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# REFORMING INDIAN LABOUR LAW FOR INCLUSIVE RECOGNITION OF TRANSGENDER RIGHTS

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## Introduction

India is a binary nation. This, in effect, implies that the nation's law and society is exclusively oriented around two genders, male and female. Transgender rights discourse has acquired a more central role to occupy in our society, and some take on the task to cover up the legal frameworks and social norms that normalise and perpetuate systemic discrimination and marginalisation. India counts more than 4.8 lakh transgender individuals in the 2011 Census though many unfettered transgender people stay in the shadows owing to pressure from society<sup>1</sup>. As it stands in India, the transgender community's struggles are distinct from those of other groups facing discrimination, as social attitudes run deep and a comprehensive legal framework to protect them from discrimination in labour laws and elsewhere is incomplete.

In India, different socio cultural groups to which transgender persons belong are hijras, kinnars, shiv shaktis, jogtas, jogappas and others having different traditions and roles in society<sup>2</sup>. Though there have been strides in the comparison of LGBTQIA+ rights, many people believe that there is still a long way down the line on transgender equality. There remains a problem of discrimination in employment, healthcare, education, and in the legal recognition of individuals. Despite legal victories such as the *NALSA v. Union of India*<sup>3</sup> judgment and the passage of the Transgender Persons (Protection of Rights) Act, 2019, the community still faces systemic barriers and social stigma. To guarantee a full participation and dignity for transgender persons in all fields of life, greater awareness, policy reforms and legal protections are required.

This paper is about transgender folks, and their different ways of reproduction and the right to make choices about their own body. It then delves into Indian labour laws and the way in which

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<sup>1</sup> National Human Rights Commission, *Making India Transgender Inclusive: An Indepth Analysis of the Education Section in India*, <<https://nhrc.nic.in/sites/default/files/Group%201%20June.pdf>>

<sup>2</sup> Shivangi Sangwan, 'Interpretation Of Labour Laws Of Transgenders In India' (2022) Indian Journal of Law and Legal Research <<https://www.ijllr.com/post/interpretation-of-labour-laws-of-transgenders-in-india>> accessed 16 April 2025

<sup>3</sup> *National Legal Services Authority v. Union of India*, [2014] 5 SCC 438

these ignore transgender needs and rights in terms of employability, workplace discrimination, access to medical and maternity benefits amongst others, amongst the other aspects.

### **History of law around Transpersons in India**

A deep dive into historical and legal context of labor laws in India, implies a fascinating journey through a hodgepodge of colonial remnants, post independence socialist visions and neoliberal modernisation, which together make the labor and protection laws in India as disparate and often inadequate to address needs of other marginalised segments including transgender community. When much inequality is still visible, clear and obvious, many problems come from hidden, indirect discrimination that can affect people's performance and even well being<sup>4</sup>. Historic bias towards a binary understanding of gender is reflected in the archaic labour laws which include the Industrial Disputes Act, the Factories Act and the Trade Unions Act etc., that does not take into account the specific challenges and vulnerabilities that transgender population in India face on a daily basis.

The NALSA judgment that gave individuals the right to self determine their gender. After this landmark judgment, Transgender Persons (Protection of Rights) Act, 2019 penned finally came into play. According to section 2(k)<sup>5</sup> of this act, transgender persons means a person whose gender does not match the gender assigned to at birth, including, transman, transwomen and others.

### **Labour Laws and Transgender inclusivity**

Increasingly, at an international level, the affirmation of transgender rights is being upheld in terms of treaties, declarations and legal principles. The Discrimination (Work and Occupation) Convention of 1958<sup>6</sup> obliges ratifying nations to set up and act on a national policy for promoting equality of opportunity and treatment in employment and occupation. This requires the passing of laws, educational undertakings, recall any laws that don't conform to those stated above, and also enforcement of them under the oversight of a national authority. However, for

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<sup>4</sup>I Boncori, LM Sicca and D Bizjak, 'Transgender and Gender Non-conforming People in the Workplace: Direct and Invisible Discrimination' in S Nachmias and V Caven (eds), *Inequality and Organizational Practice* (Palgrave Macmillan 2019) <[https://link.springer.com/chapter/10.1007/978-3-030-11644-6\\_7#citeas](https://link.springer.com/chapter/10.1007/978-3-030-11644-6_7#citeas)> accessed 16 April 2025

<sup>5</sup> The Transgender Persons (Protection of Rights) Act 2019, s 2(k)

<sup>6</sup> Discrimination (Employment and Occupation) Convention(adopted 25 June 1958, entered into force 15 June 1960) C111

transgender persons to enjoy the same rights and benefits as cisgender employees, there are several ambiguities which need to be resolved yet.

