

Third Gender: A Socio-Legal Study

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Abstract

India's legal treatment of gender-variant persons has travelled from colonial criminalisation to constitutional recognition, and now to a contested statutory retrenchment. In *National Legal Services Authority v Union of India* (2014), the Supreme Court recognised transgender persons as a "third gender" and grounded self-identification of gender in Articles 14, 15, 16, 19 and 21. Parliament codified a version of that recognition in the Transgender Persons (Protection of Rights) Act, 2019. In March 2026, however, the Transgender Persons (Protection of Rights) Amendment Act, 2026 deleted the statutory right to self-perceived gender identity, narrowed the definition of a transgender person, and introduced medical-board scrutiny for certification. Its validity is now pending before a three-judge bench of the Supreme Court.

This paper combines doctrinal analysis with socio-legal inquiry. It reads the constitutional and statutory texts alongside empirical evidence on education, employment, health, housing and violence, and alongside comparative models from South Asia and beyond. It argues that Indian law has consistently offered recognition without redistribution: identity has been declared, but the institutions needed to make it liveable have lagged. The *Jane Kaushik* judgment (2025) exposed this implementation deficit as "omissive discrimination". The 2026 Amendment risks converting that deficit into a doctrinal reversal by re-medicalising identity. The paper concludes with reform proposals centred on self-determination, horizontal reservation, enforceable reasonable accommodation and accountable grievance machinery.

Keywords: third gender; transgender persons; hijra; NALSA; self-identification; Transgender Persons Act 2019; 2026 Amendment; substantive equality; socio-legal study.

1. Introduction

Few groups in India illustrate the distance between legal recognition and social reality as sharply as the transgender community. The Census of 2011 counted 4,87,803 persons under the sex category "Other", with a literacy rate of 56.07 per cent, against 74.04 per cent for all persons; Uttar Pradesh alone accounted for 1,37,465 of them ([MoSJE, Census 2011 data](#)). The Union Government itself has cautioned that this category captured anyone who chose "Other", not transgender persons as such, so the true figure is unknown ([Rajya Sabha reply, 2019](#)). Invisibility in data mirrors invisibility in law, labour markets and public life.

The legal story is one of sharp turns. A community that enjoyed a recognised, if ambivalent, social place in pre-colonial South Asia was declared "criminal" by colonial legislation in 1871. After Independence it was decriminalised in name but excluded in fact. In 2014 the Supreme Court recognised a "third gender" and the right to self-identify. Parliament followed with the Transgender Persons (Protection of Rights) Act, 2019 ("the 2019 Act"). In October 2025 the Court in *Jane Kaushik v Union of India* found the Union and States guilty of "omissive discrimination" for failing to implement that Act. Five months later, Parliament enacted the Transgender Persons (Protection of Rights) Amendment Act, 2026 ("the 2026 Amendment"), which removed the statutory right to self-perceived gender identity and introduced medical-board scrutiny. That amendment is now under constitutional challenge.

1.1 Research problem

The central problem is the persistent gap between the rights the law declares and the lives transgender persons lead. Legal recognition has expanded on paper, yet exclusion from family, school, work, health care and housing continues. The 2026 Amendment adds a second problem: whether the State may retreat from a constitutional understanding of gender identity that the Supreme Court located in fundamental rights.

1.2 Objectives

1. To trace the social and historical position of third-gender communities in India, from pre-colonial roles to colonial criminalisation.
2. To analyse the constitutional jurisprudence on gender identity, from *NALSA* (2014) to *Jane Kaushik* (2025).
3. To evaluate the 2019 Act, the Transgender Persons (Protection of Rights) Rules, 2020, and the 2026 Amendment.
4. To assess the socio-economic conditions of transgender persons against the promises of law.
5. To draw lessons from comparative jurisdictions and propose reforms.

1.3 Research questions

1. How far has constitutional recognition of the third gender translated into substantive equality in education, employment, health and safety?
2. Does the statutory framework, as amended in 2026, conform to the constitutional standards laid down in *NALSA*, *Puttaswamy* and *Navtej Singh Johar*?
3. What institutional and legal reforms would close the gap between recognition and lived reality?

1.4 Hypothesis

The paper tests the hypothesis that Indian law has delivered recognition without redistribution. Formal acknowledgement of identity has not been matched by enforceable entitlements, accountable institutions or adequate public spending. Where that gap persists, recognition itself becomes vulnerable to legislative reversal.

1.5 Methodology

The study is doctrinal and socio-legal. The doctrinal component analyses the Constitution, the 2019 Act, the 2020 Rules, the 2026 Amendment, and leading Supreme Court and High Court decisions. The socio-legal component draws on secondary empirical sources: the Census of 2011, the National Human Rights Commission's study on transgender persons, government scheme data, and reported litigation. A comparative component examines legal gender recognition in Nepal, Pakistan, Bangladesh, Germany, Argentina and Malta. The study relies on published sources and does not include primary fieldwork; its empirical claims are therefore limited to what those sources report.

1.6 Terminology

This paper uses "transgender persons" as the umbrella term adopted by Indian statute, and "third gender" where referring to the category recognised in *NALSA*. Community-specific names such as *hijra*, *kinnar*, *aravani* and *jogta* are used when discussing those identities. The paper respects self-identification throughout, as the Constitution, per *NALSA*, requires.

2. Conceptual Framework

The law's treatment of the third gender depends on how it defines sex, gender and identity. Confusion between these concepts has shaped both judicial reasoning and legislative drafting in India.

