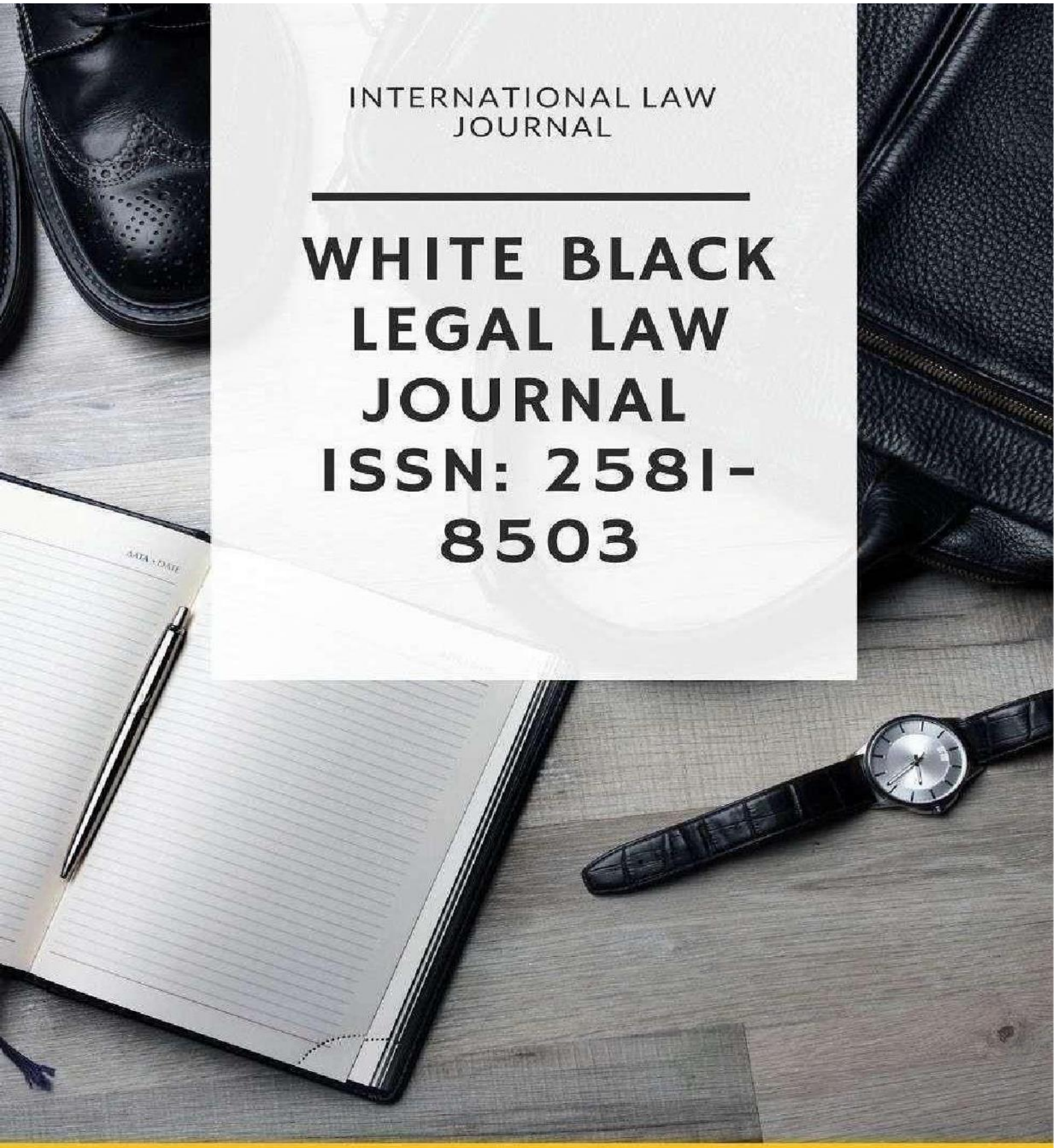

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FROM CRIMINAL TRIBES TO REGULATED IDENTITIES: A CRITICAL ANALYSIS OF STATE CONTROL IN THE TRANS BILL OF 2026

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Abstract

The Transgender Persons (Protection of Rights) Amendment Bill 2026[1] operates as a major setback for India's existing legal system which already recognizes gender identity rights. The Bill undermines the principle of self-perceived identity as affirmed by the Supreme Court in *NALSA v. Union of India*[2], which recognised transgender persons as a "third gender" and located gender identity within the domain of individual autonomy rather than state determination.

The 2026 Amendment seeks to create a new legal definition of "transgender" which divides people into specific cultural groups that include hijra, kinner, aravani, and jogta, as well as individuals who have intersex traits. The Bill does not present a complete definition of transgender identity because it develops an incomplete definition that requires all identities between trans men and trans women and between non-binary and genderfluid people to fall within specific boundaries. This restrictive classification not only fragments the transgender umbrella but also reintroduces state control over identity recognition.

The Bill establishes a governance system which enables the State to create and monitor identity groups through its classification system. The paper establishes a historical connection between the Criminal Tribes Act 1871[3] and modern state control, which shows that identity control now functions through bureaucratic methods instead of direct criminal enforcement.

The paper presents an analysis of regulatory systems which create conflicts with constitutional

[1] The Transgender Persons (Protection of Rights) Amendment Bill, 2026 (Bill No. 79 of 2026) (India), Statement of Objects and Reasons ¶ 1.
[2] National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (India) [hereinafter NALSA].
[3] Criminal Tribes Act, 1871, No. 27, Acts of Parliament, 1871 (India) [hereinafter CTA 1871].

rights that exist under Articles 14, 19, and 21, especially the rights to equality, expression, and dignity[4]. The Amendment not only weakens *NALSA*'s ability to bring change but also establishes a trend that requires people to obtain official recognition instead of relying on their own identification. The situation creates essential issues which involve personal freedom rights, accessibility rights, and government authority to determine who qualifies as an individual.

Keywords: *NALSA v Union of India, Regulated Identities, Transgender Rights in India, Criminal Tribes Act, 1871, Administrative Recognition, State Control.*

Section I: Introduction

On 12 March 2026, Dr Virendra Kumar, Minister of Social Justice and Empowerment, introduced Bill No. 79 of 2026 i.e., the Transgender Persons (Protection of Rights) Amendment Bill, 2026 in the Lok Sabha[5]. Its operative effect, stripped of its stated protective rationale, may be stated with precision: the Bill omits Section 4(2) of the Transgender Persons (Protection of Rights) Act, 2019[6] which emphasize on the provision recognising a right to self-perceived gender identity and inserts a definition of "authority" as a medical board, whose recommendation the District Magistrate must examine before issuing any certificate of identity. These two changes, relocate the power to determine legal transgender identity from the individual to a state-constituted medical authority.

