self-perceived gender identity is an inseparable facet of human dignity, personal autonomy, and self-determination protected under Articles 14, 19, and 21. The court went further, interpreting the prohibition against discrimination on grounds of "sex" under Articles 15 and 16 to encompass "gender identity". This constitutional foundation was consolidated by the nine-judge bench in *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017), which anchored bodily autonomy, privacy, and identity expression as inviolable fundamental rights, and *Navtej Singh Johar v. Union of India* (2018), which declared that constitutional morality must firmly displace societal prejudice.

Despite these clear judicial benchmarks, the subsequent legislative translation through the Transgender Persons (Protection of Rights) Act, 2019 (Act No. 40 of 2019) and the Transgender Persons (Protection of Rights) Rules, 2020 has left structural vulnerabilities unresolved. While Section 3 of the 2019 Act enacts broad prohibitions against discriminatory practices in educational institutions, healthcare services, and employment environments, the statute remains primarily declaratory:

It lacks an independent statutory enforcement commission endowed with investigatory and adjudicatory powers. It limits penal enforcement to ambiguous criminal penalties under Section 18, which carry a heavy evidentiary burden.

It omits mandatory, codified affirmative action provisions within public sector recruitment.

It fails to provide workable civil remedies, such as restitution, back-pay, or statutory damages for arbitrary termination in the private sector.

As a result, a deep divide separates legal recognition from practical occupational survival. This study analyzes the systemic bottlenecks embedded within current administrative, labor, and constitutional structures to establish an operational legal framework for substantive economic equality.

2. THEORETICAL UNDERPINNINGS: MOVING FROM FORMAL EQUALITY TO INTERSECTIONAL SUBSTANTIVE EQUALITY

To diagnose why statutory anti-discrimination protections routinely fail in practice, the legal framework must be evaluated through equality jurisprudence and intersectional legal theory.

Formal vs. Substantive Equality

Traditional anti-discrimination law often relies on formal equality, treating similarly situated individuals identically through neutral, symmetrical rules. However, when applied to communities subject to centuries of social marginalization, formal equality perpetuates systemic inequality. In contrast, transformative constitutionalism demands a substantive equality approach. Substantive equality is asymmetrical and outcome-oriented: it recognizes that structural barriers require affirmative state action, targeted adjustments, and reasonable accommodations to place historically disadvantaged populations on an equal footing.

Intersectional Legal Theory

Intersectional jurisprudence establishes that systemic marginalization cannot be evaluated through isolated, single-axis categories like gender alone or caste alone. In India's socio-legal context, the daily lived reality of a transgender person is shaped by their caste status, socio-economic class, regional linguistic context, and educational access. An institutional failure to address these intersecting factors leads to policies that serve only a small, privileged segment of gender minorities while leaving marginalized transgender individuals unprotected.

3. COMPREHENSIVE LITERATURE REVIEW

The academic and institutional discourse surrounding transgender rights and labor equity in India spans three primary phases: early judicial identity affirmation, statutory structural analysis, and contemporary intersectional critique.

The Early Judicial Phase (2014–2018)

The immediate scholarship following *NALSA* focused on the transition from a binary legal structure to third-gender recognition. Research during this era explored how colonial legislation, particularly the Criminal Tribes Act of 1871, historically erased gender minorities from public life. Doctrinal analyses examined how the Supreme Court utilized Article 21's right to dignity to protect gender self-determination without requiring mandatory medical or psychiatric validation. Concurrently, the Law Commission of India's Report No. 267 (2017) highlighted the pervasive role of hate speech and harassment in limiting minority participation in public arenas. The landmark privacy ruling in *Puttaswamy* (2017) and the decriminalization of intimacy in *Navtej Singh Johar* (2018) further expanded this framework, providing strong constitutional precedent against majoritarian discrimination.

Statutory Critiques and Regulatory Studies (2018–2021)

The introduction and enactment of the 2019 Act prompted significant scholarly scrutiny. The National Human Rights Commission's (NHRC) baseline study (2018) provided empirical evidence that 96% of transgender persons in India were excluded from the formal workforce, with substantial majorities forced into unorganized begging or street-based sex work due to institutional bias and severe family rejection.