2.1 Sex, gender and gender identity

Sex refers to biological characteristics: chromosomes, gonads, hormones and anatomy. *Gender* refers to the social roles, expectations and expressions a society attaches to being a man or a woman. *Gender identity* is a person's deeply felt internal sense of their own gender, which may or may not correspond to the sex assigned at

birth. The Yogyakarta Principles (2006), which the Supreme Court relied on in *NALSA*, define gender identity in these terms and treat it as integral to personality and dignity ([Yogyakarta Principles](#)).

Gender identity is distinct from *sexual orientation*, which concerns the persons to whom one is attracted. *NALSA* expressly separated the two, and the 2019 Act was confined to gender identity. The distinction matters because the 2026 Amendment now declares that persons with "different sexual orientations and self-perceived sexual identities" are not, and never were, within the statutory definition ([PRS](#)).

2.2 Transgender and intersex persons

Transgender is an umbrella term for persons whose gender identity differs from the sex assigned at birth. It covers trans women, trans men, non-binary and genderqueer persons, and culturally specific identities. *Intersex* persons, or persons with differences of sex development, are born with sex characteristics that do not fit typical definitions of male or female bodies. Intersex is a matter of bodily variation, not identity; an intersex person may identify as a man, a woman or neither.

Medical classification has moved in the same direction as constitutional law. The World Health Organization's ICD-11, in force since January 2022, removed gender incongruence from the chapter on mental and behavioural disorders and placed it under conditions related to sexual health. Identity is thus no longer treated as pathology, a shift that bears directly on any law requiring medical certification.

2.3 Indigenous third-gender identities

South Asia has long-standing socio-cultural identities that do not map neatly onto Western categories. The best known are the *hijra* communities of North India, organised through the *guru-chela* (teacher-disciple) relationship and the *gharana* (house) system. Regional identities include *kinnar* (North India), *aravani* or *thirunangai* (Tamil Nadu), *jogta* and *jogappa* (Maharashtra and Karnataka), and *shiv-shakti* (Andhra Pradesh). These communities have their own kinship structures, rituals, economies and dispute-resolution norms. For many members, the community replaced a birth family that rejected them.

2.4 "Third gender" as a legal category

The phrase "third gender" does two different kinds of work. As a description of *hijra* and allied communities, it captures an identity that is neither man nor woman. As a legal category, it risks a problem: trans women who identify as women, and trans men who identify as men, do not see themselves as a third gender. *NALSA* recognised both, upholding the right of transgender persons to identify as male, female or third gender. The 2019 Act preserved this breadth by listing trans men, trans women, genderqueer persons, intersex persons and socio-cultural identities.

The 2026 Amendment reverses that breadth. It retains socio-cultural identities and persons with congenital sex-characteristic variations, but removes trans men, trans women and genderqueer persons from the definition ([PRS](#)). The legal category of "third gender" thus narrows towards visible, community-based identities, while those who transition individually lose statutory recognition. This tension between a culturally rooted third category and an individual right of self-determination runs through the rest of this paper.

3. Historical and Social Context

The present marginalisation of third-gender communities is not timeless. It was produced, in large part, by colonial law and sustained by post-colonial neglect.

3.1 Pre-colonial presence

Gender variance appears throughout South Asian religious and literary traditions. The image of *Ardhanarishvara*, the deity who is half Shiva and half Parvati, unites male and female in one form. The *Mahabharata* includes Shikhandi, born female and later living as male, and Arjuna's year as Brihannala, a dance teacher in feminine guise. In Tamil Nadu, the Koovagam festival commemorates Aravan, whose story *aravani* communities claim as their own. Classical texts on sexuality also refer to a *tritiya prakriti*, or "third nature".

These references do not prove equality, but they show that gender diversity had cultural vocabulary and social space.

Under the Mughals, *khwaja saras* served in imperial households as guards, administrators and confidants, and some held positions of trust and property. *Hijra* communities developed ritual roles, most visibly *badhai*, the conferral of blessings at births and weddings. That role was socially ambivalent. It brought both reverence and fear, and it rested on income from public performance rather than secure livelihoods.

3.2 Colonial criminalisation

The decisive rupture came with British rule. Part II of the Criminal Tribes Act, 1871 required the registration of "eunuchs" in the North-Western Provinces who were "reasonably suspected" of kidnapping or castrating children or of offences under Section 377 of the Indian Penal Code. It also penalised registered persons who appeared in public in women's clothing or performed for gain. Jessica Hinchy's archival history shows that colonial officials adopted this law with the explicit aim of bringing about the community's gradual extinction ([Hinchy 2019](#)). She also shows that elite Indian attitudes, not only imported British norms, drove the campaign.

The statute converted a social identity into presumptive criminality. Registration, surveillance and police discretion became the ordinary experience of *hijra* life. Section 377, which criminalised "carnal intercourse against the order of nature", added another layer, since it was readily used to harass gender-variant persons regardless of conduct.

3.3 Post-independence exclusion

The Criminal Tribes Act was repealed in 1952, but its logic survived. Colonial-era statutes such as the Hyderabad law later known as the Telangana Eunuchs Act, 1329 Fasli (1919) remained on the books. It required "eunuchs" to register and treated them as suspected offenders. The Telangana High Court struck it down only in 2023 in *Vyjayanti Vasanta Mogli v State of Telangana*, holding that it violated Articles 14, 15 and 21 and noting its kinship with Part II of the 1871 Act ([CLPR](#)). Police laws in other States, such as Section 36A of the Karnataka Police Act, were used for similar surveillance.

