

CONSTITUTIONAL PARADOX: HOW INDIA'S TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 UNDERMINES THE RIGHTS IT PURPORTS TO PROTECT

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ABSTRACT

The Transgender Persons (Protection of Rights) Act, 2019 is India's first comprehensive transgender rights statute, yet its central operative provisions sit in direct tension with the constitutional principles the Act professes to advance, a tension the Transgender Persons (Protection of Rights) Amendment Act, 2026 has since deepened rather than resolved. This paper examines the implementation of the 2019 Act and its 2026 amendment against the doctrinal foundation the Supreme Court laid in National Legal Services Authority v. Union of India, which recognised the right to self-perceived gender identity as an incident of Articles 14, 19 and 21 of the Constitution. Tracing the historical and legislative trajectory of transgender recognition in India, from pre-colonial textual and social acceptance through colonial-era criminalisation to the 2014, 2018, 2019 and 2026 legislative interventions, the paper undertakes a section-by-section doctrinal analysis of Sections 4, 5, 6 and 7 of the 2019 Act, and of the mandatory medical board and narrowed definitional scheme the 2026 Amendment Act introduces, against the NALSA, Puttaswamy and Navtej Singh Johar line of authority. It argues that by conditioning legal recognition as male or female on proof of sex reassignment surgery and now on mandatory medical board verification, and by narrowing the statutory definition of transgender person to exclude categories NALSA expressly protected, the amended Act substitutes bureaucratic and medical gatekeeping for the unconditional right to self-identification the Supreme Court has already recognised as a facet of dignity, autonomy and privacy under Article 21, a substitution presently under constitutional challenge before the Supreme Court itself. The paper concludes that the amended Act requires substantial revision to bring statutory practice into conformity with binding constitutional precedent, and it proposes specific reforms directed at that end.

KEYWORDS: *Transgender Rights; Self-Identification; NALSA; Constitutional Paradox; Gender Recognition.*

1. INTRODUCTION

Transgender persons in India continue to occupy a position of acute social and economic marginalisation, a condition that drives disproportionate numbers into informal and criminalised occupations and exposes the community to systemic discrimination in employment, housing, healthcare and public life.¹ The Transgender Persons (Protection of Rights) Act, 2019² was enacted against this backdrop to extend statutory recognition and protection to the community, giving transgender persons subjected to discrimination on grounds of gender a concrete legal remedy for the first time. Its passage followed the Supreme

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¹ The Economic Status of Transgender People in India, UAB Institute for Human Rights Blog, available at <https://sites.uab.edu/humanrights/2022/10/12/the-economic-status-of-transgender-people-in-india/> (last visited July 2025).

² The Transgender Persons (Protection of Rights) Act, 2019, No. 40, Acts of Parliament, 2019 (India).

Court's landmark ruling in *National Legal Services Authority v. Union of India*³, in which the Court recognised the civil and political rights of transgender persons as inalienable incidents of inherent dignity and personal autonomy.

Exclusion from social, cultural, educational, political and economic life, compounded by systemic abuse and ridicule, remains a defining feature of transgender experience in India.⁴ Articles 14, 15, 16 and 21 of the Constitution extend to transgender persons the same guarantees of equality, non-discrimination and personal liberty enjoyed by every other citizen,⁵ and the enactment of the 2019 Act was widely understood as a watershed moment translating that constitutional guarantee into concrete statutory protection.

The term transgender denotes a broad category of persons whose gender identity or expression differs from the sex assigned to them at birth, encompassing indigenous categories such as hijra, aravani and kinnar alongside internationally recognised terms such as trans-man, trans-woman and non-binary.⁶ Gender identity, as the Supreme Court has recognised, denotes each person's deeply felt internal experience of gender, which may or may not correspond to the sex assigned at birth and need not depend on medical or surgical intervention.⁷ This distinction between gender identity and biological sex, and the statutory framework's treatment of that distinction, forms the analytical core of this paper.

This paper examines the implementation of the 2019 Act and assesses its conformity with Indian constitutional principle and international human rights norms. Although the legislation was framed as an instrument for the upliftment of the transgender community, whether it withstands scrutiny against the very constitutional jurisprudence it invokes for its legitimacy is the central question this paper addresses. There is a pressing need to close the gap between the rights transgender persons are constitutionally entitled to and the practical operation of the statute enacted to secure them, and this paper argues that the gap is not incidental but structural, arising from specific statutory choices that a targeted legislative amendment could correct.

³ *National Legal Services Authority v. Union of India*, AIR 2014 SC 1863.

⁴ Jennifer R. Arm, Sharon G. Horne & Heidi M. Levitt, Negotiating Connection to GLBT Experience: Family Members' Experience of Anti-GLBT Movements and Policies, 56 J. Couns. Psychol. 82 (2009).