The doctrinal novelty is striking. But the historical resonance is older and more unsettling. For over a century and a half, the Indian state, first in its colonial and then its post-independence form, has treated gender-nonconforming not as constitutional subjects requiring protection but as administrative categories requiring surveillance. The Criminal Tribes Act, 1871[7] designated entire communities, including hijras, as presumptively criminal based on heritable identity characteristics. The colonial census apparatus classified 'hijras' as a 'criminal caste' requiring enumeration and monitoring[8]. The post-independence Habitual Offenders Acts reconstituted

[4] INDIA CONST. arts. 14, 19, 21.
[5] The Transgender Persons (Protection of Rights) Amendment Bill, 2026 (Bill No. 79 of 2026), Statement of Objects and Reasons ¶ 4 (India).
[6] The Transgender Persons (Protection of Rights) Act, 2019, No. 40, Acts of Parliament, 2019 (India), § 4(2) [hereinafter TA 2019].
[7] Criminal Tribes Act, 1871, No. 27, Acts of Parliament, 1871 (India) [hereinafter CTA 1871].
[8] JESSICA HINCHY, GOVERNING GENDER AND SEXUALITY IN COLONIAL INDIA: THE HIJRA C.1850–1900 at 5–14 (Cambridge University Press 2019).

this surveillance logic under new statutory language[9]. Each legislative iteration produced a new administrative technology for managing gender-nonconforming bodies i.e., registers, passes, certificates while insisting, in the official idiom of its time, that the purpose was protective rather than punitive.

The 2026 Amendment speaks the same official idiom. Its Statement of Objects and Reasons declares that the existing definition has made it 'impossible to identity the genuine oppressed persons to whom the benefits of the Act are intended to reach', and that identity conferment cannot be acquired through 'personal choice or claimed self-perceived identity'[10]. The Amendment thus presents itself as a mechanism clarification of state control in the service of welfare delivery.

Section II: Historical Background

2.1 The Criminal Tribes Act, 1871 and the Construction of Hereditary Criminality

The enactment of the *Criminal Tribes Act (CTA), 1871* marked a decisive moment in the colonial state's attempt to transform fluid social identities into fixed, surveyable legal categories. At its core, the *CTA* rested on the presumption that criminality was not an act but an inherited trait. Entire communities could be "notified" as criminal tribes, thereby subjecting all members, irrespective of individual conduct, to systematic state surveillance. This legal shift from conduct-based liability to status-based criminality represents one of the earliest modern instances of identity being codified as a permanent site of suspicion.

The administrative machinery accompanying the Act was extensive and intrusive. Individuals belonging to notified groups were required to register with local authorities, carry passes for movement, report regularly to police stations, and were often subjected to forced settlement or labour regimes. The creation of registers, identity certificates, and pass systems did more than regulate mobility, it produced a bureaucratic archive of bodies. In this sense, the *CTA* did not merely police crime; it produced governable subjects by rendering identity legible to the state. Within this broader framework, gender-nonconforming communities, particularly hijras, became specific targets of colonial anxiety. Colonial officials increasingly constructed hijras as a "dangerous class," associating them with obscenity, moral contagion, and threats to public

[9] Maharashtra Habitual Offenders Act, 1959, No. 14, Maharashtra Acts, 1959; Karnataka Habitual Offenders Act, 1961, No. 34, Karnataka Acts, 1961; Andhra Pradesh (Prevention of Dangerous Activities) Act, 1986, No. 1, Andhra Pradesh Acts, 1986.

[10] The Transgender Persons (Protection of Rights) Amendment Bill, 2026 (Bill No. 79 of 2026), Statement of Objects and Reasons ¶ 4 (India).

order[11]. From the mid-nineteenth century onward, a distinct "Hijra panic" emerged, driven not only by Victorian morality but also by local political anxieties, intelligence gaps, and concerns over sovereignty and revenue control.

The *CTA* thus functioned as both a legal and epistemic tool. It enabled the state to redefine hijras, from culturally embedded figures with religious and social roles, into deviant and criminalized subjects. Importantly, this transformation was not purely moral; it intersected with colonial projects of disciplining public space and reinforcing normative masculinity. Hijras' public performances, feminine attire, and non-binary identities disrupted the rigid gender binaries that underpinned colonial governance, making them particularly susceptible to regulation.

However, it would be analytically simplistic to attribute the *CTA* solely to gendered anxieties. As some legal historians argue, the Act was also a response to nomadic and semi-nomadic communities whose mobility disrupted agrarian taxation and administrative control[12]. The classification of such groups as "criminal" served fiscal and territorial objectives as much as moral ones. Yet, this multi-causal explanation does not dilute the gendered dimension; rather, it reveals how gender nonconformity became entangled with broader colonial concerns about mobility, labour, and governance. Gender, in this framework, was not incidental, it was one of the markers through which deviance was made visible and governable.

2.2 The 1897 Amendment and the Targeting of Hijras

The 1897 amendment to the *Criminal Tribes Act*[13] sharpened the focus on hijras by introducing explicit provisions directed at "eunuchs." This marked a transition from generalized community surveillance to targeted regulation of gender nonconformity. Under these provisions, local authorities were empowered to maintain registers of eunuchs suspected of "criminal" or "immoral" behaviour, particularly those appearing in female dress or performing in public.

The legal language is revealing. The emphasis on dress, performance, and bodily presentation indicates that the colonial state sought to regulate not merely actions but visibility itself. Gender expression became a site of criminal suspicion. Hijras could be penalized for appearing in public in feminine attire or for engaging in traditional practices such as dancing and blessing

[11] HINCHY, supra note 6, at 42–78.
[12] Criminal Tribes Act, 1871, No. 27, Acts of Parliament, 1871 (India) [hereinafter CTA 1871].
[13] Id. at 180–200; see also SAURABH DUBE, UNTOUCHABLE PASTS: RELIGION, IDENTITY, AND POWER AMONG A CENTRAL INDIAN COMMUNITY 1780–1950 at 89–93 (SUNY Press 1998).

ceremonies, activities that had long held cultural legitimacy.

Equally significant was the mechanism of "certification." While the law presumed criminality, individuals could, in theory, demonstrate their non-criminal status through state recognition. This inversion, where innocence required bureaucratic validation, anticipates modern regimes of identity verification. The burden shifted onto the individual to prove legitimacy within a framework that already marked them as suspect.

Administrative circulars and local enforcement practices further reveal that this process was uneven and discretionary. Surveillance varied across regions depending on policing capacity and local priorities. Yet, this inconsistency did not weaken the law's impact; rather, it created a climate of uncertainty and vulnerability, allowing authorities to exercise arbitrary control.

This system effectively transformed hijra identity into a conditional legal status, one that required continuous negotiation with the state. In doing so, it laid the groundwork for contemporary identity regimes that similarly hinge on certification, documentation, and bureaucratic approval.

2.3 Section 377 IPC as a Complementary Instrument

While the *CTA* criminalized identity as status, *Section 377* of the *Indian Penal Code (1860)*[14] criminalized certain forms of sexual conduct. Together, these provisions created a dual regime of control that targeted both who a person was and what they were presumed to do.

Section 377, with its prohibition of "carnal intercourse against the order of nature," operated as a broad and ambiguous tool that enabled the policing of non-normative sexualities. Although not explicitly directed at transgender persons, its application disproportionately affected gender-nonconforming communities, who were often presumed to engage in deviant sexual practices.

In conjunction with the *CTA*, *Section 377* reinforced a feedback loop of suspicion. Hijras were already marked as inherently criminal under the *CTA*; *Section 377* provided a legal basis to criminalize their presumed conduct. This convergence of status and conduct-based criminalization intensified their marginalization, embedding them within a legal structure that left little room for autonomy or legitimacy.

Importantly, both laws relied on evidentiary flexibility and moral judgment, allowing police and local authorities considerable discretion. This facilitated routine harassment, extortion, and abuse, patterns that would persist well into the postcolonial period.

[14] Section 377, Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India) [hereinafter IPC 1860].