Moreover, Principle 12 of the Yogyakarta Principles<sup>7</sup> asserts that every person is entitled to a work environment that is fair and favorable, with decent and productive employment and social protection against unemployment, without such discrimination being made on the bases of gender identity or sexual orientation.

Several instances have occurred in Indian history and thus, there has been a continuous and reviving changing law in regards to labour law in India. However, there are still a lot of problems and breaches in the chain that still need to be closed to grant transgender people the same rights and privileges as the cisgender employees.

There are several key areas which need work on:

### **Recruitment and Equal job opportunities**

Despite Article 16 of the Constitution of India<sup>8</sup>, which provides equal opportunities in public employment, the transgender persons in India still encounter systemic hurdles and discrimination during the recruitment. Numerous cases serve as examples of where legal protections for individuals with disabilities are often not interpreted in ensuring a disability inclusive workplace.

For instance, in *Nangai v. Superintendent of Police*<sup>9</sup>, The petitioner, when applied for the post of a woman police constable, was declared 'transgender' despite all her official documents. Then she was relieved from the duty. But the Madras High court intervened to affirm her right to gender identity and kept aside the termination. In another significant case, *Prithika Yashini v. Chairman, Tamil Nadu Uniformed Services Recruitment Board*<sup>10</sup>, Court held that the Board discriminated against a transgender woman because that category of applicants did not have a separate category in police recruitment. The Court allowed her to continue to the last

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<sup>7</sup>The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007) Principle 12, <<https://yogyakartaprinciples.org>> accessed 16 April 2025.

<sup>8</sup> The Constitution of India 1950, art 16.

<sup>9</sup>*I Jackuline Mary v Superintendent of Police, Karur District and others* (2014) W.P. No. 587 of 2014 (Madras HC).

<sup>10</sup>*K. Prithika Yashini v. Chairman, Tamil Nadu Uniformed Services Recruitment Board*, 2015 SCC OnLine Mad 11830

recruitment round after barely passing a physical test, but did not suggest systemic reforms that case by case remedies cannot supply.

Internationally, similar discrimination persists. In *Creed v. A U.S.*<sup>11</sup> transgender woman lost her job for refusing to conform to masculine stereotypes at work, where she was employed by Family Express Corporation. There is currently a pressing need for structural reform in recruitment policies in order to make that real rather than formal equality for transgender people.

### **Workplace safety and prohibition of sexual harassment**

Transgender individuals are continuously overlooked by Indian Labour laws when we talk about workplace safety and protection of their dignity. Though the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013 seeks to provide a safe working environment for the woman, the said act has a narrow definition of the “aggrieved woman” under Section 2(a)<sup>12</sup> of the said act leaving transgender persons outside the competent legal framework. While the Act nicely pushes for clarity in workplace policies and the stipulation of key terms, it does not explicitly acknowledge transgender people such as transmen, non binary or intersex people who may as well suffer sexual harassment in the workplace.

There needs to be both legal and structural inclusiveness. Companies can create internal policies that dictate the language to use when referring to ‘transwoman,’ ‘transman,’ and ‘nonbinary,’ among others, so as to enhance awareness and inclusivity. Yet, this reform must be supported by broader legal reform. Borrowing from the air of freedom and equality from Section 9 of the Transgender Persons (Protection of Rights) Act 2019<sup>13</sup>, which forbids any workplace discrimination aimed at transgender persons, inclusion of transgender persons in the ambit of the POSH Act would signal a significant milestone in securing equality rights for transgender individuals.

Implementation of anti discrimination policies, equal benefits to transgender partners, leave for transgender people to undergo their gender affirmation processes and sensitisation programs

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<sup>11</sup> *Doe v Smith*, Case No. 3:06-CV-465RM (N.D. Ind., 5 January 2009).