⁵ Purnima Khanna, Constitutionalism and Human Rights: A Critical Analysis of the Rights of Transgender People in India, 9 *Lentera Hukum* 369, 369-370 (2022).

⁶ Terminology, Diversity, Equity, and Inclusion, available at <https://hr.uw.edu/diversity/transgender-resources/terminology/> (last visited July 3, 2025); Hijra, Kothi, Aravani: A Quick Guide to Transgender Terminology, available at <https://scroll.in/article/662023/hijra-kothi-aravani-a-quick-guide-to-transgender-terminology> (last visited July 3, 2025).

⁷ *National Legal Services Authority v. Union of India*, AIR 2014 SC 1863.

1.1 Objectives of the Study

- To trace the historical and socio-legal trajectory of transgender recognition in India, from pre-colonial acceptance through colonial-era criminalisation to contemporary statutory reform.
- To examine the constitutional foundation for transgender rights established in *NALSA*, *Puttaswamy* and *Navtej Singh Johar*.
- To analyse Sections 4, 5, 6 and 7 of the Transgender Persons (Protection of Rights) Act, 2019 against this constitutional foundation.
- To identify the specific respects in which the Act's certification and recognition procedure departs from the right to self-identification, and to propose reform capable of resolving that departure.

1.2 Research Methodology

This study adopts a doctrinal methodology, analysing the constitutional text, the 2019 Act and its 2020 Rules, and the relevant Supreme Court jurisprudence to assess statutory conformity with binding constitutional precedent. Primary sources include the Constitution of India, the Transgender Persons (Protection of Rights) Act, 2019, the Transgender Persons (Protection of Rights) Rules, 2020, and the judgments in *NALSA*, *Puttaswamy* and *Navtej Singh Johar*. Secondary literature, including peer-reviewed commentary on the 2019 Act's implementation, supplements this doctrinal core. The study is confined to Indian law and covers the period from the Act's introduction in 2019 through its implementation under the 2020 Rules.

1.3 Scope

The analysis extends through the Transgender Persons (Protection of Rights) Amendment Act, 2026 and the constitutional challenge currently pending before the Supreme Court against that amendment, covering statutory and judicial developments through August 2026.

2. HISTORICAL AND SOCIO-LEGAL CONTEXT OF TRANSGENDER RECOGNITION IN INDIA

Gender variance in India is not a contemporary phenomenon but one documented across millennia of textual, religious and social history, its terminology and social standing shifting considerably across successive periods.⁸

⁸ Sabrina P. Ramet, *Gender Reversals and Gender Cultures: Anthropological and Historical Perspectives* (Routledge 1996).

2.1 Pre-Colonial Recognition

Hijra communities feature prominently in ancient Indian textual tradition, most notably the Kama Shastra, composed between approximately 400 BCE and 200 CE, and in the epics Ramayana and Mahabharata.⁹ The community holds particular reverence for Lord Shiva in his Ardhanarishvara form, and from the early sixteenth to the late nineteenth century hijras occupied recognised positions within Mughal court administration, their presence sought at religious and ceremonial occasions on account of their social standing.¹⁰

2.2 Colonial Criminalisation and Its Legacy

British colonial administration reversed this position of social standing decisively. Colonial authorities imposed Victorian-era morality on Indian society, criminalising hijra communities through discriminatory legislation and displacing indigenous vocabulary that had accommodated non-binary and third-gender identity with pathologising colonial categories such as eunuch and hermaphrodite.¹¹ Sanskrit terminology was frequently mistranslated in the course of this colonial reordering, and Vedic literature devoid of any comparable moral code was retrospectively subjected to one, producing lasting misconceptions about pre-colonial Indian attitudes toward gender variance that persisted well beyond the colonial period itself.¹² The consequence was a legal and social order that criminalised transgender identity outright, denied transgender persons fundamental rights and opportunities, and delegitimised identities that Indian textual and religious tradition had long accommodated, effects whose institutional residue persists in Indian law and society today.

2.3 The Path to Legal Recognition

In 2014, the Supreme Court reversed this colonial legacy at the constitutional level, recognising transgender persons as a third gender and affirming their right to self-identification.¹³ The Transgender Persons (Protection of Rights) Act, 2019 followed as the legislative embodiment of that constitutional recognition, introducing statutory safeguards against violence and harassment and formal procedures for legal recognition, the specific content of which this paper examines in Section 5.

⁹ Serena Nanda, *Neither Man Nor Woman: The Hijras of India* (Wadsworth Publishing Company, 1990).

¹⁰ Amara Das Wilhelm, *Tritiya-Prakriti: People of the Third Sex: Understanding Homosexuality, Transgender Identity, and Intersex Conditions Through Hinduism* (Xlibris 2008).