2.4 Post-Independence Continuities: The Habitual Offenders Framework

The formal repeal of the *Criminal Tribes Act in 1952* is often presented as a moment of legal rupture. However, a closer examination reveals significant continuities in both logic and practice. The introduction of *Habitual Offenders Acts* by various states, including Maharashtra (1959), Karnataka (1961), and Andhra Pradesh (1962), effectively reconstituted the category of the "criminal tribe" under a new administrative label.

These laws shifted the language from hereditary criminality to habitual offending, but the underlying assumptions remained intact. Communities previously notified under the *CTA* continued to be subjected to surveillance, registration, and police monitoring. In practice, the stigma attached to these groups did not dissipate; it was reproduced through new legal mechanisms.

For hijra communities, the combined effect of these laws and the continued operation of *Section 377* meant that colonial patterns of control persisted under the guise of postcolonial legality. Police harassment, arbitrary detention, and social exclusion remained widespread.

Scholarly accounts describe this continuity as a form of legal afterlife, where colonial categories survive through administrative adaptation rather than explicit retention[15]. The persistence of surveillance practices suggests that the repeal of the *CTA* was less a substantive transformation and more a symbolic gesture.

2.5 Colonial to Constitutional Transition: Rupture or Continuity?

The adoption of the Constitution of India introduced a normative framework grounded in equality, freedom, and dignity, particularly under *Articles 14, 19, and 21*[16]. On paper, this marked a clear departure from colonial modes of governance. The Constitution rejected status-based discrimination and affirmed the primacy of individual rights.

Yet, the persistence of surveillance-oriented legal frameworks raises questions about the depth of this transformation. While constitutional jurisprudence, particularly in later decades, has increasingly recognised gender identity rights, administrative practices have often lagged. The continued reliance on documentation, certification, and discretionary policing reflects a lingering attachment to colonial modes of control.

The contradiction becomes especially evident when viewed through the lens of transgender rights. Even as the judiciary, in decisions such as the *NALSA* judgment (2014)[17], affirms the

[15] HINCHY, supra note 6, at 182–85; see also ARVIND NARRAIN & ALOK GUPTA, LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW 43–57 (Yoda Press 2011).
[17] NALSA, supra note 3, ¶¶ 113–129.

right to self-perceived identity, legislative and administrative frameworks frequently reintroduce mechanisms of verification and regulation. This tension suggests that the colonial logic of governing through classification and surveillance has not been fully dismantled, it has been reconfigured.

In this sense, the transition from colonial to constitutional governance is best understood not as a clean break but as a layered continuity. The vocabulary of rights may have changed, but the underlying administrative impulse to categorise, monitor, and regulate marginal identities persists. The historical trajectory from the *CTA* to contemporary legal frameworks thus reveals a deeper pattern: the state's enduring reliance on identity as a site of control.

Section III: Legal Framework

3.1 The 2019 Act: Promises and Limitation

The *Transgender Persons (Protection of Rights) Act, 2019* was enacted in the shadow of a judicial mandate that was already five years old. The Supreme Court's direction *in NALSA v. Union of India* 2014[18] had been precise in order to grant legal recognition of self-identified gender; treat transgender as a socially and educationally backward class entitled to reservations in public employment and education; ensure access to health, separate public toilets, and dedicated HIV surveillance infrastructure and prohibit any insistence on sex reassignment surgery as a precondition for recognition. The 2019 Act addressed some of these imperatives and ignored others entirely and thereby, producing a statute that was simultaneously a legislative milestone and a record of institutional reluctance.

Section 2(k)[19] defined 'transgender person' expansively to include trans men, trans women (whether they had undergone sex reassignment surgery or hormone therapy), persons with intersex variations, genderqueer individuals, and persons with socio-cultural identities including Kinner, hijra, aravani and jogta. This definition was formally consistent with *NALSA*'s recognition of gender diversity and the court's rejection of the biological test in favour of the psychological test for identity. *Section 4(1)* of the act affirmed the right to be recognised as a transgender person, and *section 4(2)*[20] which affirmed the right of self-identity is later deleted by the 2026 Amendment Bill.

[18] NALSA, supra note 3, ¶ 129 (directing the Central and State Governments to grant legal recognition to self-identified gender, treat transgender persons as a socially and educationally backward class, and provide separate wards and HIV surveillance infrastructure).
[19] TA 2019, supra note 2, § 2(k).
[20] TA 2019, supra note 2, §§ 4(1), 4(2).

Section 5 and 6[21], which governed the actual mechanics of identity recognition, immediately qualified and in practice negated what *section 4(2)* had declared. Under Section 5, a person seeking recognition as a transgender person was required to apply to the District Magistrate. Under *Section 6*, the District Magistrate was to issue a certificate. The critical gap between the right declared in *Section 4(2)* and the procedure imposed in *Section 5 and 6* was not incidental but structural and the logic under the prominent case of *NALSA* was expressly rejected. Civil society critics described this internal contradiction as the Act's defining weakness, a provision that simultaneously acknowledged and then undermined the constitutionality.

Section 7[22] compounded the problem. It created a two-tier recognition framework in which a person who had undergone gender affirmative surgery to change their gender to male or female could apply for "revised" certificate. While the Act was careful not to make surgery a condition for initial recognition as a transgender person, the existence of a separate, surgery-dependant pathway to binary recognition as male or female created a hierarchy. Those who medicalised their transition could access legal recognition as male or female, while who did not remain categorised only as "transgender." Critics identified this as a form of transition through institutional design whereby imposing surgery as a practical precondition for most socially consequential forms of legal recognition even without stating it directly.

Most evidently, the Act made no provisions for reservations in public employment or education. The question of reservations had featured prominently in the legislative debates that preceded the Act, and the 2014 Rajya Sabha bill introduced by Tiruchi Siva[23] had specifically addressed it. In 2025, in *Jane Kaushik v Union of India*[24], the Supreme Court itself came down heavily on the Union and states for failing to implement the 2019 Act and the 2020 Rules, directing the constitution of a committee to formulate equal opportunity guidelines.

The Act also left unaddressed the full range of civil rights that *NALSA* had flagged as discriminatory denied to transgender persons with respect to marriage, inheritance, adoption, and related family law entitlements. Section 18[25], which sets out offenses and penalties prescribed a maximum sentence of two years imprisonment for sexual abuse of a transgender

[21] TA 2019, supra note 2, §§ 5, 6; see NALSA, supra note 3, ¶ 129(3) (expressly rejecting the biological test in favour of the psychological test for gender identity).
[22] TA 2019, supra note 2, § 7. The two-tier pathway preserved surgery-dependent recognition as male or female distinct from the general transgender certificate
[23] The Rights of Transgender Persons Bill, 2014 (Bill No. XLII of 2014) (India), §§ 12–14 (introduced by Tiruchi Siva in the Rajya Sabha on December 12, 2014).
[24] Jane Kaushik (Transgender Rights Enforcement) v. Union of India, (2026) 1 SCC 336
[25] TA 2019, supra note 2, § 18; see also Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012 (India), § 6 (prescribing punishment of not less than ten years for aggravated penetrative sexual assault); compare Indian Penal Code, 1860, § 376 (punishment for rape: not less than seven years).

person which drew immediate challenge for its disparity with the sentence of seven years or more available for equivalent offenses against cisgender women, creating what critics characterised as a constitutionally indefensible hierarchy of bodily integrity under Article 14.

