
THE ANATOMY OF EXCLUSION: A SOCIO-LEGAL CRITIQUE OF INDIA'S TRANSGENDER RIGHTS FRAMEWORK AND THE 2026 AMENDMENT ACT

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ABSTRACT

This essay undertakes a socio-legal critique of India's transgender rights framework, tracing its evolution from the constitutional foundations laid down in *National Legal Services Authority v. Union of India* (2014) to the enactment of the Transgender Persons (Protection of Rights) Amendment Act, 2026. Methodologically, it combines doctrinal constitutional analysis with a sociological reading of the statutory text, on the premise that legal provisions cannot be understood in isolation from the entrenched social hierarchies within which they operate. It argues that while the NALSA judgment established self-perceived gender identity as an inherent facet of dignity, autonomy, and privacy under Articles 14, 15, 19, and 21 of the Constitution, subsequent legislative interventions have progressively diluted this constitutional promise. The Transgender Persons (Protection of Rights) Act, 2019 introduced bureaucratic hurdles through mandatory certification and created a discriminatory hierarchy between self-declared transgender status and medically validated binary gender recognition. The 2026 Amendment deepens this regression by deleting the statutory right to self-perceived identity, narrowing legal recognition to historically identified socio-cultural groups and persons with medically verified intersex variations, and introducing an intrusive Medical Board mechanism headed by government-appointed medical officers. The essay situates these doctrinal developments within the lived socio-economic realities of transgender communities in India, particularly the Hijra and Gharana kinship systems that have historically functioned as informal social security networks in the face of familial rejection and state exclusion. It further examines how the 2026 Act's vague anti-allurement and anti-coercion penal provisions threaten to criminalise these very support structures, chill gender-affirming healthcare, and impede grassroots crisis intervention work. Drawing on comparative models such as Argentina's *Ley de Identidad de Genero*, the essay proposes a reform pathway centred on restoring universal self-declaration, de-linking identity verification from welfare administration, and implementing horizontal reservations under Article 16. Ultimately, the essay contends that true constitutional fidelity requires the state to treat gender

identity as an inherent right rather than a medical condition requiring bureaucratic and clinical validation.

Keywords: transgender, welfare, medical validation, constitutional foundations.

I. Introduction: The Gap Between Progressive Law and Social Reality

The legal framework governing transgender identities in India reflects a significant contrast between progressive constitutional jurisprudence and the realities of persistent social discrimination. For centuries, the transgender community comprising diverse identities such as *Hijras*, *Aravanis*, *Jogtas*, *Shiv-Shaktis* and *Kinnars*, together with individuals identifying as transmasculine and transfeminine existed within an intense socio-legal paradox. Historically revered in ancient cultural narratives, they were systematically criminalised under British colonial rule via the *Criminal Tribes Act, 1871*, which branded them as inherently criminal and placed them under aggressive police surveillance¹. Though the formal criminal label was eventually stripped away post-independence, the socio-legal apparatus of erasure remained. Transgender individuals were denied basic legal recognition, effectively locking them out of civil life, employment, education, banking, and housing. This structural exclusion forced many into informal survival economies such as *badhai* (ceremonial blessings), sex work, and begging, which further reinforced social stigma and isolation.

A major shift occurred with the landmark Supreme Court ruling in *National Legal Services Authority (NALSA) v. Union of India* (2014)². The Court did not merely hand down an administrative remedy; it integrated sociology with constitutional law. It recognised that the exclusion of transgender persons was a profound social crisis rooted in the denial of a fundamental legal right: the right to self-determine one's gender identity. By reading gender identity into Articles 14, 15, 19, and 21 of the Constitution of India, *NALSA* established that personal autonomy and self-perception are core components of human dignity, entirely independent of medical intervention.