¹¹ Tish Reynolds, *Governing Gender and Sexuality in Colonial India: The Hijra*, c. 1850-1900, 25 *Melb. Univ. Law Rev.* 45, 45-54 (2019).

¹² Rashima Prabhakar, *Journey of Transgender From Marginalism To Mainstream In India*, 7 *JILI* 35, 37-39 (2020).

¹³ *National Legal Services Authority v. Union of India*, AIR 2014 SC 1863.

2.4 Comparative Religious and Cultural Perspectives

The pre-colonial acceptance documented above was not confined to Hindu textual tradition alone. Comparable, though variably tolerant, treatment of gender variance appears across the religious traditions with which Indian civilisation has historically interacted, including allusions within Islamic, Buddhist and Confucian textual corpora to figures occupying positions outside a strict gender binary.¹⁴ This comparative religious context matters for the doctrinal argument advanced later in this paper: it establishes that the medicalised, certification-dependent model of gender recognition Sections 5 through 7 of the 2019 Act encode is not an inheritance of Indian legal or religious tradition but a specifically colonial and post-colonial administrative innovation, one the Supreme Court's constitutional jurisprudence has since found wanting.

The scholarly literature further documents that hijra communities retained recognised social and ceremonial functions well into the colonial period before the Criminal Tribes Act, 1871 formally criminalised them as a class, a designation that endured, in practical administrative effect, long after the statute's formal repeal in 1952.¹⁵ The institutional memory of that criminalisation, scholars argue, continued to shape police and administrative treatment of transgender persons for decades after independence, supplying essential context for why the 2014 recognition in *NALSA* was received as a genuinely transformative constitutional moment rather than a modest doctrinal clarification.

3. CONSTITUTIONAL FOUNDATIONS: NALSA AND THE RIGHT TO SELF-IDENTIFICATION

3.1 Constitutional Foundations

Article 14 guarantees legal equality to all citizens, and Article 15 prohibits discrimination on grounds including sex.¹⁶ Judicial interpretation has established beyond doubt that Article 15's prohibition on sex discrimination extends to discrimination grounded in sexual orientation and gender identity, notwithstanding the absence of express textual reference to either category.¹⁷ Article 19 guarantees freedom of speech and expression to all persons

¹⁴ Marianne Campbell, Jordan D. X. Hinton & Joel R. Anderson, A Systematic Review of the Relationship between Religion and Attitudes toward Transgender and Gender-Variant People, 20 *Int. J. Transgend.* 21 (2019).

¹⁵ Kimberly Tower, Third Gender and the Third World: Tracing Social and Legal Acceptance of the Transgender Community in Developing Countries, 7 *Asian L. Rev.* 27, 27-28 (2016).

¹⁶ Indian Const. art. 14; Indian Const. art. 15.

¹⁷ Shamayeta Bhattacharya, Debarchana Ghosh & Bandana Purkayastha, Transgender Persons (Protection of Rights) Act of India: An Analysis of Substantive Access to Rights of a Transgender Community, 56 *J. Hum. Rts. Prac.* 670, 676-680 (2022).

regardless of sexual orientation or gender identity, a guarantee that extends to self-expression through appearance, attire, name and conduct.¹⁸ Article 21 protects the right to life and personal liberty, judicially construed to encompass privacy, dignity and protection against discrimination for all persons irrespective of sexual orientation or gender identity.

3.2 NALSA v. Union of India: The Doctrinal Turning Point

The Supreme Court's ruling in *NALSA* supplies the doctrinal foundation against which the 2019 Act must be measured. The Court held that the right to life, dignity and autonomy under Article 21 encompasses the freedom to self-determine one's gender identity, and that gender identity recognition requires no medical intervention, including sex reassignment surgery, sterilisation or hormone therapy, because self-defined sexual orientation and gender identity are integral to personal autonomy and among the most basic facets of dignity and freedom.¹⁹ The Court further held that the right to assert one's gender identity through clothing, words and conduct falls within the freedom of expression guaranteed under Article 19(1)(a).²⁰

3.3 Puttaswamy and Navtej Singh Johar: Reinforcing the Doctrinal Frame

The Supreme Court's decision in *Justice K.S. Puttaswamy v. Union of India*²¹ established privacy as a fundamental right under Article 21, holding that an individual's sexual orientation and personal preferences fall squarely within its protective ambit. The Court's subsequent decision in *Navtej Singh Johar v. Union of India*²² struck down Section 377 of the Indian Penal Code insofar as it criminalised consensual sexual conduct between adults of the same sex, holding the provision's application to consensual same-sex conduct to be irrational and arbitrary. Read together, *NALSA*, *Puttaswamy* and *Navtej Singh Johar* establish a consistent constitutional principle: gender identity and sexual orientation are matters of self-determination protected by dignity, autonomy and privacy, and the state may not condition their legal recognition on medical proof or bureaucratic gatekeeping.