Outside criminal law, the State simply did not see transgender persons. Official forms offered two sexes. Schools, hospitals, hostels, prisons and public toilets were organised on a binary basis. The Census recorded "Other" for the first time only in 2011. In this vacuum, many transgender persons, rejected by birth families, found shelter in *hijra* households. Those households offered kinship and protection but also rigid hierarchies, and their economy relied on *badhai*, *mangti* (alms-seeking) and sex work.

3.4 The social mechanics of exclusion

Exclusion typically begins in the family. Children who express gender variance face punishment, forced "correction" and, often, expulsion. The National Human Rights Commission's study, based on a survey of 900 transgender persons in Delhi and Uttar Pradesh, found that 99 per cent had experienced social rejection on more than one occasion, and that discrimination began in childhood ([APF summary of NHRC study](#); [PARI library](#)). Rejection at home leads to school drop-out, which limits employment, which pushes many towards begging and sex work, which in turn exposes them to violence and police harassment. Section 7 returns to this cycle with current evidence.

4. Constitutional Jurisprudence

The Supreme Court, not Parliament, first gave transgender persons legal personhood in their own gender. Its jurisprudence has moved through three stages: recognition (2014), autonomy (2017–2018) and accountability (2025). The 2026 Amendment now tests whether that jurisprudence binds the legislature.

Year	Decision or measure	Core holding or change
2014	<i>NALSA v Union of India</i> (2014) 5 SCC 438	Third gender recognised; self-identification of gender protected

Year	Decision or measure	Core holding or change
		by Articles 14, 15, 16, 19 and 21
2017	<i>K S Puttaswamy v Union of India</i> (2017) 10 SCC 1	Privacy, including decisional autonomy and identity, is a fundamental right
2018	<i>Navtej Singh Johar v Union of India</i> (2018) 10 SCC 1	Section 377 IPC read down for consensual adult intimacy; constitutional morality over social morality
2019	<i>Arun Kumar v Inspector General of Registration</i> (Madras HC)	A trans woman is a "bride" under the Hindu Marriage Act, 1955
2019	Transgender Persons (Protection of Rights) Act, 2019	Statutory recognition, certification by District Magistrate, anti-discrimination duties
2023	<i>Supriyo Chakraborty v Union of India</i> 2023 INSC 920	No fundamental right to marry, but transgender persons in heterosexual relationships may marry under existing law
2023	<i>Vyjayanti Vasanta Mogli v State of Telangana</i> (Telangana HC)	Telangana Eunuchs Act struck down under Articles 14, 15 and 21
2025	<i>Jane Kaushik v Union of India</i> (17 October 2025)	"Omissive discrimination" by the State; implied duty of reasonable accommodation on public and private actors
2026	Transgender Persons (Protection of Rights) Amendment Act, 2026	Self-perceived identity deleted; definition narrowed; medical-board scrutiny; challenge pending

4.1 Recognition: *NALSA* (2014)

In *National Legal Services Authority v Union of India*, a two-judge bench (K S Radhakrishnan and A K Sikri JJ) held that *hijras* and eunuchs must be treated as a "third gender" for the purpose of safeguarding their rights. More broadly, it held that every person has the right to decide their self-identified gender as male, female or third gender ([CLPR TransLaw](#)). The judgment rested on four constitutional anchors:

- **Article 14:** "Any person" includes transgender persons, who are entitled to equal protection of the laws.
- **Articles 15 and 16:** "Sex" includes gender identity, so discrimination on that ground is prohibited.
- **Article 19(1)(a):** Expression of one's gender through dress, speech and conduct is protected expression.
- **Article 21:** Gender identity lies at the core of personal autonomy and dignity.

The Court held that insisting on sex reassignment surgery as a condition of recognition was immoral and illegal. It directed governments to treat transgender persons as socially and educationally backward classes for reservation in education and public employment, to provide separate public toilets and health services, and to run awareness campaigns. Two features of the judgment shaped later debates. First, it adopted a psychological test of identity rather than a biological one. Second, its reservation direction placed transgender persons within the Other Backward Classes, ignoring that many are Dalit or Adivasi; this gave rise to the later demand for horizontal reservation.

4.2 Autonomy: *Puttaswamy* and *Navtej Singh Johar*

In *K S Puttaswamy v Union of India* (2017), a nine-judge bench held that privacy is a fundamental right under Article 21. The plurality located bodily integrity, decisional autonomy and the freedom to express one's identity within that right. This supplied a deeper foundation for *NALSA*: if privacy protects the choices that define a person, then the State cannot compel proof of one's gender through bodily examination.

In *Navtej Singh Johar v Union of India* (2018), a five-judge bench read down Section 377 IPC to exclude consensual sexual conduct between adults. The Court placed constitutional morality above popular morality and described the Constitution as transformative. Although the case concerned sexual orientation, it removed a tool historically used against gender-variant persons and affirmed that minorities need not wait for majoritarian acceptance before claiming rights. With the Bharatiya Nyaya Sanhita, 2023 replacing the IPC from 1 July 2024, Section 377 has no direct successor, though critics note the resulting gap in protection against non-consensual sexual violence against men and transgender persons.

4.3 Family and personal law

High Courts carried *NALSA* into personal law. In *Arun Kumar v Inspector General of Registration* (2019), the Madras High Court held that a trans woman is a "bride" for the purposes of the Hindu Marriage Act, 1955, and directed the State to ban sex-normalising surgeries on intersex infants. In *S Sushma v Commissioner of Police* (2021), the same Court issued guidelines against "conversion therapy" and for police sensitisation.