Yet, the legislative response has consistently struggled to match this judicial vision. The subsequent *Transgender Persons (Protection of Rights) Act, 2019*, and the subsequent passage of the *Transgender Persons (Protection of Rights) Amendment Act, 2026*, reveal a

¹The Criminal Tribes Act, 1871, No. 27 of 1871, pt. II (India) (repealed 1952) (providing for the registration, surveillance, and control of communities, including hijra communities, designated as “criminally disposed”).

²*National Legal Services Authority v. Union of India*, (2014) 5 S.C.C. 438 (India).

persistent friction between state control and individual autonomy. The state presents these statutory rollbacks as measures to streamline welfare benefits and prevent the misuse of protective provisions³. Yet, by removing the statutory right to a self-perceived gender identity and introducing a mandatory state-run medical screening process, the 2026 framework pathologises what was previously recognised as an inherent human right.

This essay provides a socio-legal analysis of this evolving statutory landscape. A purely doctrinal review of these laws is insufficient, as it fails to capture how legal text operates within entrenched social hierarchies. By combining constitutional analysis with sociological critique, this essay argues that the current legal framework, culminating in the 2026 Act, creates a sharp contradiction: it establishes a paternalistic system of surveillance that forces a vulnerable community to navigate intrusive bureaucratic and medical gatekeeping to secure basic citizenship rights.

II. Doctrinal Foundations: The NALSA Mandate and Constitutional Rights

To evaluate the current statutory framework, it is necessary first to trace the constitutional baseline established by the Supreme Court in the *NALSA* judgment. The Court shifted the legal understanding of gender identity away from a model of state-granted charity toward an approach rooted in fundamental rights.

A. The Expansion of Article 21: Bodily Integrity and Privacy

The Supreme Court recognised that gender identity is central to individual personality. Under Article 21 of the Constitution, the right to life encompasses more than mere physical existence; it guarantees the right to live with human dignity, personal autonomy, and privacy⁴. The Court observed that forcing a person to undergo gender-affirming surgery, hormone replacement therapy, or intrusive psychological evaluation as a prerequisite for legal recognition constitutes a direct violation of bodily integrity⁵. Justice K.S. Radhakrishnan observed that self-determined gender is an expression of an individual's internal personality,

³Human Rights Watch, *India's Transgender Rights Bill a Huge Setback* (Mar. 26, 2026), <https://www.hrw.org/news/2026/03/26/indias-transgender-rights-bill-a-huge-setback>; PRS Legislative Research, *The Transgender Persons (Protection of Rights) Amendment Bill, 2026* (Mar. 13, 2026), <https://prsindia.org/billtrack/the-transgender-persons-protection-of-rights-amendment-bill-2026>.

⁴*NALSA*, *supra* note 2.

⁵*Id.*

such that state-enforced medicalisation directly infringes upon personal privacy⁶.

B. Reinterpreting “Sex” Under Articles 14 and 15

The Court also expanded the scope of anti-discrimination protections under Articles 14, 15, and 16⁷. It held that the term “sex” cannot be limited solely to biological attributes or birth-assigned anatomy; instead, it must be understood to include an individual's psychological and self-perceived gender identity. To address historical inequalities, the *NALSA* ruling directed central and state governments to treat transgender individuals as a “Socially and Educationally Backward Class,”⁸ a classification mandating the extension of affirmative action, educational reservations, and public employment quotas to a community systematically excluded from the formal economy.

III. The Socio-Legal Context: The Living Realities of Transgender India

To understand why recent legislative amendments are problematic, one must examine the socio-legal reality of the transgender community in India. For centuries, the community has survived through unique socio-cultural support structures while facing persistent exclusion from formal state institutions.

In the absence of state support and family acceptance, transgender and intersex individuals formed alternative kinship networks, most notably the *Hijra* and *Gharana* systems. Led by a *Nayak* (leader) or *Guru* (mentor), these communal households provide shelter, mutual aid, and cultural continuity to individuals rejected by their biological families. However, this survival structure exists alongside severe socio-economic marginalisation⁹.