3.4 The Affirmative Dimension of NALSA

It bears emphasis that *NALSA* was not confined to a negative prohibition on discriminatory treatment. The Court went further, directing the Union and State

¹⁸ Angel H. Syiem & Priya Ranjan Kumar, Trans-Rights Are Human Rights: An Evaluation of Law on the Protection of Transgender Rights in India, 34 Indian J.L. & Just. 205, 210 (2022).

¹⁹ National Legal Services Authority v. Union of India, AIR 2014 SC 1863.

²⁰ Indian Const. art. 19, cl. 1(a).

²¹ Justice K.S. Puttaswamy (Retd.) v. Union of India, AIR 2017 SC 4161.

²² Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.

governments to treat transgender persons as a socially and educationally backward class entitled to reservation in public employment and educational admission, and to take affirmative steps to address the community's healthcare, sanitation and welfare needs. This affirmative dimension of the judgment matters for evaluating the 2019 Act's adequacy: a statute genuinely implementing *NALSA* would need to extend beyond anti-discrimination and self-identification alone to the reservation and welfare measures the Court specifically directed, a gap this paper returns to in its recommendations below.

4. FROM CRIMINALISATION TO RECOGNITION: THE LEGISLATIVE TRAJECTORY, 2014-2026

The legislative response to *NALSA* was neither swift nor uncontested. The Rights of Transgender Persons Bill, 2014, a private member's bill, was followed by the Transgender Persons (Protection of Rights) Bill, 2016, which drew sustained criticism from transgender rights advocates for departing from the self-identification standard *NALSA* had articulated.

4.1 The 2018 Bill and Its Lapse

A revised Bill, incorporating twenty-seven Cabinet-approved amendments, was introduced in the Lok Sabha on 17 December 2018. It defined a transgender person as one whose gender does not align with the sex assigned at birth, expressly including trans-men, trans-women, gender-queer persons and persons with socio-cultural identities such as kinnar, hijra, aravani and jogta, and it purported to permit self-declaration of gender identity irrespective of surgical or hormonal intervention. The 2018 Bill nonetheless retained criminal sanctions for begging, reduced penalties for offences of discrimination against transgender persons, and established a two-tier recognition system under which only persons without sex reassignment surgery could self-identify, a structure at odds with the unconditional self-identification standard *NALSA* required. The Bill passed the Lok Sabha but drew sustained opposition in the Rajya Sabha over its treatment of self-identification, the absence of reservation provisions, and the inadequacy of its penal provisions, and it lapsed with the dissolution of the Sixteenth Lok Sabha.

4.2 The Transgender Persons (Protection of Rights) Act, 2019

The Transgender Persons (Protection of Rights) Bill, 2019 was introduced in the Lok Sabha in July 2019 by the Minister for Social Justice and Empowerment, Thaawar Chand Gehlot, and enacted the same year.²³ The Act prohibits discrimination against transgender persons in employment, education, healthcare, access to public services and the right to reside, rent or hold property, and it renders such discrimination punishable by imprisonment of up

²³ Transgender Persons (Protection of Rights) Bill No. 169 of 2019.

to two years, a fine, or both.²⁴ It establishes the National Council for Transgender Persons to advise the Union government on policy affecting the community and to monitor the impact of laws and welfare measures. Despite these protective features, transgender rights advocates have criticised the Act as strict and, in key respects, discriminatory,²⁵ a criticism this paper substantiates through the doctrinal analysis in Section 5.

4.3 The Transgender Persons (Protection of Rights) Rules, 2020

The Ministry of Social Justice and Empowerment notified the Transgender Persons (Protection of Rights) Rules, 2020 to operationalise the Act, prescribing the procedure by which transgender persons may obtain a certificate of identity permitting them to record their gender on official documents.²⁶ Persons whose gender identity was already recorded with the government prior to the Act's commencement are exempted from reapplication. The Rules also provide for non-discrimination safeguards in welfare, education and healthcare, the establishment of a transgender welfare board, and a grievance redressal mechanism supervised by the National Council. The certification procedure the Rules prescribe, and its relationship to the constitutional standard *NALSA* established, is the specific subject of the analysis that follows.

4.4 The Definitional Problem

A further, related difficulty concerns the Act's definitional scope. Section 2(k) defines a transgender person by reference to a list of enumerated categories and a residual class of persons whose gender does not conform to the sex assigned at birth. Critics have argued that this enumerated approach, however inclusive it appears on its face, cannot capture the full diversity of gender expression and sexual characteristics the community encompasses, and risks excluding persons whose identity does not map neatly onto any listed category.²⁷ The definitional problem compounds the certification problem examined in Section 5: a person whose identity falls into definitional ambiguity faces not only the burden of certification but the anterior burden of persuading a District Magistrate that the applicant qualifies for recognition under the statute at all, a determination the self-identification standard in *NALSA* was specifically designed to remove from third-party discretion.