In *Supriyo Chakraborty v Union of India* (2023), a Constitution Bench declined to recognise a fundamental right to marry or to read same-sex marriage into the Special Marriage Act, 1954. It nonetheless accepted that transgender persons in heterosexual relationships may marry under existing statutory and personal law. The decision left questions of adoption, succession and partnership largely to the legislature.

4.4 Accountability: *Jane Kaushik* (2025)

Jane Kaushik v Union of India, decided on 17 October 2025 by J B Pardiwala and R Mahadevan JJ, concerned a trans woman teacher forced out of one private school and refused entry by another after her identity became known ([Indian Kanoon](#)). The judgment is significant on four counts ([CLPR](#)):

1. **Omissive discrimination.** The Union and State governments were held liable because their failure to implement the 2019 Act violated the petitioner's fundamental rights. The Court recorded that only West Bengal, Tamil Nadu and Delhi had framed rules, and only eleven States had set up Transgender Protection Cells.
2. **Reasonable accommodation.** Drawing on disability jurisprudence, the Court read an implied duty of reasonable accommodation into the 2019 Act and treated it as a facet of substantive equality under Article 14.
3. **Private liability.** Private schools and employers were bound by the Act's anti-discrimination and complaint-officer duties. Compensation of ₹50,000 each was ordered against the discriminating school and against the Union and State governments.
4. **Structural directions.** The Court constituted an Advisory Committee to draft an equal opportunity policy, review gaps in the Act and protect self-perceived identification, and directed the Union to frame its own policy within three months of the Committee's report ([SC Observer](#)).

The Union's review petition was dismissed ([Law and Other Things](#)). If *NALSA* was about recognition, *Jane Kaushik* was about responsibility: it treated non-implementation itself as a constitutional wrong.

4.5 The reservation question

The demand for horizontal reservation, cutting across SC, ST, OBC and general categories, remains unresolved. The Supreme Court declined to clarify *NALSA* on Grace Banu's application, leaving her free to file a fresh petition ([OHRH](#)). In 2025 it issued notice on a plea by transgender doctors seeking one per cent compartmentalised horizontal reservation in NEET-PG ([LiveLaw](#)). In March 2026, the Rajasthan High Court described the State's OBC-only approach as inadequate, directed a committee to study horizontal reservation, and ordered three per cent additional weightage for transgender candidates in the interim ([The Statesman](#)).

4.6 The pending challenge to the 2026 Amendment

The 2026 Amendment received Presidential assent on 30 March 2026 and came into force on 25 May 2026. Laxmi Narayan Tripathi challenged it under Article 32 on 24 April 2026, arguing violation of Articles 14, 15, 19 and 21 and of *NALSA* ([SC Observer](#)). The Court issued notice to the Union and all States but declined to stay the law ([Bar & Bench](#)). A separate petition by two trans men, *Manveer Yadav v Union of India*, challenges their exclusion from the statute ([LiveLaw](#)).

On 15 June 2026, on the Union's transfer petition, the Court stayed proceedings in the High Courts, and the matter is now before a three-judge bench ([LiveLaw](#)). The Solicitor General sought a three-judge bench on the ground that *NALSA* was rendered by only two judges, signalling that the Union will ask the Court to revisit it. In August 2026 it assured the Court that identity cards issued before the Amendment would remain operative pending the outcome ([SC Observer](#)). The core constitutional question is whether Parliament may legislate away a right the Court derived from Part III, rather than merely regulate how it is exercised.

5. Statutory and Policy Framework

India's statutory framework consists of the 2019 Act, the 2020 Rules, the 2026 Amendment, and a set of welfare schemes administered by the Ministry of Social Justice and Empowerment (MoSJE). States supplement it with their own boards, policies and rules.

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

The 2019 Act came into force on 10 January 2020. Its principal features were:

- **Definition (s 2(k)):** a person whose gender does not match the gender assigned at birth, expressly including trans men, trans women, genderqueer persons, persons with intersex variations and persons with socio-cultural identities such as *kinnar*, *hijra*, *aravani* and *jogta*.
- **Non-discrimination (s 3):** a prohibition on unfair treatment in education, employment, health care, access to goods and public facilities, movement, residence, property and public office.
- **Recognition (ss 4–7):** a right to be recognised as transgender and, under s 4(2), a "right to self-perceived gender identity"; certification by the District Magistrate; and a revised certificate as male or female only after surgery.
- **Duties (ss 8–15):** welfare measures by government; non-discrimination and a complaint officer in every establishment; a right of residence with one's family; inclusive education; and health care including gender-affirming treatment.
- **Institutions (ss 16–17):** a National Council for Transgender Persons to advise and monitor.
- **Offences (s 18):** forced labour, denial of public passage, eviction from home and physical, sexual, verbal, emotional or economic abuse, each punishable with six months to two years' imprisonment and fine.

5.2 The 2020 Rules and administrative machinery

The Transgender Persons (Protection of Rights) Rules, 2020 operationalised certification without medical examination, required establishments to adopt equal opportunity policies, and directed States to set up welfare boards and Transgender Protection Cells under the police. The National Portal for Transgender Persons, launched on 25 November 2020, allows online application for certificates and identity cards ([PIB](#)).

The central welfare vehicle is SMILE (Support for Marginalised Individuals for Livelihood and Enterprise). Its transgender sub-scheme provides scholarships from Class IX to post-graduation, skill development, *Garima Greh* shelter homes, and health coverage of ₹5 lakh per person per year under Ayushman Bharat TG Plus, including gender-affirming procedures ([PIB, April 2026](#)). All SMILE benefits require a transgender certificate, which makes certification the gateway to welfare ([CLPR](#)).