3.2.1 Amendment to Section 2: Redefinition of "Transgender Person"

The most evident provision of the Amendment is the substitution of the definition of "transgender person" in *Section 2 (k)*[26]. The 2019 Act's definition inclusive of trans men, trans women (with or without surgical or hormonal treatment), genderqueer individuals, intersex persons, and named socio-cultural communities is replaced by a two-limb definition of sharply narrower scope. The first limb i.e., clause (k)(i) recognises persons with socio-cultural identities kinner, hijra, aravani, jogta or eunuch and persons born with intersex variations, including primary sexual characteristics, external genitalia, chromosomes patterns, gonadal development, and endogenous hormone production.[27] The second limb clause (k)(ii) includes 'any person or who child who has been, by force, allurement, inducement, deceit or undue influence, either with or without consent, compelled to assume, adopt, or outwardly present a transgender identity, by mutilation, emasculation, castration, amputation, or any surgical, chemical, or hormonal procedural or otherwise'[28]

A proviso appended to the new definition provides, 'it shall not include, nor shall ever have been so included, persons with different sexual orientations and self-perceived sexual identities[29].' The legal effects of this formulation are threefold. First, trans men and trans women who identity as male or female but do not belong to the named socio-cultural communities and do not present with congenital biological variation fall entirely outside the Act's definitional scope. Second, genderqueer and non-binary persons were categories explicitly included in the 2019 Act are now without statutory recognition. Third, the retrospective character of the proviso, 'nor shall ever have been so included' purports to reach back and void the recognition of persons who received certificates under 2019 Act's broader definition, raising fundamental questions about the extinguishment of the legal status.

The proviso's conflation of gender identity with sexual orientation excluding 'persons with different sexual orientations and self-perceived sexual identities' compounds the constitutional

[26] The Transgender Persons (Protection of Rights) Amendment Bill, 2026 (Bill No. 79 of 2026), cl. 2(iv) (substituting § 2(k) of TA 2019).
[27] Id., cl. 2(iv), § 2(k)(i).
[28] Id., cl. 2(iv), § 2(k)(ii).
[29] Id., cl. 2(iv), proviso to § 2(k).

infirmity. In *Navtej Singh Johar v Union of India 2018*[30], the Supreme Court affirmed the conceptual and legal distinction between sexual orientation and gender identity. The proviso's failure to maintain this distinction, whether by oversight or design, means that a person who both has a self-perceived gender identity and a non-heterosexual orientation could be read out of the definition on either ground.

3.2.2 Omission of Section 4(2): Deletion of Self Perceived Identity

Clause 3 of the Amendment omits *Section 4(2)* of the 2019 Act in its entirety[31]. No replacement is provided. The effect is to remove from the Act the only provision that had explicitly named self-perceived gender identity as a right. As argued above in section 4.1, this right was already operationally undermined by the certification procedure.

NALSA held that gender identity is a dimension of right to life and personal liberty under Article 21, and that the psychological test, not the biological test governs its determination[32]. Parliament cannot, by ordinary legislation, override a right recognised by the Supreme Court as grounded in the Constitution. The deletion of *section 4(2)* does not extinguish the constitutional right; the right remains enforceable under *Articles 14, 19, and 21* as interpreted by the court. What the deletion achieves is the removal of the statutory anchor that connected the Act to *NALSA*'s framework, replacing it with a regime in which recognition depends entirely on state-administered classification.

3.2.3 New 'Authority' (Medical Board) Mechanism: Sections 2(aa) and 6

The amendment inserts a new definition in *section 2 (aa)* of an 'authority' which states that a State Government appoints a medical board headed by the Chief Medical Officer or Deputy Chief Medical Officer, appointed by the Central Government, or Union Territory Administrative[33]. *Section 6(1)* is amended to require that the District Magistrate issue a certificate of identity only 'after examining the recommendation of the authority and, if considers either necessary or desirable, after taking the assistance of other medical experts.[34] Certificate issuance is thus made formally contingent upon a prior medical evaluation. The

[30] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶¶ 251–262 (India) [hereinafter Navtej] (affirming that sexual orientation and gender identity are constitutionally distinct categories, each entitled to independent protection).
[31] Amendment Bill, 2026, cl. 3 (omitting § 4(2) of TA 2019).
[32] NALSA, supra note 3, ¶¶ 66–76 (holding that gender identity is a dimension of the right to life and personal liberty under INDIA CONST. art. 21, and that the psychological test, not the biological test, governs its determination).
[33] Amendment Bill, 2026, cl. 2(ii) (inserting § 2(aa)) and cl. 4(a) (amending § 6(1) of TA 2019).
[34] TA 2019, supra note 2, § 6(1), as amended by Amendment Bill, 2026, cl. 4(a).

amendment does not specify the board's composition beyond the requirement of a medical head, nor does it set out the criteria by which the board is to assess an application, the timeline within which it must act, the grounds on which it may decline to recommend, or any right of appeal against an adverse decision. These matters are left to rules to be framed under the amended section 22 which rules that, at the time of the amendment's passage, had not been notified and for which no deadline was prescribed.

3.2.4 Medical Institution Reporting: New Section 7(1A)

The amendment inserts a new sub-section 7(1A), requiring that 'the medical institution in which the person has undergone surgery to change gender, either as male or female, shall furnish the details of such person to the concerned District Magistrate and the authority[35] in such form and manner as may be prescribed'. This provision creates a mandatory state registry of gender affirming surgeries. The Bill does not specify what 'details' must be provided, does not prescribe any limitation on the use of any safeguard is not a minor omission. The provision subjects an intimate medical event to compulsory government notification without patient consent, creating the conditions for the chilling of healthcare access and the potential stigmatisation of individuals through data exposure.

3.2.5 Substituted Section 18: Offences and Penalties

The amendment entirely replaces *section 18*[36], which previously provided for imprisonment of sex months to two years for a range of offences including forced labour, denial of access to public places, forced displacement, and physical, sexual, verbal, and economic abuse. Clauses (a) through (d) of the new section 18 reproduces these existing offenses at the same penalty level. Clauses (e) through (h) introduces new categories of aggravated offenses; kidnapping or abduction of an adult combined with grievous hurt for the purpose of compelling transgender identity assumption, punishable with rigorous imprisonment from ten years to life and a fine of not less than two lakh rupees; the same offence against a child, punishable with life imprisonment and a fine of not less than five lakh rupees[37]; compelling any person to dress or present as a transgender person and engage in begging, servitude, or forced labour in case of adults punishable with five to ten years of rigorous imprisonment and a fine of not less than

[35] Amendment Bill, 2026, cl. 5(b) (inserting § 7(1A) into TA 2019).
[36] Amendment Bill, 2026, cl. 7 (substituting § 18 of TA 2019).
[37] Id., § 18(e) (rigorous imprisonment for not less than ten years extending to life and fine of not less than two lakh rupees for kidnapping or abducting an adult for compelled transgender identity assumption with grievous hurt); § 18(f) (life imprisonment and fine of not less than five lakh rupees for the same offence against a child).

one lakh rupees, and in the case of children, with ten to fourteen years.[38]

Section IV: Critical Analysis

The provisions of the *Transgender Persons (Protection of Rights) Amendment Bill, 2026 (Bill No 79 of 2026*) do not operate in a legal or historical vacuum. They emerge from and perpetuate, a longer architecture of state management over gender non-conforming bodies; one that Supreme Court appeared to have decisively interrupted between 2014 and 2018. This section offers the paper's core analytical contribution i.e., the concept of "regulated identity" as the Amendment's governing logic. It proceeds through six interconnected nodes; theoretical framework, medicalisation as state control, the definitional exclusion, the paradox of the penal provisions, intersectional inequalities, and a direct structural comparison with the *Criminal Tribes Act 1871*, each of which supports the paper's broader constitutional and historical thesis.