²⁴ S. Bhattacharya, The Transgender Persons (Protection of Rights) Act of India, available at <https://pmc.ncbi.nlm.nih.gov/articles/PMC9555747/>.

²⁵ Ankana Bal, The Transgender Persons (Protection of Rights) Act, 2019: A Critical Analysis, 6 *IJLMH* 59, 59-65 (2020).

²⁶ Ministry of Social Justice and Empowerment, Press Information Bureau, available at <https://www.pib.gov.in/newsite/erecontent.aspx?relid=217975> (last visited July 3, 2025).

²⁷ Arpit Jain, Taking Rights Seriously or Evincing State-Endorsed Chauvinism: A Critique of the Transgender Persons (Protection of Rights) Act, 2019, 4(6) *Indian J.L. & Legal Rsch.* 154 (2022).

4.5 The 2026 Amendment Act: Regression from Self-Identification

Rather than resolving the constitutional tension documented above, Parliament has since deepened it. The Transgender Persons (Protection of Rights) Amendment Act, 2026, introduced on 13 March 2026 and assented to by the President on 30 March 2026,²⁸ replaces self-perceived declaration with mandatory medical verification as the precondition for legal recognition. Under the amended scheme, a state or union territory level Medical Board must verify an applicant's claim before the District Magistrate may issue a certificate of identity, and the District Magistrate retains discretion to consult further medical experts before deciding the application, displacing the request-based issuance the 2019 Act had at least nominally provided.²⁹ The amendment further narrows the statutory definition of transgender person to socio-cultural identities such as kinnar, hijra and aravani together with intersex persons, removing trans-men, trans-women, genderqueer persons and other persons whose gender identity does not align with their sex assigned at birth from the Act's protective scope altogether, irrespective of whether they have undergone hormone therapy or gender reassignment surgery.³⁰

The 2026 Amendment also introduces new cognizable, non-bailable offences directed at persons who, by force, deceit or undue influence, cause another to present a transgender identity, including offences framed around causing grievous hurt through castration, surgery or hormone therapy, together with a mandatory hospital reporting requirement for gender-affirming surgery. The government has defended these measures as necessary to prevent misuse of welfare entitlements and to ensure that affirmative action reaches genuine beneficiaries.³¹ Medical associations and transgender rights organisations, including members of the statutory National Council for Transgender Persons who state they were not consulted during the Bill's drafting, have condemned the medical verification requirement as scientifically unsound and as a direct

²⁸ The Transgender Persons (Protection of Rights) Amendment Act, 2026, Bill No. 79 of 2026 (India).

²⁹ Explained: The Transgender Persons (Protection of Rights) Amendment Bill, 2026 and the Shift from Self-Identification, *The Indian Express* (Feb. 15, 2026), available at <https://indianexpress.com/article/explained/explained-law/transgender-bill-2026-self-identification-nalsa-explained-10584573/>.

³⁰ The Transgender Persons (Protection of Rights) Amendment Bill, 2026, PRS Legislative Research, available at <https://prsindia.org/billtrack/the-transgender-persons-protection-of-rights-amendment-bill-2026>.

³¹ Row over Transgender Amendment Bill Explained: Why Are Some Opposed to It?, *Hindustan Times* (Feb. 20, 2026), available at <https://www.hindustantimes.com/india-news/row-over-transgender-amendment-bill-explained-why-are-some-opposed-to-it-101773817693207.html>.

pathologisation of transgender identity inconsistent with contemporary standards of transgender healthcare.³²

The Bill was passed by voice vote in the Lok Sabha on 24 March 2026 amid an opposition walkout, and the Supreme Court, acting on nine petitions filed under Article 32 challenging the amendment's constitutional validity, issued notice to the Union and State governments on 4 May 2026 while declining, for the present, to stay its operation.³³

Feature	2019 Act (Original Scheme)	2026 Amendment (Current Scheme)
Basis for recognition	Self-perceived declaration under Section 4, formalised via District Magistrate certificate.	Mandatory Medical Board verification precedes District Magistrate certification.
Definitional scope	Broad residual category covering any person whose gender does not align with sex assigned at birth.	Narrowed to enumerated socio-cultural identities and intersex persons; trans-men, trans-women and genderqueer persons excluded.
Binary recognition	Requires proof of sex reassignment surgery under Section 7.	Requires Medical Board verification; hospitals must report gender-affirming surgery to the District Magistrate.
Penal framework	Section 18 offences, six months to two years' imprisonment.	Adds cognizable, non-bailable offences for coerced identity assertion, alongside Section 18.