5.3 State initiatives

States have often moved ahead of the Union. Tamil Nadu set up an Aravanigal (Transgender) Welfare Board in 2008, before *NALSA*. Kerala adopted a State Transgender Policy in 2015. West Bengal, Delhi and Tamil Nadu

framed rules under the 2019 Act, but as *Jane Kaushik* recorded, most States had not done so by October 2025. Some States, including Karnataka, have introduced reservation in public employment, while others such as Rajasthan placed transgender persons only in the OBC list.

5.4 Criminal law

The Bharatiya Nyaya Sanhita, 2023 replaced the Indian Penal Code from 1 July 2024. It retains a gender binary in many sexual offences, which are framed around women as victims, and it omits Section 377. Transgender survivors of sexual violence must therefore rely largely on s 18 of the 2019 Act, whose maximum sentence of two years is far below comparable offences against women. This asymmetry has been a constant criticism of the statute.

5.5 The 2026 Amendment

The Transgender Persons (Protection of Rights) Amendment Bill, 2026 was introduced in the Lok Sabha on 13 March 2026, passed by the Lok Sabha on 24 March and the Rajya Sabha on 25 March, received assent on 30 March, and came into force on 25 May 2026 ([PRS](#); [SCC Online](#)). Its Statement of Objects describes the earlier definition as vague and says a precise one is needed to identify "genuine oppressed persons" ([SCC Online](#)).

Issue	2019 Act (as enacted)	After the 2026 Amendment
Who is covered	Trans men, trans women, genderqueer, intersex and socio-cultural identities	Socio-cultural identities, persons with congenital sex-characteristic variations, eunuchs, and persons forced into a transgender identity; trans men, trans women and genderqueer persons removed
Self-identification	s 4(2): right to self-perceived gender identity	s 4(2) deleted; proviso says persons with self-perceived identities are not, and never were, included
Certification	District Magistrate on application, no medical examination	District Magistrate after recommendation of a medical board headed by a Chief Medical Officer or Deputy CMO
After surgery	Revised certificate <i>may</i> be obtained	Revised certificate <i>must</i> be obtained; hospital must report the surgery to the District Magistrate
Name change	Not expressly addressed	Right to change first name in birth certificate and official documents on the basis of the certificate
Offences	Six months to two years for listed offences	Same, plus 10 years to life for kidnapping or grievous hurt to force a transgender identity on an adult (life for a child), and 5–10 years for forcing a person to present as transgender to beg (10–14 years for a child)

The Amendment's defenders present it as a measure against fraudulent claims on welfare and against coercive recruitment into *hijra* households. Its critics, including medical associations, describe the medical-board requirement as scientifically unsound and the retrospective proviso as an erasure of persons already recognised. Its fate now rests with the Supreme Court (Section 4.6).

6. Critical Appraisal of the Legal Framework

Measured against *NALSA*, *Puttaswamy* and *Jane Kaushik*, the statutory framework falls short in six respects. Some defects date from 2019; others were introduced in 2026.

6.1 From self-identification to medical gatekeeping

NALSA adopted a psychological test of gender and held that compelling surgery as a condition of recognition was illegal. The 2019 Act already diluted this by requiring a District Magistrate's certificate and by tying recognition as male or female to surgery. The 2026 Amendment goes further: it deletes the statutory right to self-perceived identity and makes a medical board's recommendation a precondition of certification.

Three objections follow. First, bodily examination to verify identity sits uneasily with the right to bodily integrity and decisional autonomy recognised in *Puttaswamy*. Second, it runs against the medical consensus reflected in ICD-11, which no longer treats gender incongruence as a mental disorder. Third, because every SMILE benefit depends on a certificate, medical gatekeeping becomes welfare gatekeeping: the poorest and least connected applicants face the highest barriers.

6.2 Legislative override of a constitutional holding

Parliament may remove the basis of a judgment by changing the law on which it rests. It may not simply declare a judgment ineffective, and it cannot dilute a right that the Court has located in Part III of the Constitution. The Supreme Court has applied this distinction repeatedly, for instance in *State of Tamil Nadu v State of Kerala* (2014) 12 SCC 696 and *Madras Bar Association v Union of India* (2021). *NALSA*'s recognition of self-identification was not an interpretation of a statute; it was a reading of Articles 14, 15, 19 and 21. The challenge to the 2026 Amendment therefore raises the question whether a statute can narrow a constitutional right, or only regulate its exercise.

The retrospective proviso, declaring that certain persons "never" fell within the definition, compounds the problem. Roughly 33,000 identity cards had been issued through the National Portal ([PIB data via SuperKalam, August 2026](#)). The Amendment contains no savings clause for them; their security now rests on an assurance the Union gave in court ([SC Observer](#)). Retroactive withdrawal of a recognised legal status engages the guarantee against arbitrariness under Article 14.

6.3 Who counts: narrowing the protected class

The 2026 definition privileges visible, community-based identities and congenital variation, while excluding trans men, trans women and non-binary persons who transition individually. Trans men were already the least visible part of the population, rarely part of *hijra* networks and often absent from welfare data. Their exclusion is the subject of the first trans-men-led petition in the Supreme Court. A definition that protects only those already marked as different also reproduces the colonial habit of governing gender through visible categories rather than individual identity.

6.4 Weak penalties and a binary criminal law

Section 18 caps punishment for sexual and physical abuse of transgender persons at two years, while comparable offences against women carry far heavier sentences under the BNS. The 2026 Amendment adds severe penalties, but only for forcing a transgender identity on someone. It does not raise penalties for violence against persons who are transgender. The law thus treats coercive "conversion into" transgender identity as grave, while treating violence against transgender persons as comparatively minor, an asymmetry that is difficult to defend under Article 14.

