

# The Unfinished Promise: Constitutional Rights, Legislative Roadblocks, And the Battle for Fertility Autonomy of Transgender Persons in India

NATASHA TIWARI  
*Iilm University*

## I. EXECUTIVE SUMMARY AND FOUNDATIONAL CONTEXT

The pursuit of future family formation for transgender (TGD) and gender-diverse individuals in India is currently defined by a profound conflict: the progressive, rights-affirming principles established by the Supreme Court are being actively undermined by exclusionary provisions within recent legislation governing assisted reproductive technology. Fertility Preservation (FP) services, which are medically essential components of Gender-Affirming Care (GAC), are effectively placed out of reach for the TGD community due to legislative barriers and policy voids.

The legal framework for TGD rights in India is rooted in the constitutional guarantee of dignity and self-determination. However, this constitutional promise is stalled by laws that restrict access to assisted reproduction based on cis-heteronormative definitions of "couple" and "infertility," resulting in systemic discrimination. This report analyzes the judicial victories and the significant statutory obstacles facing TGD persons seeking reproductive autonomy in India.

### *A. Constitutional Mandate for TGD Rights*

The foundation of TGD rights in India is the landmark Supreme Court decision in *National Legal Services Authority (NALSA) v. Union of India* (2014). This judgment recognized individuals as a "third gender" and affirmed the right to self-identify one's gender as a fundamental right protected under the Constitution of India. Critically, the Court held that this right is enshrined in:

- Article 14: Guarantee of equality before the law, affording protection to "any person," including TGD persons.

- Article 15: Prohibition of discrimination based on sex.
- Article 21: Protection of the right to life and personal liberty, which includes the right to dignity and decisional autonomy.

Furthermore, the Transgender Persons (Protection of Rights) Act, 2019, mandates that the government ensures medical facilities provide care to TGD persons, including gender-affirmative procedures, and review medical curricula to address TGD health needs. Section 18 of the Act prohibits acts that "harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person". Denial of medically necessary FP, which is crucial prior to gender-affirming hormone therapy (GAHT) or surgery (GAS), can thus be argued as a violation of the spirit of the Act and the fundamental right to health under Article 21.

## II. THE LEGISLATIVE ROADBLOCK: EXCLUSION FROM ASSISTED REPRODUCTIVE TECHNOLOGY

Despite the constitutional recognition of TGD dignity, two major legislative acts—the Assisted Reproductive Technology (Regulation) Act, 2021 (ART Act) and the Surrogacy (Regulation) Act, 2021—have created significant, almost insurmountable, barriers to TGD family planning in India.

### *A. The Assisted Reproductive Technology (ART) Act, 2021*

The ART Act, which regulates IVF and gamete donation, adopts a definition of infertility that is narrow and exclusionary.

- Exclusion of TGD Individuals: The Act explicitly restricts access to ART services, including IVF and gamete cryopreservation, for unmarried men, single fathers, heterosexual cohabiting couples, transgender individuals, and homosexual couples.
- Narrow Definition of Infertility: The Act defines 'infertility' as the "inability to conceive after one year of unprotected coitus or other proven medical condition preventing a couple from conception" (Section 2(1)(m)). This restrictive language limits its scope and excludes individuals, such as TGD persons, for whom fertility preservation is a medical necessity to counteract the sterilizing effects of GAC, rather than a failure to conceive through coitus.

#### *B. The Surrogacy (Regulation) Act, 2021*

The Surrogacy Act enforces a strict altruistic model and limits who can avail surrogacy, further cementing the exclusion of TGD individuals.

- Definition of 'Couple': The Act permits only an "Indian man and woman" who are legally married to avail surrogacy operations (Section 2(h)).
- Discrimination Against LGBTQIA+: This definition is a "blatant insult" to the LGBTQIA+ community and single parents. Given that same-sex marriages remain illegal in India, the provision's requirement for a man and woman who are legally married effectively restricts surrogacy to heterosexual married couples only. The Act, therefore, explicitly forbids same-sex and non-binary couples from using surrogacy to achieve parenthood.

### III. THE JUDICIAL AFFIRMATION OF DIGNITY OVER BIOLOGY

Despite the legislative hurdles, the Indian judiciary has continued to affirm the constitutional rights of TGD individuals, providing strong legal grounds to challenge the exclusionary Acts.

#### *A. Dismantling the Link Between Womanhood and Reproductive Capacity*

In a recent and powerful application of the NALSA principles, the Andhra Pradesh High Court (June 2025) issued a landmark ruling affirming that Indian

law cannot deny transgender women recognition as women solely because they lack reproductive capacity.