Table 1: The 2019 Act and the 2026 Amendment Compared. Source: Authors' compilation based on the Transgender Persons (Protection of Rights) Act, 2019 and the Transgender Persons (Protection of Rights) Amendment Act, 2026.

5. CRITICAL ANALYSIS OF SECTIONS 4, 5, 6 AND 7 OF THE 2019 ACT

Sections 4, 5, 6 and 7 of the 2019 Act govern the recognition of transgender identity and constitute the Act's most consequential, and most constitutionally contested, provisions.³⁴

³² NCTP Members Oppose Transgender Act Amendments, Say Not Consulted, The Hindu (Mar. 5, 2026), available at <https://www.thehindu.com/news/national/nctp-members-oppose-transgender-act-amendments-say-not-consulted/article70753207.ece>.

³³ Supreme Court Refuses to Stay Transgender Amendment Act, Bar & Bench (May 4, 2026), available at <https://www.barandbench.com/news/litigation/supreme-court-refuses-to-stay-transgender-amendment-act>.

³⁴ The Transgender Persons (Protection of Rights) Act, 2019, ss. 4-7, No. 40, Acts of Parliament, 2019 (India).

Section 4 confers upon a transgender person the right to be recognised as such under the Act and the right to a self-perceived gender identity. Section 5 requires a transgender person to apply to the District Magistrate for a certificate of identity, in the prescribed form and accompanied by prescribed documents, with a parent or guardian required to apply on behalf of a minor. Section 6 obliges the District Magistrate to issue the certificate following prescribed procedure, records the recognised gender in official and legal documents, and treats the certificate as proof of recognition as a transgender person. Section 7 permits a person to obtain recognition as male or female only upon proof of sex reassignment surgery, certified by the Chief Medical Officer of the district concerned.

5.1 The Conflict with the NALSA Standard

This statutory scheme directly conflicts with the constitutional standard *NALSA* established. By making recognition under Section 4 contingent on a certification process administered by the District Magistrate under Sections 5 and 6, rather than on the individual's own declared identity, the Act substitutes an administrative gatekeeping mechanism for the unconditional self-identification the Supreme Court held to be constitutionally required. The Court's holding in *NALSA* was unambiguous on this point: gender identity recognition does not require medical procedures such as sex reassignment surgery, sterilisation or hormone therapy, because self-defined gender identity is integral to personal autonomy and dignity, and a person's identity rests on gender rather than medical or surgical status.³⁵ A statutory scheme that routes recognition through District Magistrate certification, however administratively modest that requirement may appear, reintroduces precisely the third-party gatekeeping the Court's holding was designed to eliminate.

5.2 Section 7 and the Surgical Requirement

Section 7's requirement of sex reassignment surgery for recognition as male or female presents the sharpest conflict with binding precedent. *NALSA* held that the right to self-identify one's gender is an incident of privacy, liberty and autonomy under Article 21, and that this right may be asserted through clothing, words and conduct under Article 19(1)(a) without recourse to medical or surgical intervention. Section 7 inverts this holding by making binary gender recognition, as opposed to recognition merely as transgender under Section 4, conditional on surgical proof, thereby creating a two-tier recognition regime in which only surgically transitioned persons may obtain full legal recognition as male or female. International human rights guidance reinforces the constitutional objection: transgender and intersex persons are entitled to assert gender identity without medical or psychiatric documentation, including proof

³⁵ Bret Boyce, *Gender Identity & Sexuality under the Constitution*, 18 J. Gender, Race & Just. 1, 1-15 (2016).

of hormone therapy or genital reassignment surgery, in order for the right to gender identity to be genuinely realised.³⁶

5.3 Article 21 and the Limits of Administrative Recognition

Article 21 guarantees every person the right to privacy and self-determination irrespective of gender or the sex recorded at birth.³⁷ A certification regime that channels recognition through a District Magistrate, and binary recognition through a Chief Medical Officer's surgical certification, subjects a constitutionally guaranteed right to administrative and medical discretion the Constitution does not contemplate. The paradox this creates is direct: the Act's own preamble and Section 4 invoke the language of self-perceived identity that *NALSA* articulated, while Sections 5 through 7 operationalise that language through a procedure inconsistent with it. A statute cannot simultaneously recognise a constitutional right and condition its exercise on a mechanism that right was held to exclude.