6.5 Family, residence and chosen kinship

Section 12 guarantees a right to reside with one's family and allows removal only by court order to a rehabilitation centre. For many transgender youth, however, the natal family is the first site of violence. The Act

does not recognise the *guru–chela* household or other chosen families, which in practice provide shelter. The new offences of forcing a person to present as transgender, though aimed at genuine exploitation, may be used to criminalise these kinship structures if enforced without care.

6.6 Rights without remedies

The 2019 Act created duties but few enforceable remedies. Complaint officers were rarely appointed, the National Council is advisory, and there is no specialised tribunal or time-bound complaint procedure. *Jane Kaushik* responded by designating State Human Rights Commissions as interim forums and ordering helplines and protection cells. Even so, reservation, which *NALSA* directed, appears nowhere in the Act, and the question of horizontal reservation has been left to piecemeal litigation.

6.7 Recognition without redistribution

Nancy Fraser's distinction between the politics of *recognition* (remedying cultural disrespect) and *redistribution* (remedying economic deprivation) helps explain these failures (Fraser 1995). Indian law has invested heavily in recognition: names, categories, certificates and declarations of dignity. It has invested far less in redistribution: reservations, livelihood support, housing and accessible health care. Recognition without redistribution leaves the material conditions of exclusion intact. The 2026 Amendment shows a further danger: recognition that is not anchored in material entitlements and community power can be withdrawn by a simple legislative majority.

7. Socio-Economic Realities

The evidence shows that exclusion is cumulative: disadvantage in one domain produces disadvantage in the next. Data remain thin, because the State has rarely counted transgender persons, but the available indicators point the same way.

Each stage of exclusion has a legal promise that goes unenforced

Social stage, and the provision meant to interrupt it

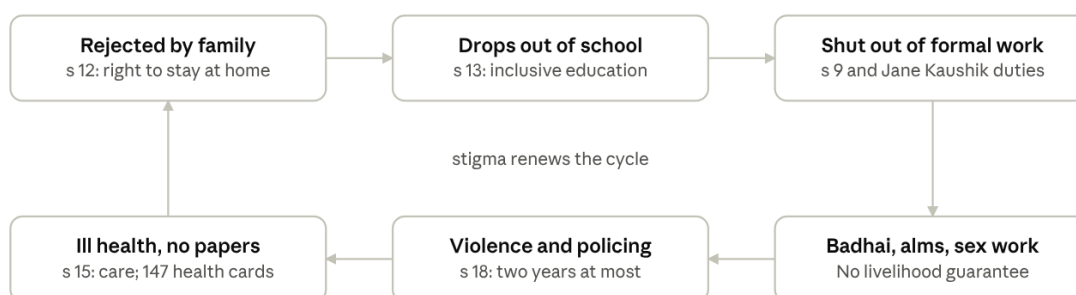


Figure 1 · cycle of exclusion · 6 stages and the statutory promise at each

Figure 1 reads clockwise from the family. At every stage the 2019 Act contains a promise, yet none is backed by a remedy strong enough to break the cycle.

Indicator	Transgender persons	Comparator	Source
Literacy (Census 2011)	56.07%	74.04% (all persons)	Census 2011, DU compilation
HIV prevalence (HSS 2017)	3.14% (hijra/TG)	0.22% (adult national estimate, 2020)	NACO Sankalak 2021
Experienced repeated social rejection	99% of 900 surveyed	—	NHRC–KDS study
Identity cards issued via	33,303	4,87,803 counted as	PIB data ; Census 2011

Indicator	Transgender persons	Comparator	Source
National Portal (to Aug 2026)		"Other" in 2011	
Ayushman Bharat transgender health cards issued (to Aug 2026)	147	—	PIB data
Persons rehabilitated in <i>Garima Grehs</i> (three years to Aug 2026)	1,041 in 23 shelters	—	PIB data

7.1 Education

The Census literacy gap of roughly 18 percentage points understates the problem in higher education. Bullying, gendered uniforms, toilets and hostels, and family rejection in adolescence push transgender students out of school at the point when credentials matter most. The consequences appear later in the labour market. In 2022, Karnataka reserved 150 of 15,000 teaching posts for transgender persons but received only two applications from transgender candidates among some 70,000 applicants ([Scroll](#)). Reservation without an educational pipeline cannot be filled.

SMILE scholarships, at ₹13,500 a year from Class IX upwards, are modest, conditional on certification, and often disbursed after admission fees fall due ([CLPR](#)). Section 13 of the 2019 Act requires inclusive education, but there is no monitoring of compliance by schools or universities.

7.2 Employment and livelihood

The NHRC-commissioned study reported that over 96 per cent of transgender respondents had been denied jobs and pushed into low-paid and sometimes unsafe work ([Scroll](#)). *Badhai*, begging and sex work remain the principal livelihoods for many *hijra* community members, not by choice but because formal employment is closed. Corporate diversity hiring has grown in metropolitan areas, but it reaches mainly educated, urban, English-speaking trans persons and often does not lead to sustained employment. *Jane Kaushik* itself arose from a qualified teacher being forced out of two schools.

The welfare architecture partly reinforces this pattern. The SMILE scheme sits alongside a sub-scheme for persons engaged in begging, which can frame transgender persons primarily as objects of rehabilitation rather than as workers and citizens entitled to equal opportunity.