When the 2019 Act and 2020 Rules were notified, legal scholars evaluated their regulatory and institutional design. Prateek Saxena (2021) observed that while the statute prohibited discrimination on paper, it failed to construct viable enforcement machinery, relying on internal company grievance officers and vague criminal penalties that offered little practical recourse. Comparative institutional analyses by the International Labour Organization (ILO, 2020) demonstrated that effective anti-discrimination regimes require clear workplace guidelines, accessible grievance forums, and proactive organizational accommodations—elements largely absent from the 2019 statutory design.

Intersectional Affirmative Action and Labor Jurisprudence (2021–2025)

Between 2021 and 2025, scholarship focused on operationalizing affirmative action and reforming labor protections. Gautam Bhat (2022) conducted a detailed analysis of reservation mechanics, arguing that categorizing all transgender persons under the general Other Backward Classes (OBC) quota created an unconstitutional friction that erased caste protections for Dalit and Adivasi trans persons. Scholars increasingly advocated for the horizontal reservation model adopted by Karnataka in 2021.

Concurrently, legal evaluations of the four consolidated Central Labour Codes identified significant implementation gaps, noting that protections failed to adequately reach the informal economy and the gig

workforce, where a substantial portion of gender minorities are employed. Recent comparative analyses emphasized the need to shift evidentiary burdens to employers in bias disputes, drawing on models like South Africa's PEPUDA (2000) and the UK Equality Act 2010.

4. RESOLVING THE AFFIRMATIVE ACTION IMPASSE: HORIZONTAL VS. VERTICAL RESERVATION MECHANICS

The central administrative failure following the *NALSA* judgment has been the executive's misapplication of affirmative action models. While Paragraph 135(3) of *NALSA* directed the state to treat transgender persons as socially and educationally backward classes and extend reservations, the practical implementation of this mandate through vertical caste groupings created an unsustainable constitutional conflict.

The Constitutional Contradiction of Vertical Lumping

In *Indra Sawhney v. Union of India* (1992), the Supreme Court established the distinction between vertical and horizontal reservations:

Vertical Reservations: Anchored in Article 16(4) and Article 15(6), vertical reservations are compartmentalized quotas based on socio-educational caste status (Scheduled Castes, Scheduled Tribes, Other Backward Classes) and economic criteria (Economically Weaker Sections). These compartments are mutually exclusive.

The Intersectional Conflict: When state authorities group all transgender persons exclusively into the existing Other Backward Classes (OBC) quota, they create an unconstitutional barrier for Dalit and Adivasi trans persons. An SC or ST transgender applicant is forced to choose between their constitutionally protected caste reservation under Article 16(4) or their gender identity status within the OBC quota.

The Asymmetrical Competition Deficit: Transgender individuals frequently face severe family rejection, early school dropouts, and social exclusion. Compelling them to compete directly against well-established OBC communities that possess greater educational and social stability results in persistent exclusion during merit rankings.

The Interlocking Horizontal Architecture under Article 15(3)

To ensure substantive equality, transgender reservations must be structured as interlocking horizontal reservations. Under Article 15(3), the state is empowered to make special provisions for disadvantaged groups. A horizontal reservation operates across all vertical categories rather than creating a separate vertical silo:

A designated quota (e.g., 1%) is applied across every vertical category: General Merit, SC, ST, OBC, and EWS. When an SC transgender candidate is selected, they are placed against the SC vertical roster point; an OBC candidate is placed against the OBC quota; and a general candidate is placed against the open merit category. This model respects intersecting caste and gender identities while remaining compliant with the 50% reservation ceiling established in *Indra Sawhney*.

State High Courts have actively supported this horizontal approach:

In *K. Prithika Yashini v. The Chairman, Tamil Nadu Uniformed Services Recruitment Board* (2015), the Madras High Court ordered the recruitment of a trans woman into the police force, directing authorities to adapt baseline criteria.