Rejection of Biological Essentialism: The court explicitly rejected arguments tying womanhood exclusively to biological reproductive function, declaring such views "legally unsustainable" and contrary to the Indian constitution's guarantees of dignity, equality, and identity (Articles 14, 15, and 21).

- Legal Protections: The court affirmed that a transgender woman is "legally entitled to recognition as a woman" and is entitled to the same protections as cisgender women, including those under Section 498A of the Indian Penal Code (IPC), which addresses cruelty by a husband or his relatives.
- This judgment provides a critical legal tool, as it philosophically and explicitly severs the link between gender identity/legal status and the capacity to bear children, thus supporting the argument for equitable access to FP regardless of the patient's biological status.

#### *B. The Right to Health and Decisional Autonomy (Article 21)*

The Supreme Court, in *K.S. Puttaswamy v. Union of India* (2017), recognized the right to privacy as a fundamental right protected under Article 21. The Court held that privacy is intrinsic to personal liberty and dignity. Furthermore, decisional autonomy, including the freedom to decide one's sexual orientation and choice of partner, has been upheld by the Supreme Court.

Reproductive choices and decisions regarding family formation fall squarely within this protected sphere of decisional autonomy. The exclusion of TGD persons from accessing ART, which is necessary to counteract the sterilizing effects of GAC, directly infringes on their constitutional right to reproductive autonomy. Clinical guidelines recommend that fertility preservation counseling and options should be discussed early in the process of transitioning, ideally before the initiation of hormone therapy or surgery, to mitigate future regret.

#### IV. ACCESS AND POLICY VOIDS

While the legal battle is ongoing, TGD individuals face significant practical barriers to accessing FP in India.

##### *A. Financial and Access Barriers*

Despite a desire for biological parenthood ranging from 13% to 54% among TGD individuals, the percentage of people accessing FP options is negligible. This is largely due to financial constraints. The high cost of FP, particularly the procedure of oocyte (egg) cryopreservation, is prohibitively expensive, as egg freezing is generally more costly than semen collection.

**Ayushman Bharat TG Plus:** The government, through the Ministry of Social Justice and Empowerment (MoSJE), signed a Memorandum of Understanding (MoU) with the National Health Authority (NHA) for providing a Comprehensive Medical Package to Transgender Persons under Ayushman Bharat TG Plus. This scheme offers health insurance coverage, including gender-reaffirmation surgery and over 50 health facilities, free of cost. The scheme is provided for transgender persons holding a Transgender Certificate & Identity Card issued by the National Portal for Transgender Persons. While this initiative is aimed at improving health conditions, policy clarification is urgently needed to ensure FP services and associated long-term storage costs are explicitly covered as essential medical procedures under this scheme.

##### *B. Gaps in Healthcare Training*

Poor utilization of FP services also stems from failures within the healthcare system, including cultural and social bias of healthcare providers, non-availability of services or knowledgeable people in the healthcare sector, and lack of support from own families.

- **Counseling Mandate:** FP counseling needs to be offered as early as possible—ideally before the start of puberty suppression (PS), GAHT, or GAS. Failure to offer timely counseling can lead to late referral when patients have reached an advanced reproductive age, or after irreversible transition steps have begun. Counseling must be

provided in a safe, non-judgmental environment, utilizing correct chosen names and pronouns, and providing objective information without encouraging or discouraging preservation based on provider assumptions.

#### V. CONCLUSION AND RECOMMENDATIONS FOR LEGISLATIVE REFORM

The constitutional protection for TGD persons in India is robust, but its execution is crippled by discriminatory legislation. The right to form a family, a core aspect of dignity and life under Article 21, is currently denied to TGD individuals by the ART Act and the Surrogacy Act.

The following steps are critical to harmonize India's laws with its constitutional and judicial mandates:

- **Repeal Exclusionary Clauses in ART and Surrogacy Acts:** The Union Government must immediately amend the ART Act and the Surrogacy Act to remove clauses that explicitly or implicitly exclude transgender persons, same-sex couples, and single individuals. The definition of 'infertility' must be expanded to include the medical necessity of FP prior to gender-affirming procedures.
- **Mandate FP Coverage under Ayushman Bharat TG Plus:** Policy clarification is required to explicitly include fertility preservation procedures (including gamete collection and long-term storage) as a covered and essential service under the *Ayushman Bharat TG Plus* scheme, ensuring financial access for all TGD persons regardless of socio-economic status.
- **Promote Culturally Competent Care:** Mandate comprehensive training for all medical professionals, including those involved in general practice and GAC, to ensure timely, non-discriminatory, and culturally competent FP counseling is provided before any transition step.