Due to widespread discrimination in formal education and hiring, many community members are restricted to informal, precarious livelihood strategies, primarily *badhai*, street-level begging, and sex work. Rejection by biological families often leads to early-stage displacement, depriving individuals of inherited property, stable shelter, and the familial

⁶Id. (opinion of Radhakrishnan, J.).

⁷Id.

⁸Id. (directing the Union and State Governments to treat transgender persons as a socially and educationally backward class for purposes of reservation in education and public employment).

⁹See generally Serena Nanda, *Neither Man Nor Woman: The Hijras of India* (2d ed. 1999); Gayatri Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* (2005) (describing the guru-chela kinship structure and the socio-economic marginalisation of hijra communities).

documentation required to access public welfare. Crucially, although the colonial-era *Criminal Tribes Act of 1871* has been repealed, everyday policing continues to rely on vagrancy, public nuisance, and anti-trafficking laws to surveil and penalise trans bodies in public spaces. This lived reality creates a continuous cycle: social marginalisation feeds the informal survival economy, which leads to civil identity erasure, rendering individuals vulnerable to heightened state policing and systemic violence.

IV. The 2019 Act: A Flawed Legislative Adaptation

When Parliament enacted the *Transgender Persons (Protection of Rights) Act, 2019*, it was presented as the definitive fulfilment of the *NALSA* mandate. In practice, the statute introduced administrative hurdles that compromised the purity of the self-determination doctrine.

A. The Certificate Dilemma and Bureaucratic Discretion

Section 5 of the 2019 Act required a transgender individual to apply to the District Magistrate for an identity certificate¹⁰. Instead of relying on a simple self-declaration, the process made recognition dependent on administrative approval. This framework failed to account for the real-world dynamics of local bureaucracies in India, where lower-level officials often lack basic sensitivity training regarding gender diversity. As a result, applicants frequently faced invasive questioning, delays, and arbitrary rejections.

More problematically, if an individual sought to change their legal gender marker specifically to “Male” or “Female” (rather than “Transgender”), Section 7 mandated that they present a certificate from a Chief Medical Officer proving they had undergone surgery¹¹. This created a statutory hierarchy: self-perception was sufficient for a generic “transgender” label, but entering the gender binary required medical validation directly contradicting the *NALSA* principle that surgery cannot be a prerequisite for legal recognition. This statutory boundary introduced an explicit socio-economic bias: gender-affirming surgeries are expensive, medically intensive, and largely confined to private, urban healthcare centres. By tying binary legal status to surgery, the state effectively created a class divide, whereby affluent trans

¹⁰The Transgender Persons (Protection of Rights) Act, 2019, No. 40 of 2019, s.5(India).

¹¹Id. s.7.

individuals could buy legal recognition as male or female, while impoverished, rural, and working-class trans individuals were left with a generic state label.

B. Criminal Asymmetry and the Devaluation of Trans Bodies

The 2019 Act also faced challenges under Article 14 regarding its penal provisions. Under Section 18(d), the maximum penalty for sexual abuse against a transgender person was fixed at two years of imprisonment¹². In contrast, under the equivalent provisions of the Indian Penal Code and, subsequently, the Bharatiya Nyaya Sanhita, sexual assault against a woman carries a minimum penalty of ten years, extending up to life imprisonment¹³. This statutory asymmetry suggested that violence against transgender individuals was treated as less severe, failing to provide equal protection under the law.

V. The 2026 Act: The Rise of the Bureaucratic-Medical Complex

The passage of the *Transgender Persons (Protection of Rights) Amendment Act, 2026*, marks a major shift in the state's approach to gender identity¹⁴. Rather than addressing the gaps in the 2019 text, the 2026 provisions systematically remove the core element of self-determination.