4.1 The "Regulated Identity" Paradigm

In his account of modern governmental rationality, Foucault distinguished between the sovereign mode of power; the power to kill or exclude and the biopolitical mode i.e., the management of population through norms, classification, and administrative technologies.[39] The 2026 Amendment exemplifies the latter. It does not criminalise being transgender. It does something analytically more sophisticated; it renders legal transgender identity a 'permission-dependent category,' accessible only through the gateway of state-administered certification. The Amendment thus effects a transition from the *Criminal Tribes Act's* blunt regime of criminal exclusion to what this paper terms "regulated identity" a paradigm of conditional inclusion in which recognition is available, but only on the state's definitional terms.

Giorgio Agamben's resonance to self-perceived identity is instructive[40]. The self-perceived transgender individual who falls outside the Amendment's narrowed definition occupies a form of legal *bare life*; biologically present but stripped of the political qualification that would make them legible. Unlike the *CTA's* explicit criminalisation, the Amendment achieves this effect through administrative silence that the excluded individual is simply not a 'transgender person'

[38] Id., § 18(g) (five to ten years rigorous imprisonment and fine of not less than one lakh rupees for compelling any person to present as transgender and engage in begging or forced labour); § 18(h) (ten to fourteen years and fine of not less than three lakh rupees for the same offence against a child).

[39] MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOL. 1: AN INTRODUCTION 135–145 (Robert Hurley trans., Pantheon Books 1978); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 195–228 (Alan Sheridan trans., Vintage Books 1977).

[40] GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 9–12 (Daniel Heller-Roazen trans., Stanford University Press 1998). The concept of "bare life" (zoe) as distinct from politically qualified life (bios) is developed in ch. 1.

for the purposes of the Act. They cannot claim its welfare provisions, its penal protections, or most importantly its formal recognition of identity.

This paradigm inverts the constitutional direction set by the *NALSA v Union of India*[41], where the Supreme Court held that the right to self-identified gender identity inheres in the individual, not in the state's capacity to confer or withhold it. In *Puttaswamy*[42], the nine-judge bench anchored this principle to the right to privacy under *Article 21*, holding that identity is a core dimension of personal liberty that the state cannot condition without the most compelling justification. The "regulated identity" paradigm of the Amendment is in direct structural tension with both authorities.

4.2 Medicalisation as a Form of State Control

The Amendment's Statement of Objects and Reasons frame the medical board mechanism as a safeguard against "misuse" of welfare provisions. This framing repays critical scrutiny. What "misuse" is being guarded against? The logic implies that without medical verification, individuals might *falsely* claim a transgender identity for benefit seeking purposes; a premise that embeds a presumption of inauthenticity directly into the legislative text. The deleted *section 4(2)* of the parent Act had recognised the right to self-perceived gender identity as inherent. The Amendment's medical board replaces inherence with interrogation.

The sociological literature on medicalisation, associated principally with Peter Conrad[43], identifies the transformation of lived human conditions into clinical categories as a process that shifts authority from individuals and communities to professional and administrative gatekeepers. The mechanism operates through the new *section 2(aa)*[44]"authority" i.e., a medical board chaired by the Chief or Deputy Medical Officer of the district on whose recommendation the District Magistrate must examine before issuing a certificate. Even if the recommendation is technically advisory, the practical dynamics of this arrangement produce a mandatory effect. The power asymmetry between a medical authority and an individual applicant; particularly a marginalised transgender person with limited institutional familiarity or legal representation that a negative recommendation will, in practice, always will be

[41] NALSA, supra note 3, ¶ 76 ("It is the right of every human being to choose their gender identity on their own…the state cannot impose the gender on them.").
[42] Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶¶ 298–310 (Chandrachud, J., concurring) [hereinafter Puttaswamy] (holding that privacy encompasses informational self-determination, bodily integrity, and the right to control personal identity).
[43] PETER CONRAD, THE MEDICALIZATION OF SOCIETY: ON THE TRANSFORMATION OF HUMAN CONDITIONS INTO TREATABLE DISORDERS 4–8 (Johns Hopkins University Press 2007).
[44] Amendment Bill, 2026, cl. 2(ii) (defining "authority" under § 2(aa) as a medical board headed by a Chief Medical Officer or Deputy Chief Medical Officer).

determinative.

Under the *unconstitutional condition's doctrine*[45], the state cannot attach conditions to constitutional rights that would, if imposed directly, violate those rights. The medical board requirement fails constitutional scrutiny. The right to have one's gender identity legally recognised was held by *NALSA* to be grounded in *Articles 14, 19, and 21*.

4.3 The Definitional Exclusion: Who is "Not" Transgender?

The proviso to the substituted *section 2 (k)*[46] introduces an exclusion of unusual constitutional severity; the definition of "transgender person" shall not include, nor shall ever have been so included, persons with different sexual orientations and self-perceived sexual identities.

First, the *retrospective character* of this exclusion; the phrase "nor shall ever have been so included" is legally extraordinary. It retroactively annuls certificates of identity that may have been lawfully issued under the 2019 Act to individuals who identified as transgender based on self-perception. Second. The proviso creates a two-tier structure within non-conforming experience i.e., those whose identity is "authentic" because it corresponds to biological intersex variations or a recognised socio-cultural identity and those whose identity is "inauthentic" because it rests on the self-perception alone. This classification fails the testo of *intelligible differentia* and *rational nexus* under *Article 14* i.e. if the Act's purpose is to protect individuals who face discrimination on the basis of their gender identity and expression, there is no rational basis for distinguishing those who experience discrimination through biological variation from those who experience identical discrimination through self-identified non conformity.

Third, the explicit exclusion[47] of sexual orientation from the definition reflects a conceptual confusion that is as significant as it is avoidable. Sexual orientation and gender identity are analytically distinct. A person may be transgender regardless of their sexual orientation, and vice versa. The Amendment as well as fails to provide a clear distinction between sex and gender of an individual with key reference to adding individuals with intersex variations without their consent and labelled them as "transgender persons" while excluding 'trans men,'

[45] For the unconstitutional conditions doctrine as applied in analogous contexts, see NALSA, supra note 3, ¶ 129(iii) (holding that requiring surgery as a precondition for gender recognition is unconstitutional); cf. Frost v. Railroad Commission, 271 U.S. 583, 594 (1926) (U.S.) (establishing that the state cannot condition enjoyment of a constitutional right on the surrender of another constitutional right). Indian courts have applied analogous proportionality reasoning under Article 21 without formally adopting the doctrine by name: see Modern Dental College & Research Centre v. State of M.P., (2016) 7 SCC 353, ¶¶ 61–65 (India).

[46] Amendment Bill, 2026, cl. 2(iv), proviso to § 2(k) (providing that "persons with different sexual orientations and self-perceived sexual identities" are excluded and "shall never have been so included").

[47] Navtej, supra note 27, ¶¶ 251–253 (treating the conflation of gender identity with sexual orientation as a fundamental analytical error).

'trans women.' The proviso suggests a fundamental misapprehension of the subject matter of the Act purports to regulate a legislative confusion that is not a technical drafting error but a substantive conceptual regression.

4.4 The paradox of the Penal Provisions

The substituted *section 18* is presented in the *Statement of Objects and Reasons* as a protective advance as per to graded offences against discrimination, abduction, and forced bodily modification represent genuine legislative progress.