In *Shanavi Ponnusamy v. Ministry of Civil Aviation* (2022), the Supreme Court instructed aviation authorities and state entities to construct inclusive hiring standards for transgender applicants.

In *S. Swapna v. State of Tamil Nadu* (2022), the Madras High Court affirmed that grouping transgender applicants into the Most Backward Classes (MBC) vertical pool violates constitutional dignity.

In *Matam Gangabhavani v. State of Andhra Pradesh* (2023), the Andhra Pradesh High Court mandated age and physical benchmark relaxations for transgender candidates in uniformed services.

In *Anjali Patel v. State of Maharashtra* (2023), the Bombay High Court reiterated that state authorities must formulate formal horizontal reservation policies for public employment.

5. REGULATORY AUDIT OF THE 2019 ACT AND SUBORDINATE PROCEDURAL RULES

A critical review of the 2019 Act and the 2020 Rules reveals administrative roadblocks that limit their practical effectiveness.

Administrative Overreach in Identity Certification

Under Sections 5 and 6 of the Act, obtaining a "Certificate of Identity" from the District Magistrate is mandatory to access statutory protections. Although Rule 5 of the 2020 Rules establishes an online submission process via the National Portal to eliminate subjective gatekeeping, implementation audits reveal ongoing issues:

Demands for Medical and Surgical Proof: District Screening Committees and local revenue authorities routinely demand invasive medical records, psychiatric evaluations, or proof of surgery before approving basic

gender identity certificates. This practice directly violates the self-determination doctrine set out in *NALSA* (Paragraph 129) and reaffirmed in *Puttaswamy*.

The Pathologizing Two-Tier System: Under Section 7, updating one's gender marker to male or female requires a certificate from a Chief Medical Officer confirming medical intervention. This framework retains a medicalized model of identity, conditioning basic legal recognition on clinical validation.

Digital and Regional Disparities: The reliance on an online portal creates barriers for rural, socio-economically marginalized trans persons who lack digital literacy or access, leading to administrative backlogs and arbitrary rejections.

Deficits in Rule 12 Equal Opportunity Policies (EOP)

Rule 12 requires both public and private establishments to notify and maintain an Equal Opportunity Policy. However, several regulatory gaps remain:

Absence of Centralized Monitoring: The law lacks a mandatory public registry, regular auditing protocols, or clear financial penalties for organizations that fail to publish an EOP.

Internal Conflicts of Interest: Section 11 directs entities with one hundred or more employees to designate a Complaint Officer. These roles are routinely assigned to existing Human Resource staff who lack statutory independence or immunity, creating conflicts of interest when handling complaints against senior management.

Exclusion of the Unorganized Sector: Small enterprises, firms with fewer than one hundred employees, and the Micro, Small, and Medium Enterprises (MSME) sector fall outside the Complaint Officer requirement. With over 90% of India's workforce operating in the informal economy, statutory workplace protections remain largely inaccessible to most transgender workers.

6. CORPORATE LIABILITY, EVIDENTIARY BURDENS, AND THE LABOUR CODE NEXUS

The enforcement regime established by the 2019 Act provides insufficient mechanisms to address institutional workplace discrimination.

The Limitations of Section 18 Penal Sanctions

Section 18 outlines general offenses, imposing imprisonment from six months up to two years and an unspecified fine for discriminatory acts. Relying on general criminal law poses severe evidentiary challenges:

Criminal Standard of Proof: Complainants must prove intentional discrimination "beyond reasonable doubt," a standard that is exceptionally difficult to meet in cases involving complex corporate hiring, wage disparities, or constructive dismissal.

Lack of Civil Restitution: Section 18 lacks civil mechanisms to order corporate employers to reinstate discharged workers, pay back-wages, or award compensatory damages.