A. The Elimination of Self-Perceived Identity

The most consequential change in the 2026 Act is the explicit deletion of Section 4(2) of the 2019 Act, which had recognised the right to a self-perceived gender identity¹⁵. The state defended this change by claiming the earlier definition was overly broad, making it difficult to target welfare benefits effectively and creating friction with existing binary laws governing marriage, inheritance, and criminal offences¹⁶.

By removing self-perception, the 2026 Act limits legal status to historically recognised socio-cultural groups such as the *Hijra*, *Kinner*, *Aravani*, or *Jogta* communities and individuals

¹²Id. § 18(d).

¹³The Bharatiya Nyaya Sanhita, 2023, No. 45 of 2023, § 64(1) (India) (prescribing rigorous imprisonment of not less than ten years, extendable to imprisonment for life, for rape); cf. The Indian Penal Code, 1860, No. 45 of 1860, § 376 (India) (repealed 2024) (prescribing, prior to repeal, a minimum term of seven years).

¹⁴The Transgender Persons (Protection of Rights) Amendment Act, 2026 (India) (assented to Mar. 30, 2026; entered into force May 25, 2026).

¹⁵Id. (omitting § 4(2) of the 2019 Act).

¹⁶Supra note 3.

with medically verified intersex variations¹⁷. This leaves trans-masculine individuals, trans-feminine individuals outside traditional communities, and non-binary or gender-fluid persons without a clear path to legal recognition. This establishes a self-reinforcing loop: the bureaucratic demand for a legal identity card directs individuals to an intrusive state screening mechanism; if they do not fit the narrow medical criteria, they are denied status, forcing them back into systemic exclusion and informal economies.

B. Institutionalising the Medical Board

The 2026 framework replaces administrative certification with an institutionalised medical process. Applicants must now go before a government-appointed Medical Board, led by a Chief Medical Officer, to verify their eligibility¹⁸. This institutional requirement introduces significant practical and constitutional issues:

- **The Fallacy of Objective Medicalisation:** There is no objective medical, genetic, or psychological test that can measure an individual's internal sense of gender identity. Mandating that a medical panel judge an individual's identity pathologises an inherent aspect of human personality.
- **Opportunities for Extortion and Harassment:** Power imbalances within localised medical boards leave applicants vulnerable to harassment. Trans individuals are often forced to endure invasive physical examinations or inappropriate questioning by officials who lack training in trans-inclusive healthcare.
- **Inherent Loss of Privacy:** Forcing individuals to present their bodies or medical histories before a state panel is a direct challenge to the privacy standards affirmed in *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017)¹⁹.

VI. The Criminalisation of Community: Severing Mutual Aid Networks

Beyond altering identity mechanics, the 2026 Act introduces penal clauses designed to

¹⁷2026 Amendment Act, supra note 14 (amending the definition of “transgender person” under § 2(k) to limit statutory recognition to historically recognised socio-cultural groups — including hijra, kinner, aravani, and jogta — and to persons with medically verified intersex variations).

¹⁸2026 Amendment Act, supra note 14 (introducing a Medical Board, headed by a Chief Medical Officer or Deputy Chief Medical Officer, to examine and recommend applications before the District Magistrate issues or revises an identity certificate).

¹⁹*Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1 (India).

curb perceived coercive practices within the community. The text establishes strict punishments, including life imprisonment, for anyone found guilty of “coercing, alluring, or forcing” individuals into assuming a transgender identity²⁰. While protecting individuals from forced medical procedures or exploitation is an unassailable goal, the broad and vague drafting of terms such as “alluring” and “coercion” poses significant risks to the community's social safety nets. This legal ambiguity introduces systemic vulnerabilities across three distinct spheres of community survival: the traditional kinship system, medical gender-affirming care, and immediate crisis intervention.

A. The Threat to the Gharana System

Because many transgender youth face severe abuse and rejection from their biological families, they regularly flee their homes to find safety. For centuries, the traditional *Gharana* system — where senior *Gurus* adopt and mentor *Chelas* (disciples) served as an essential informal social security net, offering shelter, food, community, and economic survival²¹. Under the vague anti-allurement clauses of the 2026 Act, hostile biological families can easily weaponise the law against *Gurus* and community elders, filing false charges of “kidnapping” or “allurement” simply for providing shelter and support to a young trans person.