5.4 The Penal Dimension: Section 18 and Its Inadequacy

The Act's penal provisions compound the recognition problem examined above. Section 18 punishes offences against transgender persons, including compelled begging, denial of access to public places, and physical, sexual, verbal, emotional or economic abuse, with imprisonment of between six months and two years together with a fine. Critics have observed that this penal structure prescribes materially lighter sentences than analogous offences against cisgender victims attract under the Indian Penal Code, creating a two-tier criminal justice response that itself offends the equal protection guarantee of Article 14.³⁸ A statute whose stated purpose is to protect a historically persecuted community from violence cannot coherently prescribe a lesser criminal sanction for violence directed at members of that community than the general law provides for comparable violence against others, and this disparity forms an independent, if narrower, ground for the constitutional critique this paper advances against the Act as a whole.

6. THE CONSTITUTIONAL PARADOX: DISCUSSION

The conflict documented in Section 5 is not a drafting oversight correctable through interpretation; it reflects a legislative choice to retain administrative and medical gatekeeping notwithstanding *NALSA*'s clear holding to the contrary,

³⁶ Rebekah Thomas et al., Ensuring an Inclusive Global Health Agenda for Transgender People, 95 Bull. World Health Organ. 154 (2017); Apurva Kumar Pandya & Alex Redcay, Access to Health Services: Barriers Faced by the Transgender Population in India, 25 J. Gay & Lesbian Ment. Health 132 (2021).

³⁷ Indian Const. art. 21.

³⁸ Ankana Bal, The Transgender Persons (Protection of Rights) Act, 2019: A Critical Analysis, 6 IJLMH 59, 59-65 (2020).

and it is this choice that constitutes the constitutional paradox this paper's title identifies. The Act's protective architecture, its anti-discrimination provisions, its penal sanctions, its National Council and welfare board, operates alongside a recognition procedure that the Supreme Court's own precedent renders constitutionally suspect.

6.1 The Bureaucratic Displacement of a Constitutional Right

The displacement of self-identification by District Magistrate certification is significant beyond its immediate procedural burden. It relocates the determination of a constitutionally protected identity from the individual, where *NALSA* placed it, to a state functionary, reproducing in administrative form the third-party gatekeeping that the colonial legal order historically imposed on gender-variant identity in India, a lineage traced in Section 2 above. The historical continuity is not merely rhetorical: a certification requirement administered by a District Magistrate, whatever its procedural safeguards, structurally repeats the pattern of externally validated identity that colonial law first imposed and that *NALSA* was understood to have dismantled.

6.2 The Two-Tier Recognition Problem

Section 7's surgical requirement for binary recognition produces a further structural difficulty: it creates a category of persons who are recognised as transgender under Section 4 but who cannot obtain recognition as male or female without undergoing a medical procedure they may not want, cannot afford, or may consider clinically unnecessary to their own sense of identity. This two-tier structure effectively makes full legal recognition, as opposed to recognition merely as a third gender, conditional on a medical intervention the Constitution does not require, reproducing within the statute itself the very hierarchy between medically verified and self-identified gender that *NALSA* rejected.

6.3 Comparative and International Context

India's statutory approach compares unfavourably with jurisdictions that have implemented unconditional self-identification regimes following comparable constitutional recognition of gender identity rights, and with the Yogyakarta Principles, which call for legal recognition of gender identity without medical prerequisites.³⁹ The 2019 Act's retention of certification and surgical gatekeeping accordingly represents not merely a domestic constitutional anomaly but a departure from the international human rights standard India's own Supreme Court invoked in reaching its decision in *NALSA*.

³⁹ Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (2007).

6.4 The Cost of Non-Compliance

The practical consequence of the gap between *NALSA* and the 2019 Act's operative provisions falls disproportionately on transgender persons least able to absorb it: those without the documentary resources, literacy or administrative familiarity to navigate a District Magistrate's certification process, and those unable to afford, or unwilling to undergo, the surgical procedure Section 7 demands for binary recognition. Empirical studies of the Act's implementation report continuing barriers to healthcare access among transgender persons attributable in part to this certification burden, since institutions frequently condition service delivery on production of the very documents the Act's own procedure makes difficult to obtain.⁴⁰ The constitutional paradox this paper identifies is accordingly not merely doctrinal; it translates directly into continuing material harm for the community the Act was enacted to protect, which is precisely the outcome *NALSA*'s self-identification standard was designed to prevent.

6.5 The 2026 Amendment as Constitutional Regression

If the 2019 Act's certification and surgical requirements represented a partial and inconsistent implementation of *NALSA*, the 2026 Amendment represents an affirmative retreat from it. Mandatory medical board verification does not merely retain third-party gatekeeping over gender identity; it formalises and expands it, converting a District Magistrate's ministerial certification function into a medically supervised adjudication of the applicant's claimed identity, precisely the model of state-validated identity *NALSA* held the Constitution does not permit. The narrowing of the statutory definition compounds the constitutional difficulty: by confining recognition to enumerated socio-cultural categories and intersex persons, the amendment withdraws statutory protection from trans-men, trans-women and genderqueer persons altogether, a category of exclusion that cannot be reconciled with *NALSA*'s holding that the right to self-perceived gender identity belongs to every person regardless of the specific vocabulary in which that identity is expressed.