<sup>12</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act 2013, s 2(a)

<sup>13</sup> The Transgender Persons (Protection of Rights) Act 2019, s 9

could help advance transgender inclusion. Building these workplaces can be constitutionally compliant and truly inclusive with these initiatives<sup>14</sup>. Neutrality in prejudicial environments can hurt transgender persons, where that prejudice is not lifted by strong anti discrimination frameworks. Therefore, a safety for all approach, integrative of the law, supported by necessary institutional reforms is necessary to guarantee respect and dignity for all persons regardless of gender identity.

Although the Code on Occupational Safety, Health and Working Conditions, 2020 requires separate toilets, locker rooms and bathing facilities for transgender workers<sup>15</sup>, it does not define the term 'transgender' leaving the enforcement short of clarity and uniformity. Further, the newer legislations like. Code on Social Security, 2020 and Industrial Relations Code, 2020, do not include even a single provision that deals with transgender persons directly and therefore, keep them excluded from the mainstream labour rights protection.

In comparison, the older labour laws have protective provisions only for cisgender women. Women are barred from working between 7 p.m. and 6 a.m. in accordance with Section 66 (1)(b) of the Factories Act, 1948<sup>16</sup>, Section 25 of the Mines Act<sup>17</sup>, 1952 and Beedi and Cigar Workers Act, 1966, and sanitation and hygiene facilities for women are required under several laws as mentioned, however, these gender specific protections however miss to recognise and accommodate transgender person's rights and needs in an occupational setting, and reinforce a binary course that denies rights and needs of the transgender people playing their role in working environment.

### **Maternity benefits**

However, despite the Maternity Benefit Act, 1961, enacted to safeguard the interest of working women, has inadvertently omitted transgender persons, especially transgender men from the protective ambit of this Act. Second, as used in Section 2(o) of the act<sup>18</sup>, the term "woman" is defined quite narrowly, as to one who is employed in any establishment for an employer and the gender diversity in today's workforce is not taken into account. Little problems in the

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<sup>14</sup>Vidhi Centre for Legal Policy, 'Queering the Law: Making Indian Laws LGBT+ Inclusive' <[https://vidhilegalpolicy.in/wp-content/uploads/2020/06/Queering-the-Law\\_Employment.pdf](https://vidhilegalpolicy.in/wp-content/uploads/2020/06/Queering-the-Law_Employment.pdf)> accessed 16 April 2025

<sup>15</sup> Occupational Safety, Health and Working Conditions Code 2020, s 24(1)

<sup>16</sup>The Factories Act 1948, s 66(1)(b)

<sup>17</sup> The Mines Act 1952, s 25

<sup>18</sup> The Maternity Benefit Act 1961, s 2(o)

definitions required for maternity benefits arise from this definitional rigidity, in situations where a transgender man assigned female at birth, who can still, biologically give birth, seeks maternity benefits. Consequently, like all procedural forms and entitlement under the Act, specifically gendered, transgender individuals who on the basis of a pregnancy seek maternity benefits are devoid of clear legal protection or guidance, while employers, too, remain oblivious as to what they have to do in cognizance of a transgender individual<sup>19</sup>.

In *Mini T.K. v. LIC*<sup>20</sup>, the courts were able to take progressive nature towards defining motherhood, and thereby they remain inclusive. In this individual case, the court brings up that being a mother is not a reason for being penalised at the place of employment; rather it should be protected as a right. Despite such progressive interpretations, transgender persons are outside the protective framework of the Maternity Benefit Act. It would be unlawful to deny maternity benefits to a transgender person solely on the basis of that person's gender identity. In addition, the landmark judgment in the case of *Bostock v. Clayton County*<sup>21</sup>, where the U.S. Supreme Court has held that discrimination on the basis of gender identity or sexual orientation is also a form of sex based discrimination. Denying transgender individuals maternity benefits violates their right to equality and dignity, violates the right to equality and includes system discrimination.

### Menstrual leave Policies

Menstrual leave policies have now become more popular and not having them only marks a neglect in recognising working realities inflicted upon women, but they also fail to cater to all parts of the spectrum, thereby eliminating transgender men and missing constitutional protection under Articles 16 and 23 of the Indian Constitution. According to Article 16, equality of opportunity is assured in matters of public employment without any discrimination on grounds of religion, race, caste, sex or place of birth. Article 23<sup>22</sup> explicitly prohibits all forms of forced labour because the right to dignity and bodily autonomy cannot be conscripted.