B. Chilling Effects on Gender-Affirming Healthcare

This legal ambiguity also affects the medical community. Inclusive physicians and psychiatrists who provide hormone replacement therapy or gender-affirming counselling may become hesitant to offer care. Fearing litigation from parents who claim a doctor “allured” or “coerced” their child into transitioning, healthcare providers may refuse treatment, forcing trans individuals to seek unsafe, unregulated black-market alternatives.

C. Impediments to Grassroots Crisis Intervention

Finally, independent human rights defenders and queer-led non-governmental organisations face unprecedented operational hazards. Activists who operate crisis shelters, emergency hotlines, or safe-houses for runaway queer and trans youth can easily be accused of orchestrating an “allurement ring.” By framing communal solidarity as a criminal enterprise,

²⁰2026 Amendment Act, supra note 14 (introducing offences, punishable with imprisonment up to life, for compelling, alluring, or coercing a person into assuming or presenting a transgender identity).

²¹Supra note 9 (on the guru-chela structure of the Gharana system).

the state isolates transgender individuals from the very peer networks that prevent self-harm and street-level victimisation.

VII. A Socio-Legal Path Forward: Reclaiming Substantive Equality

To address these issues and align the statutory framework with constitutional principles, India must move away from its current restrictive model and adopt an approach that respects both legal autonomy and social realities.

1. Restoring the Universal Self-Declaration Model

The right to self-perceived gender identity must be restored as a foundational statutory right. Legal systems should look to international models, such as Argentina's *Ley de Identidad de Género*, which allows individuals to update their official documents through a simple administrative process based entirely on self-declaration²². Eliminating mandatory medical evaluations respects personal autonomy and ensures the state treats trans citizens with dignity.

2. De-linking Identity Verification from Welfare Audits

The state's concern regarding the potential misuse of welfare benefits can be managed without compromising the right to self-identification. Instead of using medical boards as a barrier to basic legal recognition, the government can employ standard administrative verification for targeted financial aid, similar to the methods used for other marginalised communities. A person's legal identity should not be held hostage to a medical evaluation simply to simplify administrative tracking.

3. Implementing Horizontal Reservations Under Article 16

Finally, the state must address the core socio-economic directive of the *NALSA* ruling by introducing explicit horizontal reservations for transgender individuals in public education and employment²³. Rather than mixing transgender quotas with existing vertical caste categories which creates intersectional hurdles a horizontal framework ensures that trans individuals can access opportunities regardless of their caste background, providing a genuine

²²*Ley de Identidad de Género*, Ley No. 26.743, Dec. 9, 2012, [B.O.] (Arg.).

²³*NALSA*, supra note 2 (directions on reservation); cf. *Indra Sawhney v. Union of India*, A.I.R. 1993 S.C. 477 (India) (distinguishing vertical and horizontal categories of reservation).

path toward systemic inclusion.

VIII. Conclusion: Aligning Law with Social Justice

The ongoing evolution of India's transgender rights framework serves as a reminder that progressive judicial declarations do not automatically translate into progressive legislation. The *NALSA* judgment was a milestone for constitutional morality, affirming that identity belongs entirely to the individual, free from state or medical control.

By removing self-identification and introducing mandatory medical pre-screening, the 2026 Amendment walks back these core constitutional commitments. It treats identity as a medical condition rather than an inherent right, returning a vulnerable community to a system of state surveillance. True equality cannot be achieved through restrictive laws that demand physical or medical proof of identity. For India to honour its constitutional promises of justice, liberty, and dignity for all, its laws must respect personal autonomy. The legal system must move past paternalistic oversight and fully embrace a framework in which every citizen has the undisputed right to define who they are.