7.3 Health

Health disadvantage is both biological and institutional. HIV prevalence among *hijra* and transgender persons, at 3.14 per cent in the 2017 surveillance round, is many times the national adult estimate. Beyond HIV, transgender persons report hostile treatment in hospitals, gendered wards, and the absence of clinicians trained in gender-affirming care. Ayushman Bharat TG Plus promised ₹5 lakh of annual coverage including gender-affirming procedures, yet only 147 such cards had been issued by August 2026. After the 2026 Amendment, petitioners told the Supreme Court that some persons on hormone therapy had found treatment discontinued, and the Kerala High Court passed interim orders protecting its continuation ([SC Observer](#); [Verdictum](#)).

Mental health is a further concern. Rejection, harassment and "conversion" practices, which the Madras High Court condemned in *S Sushma*, take a heavy psychological toll, but national data on transgender mental health are almost non-existent.

7.4 Housing and family

Housing discrimination is pervasive: landlords refuse tenancy, and those evicted from natal homes have few options outside *hijra* households. The State's response, *Garima Greh* shelters, numbers 23 across 17 States and

Union Territories and has rehabilitated 1,041 persons over three years. Set against a population of at least 4.88 lakh, this is a pilot, not a policy.

7.5 Violence and policing

Violence against transgender persons comes from families, strangers, clients and, frequently, the police. The NHRC study noted that police harassment makes transgender persons less likely to report crimes ([CFNHRI summary](#)). Colonial-era suspicion survives in the routine policing of public spaces, railway stations and traffic junctions where *hijras* seek alms. The mild penalties under s 18 of the 2019 Act and the binary framing of sexual offences in the BNS weaken legal redress.

7.6 Intersectionality

Transgender persons are not a homogeneous group. Caste, class, religion, region and disability shape their experiences. Census 2011 recorded 78,811 Scheduled Caste and 33,293 Scheduled Tribe persons among those counted as "Other" ([DU compilation of Census 2011](#)). A Dalit trans woman faces a compounded disadvantage that a single-axis OBC reservation cannot address. This is the core of the case for horizontal reservation across all vertical categories.

8. Comparative Perspectives

Legal gender recognition worldwide follows three broad models: recognition of a distinct third category, self-determination of gender, and medical or biological verification. India has moved from the first two towards the third.

Jurisdiction	Key measure	Model	Medical requirement
Nepal	<i>Sunil Babu Pant v Government of Nepal</i> (Supreme Court, 2007); Constitution of Nepal, 2015	Third category based on self-feeling	None required by the judgment
Pakistan	<i>Khaki v Rawalpindi</i> (Supreme Court, 2009); Transgender Persons (Protection of Rights) Act, 2018	Third category, then self-perceived identity	None under the 2018 Act; key provisions struck down by the Federal Shariat Court in 2023, appeal pending
Bangladesh	Government recognition of <i>hijra</i> as a separate gender, 2013	Third category	Not in law; reports of medical checks in early implementation
Australia	<i>NSW Registrar v Norrie</i> (High Court, 2014)	Registration as "non-specific" sex	Depends on State law
Argentina	Gender Identity Law No. 26.743, 2012	Self-determination	None
Malta	Gender Identity, Gender Expression and Sex Characteristics Act, 2015	Self-determination; ban on non-consensual intersex surgery	None
Germany	Federal Constitutional Court, 1 BvR 2019/16 (2017); Self-Determination Act in	Third option "diverse", then self-declaration	None since 2024

Jurisdiction	Key measure	Model	Medical requirement
	force 1 November 2024		
India	<i>NALSA</i> (2014); 2019 Act; 2026 Amendment	Third category plus self-identification, now medical-board review	Medical board since May 2026

8.1 South Asian third-category models

Nepal, Pakistan and Bangladesh share India's cultural history of *hijra* and allied communities, and all three recognised a third gender before or around *NALSA*. Nepal's Supreme Court in *Sunil Babu Pant* (2007) based recognition on a person's self-feeling, and the 2015 Constitution names gender and sexual minorities among protected groups. Pakistan's experience is the most instructive for India. Its 2018 Act adopted self-perceived identity, but in 2023 the Federal Shariat Court struck down core provisions as repugnant to Islamic injunctions. Pakistan shows how quickly a self-identification law can be undone when it lacks a firm constitutional anchor and broad public support.

Bangladesh illustrates a different risk. Recognition of *hijras* as a third gender in 2013 was followed by reports that applicants for government jobs were subjected to medical examinations to verify their status. A third category, without a principle of self-identification, invites the State to police who is "genuinely" third gender, which is precisely the logic of India's 2026 medical board.

8.2 Self-determination models

Argentina's 2012 law and Malta's 2015 Act allow a person to change legal gender by declaration, without diagnosis, surgery or hormone therapy. Malta went further, prohibiting medically unnecessary surgery on intersex children without their consent. Germany moved in two steps: the Federal Constitutional Court in 2017 required a positive third option for persons who are neither male nor female, and the Self-Determination Act of 2024 replaced court-supervised expert assessment with a declaration at the registry office. These systems treat the individual, not a medical board, as the authority on gender identity, while retaining ordinary safeguards against fraud such as declarations under penalty and waiting periods.

8.3 Restrictive turns elsewhere

India's 2026 Amendment is not an isolated development. In January 2025, a United States executive order directed federal agencies to recognise only two sexes defined at conception, affecting passports and federal records. In April 2025, the United Kingdom Supreme Court held in *For Women Scotland v Scottish Ministers* [2025] UKSC 16 that "sex" in the Equality Act 2010 refers to biological sex. These decisions arise from different legal systems and debates, but together they show that recognition, once granted, can be contested and narrowed.