Inverting the Evidentiary Burden of Proof

To establish effective protections, Indian employment law should transition toward a civil-administrative model with an inverted burden of proof. Comparative statutory models demonstrate the value of this standard:

In the United Kingdom, the Equality Act 2010 provides that once a claimant shows facts from which discrimination could be inferred, the burden shifts to the employer to prove a non-discriminatory justification.

In South Africa, Section 13 of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), 2000 explicitly places the burden on the respondent to establish that differential treatment was fair once a prima facie case is made.

In the United States, following *Bostock v. Clayton County* (2020), Title VII protections against sex-based employment discrimination extend to sexual orientation and gender identity, enforced by the Equal Employment Opportunity Commission (EEOC).

Under this framework, an aggrieved transgender employee in India would only need to present a prima facie case of disparate treatment. The legal burden would then shift to the employer to demonstrate that the contested decision was based entirely on legitimate, non-discriminatory occupational qualifications.

Direct Integration into Consolidated Labour Codes

Anti-discrimination protections must be integrated directly into the four Central Labour Codes:

The Code on Wages, 2019: Section 3 must be amended to explicitly prohibit wage discrimination against self-identified gender minorities, preventing arbitrary wage suppression.

The Occupational Safety, Health and Working Conditions Code, 2020: The failure to provide inclusive, gender-neutral sanitation and infrastructure should be classified as an actionable workplace safety violation.

The Industrial Relations Code, 2020: The arbitrary termination or constructive dismissal of an employee on grounds of gender identity or transition should be classified as an "Unfair Labour Practice" under the Fifth Schedule.

The Code on Social Security, 2020: Dedicated social security funds and healthcare benefits, including coverage for gender-affirmation treatments, must be made accessible to informal and gig-economy workers.

7. COMPREHENSIVE LEGISLATIVE AND POLICY BLUEPRINT

To transform constitutional guarantees into practical socio-economic security, targeted legislative and institutional reforms are necessary across five core areas:

Horizontal Quotas under Section 9: Section 9 of the 2019 Act should be amended to mandate a 1% horizontal reservation for transgender persons across all public sector vacancies and educational admissions. Uniform testing parameters and relaxed physical benchmarks must be standardized for uniformed public services.

Statutory Civil Compensation (Section 18A): Parliament should insert Section 18A to introduce civil damages and restitution for victims of workplace discrimination. Penalties for non-compliance with Rule 12 EOP requirements should be tied to a percentage of an enterprise's gross annual turnover, creating a meaningful financial deterrent.

Establishment of an Independent National Commission: The advisory National Council for Transgender Persons should be reconstituted into an independent National Commission for Transgender Persons. Vested with powers under the Code of Civil Procedure, 1908, it should have the authority to investigate complaints, summon institutional records, issue binding directives, and initiate court proceedings.

Administrative Simplification of Certification: The 2020 Rules should be updated to issue identity certificates based solely on self-declaration affidavits submitted via the National Portal. District Magistrates must be strictly prohibited from demanding medical or psychiatric documentation, and applications should be subject to automatic approval if not processed within thirty days.

Corporate Diversity and Inclusion Mandates: Corporate entities must update internal Prevention of Sexual Harassment (POSH) frameworks to protect gender-diverse employees, ensure trans representation on internal committees, and provide inclusive healthcare policies covering gender affirmation.

8. CONCLUSION

The judicial expansion of transgender rights has reinforced the principles of transformative equality under Articles 14, 15, 19, and 21 of the Indian Constitution. However, formal statutory declarations cannot achieve substantive equality on their own. The Transgender Persons (Protection of Rights) Act, 2019 provides essential initial safeguards, but its effectiveness remains limited by administrative gatekeeping, the absence of horizontal reservations, weak corporate accountability, and an over-reliance on criminal remedies.

Securing substantive equality requires shifting from symbolic protection to functional enforcement. By establishing interlocking horizontal reservations across all vertical categories, modernizing labor codes with shifted evidentiary burdens, creating an independent statutory commission, and extending protections to unorganized workers, India can build a truly inclusive economic framework. Only through these institutional reforms can the constitutional guarantee of equal citizenship and dignified labor be fully realized..

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