Navtej Singh Johar established that identity must be treated as "a fact of one's being, not a matter of clinical determination.[48]" The criminalisation of "forced transgender identity assumption" while superficially protective, treats transgender identity as something that can be imposed on a non-consenting person. More concretely, *section 18(h)'s* criminalisation of compelling "any person to dress, present, or conduct themselves outwardly as a transgender person" carries serious over-breadth risk. The *guru-chela (teacher-disciple)*[49] initiation relationship within the hijra communities, which has been extensively documented by scholars including Gayatri Reddy, involves instruction in gender presentation, dress, and social conduct. The protection, paradoxically, may weaponize the very law against the communities it claims to protect.

4.5 Intersectionality: Caste, Class, and Regional Access

The medical board mechanism will not operate uniformly across Indian society. A transgender person in an urban district with access to legal aid, civil society support, and a sympathetic medical establishment occupies a categorically different position from a person in a rural district dependent on a single government medical officer with no such supports. The intersectional dimensions of this differential: caste, class, and regional geography are not incidental to the Amendment's operation; they are constitutive of its effect.

NALSA had specifically directed the central and state governments to extend OBC reservations and welfare provisions to transgender persons[50]. Those directions have not been implemented

[48] Navtej, supra note 27, ¶ 262 ("Identity is not an ailment that needs to be cured. It is a fact of one's being, not a matter of clinical determination.").

[49] REDDY, supra note 7, at 93–115 (documenting the guru-chela initiation system within hijra communities, which involves instruction in gender presentation, dress, naming, and social conduct as a form of cultural transmission); see also SERENA NANDA, NEITHER MAN NOR WOMAN: THE HIJRAS OF INDIA 38–52 (Wadsworth Publishing 1990).

[50] NALSA, supra note 3, ¶ 129(iv) (directing Central and State Governments to extend OBC reservations and welfare provisions to transgender persons).

in any systematic manner. The 2026 Amendment's narrowed definition reduces the universe of persons who can claim even the formal protections of the Act, compounding the implementation failure. A Dalit transgender woman in a rural district of Rajasthan faces the intersection of caste discrimination, gender discrimination, geographic distance from the certificate infrastructure, and now, the Amendment's medical gatekeeping, a convergence of exclusions that the substantive equality dimension of *Article 14* requires courts to consider in the round.

Section V: Comparative Perspectives

5.1 Framing the Comparative Inquiry: Models of Gender Recognition

A meaningful comparative analysis of gender identity regimes requires moving beyond jurisdiction-specific descriptions toward a structured framework. Contemporary scholarship conceptualises gender recognition laws along two intersecting axes: first, whether the system is **binary or non-binary** in its recognition of gender categories; and second, whether it is **ascriptive or elective** in determining gender identity.

At the intersection of these axes emerge four ideal types: ascriptive binary, ascriptive non-binary, elective binary, and elective non-binary systems. This typology provides a critical analytical lens to evaluate how different legal regimes distribute authority between the individual and the state. Systems located within the ascriptive quadrant rely on third-party validation, medical, psychiatric, or administrative, while elective systems privilege self-identification as the primary determinant of legal identity.

India's current framework, particularly under the *Transgender Persons (Protection of Rights) Act, 2019* and its subsequent rules, occupies an uneasy position within this matrix. While it formally recognises a non-binary category, its reliance on certification by executive authorities situates it closer to an **ascriptive non-binary model**. This hybrid structure produces a paradox: it appears progressive in form but remains restrictive in operation.

5.2 Argentina's Gender Identity Law: The No-Preconditions Model

Argentina's Gender Identity Law (2012)[51] represents the clearest articulation of an elective model grounded in self-determination. It is widely regarded as the first legal framework to recognize gender identity without imposing any medical, psychiatric, or judicial

[51] Ley de Identidad de Género [Gender Identity Law], Law No. 26.743, May 23, 2012 (Arg.), arts. 3–4 (permitting legal gender change through administrative request without surgical, hormonal, or psychological preconditions).

prerequisites.[52]

Under this regime, individuals may change their legal name, gender marker, and official documents through a straightforward administrative process. Importantly, the law dismisses the idea that external authorities must verify gender identity. There is no need for surgical procedures, hormonal treatments, psychological assessments, or court approval.

Equally important is the separation of legal recognition from medical access. Gender-affirming healthcare is protected as a right based on informed consent, rather than as a prerequisite for legal recognition. This reversal challenges the traditional link between bodily modification and legal legitimacy, thereby breaking down one of the main mechanisms of state control over transgender bodies.

Empirical evaluations of the law suggest that it has had an empowering effect on transgender communities, improving access to education, employment, healthcare, and civil rights, even while implementation challenges persist.

In comparative terms, Argentina demonstrates that a **demedicalized, low-interference model is not only normatively desirable but administratively feasible**. The significance of this model lies not merely in its outcomes, but in its underlying philosophy: gender identity is treated as an intrinsic aspect of personhood rather than a condition to be verified.

5.3 India's Conditional Recognition Regime: Certification and Control

In contrast, India's legal framework adopts a conditional, certificate-based approach that reintroduces forms of gatekeeping rejected by constitutional jurisprudence. Individuals seeking recognition as transgender must apply to a District Magistrate and, in practice, navigate layers of administrative scrutiny, including psychological assessment.

The system becomes even more restrictive when individuals seek recognition within the male/female binary. *Section 7* of the 2019 Act requires proof of medical intervention, effectively tying legal recognition to bodily modification. This creates a hierarchy of legitimacy in which non-binary identities are bureaucratically tolerated, while binary transitions are medically policed.

From a comparative perspective, India's framework exemplifies a **high-gatekeeping model**, where identity is mediated through institutional authority rather than individual autonomy. The requirement of certification transforms gender identity into a status granted by the state, rather

[52] Mauro Cabral & Paula Viturro, (Trans)Sexual Citizenship in Contemporary Argentina, in TRANSGENDER RIGHTS 262, 268–71 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., University of Minnesota Press 2006).

than a right inherent to the individual.

Scholars have noted that this process introduces unnecessary "external interference" and complexity, undermining the principle of self-identification affirmed by constitutional jurisprudence.

What makes this particularly significant for the present analysis is the structural resemblance between this regime and earlier colonial practices. While the language has shifted from criminality to protection, the underlying mechanism, state-issued identity validation, remains strikingly similar.

5.4 Beyond the Binary: European Models and the Limits of Self-Declaration

European jurisdictions provide additional nuance to the comparative landscape, particularly in understanding the limits of self-declaration models. Countries such as Belgium and Colombia have moved toward elective systems[53] that allow for non-binary recognition and, in some cases, multiple changes of legal gender over time. These models are often identified as having the greatest transformative potential, as they accommodate gender fluidity and resist rigid categorization.

However, not all self-declaration regimes are equally emancipatory. Denmark's 2014 reform[54], for instance, introduced legal self-identification but retained significant medical gatekeeping in practice. While individuals can change their legal gender without medical approval, access to healthcare remains mediated by medical institutions, creating a disjunction between formal legal autonomy and lived experience.

This reveals an important insight: **the removal of legal barriers does not automatically dismantle broader systems of control**. Instead, power may be redistributed across institutions, with medical authorities continuing to exercise considerable influence over transgender bodies.

For the purposes of this paper, this distinction is critical. It suggests that the debate is not simply between certification and self-identification, but between different configurations of regulatory power. Even progressive models may reproduce forms of discipline, albeit in less visible ways.