8.4 Lessons for India

Four lessons follow. First, recognition anchored in constitutional rights is more durable than recognition resting on statute, as Pakistan's experience shows. Second, a third category works best as an option within self-determination, not as a substitute for it; otherwise it becomes a tool of verification, as in Bangladesh. Third, self-determination systems in Argentina, Malta and Germany show that medical gatekeeping is not administratively necessary. Fourth, protection of intersex children from non-consensual surgery, which Malta legislated and the Madras High Court directed in *Arun Kumar*, should be national law in India.

9. Recommendations

The reforms below aim to close the gap between recognition and redistribution. They are grouped by the institution best placed to act.

9.1 Parliament

1. **Restore self-identification.** Reinstate the right to self-perceived gender identity and replace the medical-board requirement with certification on a sworn declaration, issued within a fixed period, with options of male, female and transgender.
2. **Protect existing status.** Enact an express savings clause validating every certificate and identity card issued under the 2019 Act or under State schemes following *NALSA*, rather than relying on executive assurances.
3. **Restore the full protected class.** Bring trans men, trans women and non-binary persons back within the statutory definition, while retaining socio-cultural identities and persons with intersex variations.
4. **Codify reasonable accommodation.** Write the duty recognised in *Jane Kaushik* into the statute, extend it expressly to private employers and educational institutions, and shift the burden of proof to the respondent once a prima facie case of discrimination is shown.
5. **Equalise criminal protection.** Raise the penalties under s 18 to parity with comparable BNS offences, and make sexual offences in the BNS cover transgender victims.
6. **Provide horizontal reservation.** Legislate a horizontal reservation, of the order of one per cent, across all vertical categories in education and public employment, as Karnataka has done in public employment and as petitioners have sought in NEET-PG.
7. **Protect intersex children.** Prohibit medically unnecessary sex-characteristic surgery on children unable to consent, building on *Arun Kumar* and the Maltese model.
8. **Reform family and succession law.** Recognise chosen families for residence and guardianship, and amend personal and secular succession laws to ensure that transgender heirs are not excluded by binary terms such as "son" and "daughter".

9.2 Union and State governments

1. **Comply with *Jane Kaushik*.** Notify rules in every State, constitute welfare boards and Transgender Protection Cells, appoint complaint officers, and operate the national helpline within defined timelines.
2. **Count accurately.** Census 2027 will record the sex of household heads as male, female or transgender in its houselisting phase ([ETV Bharat](#)). The population enumeration phase should record every individual's self-identified gender, with distinct options for trans men, trans women and intersex persons.
3. **Decouple welfare from certification.** Allow SMILE scholarships, health coverage and shelter to be accessed on self-declaration, and scale *Garima Grehs* to at least one per district in high-population States.
4. **Guarantee health continuity.** Direct public hospitals to continue hormone therapy without interruption pending the Supreme Court's decision, and train clinicians in gender-affirming care consistent with ICD-11.
5. **Reform policing.** Issue standard operating procedures against harassment of transgender persons in public spaces, and include gender sensitisation in police training.

9.3 Courts

The three-judge bench hearing the challenge to the 2026 Amendment should test it against *NALSA*, *Puttaswamy* and *Navtej Singh Johar*, and against the principle that a statute cannot override a right the Court has located in Part III. Interim protection for existing certificates and medical treatment should be formalised by order rather than left to assurances.

9.4 Educational institutions and civil society

Universities and schools should adopt gender-inclusive admission forms, hostels, toilets and anti-bullying policies, and fix scholarship timelines to match admission cycles. Law schools, through legal aid clinics working with District Legal Services Authorities, can help transgender persons obtain documents, file complaints under the 2019 Act and seek remedies before State Human Rights Commissions. Community-led organisations should be funded to deliver these services, since trust, not only entitlement, determines whether rights are used.

10. Conclusion

This study confirms its hypothesis: Indian law has given transgender persons recognition without redistribution. The Supreme Court's jurisprudence, from *NALSA* through *Puttaswamy* and *Navtej Singh Johar* to *Jane Kaushik*, built a strong constitutional foundation. It located gender identity in equality, expression, privacy and dignity, and it treated the State's failure to implement those rights as itself a form of discrimination. The statutory and administrative framework has not matched that foundation. Certification remained bureaucratic, penalties remained weak, reservation never arrived, and welfare schemes reached only a small fraction of the population.

The socio-legal evidence explains why recognition alone is fragile. Exclusion begins in the family, continues through school and the labour market, and ends in livelihoods that expose transgender persons to violence and policing. Where law does not reach these material conditions, the community lacks the economic security and institutional voice to defend the rights it has won. The 2026 Amendment demonstrates the consequence. By deleting self-perceived identity, narrowing the protected class and reintroducing medical verification, it reverses much of what *NALSA* established, and it does so retrospectively.

The answer to the first research question is therefore that constitutional recognition has translated only partially into substantive equality. On the second, the 2026 Amendment stands in serious tension with *NALSA* and *Puttaswamy*, and its validity depends on whether Parliament may narrow a right the Court has derived from Part III. On the third, the reforms needed are concrete: restore self-identification, protect existing status, codify reasonable accommodation, provide horizontal reservation, equalise criminal protection, protect intersex children, and build accountable institutions that deliver entitlements rather than certificates.

The third gender in India is not a new category invented by courts. It is an old presence that colonial law criminalised and post-colonial law ignored. The constitutional task now is to ensure that the promise of 2014 is neither hollowed out by non-implementation nor reversed by legislation, but completed through institutions that make dignity a lived condition.

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