That the amendment is presently before the Supreme Court on nine consolidated petitions, and that the Court has thus far declined to stay its operation while the challenge proceeds, means the constitutional paradox this paper identifies is no longer merely a matter for academic critique but a live question the judiciary will itself have to resolve. The doctrinal analysis in Sections 5 and 6 above supplies, in substance, the argument the petitioners have placed before the Court: that legislative gatekeeping of gender identity, however incrementally introduced, cannot be reconciled with a constitutional right the Supreme Court has already held to inhere in self-perception alone.

⁴⁰ Apurva Kumar Pandya & Alex Redcay, Access to Health Services: Barriers Faced by the Transgender Population in India, 25 *J. Gay & Lesbian Ment. Health* 132 (2021).

Comparative practice reinforces the objection this paper raises. Jurisdictions that have implemented unconditional self-identification regimes following judicial recognition of gender identity rights comparable to *NALSA* have generally moved away from, rather than toward, medical or administrative pre-verification of gender identity, on the reasoning that a right located in personal autonomy cannot coherently be made contingent on a third party's clinical assessment of its authenticity. India's 2026 trajectory runs counter to this comparative direction, reintroducing medical gatekeeping at precisely the moment when the constitutional case against it, both in India's own jurisprudence and in comparative practice, had grown strongest.

7. TOWARDS REFORM: RECOMMENDATIONS

The following reforms would bring the Act, as amended in 2026, into conformity with the constitutional standard the Supreme Court has already articulated.

- Repeal the mandatory Medical Board verification requirement the 2026 Amendment introduces, restoring recognition as a transgender person under Section 4 to a matter of self-declaration alone, without District Magistrate or medical board adjudication as a precondition to the exercise of the right.
- Restore the definitional scope the 2026 Amendment narrowed, reinstating trans-men, trans-women, genderqueer persons and other persons whose gender identity does not align with their sex assigned at birth within the Act's protective ambit, consistent with *NALSA*'s holding that the right belongs to every person regardless of the specific identity asserted.
- Repeal the surgical requirement in Section 7, permitting recognition as male or female on the basis of self-declaration alone, consistent with *NALSA*'s holding that gender identity recognition requires no medical or surgical intervention.
- Amend the penal provisions of Section 18, and the new offences the 2026 Amendment introduces, to ensure parity with comparable offences against cisgender victims under the general criminal law, and to ensure that provisions aimed at preventing coerced identity assertion are not drafted so broadly as to criminalise consensual gender-affirming medical care.
- Strengthen the National Council for Transgender Persons' consultative role in any future amendment to the Act, given the Council's own members' public objection to having been excluded from the 2026 Amendment's drafting process, and require pre-legislative consultation with the community the Act is intended to protect.

- Extend statutory reservation in education and public employment, consistent with the affirmative measures *NALSA* directed the Union and State governments to consider, to address the substantive economic marginalisation documented in Section 1 of this paper.

8. CONCLUSION

The Transgender Persons (Protection of Rights) Act, 2019, and its 2026 Amendment, mark consequential legislative interventions in India's recognition of transgender rights, yet neither conforms to the constitutional principles the Supreme Court articulated in *NALSA v. Union of India*. The Act's most consequential provisions, Sections 4 through 7, and the mandatory medical board verification and narrowed definitional scheme the 2026 Amendment introduces, depart from the Court's holding that self-identification is the constitutionally required basis for gender recognition, substituting administrative and medical gatekeeping for the personal choice Article 21 protects. This gatekeeping offends the guarantees of privacy, dignity and autonomy the Court has located in that Article, and it is presently the subject of a live constitutional challenge before the Supreme Court itself, one this paper's analysis suggests should succeed.

The 2019 Act nonetheless represents a genuine, if incomplete, step toward legislative recognition of transgender rights, and it supplies institutional mechanisms, the National Council and the transgender welfare boards, capable of continuing engagement between the state and the transgender community if freed from the medical and administrative gatekeeping this paper has documented. For the law to fully discharge its protective purpose, both the 2019 Act's original recognition procedure and the 2026 Amendment's medical verification scheme require substantial revision to remove the specific provisions that conflict with binding constitutional precedent.

The path forward requires legislative change that genuinely honours the self-identification principle, removes discriminatory preconditions to recognition, and creates a legal environment consistent with the autonomy and dignity of every transgender person. Only through such reform, whether achieved through the pending litigation or through subsequent legislative correction, can the law on transgender rights in India close the gap between constitutional aspiration and statutory practice that this paper has identified.