[53] See Jens M. Scherpe, The Legal Status of Transsexual and Transgender Persons in Europe: An Overview and Suggestions for Reform, in THE LEGAL STATUS OF TRANSSEXUAL AND TRANSGENDER PERSONS 463, 475–88 (Jens M. Scherpe ed., Intersentia 2015).

[54] Danish Act on Change of Legal Gender (L 182), June 11, 2014 (Den.), art. 1; see TRANS LEGAL MAPPING REPORT: RECOGNITION BEFORE THE LAW 33 (ILGA World 2020) (noting disjunction between formal legal self-declaration and continued medical gatekeeping over healthcare in Denmark).

5.5 Comparative Synthesis: From Self-Determination to State Regulation

A comparative synthesis of these models reveals a spectrum of governance, ranging from low-interference, self-determination frameworks to high-control, certification-based regimes. Argentina occupies one end of this spectrum, characterized by minimal gatekeeping and a strong commitment to autonomy. India, by contrast, lies closer to the regulatory end, where identity is mediated through bureaucratic and medical authority.

The key point of divergence lies in the **location of epistemic authority**: who has the power to define gender identity. In Argentina, this authority rests with the individual. In India, it is shared, if not dominated, by the state and its administrative apparatus.

This distinction has profound implications for rights. Systems that prioritize self-identification tend to align more closely with principles of dignity, privacy, and bodily autonomy. In contrast, certification-based systems risk reproducing stigma by framing transgender identity as something that must be verified, corrected, or authorized.

Moreover, the comparative analysis underscores a deeper continuity within the Indian framework. The reliance on documentation, certification, and administrative discretion echoes earlier colonial mechanisms of identity regulation. While the justificatory language has shifted, from criminality to welfare, the underlying logic of surveillance and control persists.

5.6 Implications for the Trans Bill, 2026

The comparative evidence suggests that the trajectory of Indian law is not inevitable but contingent. Alternative models, most notably Argentina's, demonstrate that it is possible to design legal frameworks that respect self-determination while ensuring access to rights and services.

If anything, the persistence of certification-based mechanisms in India represents a deliberate policy choice rather than an administrative necessity. The Trans Bill, 2026, in this context, must be evaluated not only against domestic constitutional standards but also against global best practices.

The central question, therefore, is not whether regulation is required, but **what form that regulation should take**. Should the state continue to function as the arbiter of identity, or should it recognize identity as a domain beyond bureaucratic control?

Comparative analysis makes one conclusion difficult to avoid: systems that minimize state interference are both normatively superior and practically viable. The continued reliance on certification and verification in India thus appears less as a protective measure and more as a continuation of a long-standing tradition of governing marginalized identities through

surveillance and control.

The comparative analysis thus reinforces the central claim of this paper: that contemporary legal frameworks governing transgender identity in India cannot be understood in isolation from their colonial antecedents. The persistence of certification, documentation, and administrative validation reflects not an incidental policy choice, but a structural continuity in the state's approach to marginalized identities. While global models increasingly move toward self-determination and minimal interference, the Indian framework, particularly as reflected in the Trans Bill, 2026, appears to consolidate rather than dismantle these inherited mechanisms of control. The question, therefore, is no longer whether reform is necessary, but whether the state is willing to relinquish its historical role as the arbiter of identity itself.

Section VI: Implications for Constitutional Rights

6.1 Article 14: Right to Equality

The 2026 Amendment introduces a two-tier classification of gender non-conforming persons: those whose identity is biologically certified or culturally recognised by the state, and those who self-identify based on self-perceived identity. To survive constitutional scrutiny under Article 14[55], this classification must satisfy the classical two-prolonged test i.e. the classification must be founded on *intelligible differentia*; a distinction that meaningfully separates the persons grouped together from others and that differentia must bear a *rational nexus* to the object sought to be achieved by the statute.

The stated object of the *Transgender Persons (Protection of Rights) Act, 2019* as ostensibly preserved and extended by the 2026 Amendment, is the protection of socially marginalised transgender persons from discrimination, exploitation, and violence. The new section 2(k), however, restricts legal recognition to persons with biological or intersex conditions, recognised socio-cultural communities, while excluding, with retrospective force, "persons with different sexual orientations and self-perceived identities". The differentia between biological certified transgender persons and self- perceived gender non-conforming individuals fails the rational nexus test on its own terms.

The social discrimination and marginalisation that the Act seeks to remedy i.e., violence, denial of employment, exclusion from public spaces, family rejection attaches to gender non-conformity as it is lived and expressed, not to biological chromosomal variation or the

[55] INDIA CONST. art. 14 (guaranteeing equality before law and equal protection of laws); NALSA, supra note 3, ¶ 120 (holding that the "reasonable classification" test requires intelligible differentia bearing rational nexus to the Act's object).

endorsement of a medical authorisation. A person who identifies as a woman is subject to the same structural violence regardless of whether a medical board validates their identity.

The Supreme Court in *NALSA v. Union of India*[56] adopted a substantive, rather than merely formal, conception of equality under Article 14[57]. Substantive equality demands that the state recognise and accommodate difference, not deploy difference as a basis for exclusion. *NALSA* specifically held that transgender persons were entitled to equal protection of all laws, and that non-recognition by the state violated their fundamental rights to equality, expression, and dignity. The 2026 Amendment's definitional exclusion inverts this holding by embedding state non-recognition into the legislative text itself.

6.2 Article 19(1)(a): Freedom of Expression

The right to express one's gender identity is a constitutionally protected dimension of freedom of expression under *Article 19 (1)(a)*. In *NALSA*, the court recognised that transgender persons have a fundamental right to express their self-identified gender, including through right to dress, conduct, and speech[58]. This expressive dimension of gender identity was further affirmed in *Navtej Singh Johar v Union of India*, where the court held that the right to expression necessarily encompasses the right to express one's sexual and gender identity, and that any legislative provision disfavouring such expression on the basis of the identity it communicates violates *Article 19(1)(a)*.

A restriction on a fundamental right under *Article 19(1)* must satisfy a structured proportionality analysis[59]: it must be prescribed by law, pursue a legitimate state objective, be rationally connected to that objective, and be no more than necessary in its operation. The definitional exclusion and deletion of *section 4(2)* constitute a restriction on expressive freedom that fails this analysis at multiple stages.

[56] NALSA, supra note 3, ¶ 124 ("[T]transgender persons have a right to decide their self-identified gender and…have to be treated consistently under Articles 14, 15, 16, 19 and 21.").
[57] NALSA, supra note 3, ¶¶ 113–122 (adopting a substantive equality approach requiring the state to recognise and accommodate difference rather than deploy difference as a basis for exclusion).
[58] Navtej, supra note 27, ¶¶ 139–145 (holding that the right to express one's gender identity, including through dress and conduct, falls within the protection of Article 19(1)(a)); NALSA, supra note 3, ¶ 74 (expressly recognising the right to express self-identified gender as a fundamental right).
[59] The proportionality test as applied to Article 19(1) restrictions requires (i) legality, (ii) legitimate aim, (iii) rational connection, and (iv) necessity. See Modern Dental College & Research Centre v. State of M.P., (2016) 7 SCC 353, ¶¶ 61–65 (India); K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1, ¶ 325 (India) (Aadhaar judgment, adopting structured proportionality).