Though they may have not gone through with hormone replacement therapy, the fact remains

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<sup>19</sup>Raagini Raghu, 'Can Transgender Persons get Maternity Benefits?' (Legal Formats India.com 25 June, 2021) <<https://legalformatsindia.com/maternity-benefit-act-and-transgender-persons-act/#:~:text=The%20Indian%20Constitution%20and%20ILO,orientation%20is%20an%20unlawful%20discrimination>> accessed 16 April 2025

<sup>20</sup>*K. T. Mini v Life Insurance Corporation Of India*, WP(C) No. 22007 of 2012 (Kerala HC, 20 December 2017).

<sup>21</sup>*Bostock v Clayton County*, 590 US (2020)

<sup>22</sup>*The Constitution of India 1950*, art 23.

that a lot of transgender men still menstruate and suffer from the same physical pain plus the emotional stress as that of cisgender women. Yet, most of the menstrual leave policies, touted by larger companies such as Zomato, ignore them or exclude them. Reaffirming the biological realities of trans men, this exclusion not only discriminates against individuals that present with female bodies but also maintains inequalities of the workplace and structural discrimination faced by transmen. To compel a transgender person to work with their menstrual pain because of policy exclusion is to deny them their right to equality and freedom from exploitation. Menstrual leave ought not to be provided as a privilege but as a constitutional right in virtue of dignity, autonomy and equal opportunity. In so far as gender equity in the workplace for menstruating individuals is concerned, menstrual leave policies will have to transcend binary frameworks and accommodate the lived experiences of all menstruating individuals, regardless of gender identity.

## **Conclusion**

In conclusion, the legal system and labour laws have not been able to grasp such nuanced disadvantages being experienced by transgender persons in the realms of recruitment, workplace discrimination, denial of equal job opportunities, maternity benefits, and safety. Population growth contributes to the gap between policy formulation and its implementation in India. Most laws and policies are passed and are never implemented; they go into the bin. Moreover, the majority of transgender people are not represented in the law and policy making bodies, stretching from parliament to the local committee, even when such issues directly involve their rights. As a result of this lack of representation, policies are made without considering the challenges of the community in real life; thereby widening the gap of policy making and actual implementation of the policy. But a grounded approach for addressing the exclusion of transgender persons from labour laws means that both transgender persons have access to the same opportunities to which they are entitled.

1. Sensitising the society at large and educating the public, officials and employers on the reality of transgender rights and their needs, needs almost at the national level to be accepted. It needs to be accompanied by curriculum reforms at all levels, principally in the professional and management education, to produce long term cultural change. By making workplace education and sensitivity training mandatory organisational policies to promote respectful and inclusive workplaces have to be instituted. Conducting regular audits and grievance redressal

mechanisms pertaining to LGBTQIA+ rights besides holding the employers accountable, is also needed.

2. The solution is to set up a centralised digital portal which standardises all documentation regarding gender identity. This would decrease bureaucratic hurdles and enhance convenient access to services like Aadhaar, passports, editing of voter ID.

3. Indian labour laws must be amended accordingly and clearly state that gender self identification of persons based on personal conviction does not require medical and surgery related prerequisites in order to be effective. This requires menstrual leave, paternity and maternity benefits for trans persons as well as anti discrimination clauses to be included in the amendments.

4. Moreover, if horizontal reservations for transgender people are introduced in terms of education, employment and political institutions, there is a visible motive for the government. These reservations would pave the way for being represented in the policymaking body as well as for earmarked allocation of funds, special scheme and legislative protection. Key to addressing systemic issues like violence, mental health, economic vulnerability, as well as employment opportunities with dignity would be the inclusion of women and girls.

5. Finally, all workplaces should mandate having grievance redressal cells with trained personnel to take up confidential and sensitive complaints of transgender employees. Periodic reporting of data on LGBTQIA+ hiring and retention should be required so that there is transparency and accountability in that. Thus, the inclusion of transgender individuals in Indian labour law is necessary, not out of charity or symbolic recognition but out of the constitutional obligation of equality, dignity and justice. Adopting such measures would be a strong move towards modernising our legal and institutional frameworks to be universally oriented to all citizens irrespective of their gender identity.