6.3 Article 21: Right to Life, Personal Liberty, and Dignity

6.3.1 The Puttaswamy dimensions of Article 21

In Justice *K.S. Puttaswamy v Union of India*[60], a nine-judge constitutional bench unanimously held that right to privacy is a fundamental right under Article 21, encompassing informational privacy, decisional autonomy, and the right to control one's personal narrative including one's identity. The court held that the protection of individual autonomy and dignity from unwarranted state intrusion is a core constitutional value that cannot be abridged without satisfying rigorous proportionality requirements.

The mandatory reporting obligation under new section 7(1A)[61] of the 2026 Amendment, compelling medical institutions to furnish details of the persons who undergo gender affirming surgery to the District Magistrate and the medical board constitutes a direct incursion on informational privacy as recognised in *Puttaswamy*. Gender affirming surgery is among the most intimate exercises of bodily and personal autonomy. The state's systematic extraction of that information without renewed, over the individual's legal identity, subjects' intimate medical data to government surveillance in a manner disproportionate to any legitimate administrative objective.

6.3.2 Bodily integrity and Autonomy

The *NALSA* Court held that, with explicit and unreserved force, that requiring medical treatment or surgery as a precondition for the legal recognition of gender identity violates Article 21's guarantee of personal liberty and bodily integrity.[62] The 2026 Amendment's mandatory medical board mechanism does not, formally, require surgery. But requiring a person to submit to a medical board's assessment of their eligibility for a transgender certificate; an assessment that may encompass examination of bodily characteristics, hormonal profiles, or psychological evaluation conducted under institutional authority and translated into a recommendation that a Magistrate is required by statute to examine constitutes a comparable, and potentially equivalent, violation of bodily integrity.

The principle is at stake is the unconstitutional conditions doctrine; where legal recognition of gender identity is a constitutionally grounded right as held by *NALSA*, the state cannot

[60] Puttaswamy, supra note 39, ¶¶ 298–302 (Chandrachud, J.) (holding that privacy encompasses informational self-determination, decisional autonomy, and the right to control one's personal narrative including identity).
[61] Amendment Bill, 2026, cl. 5(b) (inserting § 7(1A), requiring medical institutions to furnish details of gender-affirming surgery to the District Magistrate and the authority).
[62] NALSA, supra note 3, ¶ 129(iii) ("No one shall be forced to undergo medical procedures, including SRS, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.").

condition access to that recognition on submission to medical scrutiny without engaging Article 21. The power asymmetry between an individual applicant and an officially constituted medical board headed by a Chief Medical Officer, operating within a framework of in which the District Magistrate must examine the board's recommendation before issuing a certificate, ensures that the recommendation is functionally determinative regardless of its formal advisory character. The practical effect of the mechanism is indistinguishable from a medical precondition and must, therefore, be subjected to the same constitutional analysis that *NALSA* applied to such preconditions, with the same result.

6.3.3 Dignity: The Constitutional Core

Dignity occupies an axial position in the Indian Constitution's fundamental right's scheme. It is not merely an additional dimension of Article 21 but its animating and irreducible core. The Navtej Court held unanimously that the constitution guarantees everyone the right to live with dignity on their own terms, and that "constitutional morality" requires the state to affirm, not diminish, the self-definitions by which individuals constitute their lives[63]. The *Puttaswamy* bench similarly affirmed that dignity is the foundational value upon which all the fundamental rights rest, and that a state which disregards it denudes human existence of its constitutional meaning.

The 2026 Amendment's constitutive logic is antithetical to this understanding. By treating transgender identity as a condition to be medically verified before it acquires legal reality but positioning a medical board between person's lived identity and the law's acknowledgment of it, the Amendment asserts that the individual's own knowledge of who they are is insufficient, and that state authorised medical expertise must supervene as the arbiter of legal personhood. This is not a procedural inconvenience; it is a constitutional failure of the first order.

Section VII: Policy Recommendations

The following recommendations are grounded in the constitutional analysis developed above and in the comparative material reviewed in Section VI. They are offered as actionable proposals addressed to the legislature, the judiciary, and the executive branch.

[63] Navtej, supra note 27, ¶¶ 469–478 (Chandrachud, J., concurring) ("Constitutional morality requires the state to affirm the self-definitions by which individuals constitute their lives…Dignity is the foundational value upon which all the fundamental rights rest.").

7.1 Legislative Recommendations

Restore Section 4(2)

The right to self-perceived gender identity must be reinstated as a core provision of the Act, consistent with the *NALSA* direction. This restoration does not preclude the legislature from creating procedural safeguards against misuse; it precludes the legislature from making medical certification a condition to the recognition of a constitutionally grounded right.

Revise Section 2(k)

The definition of "transgender person" should revert to the inclusive formulation of the 2019 Act, or at minimum excise the retrospective exclusion proviso. An inclusive definition does not prevent the legislature from designing targeted welfare measures for specific sub-groups; it ensures that the residual category of self-perceived transgender persons retails legal visibility under the Act.

Reform Section 6

Medical board recommendations should be advisory and non-binding. The District Magistrate should be required to consider, not to follow, the authority's assessment. Self-declaration supported by an affidavit modelled on Argentina's Gender Identity Law 2012 should be the default pathway to certification, with the medical board available as an optional resource for applicants who choose to engage it.

Delete Section 7(1A)

Mandatory medical institutions reporting of gender- affirming surgery details to the District Magistrate and the medical board constitutes a disproportionate violation of informational privacy under *Puttaswamy.* If any reporting obligation is to be retained for instance, for the purpose of public health data, it must be subject to explicit informed consent and must comply with the data minimisation principles of the applicable data protection framework.

Redraft Section 18 (g)-(h)

The 'outward presentation' criminalisation provisions should be reformulated to ensure they cannot be applied to consensual cultural practices within hijra communities, including initiation rituals and guru-chela mentorship that involve gender presentation guidance. The criminal offence should be defined by the coercive conduct of the perpetrator, not by the gender-related nature of what is allegedly 'imposed'.

VIII. Conclusion

The transition from 'criminal tribe' to 'regulated identity' is not a story of progress interrupted; it is a story of mutation. The instruments through which the Indian state has managed gender-nonconforming bodies across a century and a half have evolved through identifiable stages: explicit criminalisation under the Criminal Tribes Act 1871; the cosmetic decriminalisation of independence, shadowed by Habitual Offenders legislation and the continued operation of Section 377; the brief juridical rupture of *NALSA* and *Navtej*; the statutory compromise of the 2019 Act; and now the administrative entrenchment of the 2026 Amendment. At each stage, the instruments have changed registers, certificates, medical boards but the underlying logic has not: gender-nonconforming identity must be mediated, verified, and authorised by the state before it acquires legal existence.

The constitutional response required is correspondingly sophisticated. It is not sufficient to identify individual provisions that conflict with specific judgments, although the case for striking down the deleted Section 4(2), the new definition's retrospective proviso, and the mandatory medical board requirement on those grounds is strong. The deeper constitutional task for the courts, for Parliament, and for scholarship is to address and displace the foundational assumption that legal identity is a privilege to be conferred by the state rather than a right to be recognised by it. That assumption is what *NALSA* challenged in 2014, what *Puttaswamy* reinforced in 2017, and what the 2026 Amendment reverses in 2026.

The regulated identity paradigm is not a neutral administrative arrangement. It is a technique of governmentality: it does not prohibit being transgender, but it makes being legally transgender conditional on submission to the state's categories and the state's medical authority. The effect on those who cannot or will not submit to this conditioning who lack access to medical boards, who do not present 'legibly' to District Magistrates, who belong to communities with historically distrustful relationships with state institutions is not merely bureaucratic inconvenience. It is the effective erasure of legal personhood.